



March 3, 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 is to inform you that DIRECTV met yesterday with Commission staff to respond to an ex parte presentation by Cox Communications, Inc. (“Cox”).¹ Present on behalf of DIRECTV were Stacy Fuller and outside counsel William Wiltshire and Michael Nilsson. Present on behalf of the Commission were Austin Schlick, William Scher, and Marilyn Sonn of the Office of General Counsel; Mary Beth Murphy, Nancy Murphy, Diana Sokolow, Steven Broeckaert, David Konczal, John Norton, and John Berresford of the Media Bureau; and Stuart Benjamin of the Office of Strategic Planning and Policy Analysis. Our discussions reflected the materials attached hereto.

Sincerely,

/s/

Stacy Fuller
Vice President, Regulatory Affairs

Attachment

¹ Letter from David J. Wittenstein to Marlene H. Dortch, MB Docket Nos. 07-29, 07-198 (Feb. 17, 2010).

cc: Sherrese Smith
Jamila Bess Johnson
Joshua Cinelli
Rosemary Harold
Rick Kaplan
Brad Gillen
Austin Schlick
William Scher
Marilyn Sonn
Mary Beth Murphy
Nancy Murphy
Diana Sokolow
Steven Broeckaert
David Konczal
John Norton
John Berresford
Stuart Benjamin

INTRODUCTION AND SUMMARY

A month ago, the Commission closed the so-called “terrestrial loophole” by which incumbent cable operators have withheld affiliated programming from satellite distributors for years.² It did so by holding that cable operators and vertically integrated “satellite cable programming vendors” can be found to violate Section 628 of the Communications Act (the “Act”) even with respect to programming that itself is not “satellite cable programming.”³

On the eve of the Commission’s decision, Cox wrote to the Commission to point out that Section 628 also applies to a third category of entities, “satellite broadcast programming vendors.”⁴ This term had not previously been discussed in this proceeding, and has almost never come up in the nearly twenty years since Congress adopted Section 628.⁵ In its most recent letter, Cox nonetheless continues to argue that DIRECTV is a satellite broadcast programming vendor, that DIRECTV is therefore subject to Section 628’s prohibition against “unfair practices,” and that the Commission should treat DIRECTV’s exclusive offerings as it does Cox’s withholding of its own sports channel. Cox is wrong on all counts.

As DIRECTV has described elsewhere, there is nothing “unfair” about DIRECTV’s offerings, and the Commission has so ruled repeatedly.⁶ Rather than rehash those arguments, this letter instead addresses Cox’s legal claims regarding the applicability of Section 628 to DIRECTV and its programming.

Section 628 is best read as not reaching DIRECTV at all. The statute specifically exempts satellite retransmissions of network programming. Accordingly, the statute applies only to satellite vendors of superstations, and then only those who offer such programming without consent of the station. Although DIRECTV carries a single superstation – WGN – it has obtained the consent of that station and therefore is not subject to Section 628’s provisions governing satellite broadcast programming.

² *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, FCC 10-17 (rel. Jan. 20, 2010) (“*Terrestrial Loophole Order*”).

³ *Id.* ¶ 49.

⁴ Letter from David J. Wittenstein to Marlene H. Dortch, MB Docket Nos. 07-29, 07-198 (Jan. 12, 2010) (“Cox Jan. 12 Letter”).

⁵ Indeed, the Commission has felt the need to impose program access conditions on DIRECTV in two recent transactions – and in neither case did the Commission or any commenter even raise the possibility that the program access rules would already apply to DIRECTV as a “satellite broadcast programming vendor.” See *Liberty Media Corp. and DIRECTV*, 24 FCC Rcd. 12221, ¶ 3 (2009) (explaining why conditions applicable to “Liberty Media” encompass DIRECTV as well); *News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd. 3265, App. B, Section III.1 (2008) (“*DIRECTV-Liberty Order*”).

⁶ See, e.g., Letter from Stacy Fuller to Marlene H. Dortch, MB Docket Nos. 07-29 and 07-198 (Dec. 16, 2009); *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), ¶ 39 (“*Program Access Reconsideration Order*”); *DIRECTV-Liberty Order*, App. B, Section III.5; *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, App. F, Section II, Bullet 4 (2004).

Moreover, even if DIRECTV itself were subject to Section 628, the Commission could not act here as it did with cable operators. The definition of “satellite broadcast programming vendor” specifically limits the reach of Section 628 to satellite broadcast programming. No similar provision exists with respect to cable. Thus, even if the Commission had any reason to examine DIRECTV’s offerings (and it does not), the legal reasoning by which the Commission closed the terrestrial loophole would not apply here.

