March 5, 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 the undersigned and outside counsel Mike Nilsson spoke yesterday by phone with Stuart Benjamin of the Office of Strategic Planning. In that call, we responded further to a recent *ex parte* presentation by Cox Communications, Inc. claiming that DIRECTV is a "satellite broadcast programming vendor."[1] We spoke specifically about the definition of that term, and why we believe that, under any interpretation of the provision, the Commission cannot regulate DIRECTV's exclusive offerings.

The Cable Act provides that "[t]he 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). As we see it, there are three possible ways to read this provision.

1. "Satellite broadcast programming vendor" could refer to any satellite carrier that "provides satellite broadcast programming" pursuant to section 119 of Title 17.

   - In such case, the FCC could regulate a range of conduct by satellite broadcast programming vendors (not just their provision of satellite broadcast programming).

   - But DIRECTV would not be a satellite broadcast programming vendor because—

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

- the network programming it carries pursuant to Section 119 is subject to the "network exemption" contained in subsection 548(c)(3)(B),[2]

- DIRECTV carries superstation WGN with its consent;[3] and

- Section 119 recognizes no kinds of broadcast stations other than network stations and superstations.[4]

2. "Satellite broadcast programming vendor" could also refer to a satellite carrier that carries any programming (not just satellite broadcast programming) pursuant to Section 119 – but the Commission can only regulate satellite broadcast programming offered by such vendors.

   - In such case, DIRECTV would be a satellite programming vendor, because it offers service pursuant to Section 119.

   - But the Commission could not regulate DIRECTV's exclusive offerings because they are not satellite broadcast programming. They are not "broadcast" video programming, and are not "retransmitted" by satellite.[5]

3. The provision could also represent, as DIRECTV believes, a combination of the two interpretations above. Thus, a "satellite broadcast programming vendor" would be a satellite carrier that provides satellite broadcast programming pursuant to Section 119 – *and* the Commission can only regulate "with respect to" satellite broadcast programming offered by such a vendor.

   - In such case, DIRECTV would not be a satellite broadcast programming vendor because of the network exemption discussed above and its agreement for carriage of superstation WGN.

   - Moreover, the Commission could not regulate non-satellite broadcast programming in any event.

We find the first reading of the provision to be the least plausible. It would fail to give independent meaning to the words "with respect to," rendering what could have

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[2] 47 U.S.C. § 548(c)(3)(B). "Applicability to satellite retransmissions.—Nothing in this section shall apply . . . 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 . . . . ").

[3] 47 U.S.C. § 548(i)(3) ("The term 'satellite broadcast programming' means broadcast video programming when such programming is 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*" (emphasis added)).

[4] *See* 17 U.S.C. § 119(d)(9) (defining "superstation" as "a television station, *other than a network station*, licensed by the Federal Communications Commission, that is secondarily transmitted by a satellite carrier" (emphasis added)).

[5] "Retransmission" is a term of art derived from the Copyright Act. It means the further transmission of a broadcast signal that the broadcaster itself transmits over the air. *See* 17 U.S.C. §§ 111(f), 119(a)(1), and 119(a)(4) (also using term "secondary transmission" as synonymous with "retransmission"). For these purposes, DIRECTV "transmits" cable programming such as ESPN for which it has obtained copyright authority to do so, and "retransmits" broadcast programming for which it depends on the statutory license for copyright authority.

been a simple phrase quite complicated. It would also produce outcomes contrary to the structure of the Act – giving the FCC the same scope of regulation over independent satellite carriers without market power as over cable programmers affiliated with monopoly cable systems.[6] Although the second reading is more plausible because it gives some independent meaning to the phrase "with respect to," we can think of no policy reason why the Act should define "satellite broadcast programming vendor" more broadly than the programming sold by such a vendor. The last construction is the most plausible, as it both defines a "satellite broadcast programming vendor" in terms of the programming it sells *and* limits Commission regulation to that programming – matching the scope of the provisions to the concerns that animated Congress to adopt them.

Accordingly, no matter how the term "satellite broadcast programming vendor" is construed, the ultimate result is the same – DIRECTV's exclusive offerings do not fall within the ambit of the statute.

Sincerely,

/s/

Stacy Fuller
Vice President, Regulatory Affairs

cc: Austin Schlick
William Scher
Marilyn Sonn
Mary Beth Murphy
Nancy Murphy
Diana Sokolow
Steven Broeckaert
David Konczal
John Norton
John Berresford
Stuart Benjamin

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[6] This reading would also have the perverse outcome of regulating DISH Network less heavily than DIRECTV because DISH Network lost the right to transmit network programming under Section 119. *CBS Broad., Inc. v. EchoStar Comm. Corp*, 450 F.3d 505, 526 (11th Cir. 2006).