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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
DTV Consumer Education Initiative) MB Docket No. 07-148
)

To: The Commission

**JOINT COMMENTS OF
DIRECTV, INC. AND DISH NETWORK CORPORATION**

DIRECTV, Inc. (“DIRECTV”) and DISH Network Corporation (“DISH Network”) respectfully submit joint comments on the Commission’s *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

As the two leading providers of digital satellite television services to over 31 million viewers in the United States, DIRECTV and DISH Network understand the importance of the DTV transition, and each has a business incentive to raise consumer awareness of the upcoming digital transition. Though the transition to digital local broadcasts poses no problem for the vast majority of our subscribers, DIRECTV and DISH Network each has engaged in extensive efforts to educate them about the upcoming end of analog broadcasts as DTV.gov Transition Partners.² Not only have we complied with monthly bill notice requirements and set-top box notifications, as required

¹ *DTV Consumer Education Initiative*, MB Docket No. 07-148, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 23 FCC Rcd 7272 (rel. Apr. 23, 2008) (“*Further Notice*”).

² See <http://www.dtv.gov/partners.html>.

in the Commission's March 3, 2008 *Report and Order*,³ but as detailed below, we have instituted numerous other voluntary educational outreach efforts designed to ensure that our customers are well educated about the February 17, 2009 shut-down of full-power analog broadcasting, including numerous voluntary airings of educational public service announcements ("PSAs") in our program schedules. The breadth and scope of these efforts make it both unnecessary and undesirable for the Commission to craft new additional regulations at this late stage, which will divert resources away from other more tailored consumer education efforts.

The transition to digital broadcasting affects primarily local broadcasters and those of their viewers who receive their signals off-the-air. In contrast, all televisions currently receiving DIRECTV's and DISH Network's programming, including the local broadcast stations we currently retransmit, will continue to be capable of receiving the same service after February 17, 2009. Requiring DIRECTV and DISH Network to offer on-air DTV transition education would ignore the fact that, as Direct Broadcast Satellite ("DBS") providers, we already have regular communications directly with our subscribers through the mail on a monthly basis. Requiring multichannel video program distributors ("MVPDs") like us to offer on-air DTV transition education on their systems would subject us to a greater regulatory burden than the broadcasters themselves, a bizarre result.

It also would be unworkable to impose an on-air education requirement on MVPDs given the nature of the MVPD role in retransmitting programming produced by others. Unlike local broadcasters who exercise editorial control over their program

³ *DTV Consumer Education Initiative*, MB Docket No. 07-148, *Report and Order*, 23 FCC Rcd 4134 (2008) ("*Report and Order*").

content and have numerous opportunities to insert PSAs, each MVPD is subject to numerous contractual arrangements that severely limit their editorial discretion and their ability to slot PSAs into the programming they retransmit. The on-air education requirement imposed on broadcasters obligates each local station to offer PSAs during certain times of the day, but it would be impossible for the Commission to craft an on-air education requirement that would be workable for all MVPDs. Further, all MVPDs already pass through the PSAs carried by the broadcasters, so the public interest would be better served by allowing each MVPD to tailor the content and delivery of its DTV education message according to the particular needs, interests and characteristics of its customers, thereby maximizing consumer education and reducing consumer confusion. In addition, an on-air education requirement imposed on MVPDs could be subject to legal challenge as beyond the Commission's authority and barred by the First Amendment.

II. IN LIGHT OF THE EXTENSIVE DTV CONSUMER EDUCATION EFFORTS BY DBS PROVIDERS, ADDITIONAL REQUIREMENTS ARE UNNECESSARY.

As DIRECTV and DISH Network stated in their April 2008 reports detailing their DTV consumer education efforts, each company has designed and implemented specific initiatives to help ensure that the February 17, 2009 end of the DTV transition is a non-event for television viewers. Our efforts are summarized below:

DISH Network: DISH Network has instituted a number of different programs designed to help consumers manage the transition to digital local broadcasting:⁴

- ***Public Service Announcements:*** To ensure that its existing subscribers are fully informed about the impact of the DTV transition and that they do not

⁴ Some of the efforts described herein were conducted by EchoStar Corporation before that company and DISH Network were split into two separate companies on January 1, 2008.

make unnecessary expenditures for new equipment or services, DISH Network has aired digital transition PSAs featuring government officials over 4,000 times to date.

