



March 12, 2008

EX PARTE PRESENTATION

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

Re: DISH Network/DIRECTV HD – Carry-One, Carry-All Proposal, CS Docket Nos. 98-120, 00-96

DISH Network and DIRECTV have proposed a clear path forward to a high definition (HD) “carry-one, carry-all” obligation in all local markets in which any local broadcast programming is provided by satellite in HD.¹ Encouragingly, a number of parties across different industries and constituencies have voiced their support for the Direct Broadcast Satellite (“DBS”) industry’s compromise approach, and we urge its prompt adoption.

The outlier in this proceeding is the National Association of Broadcasters (NAB). NAB’s most recent fishing expedition is a calculated effort to scuttle a reasonable compromise. The DBS joint proposal, offered in good faith, was filed in response to inquiries by Commissioners’ offices and FCC staff who – understanding the capacity challenges facing the satellite industry – requested that the DBS industry propose a phased-in schedule with realistic benchmarks. Although such an aggressive schedule is burdensome and requires significant additional investment by the DBS industry, it has the advantage of providing certainty and clarity for all stakeholders – policymakers, DBS companies, broadcasters, consumers, and investors.

Now, at the eleventh hour, NAB is attempting to derail the process. Specifically, having neglected to respond to the public filings over the past year addressing DBS-capacity issues, NAB has now propounded a series of questions that either bear no relevance to the issues presented in this proceeding or seek basic information about fleet and network operations that is readily accessible in the public domain.

Nonetheless, we respond to NAB’s litany of questions with technical and operational details in the attached appendices and associated documentation. This material only confirms that the February 15, 2008, DBS joint proposal balances the needs of viewers, broadcasters, and satellite providers to maximize the amount of HD programming available to consumers across the nation in a manner consistent with the DBS must carry statute, satellite technology, and the needs of MVPD competitors. It also helps ensure that a smooth digital transition is not undermined for 30 million DBS households,

¹ See Letter from Linda Kinney, Vice President, Law and Regulation, DISH Network, and Susan Eid, Senior Vice President, Government Affairs, DIRECTV, Inc. to Marlene Dortch, Federal Communications Commission, MB Docket Nos. 98-120, 00-96, and 07-91 (Feb. 15, 2008) (“*Joint Proposal Letter*”).

which could well result if NAB succeeds in steering the Commission off course with an unprecedented and unnecessary document request.

A Growing Consensus Supports the DBS Industry's Approach

In the four weeks since DISH Network and DIRECTV first proposed a phased-in approach to HD must carry, a growing number of parties have expressed their support for our approach:

- Members of the Congressional Hispanic Caucus on February 14, 2008 expressed their concern with any “overly burdensome carriage requirements” that do not “account for DBS’ particular capacity constraints.” They highlighted their objection to any regulatory action that would force DBS providers to “drop markets or programming in the short run,” including Spanish-language programming. Instead, they advocated for a solution that did not “mandate 100% HD must carry all at once in 2009.” The letter is attached as Tab 1.
- The Media Access Project on March 4, 2008 similarly expressed its support for “the compromise proposal offered by DIRECTV and DISH Network.” They described our proposal as “a measured approach that provides a clear roadmap to full HD must carry compliance in all HD markets within a reasonable timeframe.” They stressed the critical need to “ensure continuity of existing services to all 30 million DBS subscribers,” and urged that any regulatory solution permit DBS providers to continue to “offer a viable competitive choice to cable companies.” Media Access Project’s statement is attached as Tab 2.
- Windstream, a telephone provider with a rural customer base, on February 26, 2008 advocated a flexible approach to “ensure our rural customers, to the greatest degree possible, have the ability to access HD video services.” Given the “unique capacity issues of satellite,” Windstream recommended an “approach that does not require a flash cut to 100% HD must carry in 2009, but rather establishes a later date-certain by which such carriage should be implemented.” Windstream’s letter is attached as Tab 3.
- The Satellite Industry Association on March 5, 2008 noted that satellite providers “maximize their available capacity,” and, therefore, concluded that “[i]n order to satisfy HD must carry requirements, satellite operators must use and have access to additional spectrum resources and construct new spacecraft.” SIA recommends that any new obligations be “phase[d]-in ... over a minimum of four years from the DTV transition.” SIA’s letter is attached as Tab 4.