ARGUMENT

I. DIRECTV is Not Subject to Section 628

All parties agree that Section 628(b) applies to only three types of entities: “a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor.”⁷ For nearly twenty years, the debate on this section centered on cable operators and vertically integrated satellite cable programming vendors. Indeed, the term “satellite broadcast programming vendor” has lain dormant since that time.⁸ Cox nonetheless claims that DIRECTV is a “satellite broadcast programming vendor” subject to Section 628(b)’s restrictions. This, however, is not the best reading of the statute.

A. Section 628(b) is Best Read as Applying to Satellite Carriage of Superstations Only

In its initial response to Cox, DIRECTV explained that Section 628(b) applies only to satellite carriage of superstations.⁹ Cox reads the section as also applying to satellite carriage of network stations.¹⁰ Cox’s reading, however, does not accord with the text itself or reflect the Congressional concern that the statute was intended to address.

With respect to the text itself, Cox accuses DIRECTV of “conveniently omit[ting] the key language” favoring Cox’s interpretation – only to itself omit key language favoring *DIRECTV’s* interpretation in the very next sentence.¹¹ Because the language is less than straightforward, we have set forth all of the provisions relevant to “satellite broadcast programming vendors” in their entirety below:

- ***Definition of satellite broadcast programming.*** “The term ‘satellite broadcast programming’ means broadcast video programming when such programming is

⁷ 47 U.S.C. § 548(b).

⁸ DIRECTV is aware of only one case in nearly twenty years involving allegations concerning satellite broadcast programming. *Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C., and Tele-Communications Inc.*, 12 FCC Rcd. 22,102 (CSB 1997) (rejecting allegations of discrimination concerning satellite broadcast programming because complainant was not MVPD, and not reaching question of whether programming was satellite broadcast programming to begin with).

⁹ Letter from Stacy Fuller to Marlene Dortch, MB Docket Nos. 07-29, 07-198, at 1-2 (Jan. 13, 2010) (“DIRECTV Letter”).

¹⁰ Letter from David J. Wittenstein to Marlene H. Dortch, MB Docket Nos. 07-29, 07-198, at 3 (Feb. 17, 2010) (“Cox Feb. 17 Letter”).

¹¹ *See id.* (citing Section 628(c)(3)(B)(i) but omitting language).

retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.” 47 U.S.C. § 548(i)(3).

- **Definition of satellite broadcast programming vendor.** “The term ‘satellite broadcast programming vendor’ means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.” 47 U.S.C. § 548(i)(4).
- **Exemption for satellite retransmissions.** “Applicability to satellite retransmissions. — Nothing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming; or (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.” 47 U.S.C. § 548(c)(3)(B).

Read alone, the first two items – the definitions of “satellite broadcast programming” and “satellite broadcast programming vendor” – support Cox’s reading of the statute. DIRECTV is (1) a satellite carrier (2) that retransmits certain network-affiliated broadcast signals (3) pursuant to the distant signal statutory copyright license; (4) without the consent of the broadcaster.¹²

But the first two items cannot be read alone. The third item contains an exemption for satellite carriage – one that applies to the entire “section” (as in “Section 628”), not a subsection or paragraph such as “Section 628(c),” as Cox erroneously claims.¹³ That exemption provides, in relevant part, that “[n]othing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network *or* other television signal that is retransmitted by satellite but that is not satellite broadcast programming.”¹⁴

The key word in this provision is “or.” This word creates an exemption that applies to two separate sets of television signals transmitted by satellite: (1) those broadcast by network affiliates; and (2) “other signals” that are not satellite broadcast programming. Accordingly, “nothing in this section” shall apply to satellite retransmissions of network stations – meaning that the rules governing satellite broadcast programming vendors relate only to superstations.¹⁵

¹² However, with respect to a significant number of distant network signals, DIRECTV actually is “an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.” 47 U.S.C. § 548(i)(3).

¹³ Cox Feb. 17 Letter at 3 (arguing that “this provision is only an exclusion from the coverage of Section 628(c) and has no relevance to Section 628(b)”).

¹⁴ 47 U.S.C. § 548(c)(3)(B) (emphasis added)

¹⁵ Section 119 of the Copyright Act, incorporated by reference into the definition of “satellite broadcast programming vendor,” has always divided broadcast stations into two categories: “network stations” and “superstations.” These provisions are now codified at 17 U.S.C. § 119(d)(2) and 17 U.S.C. § 119(d)(9), respectively.