- ***Billing Notices and Set-Top Box Notices:*** In accordance with the *Report and Order*, DISH Network has included DTV transition information in monthly bills sent to its customers, and with new set-top box receivers.
- ***Charlie Chat:*** DISH Network's June 2008 edition of its one-hour "Charlie Chat" program addressed the DTV transition and the converter box program as one of its main topics. In that show, which aired originally at 9 p.m. ET on June 9, 2008, DISH Network CEO Charlie Ergen discussed the impact of the transition on consumers. "Charlie Chat" is re-broadcast throughout the month as a resource for subscribers.
- ***NTIA-Approved Digital-to-Analog Converter Box:*** DISH Network is participating in the National Telecommunications and Information Administration's ("NTIA's") digital-to-analog converter box program. DISH Network's DTVPal is approved by the NTIA and is one of a handful of boxes that currently includes an analog pass-through capability. As the only pay TV provider with a NTIA-approved converter box, DISH Network is uniquely situated to offer non-subscribers with a full range of options to prepare for the digital transition. DISH Network also has become a retailer under the NTIA program, providing a national platform for the sale and distribution of our NTIA-authorized converter boxes. DISH Network's online and toll-free number access points provide a means for consumers in remote locations to acquire a converter box.
- ***Converter Box Installation Program.*** DISH Network will offer installation services to households so that they may install and integrate an over-the-air antenna and digital-to-analog converter box into their home. This installation program offers consumers – particularly elderly and non-technical households – the option to permit a professional to set-up all transition-related equipment in a simple and straightforward manner.
- ***Wilmington Outreach.*** Among other efforts to help promote and educate consumers about the Wilmington, North Carolina September cut-over date, DISH Network has offered to make a donation of a limited number of converter boxes free of charge to nursing homes in Wilmington that are unable to participate in the coupon program under current NTIA rules. The NTIA is currently reviewing nursing home resident participation in the program. These nursing home residents represent a potential gap in the overall transition efforts, which DISH Network is attempting to fill in a proactive and voluntary manner.

- **Online Information and Call Center Training:** DISH Network also offers a web-based resource (see www.dishnetwork.com/digitaltransition) that offers information for subscribers and non-subscribers. The company also has trained its call center staff on the transition and its effect on subscribers, targeting the small subset of subscribers that may need to take action to prepare for the transition (e.g., those who do not receive local broadcast stations through DISH Network and those with TVs in their homes that are not connected to DISH Network).

DIRECTV: DIRECTV has instituted its own independent public relations, advertising and promotional campaign to further DTV transition education, the cost of which has already exceeded \$3.5 million through May 2008.

- **Public Service Announcements:** Since March 27, 2008, DIRECTV has been running a thirty-second general market PSA, which aired over 3500 times before the end of May. In addition, DIRECTV is airing three different Spanish language PSAs: (i) a thirty and sixty-second spot that began running on VME in March; and (ii) a thirty and sixty-second spot running on certain Spanish-language networks that began in May; and (iii) another thirty-second spot which just recently began running on the DIRECTV MAS service.
- **Print Advertisements:** DIRECTV has placed full page color educational announcements in its April and June ACCESS programming magazines, and plans to do so periodically through the end of the DTV transition.
- **Billing Notices:** Even before the issuance of the *Report and Order*, DIRECTV began including DTV transition information in monthly bills sent to its customers. In addition, a Spanish language version of this information has been provided to customers who subscribe to Spanish language program packages.
- **Notices Accompanying Equipment:** In accordance with the *Report and Order*, DIRECTV, in cooperation with its manufacturers, includes DTV transition information with its set-top boxes and over-the-air tuners.
- **Online Information:** A tutorial regarding the DTV transition has been incorporated into DIRECTV's website (see www.directv.com/dtv2009).
- **Wilmington Outreach:** To educate consumers in the Wilmington, North Carolina television market about the September cut-over date, DIRECTV is planning on providing targeted communication to its subscribers via emails and auto calls informing them about the shut-down of analog broadcasts in that market and about how the transition may affect them.

- **Call Center Training:** DIRECTV's customer service representatives have been trained to answer the myriad of questions that consumers may have about the DTV transition.

DIRECTV and DISH Network also are actively working with the broadcast community to coordinate the transition of broadcast stations on their systems from analog to digital. This requires the replacement of analog equipment and antennas with digital equipment at each of local receive facilities in each local-into-local market. In addition, it is important to note that wherever DIRECTV and DISH Network carry local broadcasts over their DBS systems, the on-air DTV education PSAs produced by those local broadcasters also reach our subscribers.

