

# STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Pantelis Michalopoulos  
202.429.6494  
pmichalo@steptoe.com

1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
Tel 202.429.3000  
Fax 202.429.3902  
steptoe.com

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The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re:** *Ex Parte – In the Matter of Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 03-15, RM 9832*

Dear Chairman Powell:

In a March 22, 2004 letter to you, the National Association of Broadcasters (“NAB”) expressed strident opposition to the plan proposed by EchoStar Satellite LLC (“EchoStar”) to speed up the digital television transition by permitting viewers currently left out of the transition to receive digital service through the importation of distant HD broadcast signals via satellite.<sup>1</sup> The NAB alleges that the tremendous progress achieved by its members renders unnecessary any plan to hasten the transition, that the EchoStar proposal would create a “nightmare,” that the proposal would not provide an incentive for broadcasters to build or upgrade their DTV facilities, and that the Commission should require EchoStar to carry local HDTV signals instead. Such arguments are misguided, and should not dissuade the Commission from pursuing EchoStar’s proposal as a practical, immediate means of spurring the transition. The proposal is simple: if a household today cannot receive a DTV local network station, that station’s authorization should be conditioned on the grant of a narrow waiver allowing the household to receive a distant DTV signal of that same network by satellite. The NAB cannot persuasively portray this pro-consumer idea as running counter to the public interest.

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<sup>1</sup> Letter from Marsha J. McBride, NAB, to Chairman Michael K. Powell, FCC (Mar. 22, 2004) (“NAB Letter”). The NAB’s letter responded to EchoStar’s Letter of March 4, 2004 setting forth the proposal. Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite, LLC, to Chairman Michael K. Powell, FCC (Mar. 4, 2004) (“EchoStar DTV Letter”).

Importantly, the NAB does not allege that the Commission lacks the authority to condition broadcast licenses in this manner. Rather, its objection appears to be grounded on the assertion that EchoStar's proposal is unneeded because most households in America are already able to receive digital broadcast signals; essentially, according to the NAB, nothing needs to be done about the DTV problem, because there is no problem to solve. Likewise, in testimony before a Congressional subcommittee, the NAB's representative recently maintained that only a "handful" of broadcasters do not provide full-power DTV service. The reality is otherwise. The NAB representative's statement is belied even by the partisan study that the NAB letter relies on.<sup>2</sup> Moreover, the letter's description of the progress that broadcasters have made is based on two false premises: that one out of four commercial network stations is enough for consumers in a particular market; and that wherever there is a DTV station, all households in the market can receive it. NAB remains willfully blind to the fact that a significant number of viewing households (as of February 2004, all except 17 out of 210 markets) still lack access to a full complement of full-power digital broadcasts from the networks serving their areas. The credibility of NAB's estimates is also undercut by its reliance upon the MSTV study, which overestimates the percentage of viewers being served by digital signals. The MSTV study does so by adding the alleged service surpluses of full-power DTV stations to the service shortages of low-power DTV stations to "net" a larger number of served households.

Second, the only specter of a "nightmare" proffered by the NAB is illusory, as there is in fact no logical link between the proposal and the imaginary scenario the NAB unfolds. The NAB is referring to the 1999 distant signal importation episode, when many subscribers receiving distant stations were found ineligible to receive these stations under the copyright license of 17 U.S.C. § 119 and lost their service. Under the EchoStar proposal, however, no one would lose his or her service. Satellite carriers would have the right to import the distant HDTV network feed to households that do not receive local DTV service, either because the local DTV licensee has not built DTV facilities at all, or because it does not operate at full power. If the licensee subsequently builds or upgrades its facilities, the satellite carriers will not lose their right to serve households they have signed up, and therefore there will be no interruption of service whatsoever. The satellite carriers will only lose the right to sign up additional households in the affected area. The NAB's use of the word "nightmare" to describe what happened in 1999 is in any event characteristic of its cavalier disregard for what consumers want, and of its peculiar approach to consumer satisfaction and the public interest. NAB does not mind if consumers do not get what they want, so long as the consumers do not have an opportunity to express their dissatisfaction.

Third, the NAB is wrong in its contention that EchoStar's proposal will not provide an incentive to broadcasters. The proposal will certainly motivate broadcasters to build or upgrade their facilities because by doing so they will deprive satellite carriers of the ability to

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<sup>2</sup> See Mark R. Fratrick, Ph.D., *Reaching the Audience: An Analysis of Digital Broadcast Power and Coverage* (BIA Financial Network, Oct. 17, 2003) (prepared for Association for Maximum Service Television, Inc.) ("MSTV Study").

serve additional households in their areas. And, moreover, EchoStar has proposed a 3-month grace period to allow low-power DTV stations to upgrade before satellite carriers may commence distant HDTV service.