Cox seems to argue that the phrase “that is not satellite broadcast programming” modifies both “other television signal” and “the signal of any broadcast affiliate of a national television network.”¹⁶ This would make the exemption apply to (1) network programming that is not satellite broadcast programming and (2) “any other television signal” that is not satellite broadcast programming. But that is just a long way of saying that the exemption applies to all television signals other than satellite broadcast programming. If that is what Congress intended, all of the language discussing “networks” or “other” television signals would be superfluous – Congress could have simply exempted all “television signals that are not satellite broadcast programming.” Only DIRECTV’s interpretation gives the reference to network affiliates independent meaning. Accordingly, only DIRECTV’s approach is consistent with “the familiar principle of statutory interpretation which requires construction ‘so that no provision is rendered inoperative or superfluous, void or insignificant.’”¹⁷

DIRECTV’s interpretation of Section 628 not only hews more closely to the text but also best reflects the only known concern about “satellite broadcast programming” at that time. These provisions appear to stem from a Congressional concern about the treatment of “distributors” (*i.e.*, wholesalers) of programming to be delivered to big-dish home satellite antennas that dated back to at least 1988. When Congress first created a statutory copyright license for the satellite retransmission of broadcast programming in 1988,¹⁸ it included a provision prohibiting satellite carriers from discriminating against “distributors.”¹⁹ It also directed the Commission to study whether satellite carriers were discriminating against distributors with respect to superstation and network programming.²⁰ After conducting that study, the Commission found that there was no discrimination by satellite carriers *as between different distributors*, but that there may have been discrimination by satellite carriers *as between distributors and cable operators*.²¹ More specifically, distributors claimed that satellite carriers charged them more for programming than they charged cable operators for the same programming.

This distinction is important because cable operators generally did not purchase network programming from satellite carriers – there was no need for them to do so because they obtained network programming over-the-air from local affiliates.²² However, cable operators did purchase superstation programming from satellite

¹⁶ Cox Feb. 17 Letter at 3.

¹⁷ *C.F. Commc’ns. Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (citation omitted).

¹⁸ Satellite Home Viewer Copyright Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat. 3935 at 3949 (1988).

¹⁹ That provision remains law today, and is now codified at 17 U.S.C. § 119(a)(8).

²⁰ *See Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, Second Report, 6 FCC Rcd. 3312, ¶ 3 (1991) (“*Satellite Discrimination Inquiry*”).

²¹ *Id.*, ¶ 5 (citing *Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming* First Report, 5 FCC Rcd 523 (1989)).

²² *E.g., id.*, ¶ 32 (noting that satellite “[c]ontracts with HSD distributors are, more often than not, for packages of stations while cable systems often only buy one superstation from a carrier”).

carriers.²³ Satellite carriers could not discriminate against distributors and in favor of cable operators with respect to network programming for the simple reason that they rarely sold cable operators that programming in the first place.

It should thus come as no surprise that, when Congress addressed discrimination in the sale of “satellite broadcast programming” less than one year after the Congressionally-mandated Commission inquiry, it would choose to exempt network programming from its new rules. This result is also understandable in light of the potentially broader sweep of the provision. Unlike the provisions applicable to “satellite cable programming vendors,” which apply only to those entities that are affiliated with a cable operator, the provisions applicable to “satellite broadcasting programming vendors” generally apply regardless of affiliation.²⁴ Having included a broader group of entities within the statutory mandates, it makes sense that Congress narrowly tailored those mandates to address only the issue identified by the Commission as a competitive issue.

This understanding of Section 628 is reflected in the fact that the Commission itself has treated the term “satellite broadcast programming vendor” as if synonymous with “superstation vendor.” In *Turner Broadcasting System*,²⁵ the Commission described the statute as prohibiting “discrimination by a vertically integrated (i.e., cable-affiliated) satellite cable programming vendor *or by a superstation vendor* in the prices, terms and conditions of sale of programming.”²⁶ By contrast, we are aware of no instance in which the Commission ever used the term “satellite broadcast programming vendor” to refer to anything other than a superstation vendor.²⁷

B. DIRECTV Carries WGN With Its Consent

Cox claims that, “even if” DIRECTV’s interpretation of Section 628 is correct, DIRECTV is nonetheless a “satellite broadcast programming vendor.”²⁸ This, Cox argues, is because DIRECTV carries superstation WGN pursuant to Section 119 of the Copyright Act and because “Cox is confident that [DIRECTV] does not obtain retransmission consent for its nationwide retransmission of superstation WGN.”²⁹ Cox’s confidence in this regard is misplaced, and DIRECTV is not a satellite broadcast vendor.

²³ Indeed, satellite distribution is what makes a superstation a superstation in the first place. See 17 U.S.C. § 119(d)(9) (1988) (defining a “superstation” as “a television station, other than a network station, licensed by the Federal Communications Commission, that is secondarily transmitted by a satellite carrier”).

²⁴ See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 3359, ¶ 21 (1993) (“Congress chose program access provisions targeted toward cable satellite programming vendors in which cable operators have an ‘attributable’ interest and toward satellite broadcast programming vendors regardless of vertical relationships”).

²⁵ *Turner Broadcasting System, Inc. and Time Warner, Inc.*, 11 FCC Rcd 19595 (1996).