All these efforts, along with those of broadcasters, the cable industry⁵ and the consumer electronics industry, evidently are working to increase consumer awareness of the DTV transition. According to a recent research study, 90 percent of Americans are aware of the upcoming switch to digital broadcasting by full-power television stations.⁶ The FCC has not identified any problem with awareness among DBS subscribers. Given the progress being made in consumer education efforts to date, the media industry's obvious interest in seeing that progress continue, and DBS providers' already extensive efforts to educate their subscribers about the transition (including the airing of educational PSAs), no further federal mandates are warranted. The Commission should not risk disrupting the industry's ongoing and planned efforts by adopting new burdensome one-size-fits-all regulation for MVPDs. Particularly given the short time

⁵ The Commission noted in the *Further Notice* that the cable industry is engaged in a "\$200 million digital TV transition consumer education campaign, highlighted by English and Spanish language television commercials." *Further Notice* at ¶ 19 (quoting Comments of the National Cable and Telecommunications Association at 2 (Sept. 17, 2007)).

⁶ See John Eggerton, *NAB Poll: 90% Aware of DTV Transition - Smith-Geiger Conducts Survey of 31,426 Households*, *Broadcasting & Cable* (Jun. 16, 2008), available at <http://www.broadcastingcable.com/article/CA6570715.html?industryid=48696>.

before the September cut-over in Wilmington, MVPDs should have the flexibility to continue to implement and roll-out their own targeted and tailored communications tools to consumers.

III. IMPOSITION OF AN ON-AIR EDUCATION REQUIREMENT ON DBS SERVICE PROVIDERS IS INAPPROPRIATE AND UNWORKABLE.

DIRECTV and DISH Network understand the Commission's desire to take all appropriate steps to ensure that over-the-air television viewers are not left without the ability to receive local broadcast signals after February 17, 2009. But requiring DBS service providers to engage in on-air education efforts would amount to regulatory overkill, and would do little if anything to allay DTV transition concerns. Thus, it would be inappropriate to impose such a requirement in the DBS context for the following reasons:

- There is no need to impose an MVPD on-air education requirement to address concerns regarding the population "at risk" in the DTV transition;
- DBS service providers should not be required to offer more DTV education than the local broadcasters themselves;
- Given the disparate legal arrangements governing programming carried on DBS systems, it would be impossible for the Commission to craft a "one-size-fits-all" rule that would achieve the desired purpose;
- Burdensome new regulations would divert resources away from a myriad of current and planned transition efforts, from web tutorials and Spanish-language communications to converter box installation services; and
- Imposing a program content requirement on DBS providers runs counter to the regulatory scheme established for DBS by the Commission.

A. The existing bill notice and set-top box notification requirements, coupled with voluntary educational campaigns, are adequate to address DTV education concerns regarding MVPD subscribers.

The people most “at risk” of losing access to local television signals after the transition are those who rely exclusively on over-the-air broadcasts using televisions capable only of receiving analog signals. Some MVPD subscribers have televisions sets that are not connected to the MVPD service, and though their numbers are likely small and declining, some of these televisions may be used by these subscribers to receive broadcast signals over the air.⁷ To maximize the information flow going to MVPD subscribers regarding the potential impact of the DTV transition, the Commission adopted requirement that MVPDs provide specific transition-related information in their monthly bills and with set-top boxes.

Among other things, MVPDs’ bill notices must highlight that “analog sets not connected to an MVPD service may need additional equipment (*i.e.*, a converter box) or may need to be replaced.”⁸ The Commission noted that bill notices would “reach viewers who are engaged with television viewing and well positioned both to act on the information regarding the [over-the-air] sets they may have and to serve as a source of information for others.”⁹ The Commission also concluded that, based on the record, bill notices would “contribute significantly to consumer education efforts”¹⁰ and that the bill

⁷ It is likely that many of these “additional” televisions in MVPD households are used to display pre-recorded content through VCRs and DVD players, or for videogames. Indeed, nearly all DBS subscribers can access local broadcast stations through their subscription service. DIRECTV’s DBS system retransmits local broadcast stations to its subscribers in 150 television markets in the U.S., representing 94.6 percent of all TV households, while DISH Network’s system offers local stations in 176 markets covering 96 percent of U.S. TV households.

