

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION**

Case No. 98-2651-CIV-Dimitrouleas/Seltzer

CBS BROADCASTING INC., et al.,)	
)	
Plaintiffs,)	
v.)	
)	
ECHOSTAR COMMUNICATIONS)	
CORP., et al.,)	
)	
Defendants.)	
)	

**RESPONSE BY ALL PLAINTIFFS TO
MOTIONS BY ECHOSTAR AND NPS FOR HEARING**

Plaintiffs have requested that the Court either find EchoStar, NPS, and Mr. Mountford in contempt *or* clarify that the Permanent Injunction bars EchoStar from “leasing” its facilities to accomplish through a third party what EchoStar is barred from doing – delivering distant network programming to EchoStar customers using the EchoStar satellite system. Because the basic facts are not in dispute, the Court can clarify the Permanent Injunction without holding a hearing or providing any additional process.^{1/} The undisputed facts also provide ample basis for the Court to hold EchoStar, NPS and Mountford in contempt.

^{1/} EchoStar cites the *Mercer* case (at 2) for the proposition that a hearing is necessary if there are disputed factual issues in a contempt proceeding. But that case is off point here, for two reasons. *First*, even as to contempt, there are no genuine disputes about the facts recited in plaintiffs’ Supplemental Memorandum, which is based on admissions by EchoStar and NPS themselves. *Second*, EchoStar does not and could not contend that a court must hold a hearing before amending an injunction to clarify what conduct it reaches. See *Hodge v. Dep’t. of Hous. and Urban Dev.*, 862 F.2d 859, 861 (11th Cir.1989) (“[i]nherent in the jurisdiction of a court of equity is the power ‘to modify an injunction in adaptation to changed conditions’”) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)).

If the Court wishes to reach the issue of contempt, and concludes that further development of the facts is needed to decide that issue, plaintiffs need to pursue certain limited discovery in order to develop the factual record. This limited discovery would be to go beyond the facts already shown through EchoStar's and NPS's own admissions – which are already far more than sufficient for the Court to act now to shut down this charade. Rather, if the Court wishes to hold a hearing, plaintiffs need discovery to seek to document *additional* facts that would make the case against EchoStar and NPS still more damning. Most notably, there are many reasons to believe that EchoStar provided its distant-signal subscriber list to NPS to assist NPS in carrying out the joint plan to defeat the Permanent Injunction.^{2/} The details are set forth below, but in brief, plaintiffs propose that, if the Court wishes to conduct a hearing, it should do so pursuant to the following schedule:

- **Production of key documents by EchoStar and NPS:** three business days after the Court issues an order setting a hearing, EchoStar and NPS should be required to produce a specific set of highly relevant documents, listed below.
- **30(b)(6) depositions of EchoStar and NPS:** two business days thereafter, EchoStar should be required to provide a witness (or witnesses) for a Rule 30(b)(6) deposition concerning the relevant facts; the next day, NPS should be required to do the same.
- **Hearing:** two business days later, or as soon as is consistent with the Court's schedule, the Court could hold a hearing on the matter, at which the parties would be able to make their cases based on a full record.

^{2/} It would be highly inefficient to conduct this discovery “on the fly” at a hearing before the Court; rather, at the hearing, the Court could hear the distilled highlights of the expedited discovery process.

Again, we emphasize that a hearing (and the necessary discovery beforehand) are *not* necessary, in light of the dispositive facts shown through EchoStar's and NPS' own candid admissions.

DISCUSSION

As discussed in detail in plaintiffs' Supplemental Memorandum filed on Friday, December 1, 2006, the nature of the collaboration between EchoStar and NPS is not subject to genuine dispute, since public statements by EchoStar and NPS themselves confirm that:

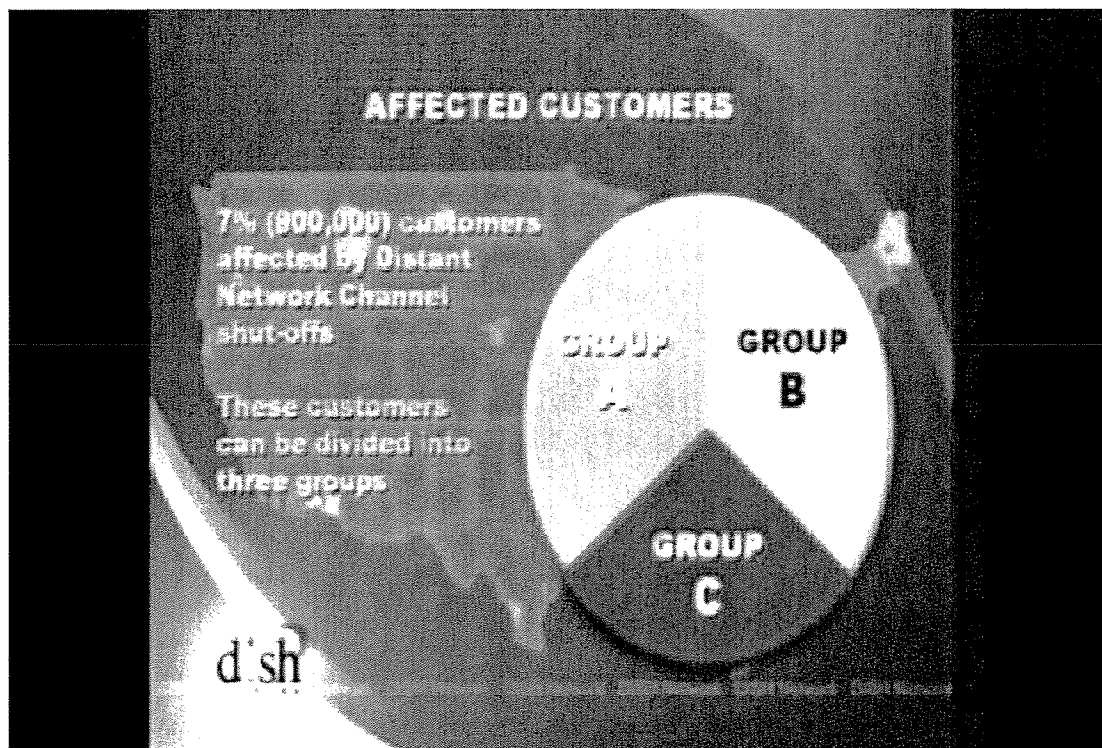
- EchoStar is leasing capacity on its EchoStar VII satellite to NPS for \$150,000 per month.
- The stated purpose of this arrangement is to enable NPS to deliver distant network signals to EchoStar customers losing those signals as a result of the Permanent Injunction.
- NPS is using frequencies licensed to EchoStar by the FCC to deliver distant signals to EchoStar customers.
- EchoStar customers can use their EchoStar satellite dishes and EchoStar set-top boxes to receive distant signals from NPS. In the words of EchoStar executive James DeFranco, EchoStar customers can continue receiving distant signals "using your existing DISH Network satellite system."
- Through its top executives, including Charlie Ergen and Mr. DeFranco, EchoStar is actively encouraging its customers to sign up for NPS (d/b/a All American Direct) to obtain the distant signals that EchoStar is forbidden by the Permanent Injunction from providing.

These facts, which come from public statements by EchoStar and NPS themselves, provide more than a sufficient basis for the Court to either clarify the Permanent Injunction or hold EchoStar and NPS in contempt.

Plaintiffs have reason to believe, however, that there are still more facts – which can be established through limited, expedited discovery – that would provide still further support for their pending motions to halt the trickery being orchestrated by EchoStar and NPS. Most notably, although plaintiffs cannot know for certain without conducting discovery, *there are many suggestions in the public record that EchoStar has provided a list of its customers to NPS* for use by NPS in signing up customers for distant signals.

The indications that EchoStar has provided a subscriber list to NPS include the following:

□ During the televised “Charlie Chat” on Thursday evening, when the Permanent Injunction went into effect, Mr. Ergen told EchoStar customers that NPS’ distant-signal service would be available to *certain* EchoStar customers, *depending on what services the customer takes from EchoStar*. Using PowerPoint slides, Mr. Ergen told viewers that EchoStar distant-signal customers can be divided into three groups:



- **Group A** consists of about 300,000 customers, who are “already subscribing to local network channels today”;^{3/}
- **Group B** consists of another “300,000 or so customers” who today “don’t subscribe to our local channels but in fact those local channels are up there for you”; and
- **Group C** consists of those customers who are in one of the 33 markets “where we don’t do local-to-local as a company today,” or who “have an RV,” or who “live in an area where the market itself does not have all four networks.”

During the Charlie Chat, Mr. Ergen told viewers that those customers in the “A” category – those currently subscribing to local-to-local from EchoStar – will not have “the luxury of getting a distant network signal *from anybody*.” (Emphasis added.)^{4/} And in discussing the option of receiving distant signals from NPS, Mr. Ergen said that “*if you are a B or a C customer*, [NPS / All American Direct] is going to be one of your better choices.” (Emphasis added.)