Fourth, rather than contribute to the dialogue on how to provide digital network broadcasts to the “have nots,” the NAB instead devotes its energy, and seeks to turn the Commission’s attention, to NAB’s own demands for digital mandatory carriage by cable and satellite systems. The technical constraints that presently preclude satellite carriage of all digital local signals have already been well documented. Thus, satellite digital must-carry will not provide the solution hoped for by broadcasters that have failed to fulfill their obligation to operate DTV stations that serve their entire Grade B contour. In fact, digital must-carry, if imposed, would remove any incentive for such broadcasters to step up their power levels to serve their entire viewing area. And it is again characteristic that NAB members, having received spectrum worth tens of billions of dollars in exchange for their promise to provide DTV service, are now seeking to abdicate their end of the bargain and have someone else – the satellite and cable industries – shoulder it.

Finally, the NAB embroiders its response with its usual ad hominem attacks on EchoStar. These attacks appear to have become part of a concerted campaign orchestrated by the NAB to smear EchoStar’s reputation. EchoStar will not dignify these attacks with a response, however, as to do so would be to achieve precisely the NAB’s goal – to divert attention from the question of speeding up the DTV transition.

## **I. The DTV Transition Needs To Be Expedited**

EchoStar has proposed that the Commission: (a) require all network stations that have not completed construction of DTV facilities to grant waiver requests that will allow consumers in the relevant Designated Market Area (“DMA”) to receive, by satellite, the HD feed of the network in question; and (b) require all network stations that fail to replicate their analog Grade B contours to grant such waivers for households predicted as served by the station’s analog signal but outside the station’s community of license. The proposal is ripe for consideration for at least two reasons: first, developments likely unanticipated by Congress have made it easier for broadcasters to obtain extensions of the statutory DTV build-out deadline under the so-called 85% test. Second, a large number of existing digital facilities still are not operating at power adequate to serve their entire Grade B contour.<sup>3</sup> The common consequence

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<sup>3</sup> Recent studies of the adoption rate for HDTV provide more cause for continued concern regarding the pace of the transition. It appears that the actual rate of HDTV ownership by U.S. households has utterly failed to keep pace with industry analysts’ expectations. See Rich Luhr, “Analysts Still Wishful About HDTV” (Apr. 8, 2004) available at [www.always-on-network.com/comments.php?id=3606\\_0\\_9\\_0\\_C](http://www.always-on-network.com/comments.php?id=3606_0_9_0_C) (comparing November 2002 study by Strategy Analytics, which predicted that 4.8 million U.S. homes would own HD-capable TVs by year-end 2002, to a study released April 2004 by In-Stat/MDR reporting that only 1.5 million homes receive HDTV programming).

of these developments is that many television viewers can expect to remain unserved by digital network broadcast signals for quite some time. Delivering an imported digital signal via satellite to these households will ensure that they are not left out of the transition, while providing a competitive incentive to lagging broadcasters to build facilities and/or serve their entire viewing area, *and* facilitating satisfaction of the 85% test.

The NAB first suggests that such measures are unnecessary, citing a healthy 99.42% of TV households in 203 markets as the number “served” by digital signals, and claiming that DTV facilities are serving 92.7% of the population served by corresponding analog stations.<sup>4</sup> The NAB appears ready to declare the DTV transition a success now. Indeed, if the NAB’s figures are to be believed, it would be difficult to understand why it so adamantly objects to the satellite TV industry serving the remaining 0.58% of households that, by its calculation, cannot receive DTV service.

The NAB’s assessment is contrary to reality, however. First, the 99.42% of TV households in 203 markets that are “served” by DTV facilities according to the NAB do not have access to a full complement of the big four networks and PBS. Rather, the NAB’s figure reflects only that, in each of 203 markets, there is at least one broadcaster offering digital service. And it goes without saying that consumers expect to receive CBS, NBC, ABC, FOX and PBS in digital, and cannot be expected to be content with only one broadcaster in the market providing service in digital. Furthermore, the 99.42% figure is merely the total number of households in those 203 markets and not the number of households that actually can *receive* the digital service. In the same vein, the NAB’s assertion that 73.7% of TV households have “access to” at least six DTV signals is in error.<sup>5</sup> In fact, even the partisan MSTV study that NAB relies upon for that assertion does not support it. Rather, the study concluded that 73.7% of TV households were “in markets” where there are at least six operating DTV facilities, without regard to whether these facilities operate at full power and, therefore, whether all of these households can actually receive the service.<sup>6</sup> This distortion is consistent with the outlandish assertion of the NAB representative during congressional testimony that only a “handful” of DTV stations do not operate at full power.<sup>7</sup>

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<sup>4</sup> See NAB Letter at 2, 4.