⁸ 47 C.F.R. § 76.1630(b)(3).

⁹ *Report and Order* at ¶ 40.

¹⁰ *Report and Order* at ¶ 40.

notice requirement would provide MVPD subscribers with “[a]ccurate and timely communication of the impending change from analog to digital transmission”¹¹

The record in this proceeding contains nothing to suggest that the Commission was wrong about the efficacy of its MVPD bill notice requirement. In fact, in asking whether an on-air DTV education requirement should be imposed upon MVPDs, the *Further Notice* does not even suggest the existence of any evidence that subscribers to MVPDs are still uninformed about the DTV transition.

Additionally, parties that “manufacture, import, or ship interstate” set-top boxes must also include specific information regarding the DTV transition, including an explanation of the effect, if any, the DTV transition will have on the use of the set-top box.¹² In order to ensure that their subscribers are receiving consistent messages regarding the potential impact of the DTV transition on them, DIRECTV and DISH Network each has provided the notifications used in connection with the distribution of set-top boxes that are used with their DBS services, thereby incurring additional costs.

Though the vast majority of their subscribers will be unaffected by the February 17, 2009 cessation of analog transmissions, MVPDs have made, and will continue to make, the requirement notifications, and many – like DIRECTV and DISH Network – have devoted substantial energy and resources to additional educational efforts implemented through a variety of media. In addition, large-scale educational efforts have been undertaken by broadcasters, consumer electronics manufacturers, retailers and the government itself. There is no evidence to suggest that any additional regulatory mandate is needed to ensure that DBS subscribers are informed about the DTV transition.

¹¹ *Id.* at ¶ 43.

¹² 47 C.F.R. § 15.124.

B. MVPDs should not be subjected to more onerous DTV education requirements than broadcasters.

The Commission's requirement that broadcasters air DTV transition PSAs is based on the obvious notion that "at risk" population (*i.e.*, those who rely exclusively on over-the-air broadcasting for their video programming) is most effectively reached through the medium they are already accustomed to using.¹³ Requiring local broadcasters to run on-air educational PSAs on the DTV transition is natural because on-air broadcasts are their primary (and indeed their only) means of communicating with their viewers.

In contrast, because of the subscription-based nature of their services, MVPDs naturally communicate with their subscribers on a regular basis in multi-faceted ways, including call centers, website resources and monthly bills. In the *Report and Order*, the Commission ordered MVPDs to use the monthly bill communications channel as a tool to educate subscribers about the potential impact on them of the DTV transition, and MVPDs are complying with this mandate. It was reasonable for the Commission to reject the idea of on-air education requirements for MVPDs because (1) the broadcaster-viewer relationship is fundamentally different from the MVPD-viewer relationship, and (2) unlike broadcasters who exercise complete and continuous editorial control over their stations' programming, MVPDs do not generally exercise editorial control over the programming they retransmit.

Ironically, a new Commission requirement placed on MVPDs to provide on-air DTV education would impose upon MVPDs – secondary players in the DTV transition –

¹³ See *Report and Order* at ¶¶ 7-37. The Commission has afforded licensees of full-power commercial broadcast stations two compliance options while offering a third option to noncommercial licensees and urging low-power television licensees to educate their viewers as well.

a more onerous regulatory burden than is imposed upon broadcasters – the primary players. This is particularly true for DBS systems, which have no need even to “transition” to digital since they are all-digital already.

C. An MVPD on-air education requirement is unworkable and would be of questionable legality.

The Commission’s on-air education requirement for broadcasters achieves its desired purpose – that is, whenever a local broadcast station runs a DTV education PSA, it reaches viewers tuned in to that station and educates them about the DTV transition. Local television stations are carried on every cable television system, and nearly all U.S. TV households can access local television stations through a DBS service. MVPDs therefore already carry both the on-air DTV education produced by the local broadcasters they carry and the PSAs that they themselves have voluntarily produced and run (*see* Section II above).

The *Further Notice* gives no hint as to how the Commission might structure an on-air DTV education requirement that could apply across-the-board to all MVPDs. This cursory treatment of this issue might lead one to conclude that it would be as simple to impose an on-air education requirement on MVPDs as it has been to impose one on broadcasters. To the contrary, however, while each broadcast licensee exercises editorial control over the programming broadcast over its stations, DIRECTV and DISH Network each is party to numerous carriage agreements that include provisions affecting its ability to insert PSAs in the program schedule on the channels being retransmitted. These agreements limit MVPDs’ editorial discretion and restrict their ability to slot PSAs into programming.

