

**EXHIBIT 12**

FCC00000342

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# MEMORANDUM



**To:** Melissa Ingalls  
Marcie Gardner

**Date:** 10/24/00

**FROM:** Colleen Spidell

**Phone:** (310) 964-4950

**Subject:** Bischoff Case

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Melissa and Marcie

Enclosed are copies of USSB information concerning Jeffrey Bischoff. Also enclosed are USSB Terms and Conditions of Service (Customer Agreement) for May 1997 and November 1997. Unfortunately, because Mr. Bischoff seems to have disconnected his service in January 1997, the enclosed Agreements might not help. I am trying to locate an earlier agreement. I will keep you posted.

Colleen

FCC000000343

**Spidell, Colleen M**

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**From:** Cohen, David H  
**Sent:** Monday, October 16, 2000 9:17 AM  
**To:** Desmond, Danielle L; Spidell, Colleen M  
**Subject:** 14851 ussb



14851\_eorlscd.htm



14851\_eorlshn.htm



14851\_eorlca.htm



14851\_eorlbdg.htm



14851\_eorlban.htm

Colleen,

Here is the data for this subscriber. As you will see, two of the tables had no data, so the files are empty.  
David

-----Original Message-----

**From:** Desmond, Danielle L  
**Sent:** Wednesday, October 11, 2000 2:38 PM  
**To:** Cohen, David H  
**Subject:** FW: Ad Hoc Request

fyi for 14851

-----Original Message-----

**From:** Spidell, Colleen M  
**Sent:** Wednesday, October 11, 2000 2:32 PM  
**To:** Desmond, Danielle L  
**Subject:** Ad Hoc Request

Danielle:

Attached is an ad hoc request concerning USSB Account Information. The subscriber, Jeffrey Bischoff, has filed a class action case against DIRECTV. The law firm of Kirkland & Ellis is representing DIRECTV. The attorneys are in desperate need of Mr. Bischoff's historical account information for USSB Account no. 6008272419908690. Because Mr. Bischoff canceled his DIRECTV subscription back in January 1997, there is an issue over the arbitration clause. We need to ascertain the dates of Mr. Bischoff's USSB service, among anything else historical that we can obtain.

thanks,  
Colleen Spidell, Legal Dept., ext. 4950 << File: adhocreq2.doc >>



14851\_eothbsd

1551000120

UN-1996 -104.85  
 EB702DA 04-JUN-1996  
 6008272419908690 22-MAY-1996  
 EP-1996 104.85 ENT+Q  
 R-1995 EB709DA 20-JUN-1996  
 6008272419908690 22-AUG-1996  
 EC-1996 104.85 ENT+Q  
 R-1995 EB709DA 20-SEP-1996  
 6008272419908690 22-SEP-1996  
 EC-1996 -72.66 ENT+Q  
 R-1995 EB708DA 19-OCT-1996  
 6008272419908690 22-OCT-1996  
 CT-1996 -104.85  
 EB702DA 29-OCT-1996  
 6008272419908690 22-OCT-1996  
 OV-1996 -32.19 —  
 EB702DA 05-NOV-1996  
 6008272419908690 22-NOV-1996  
 104.85  
 EB708DA 17-DEC-1996

2 PCKAG 19-JUN-1996 19-S  
 1 21-MA  
 1 PCKAG 19-SEP-1996 19-D  
 1 21-MA  
 1 DLPKG 18-OCT-1996 19-D  
 1 21-MA  
 1 PYMNT 28-OCT-1996 28-O  
 3020012027  
 2 PYMNT 04-NOV-1996 04-N  
 3090246160  
 1 RFUND 16-DEC-1996

21 rows selected.

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14851\_eothbsd

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SUBP\_A HBSD\_USE HBSD\_TIMEST

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6008272419908690 22-JAN-1995 1 NPACK 22-FEB-1995 21-M  
AR-1995 0 FRPRE+ 1 22-FE  
B-1995 EB708DA 23-FEB-1995  
6008272419908690 22-JAN-1995 2 NPACK 22-FEB-1995 21-M  
AR-1995 0 FREE 1 22-FE  
B-1995 EB708DA 23-FEB-1995  
6008272419908690 22-FEB-1995 1 NPACK 21-MAR-1995 20-J  
UN-1995 104.85 ENT+Q 1 21-MA  
R-1995 EB708DA 22-MAR-1995  
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PR-1995 0 FREE 1 22-FE  
B-1995 EB709DA 22-MAR-1995  
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PR-1995 -104.85 - 1040024057  
EB702DA 15-APR-1995  
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AY-1995 0 FREE 1 22-FE  
B-1995 EB709DA 22-APR-1995  
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EP-1995 104.85 ENT+Q 1 21-MA  
R-1995 EB709DA 21-JUN-1995  
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R-1995 EB709DA 21-DEC-1995  
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AN-1996 -104.85 0220048083  
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14851\_eotca

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C CA_S	CA_ADDR_1_TX	CA_ADDR_2_TX	CA_ST CA_Z
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IPCOD CA_CO	CA_ME	CA_PY	CA_D CA_ CA_ CA_D CA_N CA_ CA_ CA_N CA_TAX_ID
CA_ST CA_SC	CA_CYC_NO	CA_ACTVN_DT	CA CA_ CA_OUT CA_MKT_CD C C CA_CO
CA_COLL_AGC C	CA_ADDR_CHN	CA_OW	CA_USER_ CA_TIMESTAM