These third parties have corroborated our description of the technical realities of satellite service, justifying a more gradual transition. The diversity of these parties and the unanimity of their positions confirm that the DBS proposal is in the public interest and successfully balances the interests of consumers and the industry.

Imposition of DBS HD Must Carry Obligations Requires Time and Resources to Comply

Given that it is exponentially more burdensome for DBS providers to carry a high definition digital signal than a standard definition digital signal, the Commission should provide sufficient time for satellite companies to acquire the new capacity (and new frequencies) to comply with an HD carry-one, carry-all requirement. In most instances, this will require new satellites designed specifically to comply with any new rules. As detailed in Appendix B, satellite design and construction timetables – as well as spectrum availability issues – support the proposed milestones and an end date of no earlier than February, 2013. Given the “practical and technical limitations of satellite operations now and in the future,” we believe that the Commission has clear evidentiary and statutory support for providing this reasonable transition period for satellite providers before the imposition of a substantial new regulatory requirement.² Such a transition mirrors Congress’s framework for the introduction of analog local-into-local in 1999, when a multi-year period was provided to DBS providers to commence local service free from carriage obligations because of the “the logistics of adding hundreds of local television stations to its channel line-up.”³ Similarly, it comports with the Commission’s prior finding that satellite “carriers need some measure of control in configuring their satellite systems to meet their statutory obligations.”⁴

In fact, NAB’s public position last year with respect to digital must carry issues acknowledged the need for a transition period. Before the House Committee on Energy and Commerce, a NAB designee stated plainly that “satellite carriage should be subject to the same requirements, with the FCC empowered to implement different timing for their imposition based on satellite’s more limited but growing spectrum capacity.”⁵ The DBS industry has offered a proposal that does just that. HD carry-one, carry-all in all HD markets – the satellite equivalent of cable must carry – with “different timing,” in this case a firm date of February 2013 with applicable compliance benchmarks. Tellingly, when faced with real world technical implementation challenges, NAB routinely seeks time to comply with new regulation.⁶ We ask only the same consideration be given to DBS providers.

² See FCC Written Response to the GAO Report on DTV at 45.

³ See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, ¶ 20 (2000); 47 U.S.C. § 338(a)(3).

⁴ *Id.*, ¶ 22.

⁵ Statement of K. James Yager, Chief Executive Officer Barrington Broadcasting Co., LLC on behalf of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., Hearing before the House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet (Mar. 28, 2007)(detailing NAB’s proposal with respect to multicast must carry).

⁶ See e.g., Petition for Reconsideration and Clarification of the Association for Maximum Service Television, Inc. (“MSTV”) & NAB, *Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, at 6 (Feb. 29, 2008)(seeking one-year delay of effective date of PSIP standard because broadcasters need the additional time to procure and install the needed hardware and software); Reply Comments of MSTV and NAB, *Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, at 10-11 (Aug. 30, 2007)(requesting flexible period of one year after digital transition to complete digital construction because of technical and practical difficulties of the transition); Comments of MSTV and NAB, *Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, at 4-5 (Aug. 15, 2007)(noting practical realities cannot be ignored in developing DTV transition policies and thus advocating flexibility in DTV policy).

Any Further Delay Adversely Affects Digital Transition

Until last week, the NAB did not participate actively in the DBS HD must carry proceeding. Over the past several years, both DBS providers have updated the Commission routinely on their satellite systems and the heavy burden faced by the industry if an HD must carry requirement were imposed without taking capacity limits into account.⁷ If the NAB had questions or concerns about the validity of DBS providers' repeated presentations, it had every opportunity to raise them. It did not.

Now, less than a year before the transition, NAB wants to ask more questions about DBS operations – including tangential inquiries like whether flash memory is installed in our set-top boxes – rather than recognize the urgency of the upcoming digital transition. The transition already poses operational challenges for the DBS industry, which needs to ensure the smooth transition of 30 million satellite households (representing more households than receive broadcast signals over the air today). In virtually every other instance relating to the transition, NAB has urged “both the industry and the FCC [to] act with deliberate speed to meet the deadline.”⁸ This departure from NAB's advocacy with respect to transition-related matters is regrettable.

In adopting the final DTV table this month, the Commission expressed the desire to act “as expeditiously as possible to provide stations with the certainty they need to complete their digital buildout.”⁹ We ask for similar prompt action as the DBS industry prepares for the digital transition. The cable industry had eight years from the imposition of a digital must carry obligation to plan and prepare for February 2009; DBS providers will have a little over eight months to do the same.¹⁰ This inequitable treatment should not be exacerbated by NAB's attempt to derail this proceeding.