From an administration and implementation perspective, an on-air PSA obligation would be an ineffective blunt tool to communicate individualized transition-related information to MVPD subscribers so close to the transition. This is particularly true for national satellite providers who cannot target messages to individual markets or communities. For instance, a mandated PSA obligation imposed on DIRECTV and DISH Network would cause residents of the Wilmington, North Carolina television market to be exposed to a PSA informing them – inaccurately – about the February 2009 analog cut-over date. Similarly, PSAs are a poor means to communicate to DBS subscribers who may need to take steps to prepare for the digital transition (*e.g.*, those who do not subscribe to locals through their MVPD). Consumers can get more personalized and granular information about their particular service through bill statements, call center contact, website resources and other means designed by a DBS provider for its particular consumer constituencies.

Finally, it is far from clear that the Commission possesses the authority to impose an on-air DTV education requirement on MVPDs. Content-based regulations are subject to strict scrutiny by the courts, which requires that they “be narrowly tailored to promote a compelling Government interest” that cannot be served by any “less restrictive alternative.”¹⁴ While the government certainly has an interest in ensuring that over-the-air television viewers are informed about the impending end to analog broadcasts, the case is far less compelling that DBS subscribers require on-air education in order to become adequately informed. The required monthly bill notices that are being sent to DBS subscribers do not impact the content of programming and thus are arguably a less

¹⁴ *United States v. Playboy Entertainment Group*, 528 U.S. 803, 813 (2000). Though a less rigorous standard of First Amendment scrutiny may apply to broadcasters under *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969), that argument would afford no refuge to a requirement imposed on MVPDs.

restrictive – and perhaps even more effective – means to promote that government’s interest in a smooth DTV transition.

When it adopted the MVPD bill notice requirement, the Commission rejected USTelecom’s challenge to its authority, saying that its reliance on a 2002 appeals court decision vacating the Commission’s video description rules¹⁵ was misplaced because “programming content is not at issue.”¹⁶ On-air education requirements clearly affect programming content, however, so the court’s reasoning in *MPAA* is relevant to any Commission assertion of authority to impose such requirements on MVPDs.

The Commission stated that its authority to require DTV consumer education flows from the fact that “Congress has endowed the Commission with general authority to prescribe regulations that will ‘promote the orderly transition to digital television.’”¹⁷ The Commission’s reliance on Section 336(b)(5) of the Communications Act, however, may be legitimately questioned in the context of an MVPD on-air education requirement because that section appears to apply only in the context of the issuance of DTV licenses.¹⁸

IV. CONCLUSION

When it adopted the requirement that broadcasters run on-air DTV education PSA, the Commission noted that “*broadcast* consumer education efforts are the best way to reach viewers who will be most affected by the full-power transition, particularly those

¹⁵ *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (“*MPAA*”).

¹⁶ *Report and Order* at ¶ 45.

¹⁷ *Id.* (quoting 47 U.S.C. § 336(b)(5)).

¹⁸ 47 U.S.C. § 336(b)(5) (“In prescribing the regulations required by subsection (a), the Commission shall . . . prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.”). Section 336(a) relates solely to the issuance of DTV licenses and the regulations governing the services they may provide.

who rely primarily or exclusively on [over-the-air] television.”¹⁹ The Commission refused to embrace a proposal to impose a similar on-air education requirement on MVPDs. In the intervening months, DIRECTV and DISH Network – along with other members of the media and consumer electronics industries – have devoted substantial time and resources to the DTV consumer education effort, including voluntarily offering educational PSAs on the DTV transition. There is no reason to believe that an on-air DTV education requirement imposed on MVPDs is needed, or indeed could even be effectively instituted at this late juncture. In fact, any additional regulations may preclude or delay voluntary efforts of MVPDs that are more tailored to reach affected consumers. Further, the Commission’s authority to burden MVPDs with such a requirement may legitimately be questioned.

For the reasons discussed above, DIRECTV and DISH Network respectfully urge the Commission to refrain from imposing on-air DTV consumer education requirements on MVPDs.

Respectfully submitted,

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June 27, 2008

¹⁹ *Report and Order* at ¶ 16 (emphasis added).