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6008272419908690 RES    BISCHOFF                JEFFREY
      MR.          6138 MARYLAND DR
      LOS ANGELES
84736 USA          CHECK                LOS ANGELES          CA    9004
INACT 00000          0 22-FEB-1995 06 037 T03000 RES          312 751 0439          Y Y
      Y 31-JUL-1998 USSB  USB904DA 31-JUL-1998

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14851\_eothbsh

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 EFUND\_AM HBSH\_BILL\_C H HBSH\_ HBSH\_LK BX\_1\_AM HBSH\_LK BX\_2\_AM HBSH\_USE HB  
 SH\_TIMEST

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04.85          0          0          0          0          0
0 22-MAR-1995 N CLOSE          12.45          0          10.75          0          23
-MAR-1995          22          104.85          0          0          0
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0          0          -104.85          0          0          0
0 22-APR-1995 N CLOSE          0          0          0          0          0
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-JUN-1995          22          104.85          0          0          0
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0 22-SEP-1995 N CLOSE          12.45          0          10.75          0          23
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0          0          -104.85          0          0          0
0 21-OCT-1995 N CLOSE          0          0          0          0          0
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6008272419908690 21-OCT-1995          22          0          0          0
0          0          0          0          0          0
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6008272419908690 22-NOV-1995          22          0          0          0

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14851\_eothbsh

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-JAN-1996									
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0	22-MAR-1996	N	CLOSE	12.25	10.67	EB738DA	23		
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0	0			0	0	0	EB738DA	23	
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-APR-1996									
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0	0			0	-104.85	0	EB738DA	23	
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0	0			0	0	0	EB738DA	23	
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-JUL-1996									
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0	0			0	0	0	EB738DA	23	
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0	0			0	-137.04	0	EB738DA	23	
0	22-NOV-1996	N	CLOSE						
-NOV-1996									
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0	0			0	0	0	EB738DA	23	
104.85	22-DEC-1996	N	CLOSE						
-DEC-1996									



## TERMS AND CONDITIONS OF SERVICE

**Thank You For Your Business.** The purpose of these terms and conditions ("Terms") is to make sure that you receive the maximum enjoyment from your U.S. Satellite Broadcasting ("USSB®") services while providing USSB with the necessary guidelines to effectively run our business.

The Terms that follow constitute an agreement ("Agreement") for the delivery of direct broadcast satellite service ("Services") between you and United States Satellite Broadcasting Company, Inc. "Services" include Subscription Services available on a monthly, quarterly, semi-annual or annual basis, as well as Pay-Per-View events, and any other Services you order from or through USSB. These Services may be provided by an affiliate of USSB. In this Agreement "you", "your", and "yours" mean the subscriber named on the front of this invoice. The word "we", "us", "our" and "ours" refer to USSB. Digital Satellite System ("DSS®") or "Equipment" means the equipment needed to receive the Services, including the dish antenna, the receiving unit ("Receiver") which is connected to your television, and the DSS Access Card ("Access Card").

Your acceptance of the Services constitutes acceptance of these terms. These terms replace all prior terms set forth on previous invoices. USSB reserves the right to change the Terms at any time. By continuing to receive the Services, you agree to accept any new Terms.

1. **Payment for Services.** You agree to pay us for all Services you receive, in U.S. dollars, including Pay-Per-View events, as well as any taxes or administrative fees set forth on your billing statements.
2. **Payment Terms.**

a. **Due Date.** Charges for the Services are billed in advance on a monthly, quarterly, semi-annual, or annual basis beginning from the date of activation. Payment is due when indicated on the billing statement. You must bring any billing errors or requests for credit to our attention within 30 days of the date of the invoice for which you are seeking a correction or credit. We reserve the right to establish maximum monthly limits for certain Services, such as Pay-Per-View events, and to deny you access to Pay-Per-View events if your account is more than 45 days overdue.

b. **Rate Changes.** The rates specified for the Services are current rates. We reserve the right to revise our Services (including changing the programming services offered) and subscription rates at any time at our sole discretion. Increases in subscription rates will be reflected in your next billing cycle.

3. c. **Credit Balances on Active Accounts.** Credit balances on active accounts will be applied to future statements. Credit balances will be refunded within seven business days of our receipt of a written request.

4. d. **Cancellation.** If you cancel your subscription prior to the expiration date, we will send a final billing statement to you. Your cancellation will be effective at the end of your current subscription month. If you are a quarterly, semi-annual, or annual subscriber you will receive a pro rata refund (calculated on a month-to-month basis, at the full monthly rate) for the unused portion of your program package, provided that you have received

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(4) { the program package for at least one month. A credit balance of \$1.00 or more will be refunded within seven business days of our receipt of a written request. Otherwise, such a balance will be refunded within six months. No refunds will be made if your credit balance is less than \$1.00.

e. **Service Outages.** If your reception of the Services is materially interrupted for 24 consecutive hours or more due to shutdown or malfunction of USSB's transmission facilities, USSB's sole liability will be to provide you with a pro-rata reduction of the charges for the affected Services in your next billing statement. We will not be liable for any other interruption of Services. You must notify us within 24 hours after any such shutdown or malfunction to be eligible for the reduction of charges.