DBS Capacity Predictions Have Proven Accurate and Sound

NAB repeatedly accuses the DBS industry of exaggerating its past capacity constraints. The most recent example offered by NAB is the 2007 digital carriage obligation in Alaska and Hawaii. Yet, a review of DISH Network's position in that proceeding actually lends support to the DBS capacity claims here and shows that DISH Network was quite prescient in its 2005 filings. Specifically, when faced with an obligation to provide carriage for all digital signals of Alaska and Hawaii broadcasters –

⁷ See generally Letter to Marlene H. Dortch from Linda Kinney, *Ex Parte Presentation*, CS Docket Nos. 00-96, 98-120 (Feb. 15, 2008); Letter to Marlene H. Dortch from Bradley K. Gillen, *Ex Parte Presentation*, CS Docket Nos. 00-96, 98-120 (Sept. 6, 2007); Letter to Marlene H. Dortch from Bradley K. Gillen, *Ex Parte Presentation*, CS Docket No. 00-96, 98-120 (Aug. 31, 2007); Letter to Marlene H. Dortch from Bradley Gillen, *Ex Parte Presentation*, CS Docket No. 00-96 (Aug. 15, 2007); Letter to Marlene H. Dortch from Bradley Gillen, *Ex Parte Presentation*, CS Docket No. 00-96 (Aug. 3, 2007); Letter to Marlene H. Dortch from Linda Kinney, *Ex Parte Presentation*, CS Docket Nos. 00-96, 98-120 (Feb. 11, 2007); Letter to Marlene H. Dortch from Ross Lieberman, *Ex Parte Presentation*, MB Docket Nos. 00-96, 98-120, 00-2 (June 15, 2006); Letter to Marlene H. Dortch from Pantelis Michalopoulos & Rhonda M. Bolton, *Ex Parte Presentation*, CS Docket No. 98-120 & MB Docket No. 03-15 (Jan. 14, 2005); Letter to Marlene H. Dortch from David Goodfriend, *Ex Parte Presentation*, CS Docket No. 98-120 (Jan. 31, 2003).

⁸ Comments of NAB/MSTV, MB Docket No. 07-91, at 3-4 (Aug. 15, 2007).

⁹ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order, FCC 08-72, ¶ 3 (2008).

¹⁰ *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 01-22 (Jan. 23, 2001).

high definition and multicast signals – DISH Network did not state it could not comply (as asserted by NAB); it explained that compliance would have anti-consumer consequences:

Superimposing a multicast requirement on the already burdensome HD carriage rule would likely result in EchoStar being unable to use available spectrum on a spot beam to provide regional programming that Alaskans and Hawaiians want, as opposed to programming dictated by government fiat. This would disserve subscribers in Alaska and Hawaii – the very class of consumers that Congress intended to benefit.¹¹

That is exactly what happened in June 2007: DISH Network reserved sufficient capacity on its satellite spot beams over Alaska and Hawaii for each broadcaster's content. Approximately one-third of that spectrum – the equivalent of three transponders – remains empty today. DISH Network cannot repurpose those transponders because, if a broadcaster were to start broadcasting in HD, DISH would be required to retransmit the HD signal with almost no lead time. In the end, an overly burdensome requirement has resulted in less service to DBS subscribers – just as predicted by DISH Network.

More generally, a review of the history of local-into-local supports DBS providers' position in this proceeding. There are finite limits to satellite capacity at any given time: satellite transponder space is maximized, and compression and modulation efficiencies are exhausted. Explaining that DISH Network's system is very near, or at, total useable capacity today does not foreclose future expansion. By way of example, in 2002, there were real limits to DBS providers' ability to reach many local markets. Since that time, DISH Network has invested or acquired multiple spot beam satellites, gained access to additional satellite spectrum frequencies (including some in other countries), designed and distributed more advanced multi-feed satellite antennas, invested in improved compression technologies (MPEG-4) as well as improved modulation technologies (8PSK). At the inception of carry-one, carry-all in 2000, DISH Network provided local service in only 34 markets. Less than seven years later, that number is 174 – translating to over 1460 local broadcasters today. This huge investment in local markets and local broadcasters is a testament to the substantial financial, technological, and engineering investment made by DISH Network to maximize the amount of satellite capacity available. The DBS joint proposal to meet an onerous HD carriage obligation in 2013 is based on the continued commitment of both providers to continue this history of engineering and technological advancement, the most significant component of which is to design, construct and launch new state-of-the-art satellites. The culmination of all our efforts will be the "creation" of new satellite capacity – whether it be in the form of new satellites, new spectrum, or more efficient technologies – that does not exist today.

