January 13, 2010

BY ELECTRONIC FILING

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

Re: *Ex Parte Communication in MB Docket Nos. 07-29, 07-198*

Dear Ms. Dortch:

This letter responds to a letter submitted last night by Cox Communications, Inc. ("Cox").[1] Just one day before *ex parte* presentations in theses proceedings will be prohibited, Cox advances a brand new argument about DIRECTV's NFL Sunday Ticket, an exclusive package of out-of-town NFL football games. Specifically, Cox argues for the first time that DIRECTV is a "satellite broadcast programming vendor" as that term is defined in the Cable Act. Thus, argues Cox, the Commission ought to declare DIRECTV's provision of the NFL Sunday Ticket to be an "unfair practice" under Section 628(b) of the Act. But DIRECTV is *not* a "satellite broadcast programming vendor," and the Commission has already determined the NFL Sunday Ticket to be anything but unfair.

The term "satellite broadcast programming vendor" has yet to come up in this proceeding – and for good reason. It does not mean, as Cox seems to think, "any satellite carrier that offers distant signals under Section 119 of the Copyright Act."[2] Rather, as Cablevision recently pointed out,[3] a satellite broadcast programming vendor is one that provides a very specific subset of distant signals under Section 119 of the Copyright Act – namely, distant signals that both originate from a station unaffiliated with "a national

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[1] Letter from David J. Wittenstein to Marlene H. Dortch, MB Docket Nos. 07-29, 07-198 (Jan. 12, 2010) ("Cox *ex parte*").

[2] Cox *ex parte* at 2-3.

[3] *See* Letter from Henk Brands to Marlene H. Dortch, MB Docket Nos. 07-29 and 07-198, at 3 n.1 (Jan. 8, 2010) ("'Satellite broadcast programming' is even more niche-like than Spanish-language programming – it captures only so-called superstations, of which only a handful exist.")

television network" (*e.g.*, a "superstation")[4] *and* which are carried without the permission of the station itself.[5] DIRECTV transmits no such signals under Section 119 of the Copyright Act. It is thus not a satellite broadcast programming vendor.[6] Given the demise of the superstation, DIRECTV believes that the term "satellite broadcast programming vendor" no longer applies to anybody, which would explain its absence from the debate thus far.[7]

In an attempt to buttress its jurisdictional argument, Cox cites a case involving a challenge by the National Rural Telecommunications Association ("NRTC") to exclusive programming arrangements between a DBS operator and cable-affiliated satellite cable programming vendors.[8] Putting aside the fact that the cited case involved satellite *cable* programming rather than satellite *broadcast* programming, it still does not support Cox's argument. In that case, the Commission rejected NRTC's challenge to DBS exclusivity under the *per se* prohibitions against exclusive agreements in Section 628(c).[9] In rejecting NRTC's argument, the Commission noted that "[t]he legislative history of Section 628 specifically, and of the 1992 Cable Act in general, reveals that Congress was concerned with market power abuses exercised *by cable operators and their affiliated programming suppliers* that would deny programming to non-cable technologies, and did not address any such abuses exercised by non-cable technologies, such as DBS."[10]

Cox asserts that the Commission nonetheless concluded that it had broad authority under Section 628(b) to consider exclusive programming arrangements involving DBS operators.[11] However, the Commission's discussion related solely to the

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4 *See* 47 U.S.C. § 548(c)(3)(B) (providing that "nothing in this section shall apply . . . to the signal of any broadcast affiliate of a national television network"). The definition of "satellite broadcast programming" falls within "this section" – that is, Section 628 of the Act.

5 *See* 47 U.S.C. § 548(i)(3) (exempting from the definition of "satellite broadcast programming" programming transmitted by a satellite carrier "performing such retransmission on behalf of and with the specific consent of the broadcaster").

6 *See* 47 U.S.C. § 548(i)(4) (defining "satellite broadcast programming vendor" as "a fixed service satellite carrier that provides service pursuant to section 119 of title 17 *with respect to satellite broadcast programming*.") (emphasis added).

7 DIRECTV notes that, even if it did carry "satellite broadcast programming," the program access rules arguably only restrict its conduct "with respect to [such] programming," *id*, and the NFL Sunday Ticket is indisputably not such programming. No similar restriction appears in the corresponding definition of "satellite cable programming vendor." 47 U.S.C. 548(i)(2) (defining "satellite cable programming vendor" as "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor").

8 Cox *ex parte* at 3-4.

9 *Implementation of the Cable Television Consumer Protection & Competition Act of 1992: Development of Competition & Diversity in Video Programming Distribution & Carriage*, 10 FCC Rcd. 3105 (1994) ("*Program Access Reconsideration Order*").

10 *Id.*, ¶ 35 (emphasis added).

11 Cox *ex parte* at 3.

context of an exclusive arrangement "between a non-cable MVPD and a vertically integrated satellite cable programming vendor"[12] – the latter of which is specifically subject to the restrictions on "unfair practices" in Section 628(b). Here, Cox raises allegations against a DBS provider that is not a "satellite broadcast programming vendor" with respect to programming sold by an entity that is neither a cable-affiliated satellite cable programming vendor nor a satellite broadcast programming vendor. As none of these entities are subject to Section 628(b), the Commission lacks jurisdiction in this area.

Even setting aside jurisdiction, the NFL Sunday Ticket is anything but "unfair." In the very case cited by Cox, the Commission found no evidence that *non-cable* exclusives were "harmful to the development of competition, 'unfair' or 'deceptive,' or have negative effects on consumers."[13] In these circumstances, it is perhaps not surprising that the Commission has twice in the last six years explicitly authorized DIRECTV to continue to enter into exclusive agreements with non-affiliated programmers – listing NFL Sunday Ticket by name – even as it imposed access requirements on other types of programming.[14] Clearly, there is nothing about DIRECTV's exclusive provision of the NFL Sunday Ticket that would raise program access concerns.[15]

Sincerely,

/s/
Stacy Fuller
Vice President, Regulatory Affairs

cc: Jamila Bess Johnson
Joshua Cinelli
Sherrese Smith
Rick Kaplan
Rosemary Harold
William Lake
Austin Schlick

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[12] *Program Access Reconsideration Order*, ¶ 40.

[13] *Id.*, ¶ 39.

[14] *See News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd. 3265, App. B, Section III.5 (2008); *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, App. F, Section II, Bullet 4 (2004).

[15] DIRECTV has explained the differences between its arrangement for a niche product obtained from an unaffiliated programmer in an open market process and the exclusive arrangements between cable operators and their affiliated regional sports networks for "must have" content. *See, e.g.*, Letter from Stacy Fuller to Marlene H. Dortch, MB Docket Nos. 07-29 and 07-198 (Dec. 16, 2009). Rather than repeat that explanation, DIRECTV hereby incorporates it by reference.