f. **Late Charges/Disconnection of Services/Reinstatement of Service.** If you do not make full payment within 45 days after the due date, we reserve the right to reduce or disconnect the Services and charge an administrative fee. If the Services are disconnected because you did not make your payment when due, we reserve the right to require you to pay all unpaid charges, a reconnect fee, a change of service fee and at least one month's advance charges before we reconnect the Services. Clearance of accounts sent for collection will take 7 to 10 working days. It is your responsibility to call USSB Customer Service to have services turned back on.

g. **Returned Checks and Costs of Collection.** You agree to pay us handling and all other charges we incur for all checks written to us and returned by your bank. USSB will charge you a \$10 Returned Check Fee for all checks returned due to insufficient funds. To the extent permitted by law, you agree to pay all reasonable costs, including collection agency fees, court costs and attorney's fees we pay to collect any amounts you owe us.

h. **Third Party Payment/Collection Prohibited.** USSB does not permit third parties to collect payment for USSB Services unless specifically authorized by USSB. You should not pay for the Services through any third party and, if you do, you remain liable for the charges due pursuant to this Agreement.

i. **Liability for Unauthorized Use.** You are responsible for any and all Services received on your DSS system, whether or not the purchase is authorized by you. If your DSS system is stolen, you must notify us within five (5) days of such theft, or you will be responsible for charges for Services received on the stolen system.

### 3. **Subscriber's Additional Rights and Obligations.**

a. **Services/Equipment.** You agree to use the Services only in your residence for your own private viewing entertainment within the United States and not for commercial purposes. You are responsible for obtaining the necessary Equipment to receive the Services. The purchase of DSS hardware and any hardware problems which you may have are and will remain completely separate from the purchase of Services from us.

(5)

b.

**Access Cards.** Access Cards are the property of News Datacom, Inc., and any tampering or other unauthorized modification to the Access Card may result in, and subject you to, legal action. Periodically, it may be necessary to change your Access Card as a condition for continuation of Services.

(i) **Reissuance of Access Cards.** In the event your Access Card is lost, stolen, defective or damaged, USSB will issue a new Access Card. Your account will be charged a security deposit of \$150.00. If you return the old Access Card to USSB, your account will be credited the amount of the security deposit, less a \$35 Card Replacement Fee. If the Access Card reveals unauthorized tampering or modification, USSB reserves the right to refuse to replace your Access Card and not refund the security deposit.

(ii) **Transfer of Ownership.** In the event you sell or transfer your DSS receiver, the new DSS owner will be required to purchase a new Access Card. The new owner should contact USSB, and we will establish a new account and issue a new Access Card to the new owner. The new account will be charged a security deposit of \$150. If the new owner returns the old Access Card to USSB, the new account will be credited the amount of the security deposit, less a \$35 Card Replacement Fee.

c.

**Representations/Warranties/Penalties.** You acknowledge and agree that: (i) the address listed on this billing statement is the location of your residence; (ii) if you live in an apartment, condominium or other multiple family dwelling, the address identifies your residence; (iii) you will receive the Services solely for your private viewing entertainment; (iv) the Services will not be displayed in a public place or a commercial establishment or offered for resale in any way; (v) **SERVICES WILL NOT BE RECEIVED OUTSIDE THE UNITED STATES.** We reserve the right to verify the accuracy of the information which you provide to us at any time. Any violation of this provision, including providing us with inaccurate information, is grounds for termination of this Agreement, disconnection of the Services, and may lead to additional legal remedies against you. In addition, unauthorized reception of the Services is a violation of federal law (e.g., 47 U.S.C § 605) and may result in civil and/or criminal penalties.

d.

**Programming Services.**

(i) **Programming.** USSB reserves the right to change programming services and programming packages and prices. All orders for programming are subject to USSB's approval.

(6)

(ii) **Free Month of Entertainment Plus.** To be eligible for One Free Month of USSB Entertainment Plus, a customer must be a first time residential DSS purchaser and have not received the Free Month previously. The Free Month is intended for the customer's primary DSS unit and is available only upon a first-time account set-up with USSB. USSB may substitute a free month of a different

programming package for USSB Entertainment Plus or discontinue the free month offer entirely.

(iii) **Multiple Receiver Discount.** Additional Receivers are required to be directly and continuously connected to the same land-based telephone line as the primary Receiver in order to receive a discount on secondary Receivers.

e. **Mobile Units.** Mobile units, (cabins, trailers, etc.) are not eligible for a multiple Receiver discount unless continuously connected to the same land-based telephone line as the primary receiver.

f. **Renewals/Changes in Services.**

(i) **Subscription Renewals.** We will continue to provide Services to you until you request your Services to be stopped or we cancel your Services as provided in this Agreement. Unless otherwise stated, all subscriptions will automatically renew.

(ii) **Credit Cards.** If you pay for your subscription with a credit card, we will continue to charge that credit card until you notify us (a) to cancel your subscription, (b) to charge your subscription to a different credit card, or (c) to bill you directly. You agree to provide us with the new expiration date when your credit card is renewed. If you do not, we will continue to charge your Services to the credit card you previously authorized. If your credit card issuer rejects a charge to your credit card because your card is expired or terminated, we will bill you directly for your subscription on a monthly basis.

(iii) **Changes In Your Level of Services.** You may change the Services to which you subscribe from month to month. These Services may be upgraded at any time subject to our right to deny or limit Services to you as provided in this Agreement. To downgrade your Services, you must receive programming for a minimum of one (1) month and any requested downgrade of Services will take effect at the start of the next subscription month.