^{3/} The quotations in text are transcribed from the audio recordings of the November 20, 2006 Charlie Chat posted at www.satelliteguys.us, discussed in footnote 1 of plaintiffs’ Supplemental Memorandum filed on December 1, 2006. The EchoStar PowerPoint slide in text above is posted on the same online forum.

^{4/} If EchoStar and NPS have reached an agreement that NPS will not sell distant signals to EchoStar customers who receive local-to-local service from EchoStar (the “A” group), there are two possible explanations – both devastating to EchoStar. The first possibility is that EchoStar recognizes that far from being two independent operations, EchoStar and NPS are inextricably linked for purposes of the Act, including the “if local, no distant” rules.

The second possibility is that EchoStar does not want NPS to pull subscriber dollars away from EchoStar by encouraging EchoStar subscribers to cancel their local-to-local service from EchoStar and sign up for distant signals from NPS instead. That would be equally damning for EchoStar, since it would constitute yet another way in which EchoStar and NPS are acting in concert. (Should the Court elect to allow discovery and hold a hearing, plaintiffs will carefully explore these two possibilities with EchoStar’s and NPS’ 30(b)(6) witnesses.)

But the only difference between the “A” and “B” groups of EchoStar customers – all of whom are in EchoStar local-to-local markets – is whether the customer subscribes (Group A) or does not subscribe (Group B) to EchoStar’s local-to-local service. *And there is no way that the supposedly independent NPS could know that unless EchoStar tells them.*^{5/} Thus, Mr. Ergen’s statements during the November 30 Charlie Chat provide a strong basis for concluding that EchoStar has provided a list of its distant-signal customers to NPS.

➤ Numerous comments made by EchoStar subscribers in public discussion forums among satellite dish subscribers also suggest that EchoStar has provided a list of its distant-signal customers to NPS. (We present these comments not as admissible evidence, but to show that there are additional grounds, fully consistent with Mr. Ergen’s presentation, for pursuing discovery about whether EchoStar has provided a list of its distant-signal subscribers to NPS.)

For example, one discussion group participant reported that he (or she) had “called AAD” [*i.e.*, All American Direct] about getting distant network signals, and was told that “*E[choStar] had provided them [All American Direct] with records of all [EchoStar’s] DNS [distant network signal] customers.*” See Exhibit 12, attached hereto (emphasis added). Another participant quoted and commented on that post as follows:

^{5/} In theory, of course, NPS could ask customers themselves whether they are in Group A or Group B (*i.e.*, whether they subscribe to local-to-local), rather than getting the information from EchoStar. But absent a coordinated scheme by EchoStar and NPS, there is no way that Mr. Ergen would have *known* on the evening of November 30 that NPS would impose such a requirement.

Just for kicks, posted at another forum...

Quote:

Originally Posted by **joblo**

I called AAD today re DNS. They told me they could not find my phone number in the records. They said E provided them with records of all of their DNS customers, and since they couldn't find my name or number on that list, they could not qualify me for DNS.*

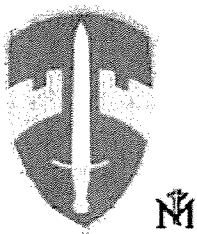
First come the strings, then come the woodwinds, and then the brass followed by the percussion.


"in active concert".

Another discussion participant, "Walt in VT," reported on Friday morning, December 1, that NPS signs up subscribers for distant signals "*based on the phone number that is tied to the [EchoStar] account*" (emphasis added):

12-01-2006, 09:29 AM

Supporting Founder
 Join Date: Feb 2004
 Location: Vermont
 Posts: 2,056



waltinvt 


Supporting Founder

Ok. I talked with a real person at the above number. A very nice lady, who was quite patient I might add.

She said they qualify based on the phone number that is tied to the Dish account. Trouble is none of my phone numbers would bring up my account, so something is screwy. She suggested I call my provider and confirm my account's phone number.

See Exhibit 12 (Post # 8).

Likewise on Friday, December 1, a different discussion participant reported that NPS customer service representatives had said that "*NPS is working off an account database Dish provided as a one-time dump*. NPS tries to access that database using your Dish account phone number" (emphasis added):

<u>rdinkel</u>  Pub Member / Supporter	Pub Member / Supporter Join Date: Jul 2004 Location: Woodland Park, Colorado Posts: 750
No Joy--Not in NPS Database	
<p>Just spent an hour and half with NPS and Dish and then NPS again. The deal is, NPS is working off of an account database Dish provided as a one-time dump. NPS tries to access that database using your Dish account phone number. Then, assuming you show up in the database, NPS loads your address info from the database into their prediction model in order to qualify you. Well, in my case, and apparently others, my phone number did not make it into the provided database, so NPS cannot go any further. They had me contact Dish (which took considerable time and progression from India up the supervisor chain), but Dish said they had no way to transfer any more data to NPS (I am guessing it had to have been done before 1 Dec to keep the judge happy). So back to NPS and they were cordial, but unable to go forward. I even offered to fax copies of waiver letters and Dish statements showing the distant networks I have been receiving. All to no avail. Full stop!!</p>	

See Exhibit 12 (Post # 50).