²⁶ *Id.*, ¶ 21 (emphasis added).

²⁷ We have found one case in which the Acting Chief of the Cable Service Bureau appeared to use the term erroneously to describe CNN – clearly a “satellite cable programming vendor.” *Turner Vision, Inc., Satellite Receivers, Ltd., Consumer Satellite Systems, Inc., and Programmers Clearing House, Inc. v. Cable News Network, Inc.* 13 FCC Rcd 12610, ¶ 16 (CSB 1998).

²⁸ Cox Feb. 17 Letter at 2.

²⁹ *Id.* at 3-4.

Cox and DIRECTV apparently agree that, where a satellite carrier obtains retransmission consent from a broadcaster, the “satellite broadcast programming” definition simply does not apply.³⁰ The only dispute here is whether DIRECTV has such consent with respect to WGN carriage outside of Chicago.³¹ Cox points out, correctly, that DIRECTV need not obtain such consent, because WGN is one of a limited class of “nationally distributed” superstations for which such consent is not required.³²

DIRECTV has nonetheless obtained such consent as part of a larger transaction with WGN’s owner, Tribune Company. Such consent specifically covers DIRECTV’s carriage of WGN nationwide.³³ For this reason, it is not a “satellite broadcast programming vendor” and thus not subject to the provisions of Section 628.

II. Even if DIRECTV Were Subject to Section 628, Its Exclusive Offerings Are Not

In its initial response, DIRECTV argued that, even if it *were* deemed to be a “satellite broadcast programming vendor,” the provisions of Section 628 do not reach DIRECTV’s exclusive offerings – including the NFL Sunday Ticket. Cox takes issue with this assertion, citing the Commission’s holding that once an entity is “found to fit within the scope of Section 628(b), the prohibitions of Section 628(b) apply to programming arrangements other than those identified in the narrow definitional provision.”³⁴

The Commission’s holding, however, applied only to cable operators and cable affiliated satellite cable programmers.³⁵ Section 628 requires a different outcome for satellite broadcast programming vendors – as is made clear by the definition itself. “Satellite broadcast programming vendor” is defined as “a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, *with respect to satellite broadcast programming.*”³⁶ The latter phrase suggests that the rules themselves apply only “with respect to satellite broadcast programming,” and not to other “programming arrangements.” The provisions applicable to satellite *cable* programming vendors include no similar limitation.³⁷

³⁰ Cox Feb. 17 Letter at 2-3. The definition of “satellite broadcast programming” excludes programming transmitted by an entity “performing such retransmission on behalf of and with the specific consent of the broadcaster.” 47 U.S.C. § 548(i)(3).

³¹ Cox Feb. 17 Letter at 3.

³² See 47 U.S.C. § 325(b)(2)(B) (exempting certain stations that were superstation as of May 1, 1991 from retransmission consent requirement)

³³ See Declaration of Daniel Hartman, attached hereto.

³⁴ Cox Feb. 17 Letter at 5.

³⁵ *Terrestrial Loophole Order*, ¶ 14.

³⁶ 47 U.S.C. § 548(i)(4) (emphasis added).

³⁷ Cox also argues that DIRECTV’s interpretation “would render the inclusion of satellite broadcast programming vendors within the Section 628(b) prohibitions meaningless” because such programming is “available to multiple parties for the taking.” Cox Feb. 17 Letter at 5. To the contrary, DIRECTV’s interpretation would treat the inclusion of such vendors exactly as Congress intended – as a way to

* * *

Cox has asserted a novel interpretation of a long-unused statutory provision to attack DIRECTV offerings that the Commission has repeatedly found to be “fair” and in the public interest. But Congress intended for Section 628 primarily to address anticompetitive conduct by cable operators and cable-affiliated programmers – conduct that Cox itself perpetrates to this very day – and only secondarily to address a very specific issue related to superstation programming that is not relevant here. The Commission should not allow Cox’s attempt at legal diversion to distract from continuing efforts to close the terrestrial loophole.

prevent big dish satellite carriers from discriminating against distributors and in favor of cable operators in the sale of superstation programming.

DECLARATION OF DANIEL HARTMAN

1. My name is Daniel Hartman. My title is Senior Vice President, Programming Acquisition at DIRECTV, Inc. In this role, I am responsible for agreements DIRECTV negotiates for the carriage of programming.
2. I have personal knowledge of a valid, current agreement between DIRECTV and Tribune Company for carriage of Tribune's superstation, WGN.
3. That agreement specifically permits DIRECTV to carry WGN throughout the country.

I declare under penalty of perjury that the above is true and correct.

A handwritten signature in black ink, appearing to read "Daniel Hartman", is written over a horizontal line.

Daniel Hartman
March 3, 2010