(iv) **Inactivating Your Account.** You may temporarily inactivate your Services after you have been a paying subscriber for at least one month. Your inactivation will become effective at the start of your next subscription month. Upon inactivation, you are still responsible for any outstanding balance on your account.

g. **Change of Address.** If your address or telephone number change, you agree to provide us with new information promptly.

h. **Transfer of Ownership / Account.** If you sell or transfer your DSS system: (i) It is your responsibility to inform USSB of the transfer of ownership and pay any outstanding balances for programming before your account can be closed; (ii) You will remain responsible for all new charges incurred using your Access Card unless you have informed USSB that you have sold your DSS system and your Access Card has been returned to USSB.

- i. **Telephone Connection.** USSB recommends that the DSS Receiver(s) be directly and continuously connected to a land-based telephone line. Information regarding the programming services that you have ordered is transmitted via the telephone line. During the short information transmission period, you may not have the ability to use this telephone line. Your DSS Receiver and all secondary Receivers are required to be directly and continuously connected to the same land-based telephone line in order to receive discounts on all secondary Receivers. If the DSS Receiver (s) is not so connected, or if the Receiver(s) is connected to a phone line other than that which you have identified, or if the telephone line is not performing in accordance with USSB's requirements, USSB may, at its discretion, inactivate your Services, or charge full price for Services on all secondary Receivers. If Services are inactivated, you are still responsible for payment of all outstanding balances for Services received through the date of inactivation. Use of the remote control for ordering Pay-Per-View events will require a continuous telephone connection.

4. **USSB's Additional Rights and Obligations.**

- a. **Change In Programs or Services.** We reserve the right to rearrange, black out, terminate, discontinue or otherwise change the Services at any time without notice.
- b. **Content of Programming Material.** We make no representations whatsoever concerning the content of the Services or accuracy of any programming information you receive through the Services. No refunds will be given based on the content of the programming or events.
- c. **Pay-Per-View Events.** To use your remote control to order Pay-Per-View events, and obtain any special discounts which may apply associated with ordering through your remote control, you must meet certain criteria. Your DSS system must be continuously connected to the same land-based telephone line indicated on your account, and a call back from USSB to the receiver must be successful. Your DSS System test will take place within the first 30 days of the date you set-up your account. If you have questions on using your remote control to order Pay-Per-View events, please call our Customer Service Center. If your account is 45 days or more past due, Pay-Per-View privileges will be revoked until your account is brought current. USSB reserves the right to black out programming as well as Pay-Per-View events in a given geographical location at any given time. Customer circumvention of such blackouts may result in legal action. USSB is not responsible for the content of Pay-Per-View events. Commercial establishments cannot lawfully obtain Pay-Per-View events under a residential account. Some Pay-Per-View events may be available to commercial accounts, but under separate terms and conditions. Commercial theft of service is subject to civil and criminal penalties.
- d. **Denial of Services.** We reserve the right to deny you access to any or all of the Services if you use the Equipment in violation of this Agreement, or if you fail to comply with your obligations under this Agreement.
- e. **Reporting of Information.** Subject to applicable law, you agree to allow us to share your payment history and certain other limited information with

others and to provide your name and address to third parties for marketing and other purposes.

- f. **Limitation of Warranties/Liabilities.** USSB is not responsible for any problems or defects with the Equipment you use to receive the Services. You agree to hold the seller and/or manufacturer of the Equipment solely responsible with respect to any such problems or defects. USSB is not responsible for the content of the Services or the accuracy of any information you receive through the Services. We also disclaim any responsibility or liability whatsoever for the Services. **WITHOUT LIMITING THE FOREGOING, WE EXPRESSLY DISCLAIM ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY OTHER EXPRESS OR IMPLIED WARRANTIES OF WHATEVER KIND (STATUTORY, WRITTEN, ORAL OR OTHERWISE) WITH REGARD TO YOUR EQUIPMENT, THE PROGRAMMING AND/OR THE SERVICES.**

**IN THE EVENT OF A BREACH OR TERMINATION BY US OF THIS AGREEMENT FOR ANY REASON, OUR SOLE LIABILITY, AND YOUR SOLE REMEDY, SHALL BE A REFUND TO YOU OF ANY AMOUNTS PAID BY YOU TO US FOR SERVICES NOT RECEIVED. IN NO EVENT SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, NOR SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY OTHER DAMAGES IN EXCESS OF THE REFUND DESCRIBED IN THE PRECEDING SENTENCE.**

- ⑨ { g. **Minimum Level of Service.** As a condition of its provision of certain programming services to you including, without limitation, Pay-Per-View and a la carte programming, USSB may require that you purchase and maintain a minimum level of programming.

5. **Interpretation and Enforcement of This Agreement.**

- a. **Severability.** If any provision of this agreement is held by a court or regulatory authority of competent jurisdiction to be illegal, in conflict with any law or regulation, or unenforceable, as the case may be, that provision may be deleted or modified, without affecting the validity of the other provisions of this Agreement.
- b. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of Minnesota, subject to applicable federal, state or local law. Notwithstanding the foregoing, the United States Arbitration Act, 9 U.S.C.A. §§ 1-16, shall govern the interpretation and enforcement of the arbitration clause contained in Section 5.d hereof.
- c. **Notices.** We will be deemed to have given you notice when such notice is deposited in the U.S. mail addressed to your last known address. Your notice to us is deemed given when received by us at the address identified below. Do not write to us on the bill.
- d. **Arbitration of disputes.** Upon the request of any party to this Agreement, any dispute, claim or controversy of any kind arising under this Agreement or relating to this Agreement or the Services provided by USSB

shall be resolved by arbitration in accordance with the procedures of the commercial arbitration rules of the American Arbitration Association. The arbitrator or arbitrators shall have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the Terms of this Agreement.