On Saturday, December 2, another discussion participant said: “They do not qualif[y] you until[] they have your phone number. If your phone number is not in the[ir] system they will NOT qualify your address.” (See Exhibit 12 hereto (Post # 589).) Also on Saturday, still another participant reported being denied distant signal service by NPS because “I am not in their system.” When the participant asked why he or she “would [be] in their [computer] to begin with,” the participant was told: “*DISH network gave them the peopl[e] eligible.*” See Exhibit 12, Post # 616 (emphasis added).

* * * * *

Plaintiffs have sought to obtain information about this matter from EchoStar voluntarily, but without success. Specifically, when EchoStar and NPS notified plaintiffs on Wednesday evening, November 29, that they were implementing this scheme to defeat the Permanent Injunction, plaintiffs’ counsel immediately asked EchoStar’s General Counsel, Mr. Moskowitz,

“Is EchoStar providing a list of distant network signal customers to NPS?” (See Exhibit 13.)

Mr. Moskowitz has never responded.

Proposed Discovery Plan

Should the Court order a hearing, plaintiffs first need an opportunity to develop the full story of the “collaboration” between EchoStar and NPS, and not just those facts that plaintiffs can glean from the public record or that EchoStar and NPS have selectively chosen to disclose.^{6/} Accordingly, plaintiffs respectfully suggest that, if the Court orders a hearing in this matter, the Court should also enter an order providing for the following expedited discovery:

1. **Document production.** The Court should order EchoStar and NPS to produce, within three business days, copies of the following documents:
 - a. any subscriber list that EchoStar has provided to NPS, including all communications relating to any such subscriber list;
 - b. all other communications between EchoStar and NPS;
 - c. all agreements (formal or informal) between EchoStar and NPS;
 - d. all documents relating to the methods used by NPS to deliver distant signals to customers and to sign up subscribers for such signals;
 - e. all communications by NPS with customers or potential customers relating to distant signals or by EchoStar with customers relating to options for obtaining distant signals after November 30, 2006;

^{6/} *FTC v. Gill*, 183 F. Supp.2d 1171, 1189-90 (C.D. Cal. 2001) (ordering compliance with federal district court’s Order authorizing expedited discovery in civil contempt action); *Am. Fed. of State County and Mun. Employees v. United Domestic Workers*, No. 05CV1251BTM (POR), 2005 WL 2128979, at *5 (S.D. Cal. Aug.9, 2005) (granting plaintiffs’ request for expedited discovery on issues to be considered at Order to Show Cause hearing).

f. all scripts for customer service representatives relating to distant signals;

g. all communications with Decisionmark relating to the termination of subscribers by EchoStar or sign-up of subscribers by NPS; and

h. all video or audio recordings or transcripts of statements by EchoStar personnel about the Permanent Injunction or about NPS, including but not limited to a complete copy of the November 30 Charlie Chat, a complete copy of the loop video featuring James DeFranco, and a complete copy of any recording of EchoStar's presentation to retailers on November 30, 2006.^{7/}

2. **30(b)(6) depositions.** EchoStar should be ordered to produce a 30(b)(6) witness relating to the topics listed above, for a videotaped deposition to be held two days after production of the documents described in the preceding paragraph. NPS should be ordered to do the same one day later.

A proposed Order to this effect is being filed herewith.

Conclusion

There is no need for a hearing, given the undisputed facts and admissions by both EchoStar and NPS that they are engaging in a transparent sham to subvert the Permanent Injunction. The Court can halt this abuse right now by clarifying the Permanent Injunction -- or by holding EchoStar and NPS in contempt. Should the Court order a hearing, however, plaintiffs respectfully request that they be allowed to pursue the limited, expedited discovery outlined above to enable plaintiffs to present all of the relevant facts to the Court.

^{7/} On December 3, 2006, plaintiffs formally asked counsel for EchoStar and NPS to preserve all relevant documents. With EchoStar, this is not an academic precaution. See *Broccoli v. EchoStar Comm'ns Corp.*, 229 F.R.D. 506, 512 (D. Md. 2005) ("EchoStar clearly acted in bad faith in its failure to suspend its email and data destruction policy . . . to fulfill its duty to preserve the relevant documentation for purposes of potential litigation").

Respectfully submitted,

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