NAB's Request for Further Inquiry

In its March 6, 2008 filing, NAB states that a formal Commission Notice of Inquiry is warranted because "information about satellite design and capacity is not readily available." In doing so, NAB fails to explain how the existing filings by DISH Network or DIRECTV are incomplete or insufficient, or that any effort was made to review public sources for the answers to its questions. Nor does it provide any evidence that statements made by either party on the record in this proceeding are inaccurate.

¹¹ Petition for Partial Reconsideration of EchoStar Satellite L.L.C., MB Docket No. 05-181, 4 (Sept. 30, 2005).

Furthermore, given the unprecedented information request that NAB is suggesting, we have grave concerns that any proposal that involves market-by-market waiver requests would be bogged down by a process resembling discovery in protracted litigation with the aim of second-guessing every business decision and capacity calculation of both DBS providers. Injecting that level of uncertainty so close to the digital transition – and imposing such an unknown and resource-intensive process on DBS providers and Commission staff – cannot serve the public interest.

Nonetheless, in order to facilitate prompt Commission action, we respond to NAB’s operational and capacity questions in Appendix A (DISH Network Operations), Appendix B (Joint Proposal and Future Capacity), and Appendix C (210 Markets – Broadcasters Have Not Invested in Rural America). Those responses demonstrate that DISH Network’s current fleet operates effectively at full capacity and efficiency, and that the 2013 benchmark proposal is a fair and aggressive timetable to comply with a new highly burdensome regulatory obligation.

Broadcasters Are Attempting to Free Ride on DBS Investment

Although broadcasters are quick to demand that DBS providers invest hundreds of millions of dollars to expand the reach of must carry stations, many broadcasters are unwilling to make that same investment in their own facilities. Ironically, this is particularly true in rural America. For many years, NAB has been asking the government to mandate DBS carriage of broadcast signals in all 210 markets. Yet most of the markets that remain unlaunched by DBS are missing at least one affiliate of the big four networks, thus limiting the commercial viability of DBS service in those rural markets. The broadcasters appear to have concluded long ago that the population is so sparse in these rural areas that they do not generate enough revenue to justify the economic investment – so they are asking the government to force the DBS industry to make the investment for them. Moreover, the broadcasters that are in rural America – as well as broadcasters in DMAs across the nation – have not built out their facilities sufficiently to provide full signal coverage throughout their DMAs. It is clear that the availability of forced carriage on MVPD systems has stripped broadcasters of the proper incentive to serve their entire local communities.

Minimum HD Content Threshold for DBS HD Carriage

If DIRECTV and DISH Network are forced to invest in expensive facilities to extend the reach of broadcasters’ HD content, it is fair to ask that the broadcasters also be required to invest in HD content by providing a minimal amount of native HD programming in exchange for carriage rights. Reserving valuable and finite satellite capacity for a broadcaster that transmits a *de minimis* amount of HD programming is a disservice to consumers. The big four networks, carried in HD on DBS platforms today, produce 20-40 hours of HD programming per week – and the quality and quantity of HD programming continues to grow. By contrast, very few must carry stations are broadcasting in HD. Indeed, some financially strapped must carry stations might never invest in expensive equipment needed to produce and deliver native HD content. Planning for and constructing extra satellite transponders that could remain empty “just in case” these stations ever decided to produce HD content is contrary to the public interest. As part of the digital must carry carriage election process, therefore, the Commission should establish a clear HD threshold, which grows over time, that is comparable to the amount of HD carried by retransmission stations. Broadcasters falling under a minimum threshold would still be carried on our system in a down-converted format consistent with the vast majority of programming offered by that broadcaster.

Conclusion

The Commission should adopt the DBS joint proposal, providing certainty to DBS providers and ensuring continuity of service to over 30 million households. This balanced approach accounts explicitly for current satellite capacity, planned satellite capacity, potential compression technology improvements, and the potential anticompetitive ripple effect on DBS local markets and programming if too stringent a requirement is imposed too quickly on satellite systems.

Respectfully submitted,

/s/ Linda Kinney

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Attachment

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