#### **PROBLEMS ABOUT A BILL OR THE SERVICES**

If you have a question or problem relating to a bill or the Services, please write to us on a separate piece of paper - **NOT ON THE BILL**; our bills are electronically processed and any message written on them will be delayed in reaching us. Send all correspondence to: U.S. Satellite Broadcasting, Customer Service Manager, 9750 Walnut Street, Dallas, Texas 75243. Always include your account number on any correspondence with USSB. You also may call us at 1-800-204-USSB.

**THE ABOVE TERMS ARE SUBJECT TO ANY AND ALL APPLICABLE FEDERAL, STATE AND LOCAL GOVERNMENTAL REQUIREMENTS AND ARE LIMITED AS NECESSARY TO CONFORM THERETO. THE ABOVE TERMS ARE SUBJECT TO CHANGE AT ANY TIME.**

## TERMS AND CONDITIONS OF SERVICE

**Thank You For Your Business.** The purpose of these terms and conditions ("Terms") is to make sure that you receive the maximum enjoyment from your USSB, S. Satellite Broadcasting ("USSB@") services while providing USSB with the necessary guidelines to effectively run our business.

The Terms that follow constitute an agreement ("Agreement") for the ~~provision~~ delivery of direct broadcast satellite service ("Services") between you and U.S. Satellite Broadcasting Company, Inc. ("USSB@"). "Services" include ~~subscription~~ Subscription Services available on a monthly, quarterly, semi-annual or annual basis (~~Subscription Services~~) ~~as well as Pay-Per-View events.~~ In this Agreement "you" and any other Services you order from or through USSB. These Services may be provided by an affiliate of USSB. In this Agreement "you", "your", and "yours" mean the subscriber named on the front side of this invoice. The words "we", "us", "our" and "ours" refer to USSB. Direct Broadcast Satellite System ("DSS@") or "Equipment" means the equipment needed to receive the Services, including the dish antenna, the receiving unit ("Receiver") which is connected to your television, and the DSS Access Card ("Access Card").

Your acceptance of the Services constitutes acceptance of these terms. These terms replace all prior terms set forth on previous invoices. USSB reserves the right to change the Terms at any time. By continuing to receive the Services, you agree to accept any new Terms.

1. **Payment for Services.** You agree to pay us for all Services you receive, in U.S. dollars, including Pay-Per-View events, ~~which you receive,~~ as well as any taxes or administrative fees set forth on your billing statements.

2. **Payment Terms.**

~~a. Payment Due Upon Receipt~~

a. **Due Date.** Charges for the ~~Subscription Services~~ are billed in advance on a monthly, quarterly, semi-annual, or annual basis beginning from the date of activation. Payment is due ~~upon receipt of the~~ when indicated on the billing statement. You must bring any billing errors or requests for credit to our attention within 30 days of the date of the invoice for which you are seeking a correction or credit. We reserve the right to establish maximum monthly limits for certain Services, such as Pay-Per-View ~~Services~~ events, and to deny you access to Pay-Per-View events if your account is more than ~~fifteen (15) days overdue~~ 45 days overdue.

b. **Rate Changes.** The rates specified for the Services are current rates. We reserve the right to revise our Services (including changing the programming services offered) and subscription rates at any time ~~in~~ at our sole discretion. Increases in subscription rates will be reflected in ~~the next applicable~~ your next billing cycle.

~~c. Refunds. We will provide a refund for the unused portion of your subscription if you have been a paying subscriber for at least one month. Cancellation will not become effective until the end of the monthly billing period in which notice of cancellation is given. If you are a quarterly, semi-annual or annual subscriber you will receive a pro-~~

c. **Credit Balances on Active Accounts.** Credit balances on active accounts will be applied to future statements. Credit balances will be refunded within seven business days of our receipt of a written request.

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d. Cancellation. If you cancel your subscription prior to the expiration date, we will send a final billing statement to you. Your cancellation will be effective at the end of your current subscription month. If you are a quarterly, semi-annual, or annual subscriber you will receive a pro rata refund (calculated on a month-to-month basis, at the full monthly rate) for the unused portion of your program package, provided that you have received the program package for at least one month. A credit balance of \$1.00 or more will be refunded within seven business days of our receipt of a written request. Otherwise, such a balance will be refunded within six months. No refunds will be made if your credit balance is less than \$1.00. ~~In addition,~~

e. Service Outages. If your reception of the Services is materially interrupted for 24 consecutive hours or more due to a shutdown or malfunction of USSB's transmission facilities, USSB's sole liability will be to provide you with a pro-rata reduction of the charges for the affected Services in your next billing statement. We will not be liable for any other interruption of Services. You must notify us within 24 hours after any such shutdown or malfunction to be eligible for the reduction of charges.

f. Late Charges/Disconnection of Services/Reinstatement of Service. If you do not make full payment within 45 days after the date of this invoice date, we reserve the right to reduce or disconnect the Services and charge an administrative fee. If the Services are disconnected because you did not make your payment when due, we reserve the right to require that you pay all past-due unpaid charges, a reconnect fee, a change of service fee and at least one month's advance charges before we reconnect the Services. Clearance of accounts sent for collection will take 7 to 10 working days. It is your responsibility to call USSB Customer Service to have services turned back on.