<sup>5</sup> See *id.* at 2.

<sup>6</sup> See MSTV Study at 12.

<sup>7</sup> Robert G. Lee, President and General Manager of WDBJ-TV, appeared on behalf of the National Association of Broadcasters at a recent House Energy and Commerce subcommittee hearing and testified that “[t]here is still [sic] a handful of stations who haven’t been able to either go to the power they’ll ultimately use or start at all . . . .” *Reauthorization of the Satellite Home Viewer Improvement Act: Hearing Before the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee*, 108th Cong. (Apr. 1, 2004) (transcript available through Federal News Service).

As the Commission well knows, the reverse is true.<sup>8</sup> Even according to the MSTV study cited by the NAB, 52.6% of operational DTV stations “are operating pursuant to an STA”<sup>9</sup> meaning that they very likely operate at less than licensed power. The “handful” referred to by the NAB is accordingly more than 500 (and that does not even take into account the hundreds of stations that have not deployed any DTV service whatsoever).<sup>10</sup> The MSTV study goes on to allege that some of these low power stations can nevertheless serve their entire analog population coverage, but for present purposes it is not even necessary to examine the accuracy of this dubious proposition. Even the MSTV study puts that percentage at a low 18.8%.<sup>11</sup> The study concedes that 60.4% of the STA stations reach only 70% of their coverage area,<sup>12</sup> meaning that the remaining 20.8% do not even achieve that questionable distinction.

As for the 92.7% of the population purportedly receiving digital broadcasts in full replication areas, the NAB’s figures are based on an erroneous methodology. Specifically, the MSTV study compensates for stations serving less than their full replication area by effectively netting that deficiency against stations that are maximizing power and allegedly serving a population larger than that in its replication area.<sup>13</sup> The result of this sleight of hand is the appearance that a greater percentage of replication areas are being served. It is misleading as a practical matter because, for example, one network station serving a population larger than its replication area statistically boosts the percentage of another, underpowered station in the market, yet additional viewers are actually not able to receive the signal of the underpowered station.

The fact is that, in contrast with the NAB’s estimates, only 17 out of the 210 DMAs were able to receive a full complement of full-power network DTV service (NBC, ABC,

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<sup>8</sup> See, e.g., Summary of DTV Applications Filed and DTV Buildout Status (dated Mar. 24, 2004) (reporting that 763 stations “are authorized to be on the air with special or experimental DTV authority”) available at [www.fcc.gov/mb/video/dtvstatus.html](http://www.fcc.gov/mb/video/dtvstatus.html) (visited Apr. 13, 2004).

<sup>9</sup> See MSTV Study at 15.

<sup>10</sup> See [www.fcc.gov/mb/video/dtvstatus.html](http://www.fcc.gov/mb/video/dtvstatus.html) (reporting that of the nearly 1700 TV stations, 1397 are on the air with DTV operations).

<sup>11</sup> See MSTV Study at 16.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.* at 17 (aggregating the population covered by each DTV station in a market to arrive at a lump “market current population coverage” figure for the market allows a station serving a population larger than that in its replication area to compensate for a low-power station not serving its full replication area).

CBS, FOX and PBS) as of February 2004.<sup>14</sup> Thus, the DTV transition still has far to go in this regard. And while the NAB focuses on the number of households that have access to digital signals, there is no mention of the significant number of households that do not, and will not in the near future. The NAB would simply leave these viewers behind and declare the DTV transition a success now. It is those households EchoStar's proposal is geared toward, recognizing that they can play a role in ensuring that the transition proceeds apace.

## **II. The EchoStar Proposal Would Provide Needed Incentive To Speed Up The Transition and Would Confer Tremendous Benefit, Not Harm, Upon Consumers**

Equally important, it is hard to glean from the NAB letter exactly how the NAB believes the public interest will suffer if EchoStar's proposal is adopted. First of all, of course, if the unserved DTV households are as few as the NAB suggests, EchoStar's proposal would change very little and the NAB would have little reason to object.

