WILTSHIRE & GRANNIS LLP

January 8, 2010

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation in MB Docket No. 07-29

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, this is to inform you that Stacy Fuller, Allen Chew, and undersigned counsel on behalf of DIRECTV, Inc. met yesterday with Millie Kerr, Staff Attorney for Commissioner Baker. In this meeting, DIRECTV argued that the Commission has the statutory authority to close the "terrestrial loophole," and sufficient evidence upon which to do so immediately with respect to regional sports network programming. The substance of DIRECTV's arguments is reflected in the attached talking points, which were provided to Ms. Kerr during the meeting.

Should you have any questions regarding this *ex parte* submission, please contact the undersigned.

Respectfully submitted,

/s/

William M. Wiltshire
Counsel for DIRECTV, Inc.

Attachment

cc: Millie Kerr

TERRESTRIAL LOOPHOLE TALKING POINTS

- As the Commission has found and the DC Circuit has confirmed, the general prohibition against "unfair practices" in Section 628(b) is not limited to the matters particularly called out in Section 628(c)
    - *MDU Exclusivity Order* found that conduct that may not be directly related to programming at all – such as an exclusive arrangement with an MDU owner – can be the basis of a violation of Section 628(b) if it has the prescribed purpose or effect
    - DC Circuit affirmed, noting that "statutes written in broad, sweeping language should be given broad, sweeping application" and that "Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission's power solely to that version of the problem"
- An unfair practice may be prohibited if *either* its "purpose *or effect*" is to "hinder significantly" an MVPD from providing satellite-delivered programming
- As the DC Circuit found in affirming the *MDU Exclusivity Order*, the Commission may use "the evidence before it to make a reasonable prediction about the likely present and future effects of changing competitive pressures on the cable market" – and the court "must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency"
    - *NCTA v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) (quoting *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001))
- The Commission has found numerous times that withholding must-have RSN programming has a dramatic effect on an MVPD's ability to compete in the market for the provision of satellite-delivered programming
    - ***"We conclude that there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN."*** *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 151 (2006)
    - Regression analysis in *Adelphia* found DBS subscribership to be reduced by 40% in Philadelphia and 33% in San Diego due to withholding. *Adelphia*, ¶¶ 146-149 and Appendix D.
    - *News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd. 3265, ¶¶ 87-92 (2008)
    - *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 17791, ¶¶ 39-49 and Appendix C (2007)

- *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, Appendix F (2004)
- This evidence is a substantial change in the record compared to previous occasions on which the FCC considered the terrestrial loophole

- Thus, at a minimum, the FCC has sufficient evidence of the effect of RSN withholding to make a predictive judgment as to its effect in hindering significantly the development of MVPD competition
  - No need for additional evidence, and can use predictive judgment to extend findings to other RSN markets
- Complaint procedure for RSN withholding would serve no purpose in this situation
  - What more could we show beyond 40% reduction in subscribership?
  - Why require MVPDs to suffer loss of subscribers necessary to demonstrate harm before acting on a problem already clearly recognized?