g. Returned Checks and Costs of Collection. You agree to pay us handling and all other charges we incur for all checks written to us and returned-unpaid by your bank. USSB will charge you a \$10 Returned Check Fee for all checks returned due to insufficient funds. To the extent permitted by law, you agree to pay all reasonable costs, including collection agency fees, court costs and attorneys' fees we pay to collect any amounts you owe us.

h. Third Party Payment/Collection Prohibited. USSB does not permit third parties to collect payment for USSB Services unless specifically authorized by USSB. You should not pay for the Services through any third party and, if you do, you remain liable for the charges due pursuant to this Agreement.

i. Liability for Unauthorized Use. You must notify us within five (5) days of the theft of your DSS equipment or you may be liable for charges based on the ongoing receipt of Services, even in the receipt if not authorized by you.

3. Additional Subscriber

Liability for Unauthorized Use. You are responsible for any and all Services received on your DSS system, whether or not the purchase is authorized by you. If your DSS system is stolen, you must notify us within

five (5) days of such theft, or you will be responsible for charges for Services received on the stolen system.

**3. Subscriber's Additional Rights and Obligations.**

- a. **Services/Equipment.** You agree to use the Services only in your residence for your own private viewing entertainment within the United States and not for commercial purposes. You are responsible for obtaining the necessary Equipment to receive the Services. The purchase of DSS hardware and any hardware problems which you may have are and will remain completely separate from the purchase of Services from us.
- b. **Access Cards.** Access Cards are the property of News Datacom, Inc., and any tampering or other unauthorized modification to the Access Card may result in, and subject you to, legal action. Periodically, it may be necessary to change your Access Card as a condition for continuation of Services.
- (i) **Reissuance of Access Cards.** In the event your Access Card is lost, stolen, defective or damaged, USSB will issue a new Access Card. Your account will be charged a security deposit of \$150.00. If you return the old Access Card to USSB, your account will be credited the amount of the security deposit, less a \$35 Card Replacement Fee. If the Access Card reveals unauthorized tampering or modification, USSB reserves the right to refuse to replace your Access Card and not refund the security deposit.
- (ii) **Transfer of Ownership.** In the event you sell or transfer your DSS receiver, the new DSS owner will be required to purchase a new Access Card. The new owner should contact USSB, and we will establish a new account and issue a new Access Card to the new owner. The new account will be charged a security deposit of \$150. If the new owner returns the old Access Card to USSB, the new account will be credited the amount of the security deposit, less a \$35 Card Replacement Fee.

- ~~b. Representations/Warranties~~
- c. **Representations/Warranties/Penalties.** You acknowledge and agree that: (i) the address listed on this invoice/billing statement is the location of your residence; (ii) if you live in an apartment, condominium or other multiple family dwelling, the address identifies your residence; (iii) you will receive the Services solely for in-your-residence-only your private viewing entertainment; (iv) the Services will not be displayed in a public place or a commercial establishment or offered for resale in any way; ~~and (v) the Services will not be received outside of the United States.~~ **SERVICES WILL NOT BE RECEIVED OUTSIDE THE UNITED STATES.** We reserve the right to verify the accuracy of the information which you provide to us at any time. Any violation of this provision, including providing us with inaccurate information, is grounds for termination of this Agreement, disconnection of the Services, and may lead to additional legal remedies against you. In addition, unauthorized reception of the Services is a violation

of federal law (e.g., 47 U.S.C. § 605) and may result in civil and/or criminal penalties.

~~e. Renewals/Changes in Services.~~  
d. Programming Services.

- (i) Programming. USSB reserves the right to change programming services and programming packages and prices. All orders for programming are subject to USSB's approval.
- (ii) Free Month of Entertainment Plus. To be eligible for One Free Month of USSB Entertainment Plus, a customer must be a first time residential DSS purchaser and have not received the Free Month previously. The Free Month is intended for the customer's primary DSS unit and is available only upon a first-time account set-up with USSB. USSB may substitute a free month of a different programming package for USSB Entertainment Plus or discontinue the free month offer entirely.
- (iii) Multiple Receiver Discount. Additional Receivers are required to be directly and continuously connected to the same land-based telephone line as the primary Receiver in order to receive a discount on secondary Receivers.

~~e. Mobile Units.~~ Mobile units (cabins, trailers, etc.) are not eligible for a multiple Receiver discount unless continuously connected to the same land-based telephone line as the primary receiver.

f. Renewals/Changes in Services.

- (i) Subscription Renewals. We will continue to provide Services to you (including Subscription Services provided on a quarterly, semi-annual or annual basis) until you request your Services to be stopped or we cancel your Services as otherwise provided in this Agreement provided in this Agreement. Unless otherwise stated, all subscriptions will automatically renew.
- (ii) Credit Cards. If you pay for your subscription with a credit card, we will continue to charge that credit card until you notify us (a) to cancel your subscription, (b) to charge your subscription to a different credit card, or (c) to bill you directly. You agree to provide us with the new expiration date when your credit card is renewed. If you do not, we will continue to charge your Services to the credit card you previously authorized. If your credit card issuer rejects a charge to your credit card because your card is expired or terminated, we will bill you directly for your subscription on a monthly basis.
- (iii) Changes In Your Level of Services. You may change the Services to which you subscribe from month to month. These Services may be upgraded at any time subject to our right to deny or limit Services to you as otherwise provided in this Agreement. ~~To~~ downgrade your Services, you must receive programming for a minimum of one (1) month from the date of its activation. ~~(Subscription~~

Month) and any requested downgrade of Subscription Services will take effect the start of the Subscription Month following notice of change of such Services and any requested downgrade of Services will take effect at the start of the next subscription month.