Moreover, the NAB is wrong that EchoStar's proposal will not provide an incentive to broadcasters.<sup>15</sup> While it is true under the proposal that the subsequent construction of DTV facilities would not disqualify subscribers previously found eligible to receive a distant HDTV feed, it would prevent the satellite carrier from signing up additional subscribers. Thus, the plan will motivate broadcasters to build or upgrade their facilities because by doing so they will deprive satellite carriers of the ability to serve additional households in their areas. Furthermore, EchoStar has proposed a 3-month grace period to allow low-power DTV stations to upgrade before satellite carriers may commence distant HDTV service.<sup>16</sup>

The only argument that the NAB makes against the proposal on the grounds of purported public policy is illogical. The NAB suggests that EchoStar's plan will lead to a repeat of the events in 1999 when many subscribers receiving distant stations were found ineligible to receive these stations under the copyright license of 17 U.S.C. §119 and lost their service.<sup>17</sup> Under the EchoStar proposal, however, no one would lose his or her service. Satellite carriers would have the right to import a distant HDTV network feed to households that do not receive local DTV service, either because the local DTV station has not built DTV facilities at all, or because it does not operate at full power. If the station subsequently builds or upgrades its

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<sup>14</sup> Statistic compiled from data reported as of February 25, 2004 at [www.fcc.gov/mb/video/dtvstatus.html](http://www.fcc.gov/mb/video/dtvstatus.html).

<sup>15</sup> See NAB Letter at 6 ("the 'distant digital' plan . . . would *not* encourage stations to invest in the digital rollout . . .") (emphasis in original).

<sup>16</sup> See EchoStar DTV Letter at 7.

<sup>17</sup> See NAB Letter at 5 ("allowing EchoStar to deliver distant digital (or HD) signals to so-called 'digital white areas' would set the stage for a consumer nightmare almost identical to what occurred in 1999. . . .")

facilities, the satellite carriers will maintain their right to serve households they have signed up, and therefore, there will be no interruption of service whatsoever. Satellite carriers will only lose the right to sign up additional households in the affected area.

Nor is it true, as the NAB alleges, that the proposal would allow EchoStar to import distant HDTV stations “on the cheap.”<sup>18</sup> The proposal does not represent a windfall to satellite carriers because the carriers would still owe royalties for retransmission of distant stations based on nothing less than the fair market value determined by Congress for these retransmissions. Importantly, EchoStar notes that these royalties are still higher than what cable operators pay for distant signal retransmissions.

### **III. Local HDTV Mandatory Carriage Is Not Feasible For Satellite Carriers**

The NAB devotes considerable energy to its own demands for digital must-carry, a mechanism through which, not surprisingly, broadcasters can avoid the obligation to serve their entire Grade B contour viewing area by forcing cable and satellite providers to fill the gaps. The current technical constraints precluding digital must-carry for satellite have already been well documented before the Commission, notwithstanding the NAB’s idle speculation about what might be possible. Carriage of all digital as well as analog local signals would require, at a minimum, double the bandwidth capacity currently used to carry all analog stations, and is simply not feasible at this point. As EchoStar explained in its proposal, EchoStar is actively seeking ways to alleviate the bandwidth constraints to which it is subject.<sup>19</sup> However, any appreciable relief through such measures is years away.

Significantly, the imposition of digital must-carry would remove any incentive for under-powered digital broadcast stations to increase power to a level sufficient to serve their entire Grade B contour. Rather than make the necessary investment to increase their power, these stations could simply elect mandatory carriage and derive all the benefits from having their signal reach areas unserved by their over-the-air signal.

In conclusion, the Commission should not be sidetracked by the NAB’s contentions. There is credible cause for concern as to when, and whether, the public will ever reclaim the analog broadcast spectrum that was supposed to be freed by the DTV transition. Support of distant HD network service through exercise of the Commission’s conditioning authority is one concrete and immediate means for stimulating an important aspect of the transition. EchoStar urges the Commission to adopt this proposal.

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<sup>18</sup> *See id.* at 2.

<sup>19</sup> *See* EchoStar DTV Letter at 3, n.7.

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April 13, 2004  
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STEPTOE & JOHNSON<sup>LLP</sup>

Respectfully submitted,

*Pantelis Michalopoulos/rmb*

David K. Moskowitz  
EchoStar Satellite LLC  
9601 South Meridian Boulevard  
Englewood, CO 80112

Pantelis Michalopoulos  
Rhonda M. Bolton

Karen E. Watson  
Lori Kalani  
EchoStar Satellite LLC  
1233 20<sup>th</sup> Street, NW, Suite 701  
Washington, DC 20036

*Counsel for EchoStar Satellite LLC*

cc: Commissioner Kathleen Q. Abernathy  
Commissioner Jonathan S. Adelstein  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin  
Mr. W. Kenneth Ferree, Chief, Media Bureau