~~iii. Closing Your Account. You may cancel your Subscription~~  
(iv) Inactivating Your Account. You may temporarily inactivate your Services after you have been a paying subscriber for at least one month. Your cancellation will not become effective until the end of the Subscription Month in which it is initiated. Upon cancellation, inactivation will become effective at the start of your next subscription month. Upon inactivation, you are still responsible for any outstanding balance on your account. If you rent Equipment, you authorize the rental agent to notify USSB upon your return of the Equipment to the rental agency, but it remains your responsibility to notify us when you cancel Services.

2. Change of Address. If your address or telephone number change, you agree to provide us with the new information promptly.

h. Transfer of Ownership / Account. If you sell or transfer your DSS system: (i) It is your responsibility to inform USSB of the transfer of ownership and pay any outstanding balances for programming before your account can be closed; (ii) You will remain responsible for all new charges incurred using your Access Card unless you have informed USSB that you have sold your DSS system and your Access Card has been returned to USSB.

~~e. Telephone Connection May Be Required. The Receiver of most USSB subscribers will be directly and continuously connected to a telephone line. As a condition of receiving certain Services (such as Impulse Pay-Per-View) you will be required to have such telephone connection. Information regarding certain Services that you have ordered will be transmitted to us from the receiver unit through the telephone line. During such short information transmission periods (on average not more than one minute), you may not be able to otherwise use this telephone line. If the inability to use your telephone for even short periods of time is of concern to you, please contact us at 1-800-304-USSB to discuss alternatives. Also, you will be required to have a telephone connection for all Receivers to qualify for a \$1.00 monthly administrative fee (instead of the ordinary monthly subscription charge) for each additional Receiver located in your residence.~~

i. Telephone Connection. USSB recommends that the DSS Receiver(s) be directly and continuously connected to a land-based telephone line. Information regarding the programming services that you have ordered is transmitted via the telephone line. During the short information transmission period, you may not have the ability to use this telephone line. Your DSS Receiver and all secondary Receivers are required to be directly and continuously connected to the same land-based telephone line in order to receive discounts on all secondary Receivers. If the DSS Receiver(s) is not so connected, or if the Receiver(s) is connected to a phone line other than that which you have identified, or if the telephone line is not performing in accordance with USSB's requirements, USSB may, at its discretion, inactivate your Services, or charge full price for Services on all secondary Receivers. If Services are inactivated, you are still responsible for payment of all outstanding balances for Services received through the date of

inactivation. Use of the remote control for ordering Pay-Per-View events will require a continuous telephone connection.

4. **USSB's Additional Rights and Obligations.**

- a. **Change In Programs or Services.** We reserve the right to rearrange, black-out, terminate, discontinue or otherwise change the Services at any time without notice.
- b. **Content of Programming Material.** We make no representations whatsoever concerning the content of the Services or the accuracy of any programming information you receive through the Services. No refunds will be given based on the content of the programming or events.
- c. **Pay-Per-View Events.** To use your remote control to order Pay-Per-View events, and obtain any special discounts which may apply associated with ordering through your remote control, you must meet certain criteria. Your DSS system must be continuously connected to the same land-based telephone line indicated on your account, and a call back from USSB to the receiver must be successful. Your DSS System test will take place within the first 30 days of the date you set up your account. If you have questions on using your remote control to order Pay-Per-View events, please call our Customer Service Center. If your account is 45 days or more past due, Pay-Per-View privileges will be revoked until your account is brought current. USSB reserves the right to black out programming as well as Pay-Per-View events in a given geographical location at any given time. Customer circumvention of such blackouts may result in legal action. USSB is not responsible for the content of Pay-Per-View events. Commercial establishments cannot lawfully obtain Pay-Per-View events under a residential account. Some Pay-Per-View events may be available to commercial accounts, but under separate terms and conditions. Commercial theft of service is subject to civil and criminal penalties.
- d. **Denial of Services.** We reserve the right to deny you access to any or all of the Services if you use the Equipment in violation of this Agreement, or if you ~~otherwise~~ fail to comply with your obligations under this Agreement.
- e. **Reporting of Information.** Subject to applicable law, you agree to allow us to share your payment history and certain other limited information with others and to provide your name and address to third parties for marketing and other purposes.
- ~~e. **Limitation of Warranties/Liability.** We disclaim any responsibility or liability~~
- f. **Limitation of Warranties/Liabilities.** USSB is not responsible for any problems or defects with the Equipment you use to receive the Services. You agree to hold the seller and/or manufacturer of the Equipment solely responsible with respect to any such problems or defects. USSB is not responsible for the content of the Services or the accuracy of any information you receive through the Services. We also disclaim any responsibility or liability whatsoever for the Services. WITHOUT LIMITING THE FOREGOING, WE EXPRESSLY DISCLAIM ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY OTHER EXPRESS OR IMPLIED WARRANTIES OF WHATEVER KIND (STATUTORY, WRITTEN, ORAL OR

OTHERWISE), WITH REGARD TO YOUR EQUIPMENT, THE PROGRAMMING AND/OR THE SERVICES.

~~EXCEPT AS PROVIDED OTHERWISE IN THIS AGREEMENT, IN THE EVENT OF A BREACH OR TERMINATION BY US OF THIS AGREEMENT FOR ANY REASON, OUR SOLE LIABILITY, AND YOUR SOLE REMEDY, SHALL BE A REFUND TO YOU OF ANY AMOUNTS PAID BY YOU TO US FOR SERVICES NOT RECEIVED. IN NO EVENT SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, NOR SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY OTHER DAMAGES IN EXCESS OF THE REFUND DESCRIBED IN THE PRECEDING SENTENCE.~~

~~2. Minimum Level of Service. As a condition of its provision of certain programming services to you including, without limitation, Pay-Per-View and a la carte programming, USSB may require that you purchase and maintain a minimum level of programming.~~

5. Interpretation and Enforcement of This Agreement.

a. Severability. If any provision of this agreement is held by a court or regulatory authority of competent jurisdiction to be illegal, in conflict with any law or regulation, or unenforceable, as the case may be, that provision may be deleted or modified, without affecting the validity of the other provisions of this Agreement.

~~b. Governing Law.~~ This Agreement will be governed by and construed in accordance with the laws of Minnesota, subject to applicable federal, state or local law ~~that is inconsistent therewith.~~ Notwithstanding the foregoing, the United States Arbitration Act, 9 U.S.C.A. §§ 1-16, shall govern the interpretation and enforcement of the arbitration clause ~~contained in Section 5.d hereof.~~

~~c. Notices.~~ We will be deemed to have given you notice when such notice is deposited in the U.S. mail addressed to your last known address ~~or is hand delivered to you or your place of residence.~~ Your notice to us is deemed given when received by us at the address identified below. Do not write to us on the bill.

d. Arbitration of disputes. Upon the request of any party to this Agreement, any dispute, claim or controversy of any kind arising under this Agreement or relating to this Agreement or the Services provided by USSB shall be resolved by arbitration in accordance with the procedures of the commercial arbitration rules of the American Arbitration Association. The arbitrator or arbitrators shall have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the Terms of this Agreement.

## PROBLEMS ABOUT A BILL OR THE SERVICES

If you have a question or problem relating to a bill or the Services, please write to us on a separate piece of paper - NOT ON THE BILL; our bills are electronically processed and any message written on them will be delayed in reaching us. Send all correspondence to: USSB, ~~P. O. Box 44280, Rio Rancho, New Mexico~~, S. Satellite Broadcasting, Customer Service Manager, 9750 ~~8747~~ Walnut Street, Dallas, Texas 75243. Always include your account number on any correspondence with USSB. You also may call us at 1-800-204-USSB.

THE ABOVE TERMS ARE SUBJECT TO ANY AND ALL APPLICABLE FEDERAL, STATE AND LOCAL GOVERNMENTAL REQUIREMENTS AND ~~SHALL BE~~ LIMITED AS NECESSARY TO CONFORM THERETO. THE ABOVE TERMS ~~SHALL BE~~ ARE SUBJECT TO CHANGE AT ANY TIME BY US AT ANY TIME.

## TERMS AND CONDITIONS OF SERVICE

**Thank You For Your Business.** The purpose of these terms and conditions ("Terms") is to make sure that you receive the maximum enjoyment from your U.S. Satellite Broadcasting services while providing USSB with the necessary guidelines to effectively manage our business.

The Terms that follow constitute an agreement ("Agreement") for the provision of programming service ("Services") between you and United States Satellite Broadcasting Company, Inc. ("USSB®"). "Services" include Subscription Services available on a monthly, quarterly, semi-annual or annual basis, as well as Pay-Per-View events, and any other Services you order from or through USSB. These Services may be provided by an affiliate of USSB. In this Agreement "you", "your", and "yours" mean the subscriber named on the front of this invoice. The words "we", "us", "our" and "ours" refer to USSB. Digital Satellite System ("DSS®") or "Equipment" means the equipment needed to receive the Services, including the dish antenna, the receiving unit ("Receiver") which is connected to your television, and the DSS Access Card ("Access Card").

Your acceptance of the Services constitutes acceptance of these Terms. These Terms replace all prior Terms set forth on previous invoices and/or agreements. USSB reserves the right to change the Terms at any time. You will be informed if USSB changes the Terms. By continuing to receive the Services and/or by paying your next bill after the effective date of a change, you agree to accept any new Terms.

1. **Payment for Services.** You agree to pay us for all Services you receive, in U.S. dollars, including Pay-Per-View events, as well as any taxes or administrative fees set forth on your billing statements.
2. **Payment Terms.**
  - a. **Due Date.** Charges for the Services are billed in advance on a monthly, quarterly, semi-annual, or annual basis beginning from the date of activation. Payment is due when indicated on the billing statement. You must bring any billing errors or requests for credit to our attention within 30 days of the date of the invoice for which you are seeking a correction or credit. We reserve the right to establish maximum monthly limits for certain Services, such as Pay-Per-View events, and to deny you Services if your account is more than 45 days overdue.
  - b. **Rate Changes.** The rates specified for the Services are current rates. We reserve the right to revise our Services (including changing the programming services offered) and subscription rates at any time at our sole discretion. Revisions in subscription rates will be reflected in your billing invoice.
  - c. **Credit Balances on Active Accounts.** Credit balances on active accounts will be applied to future statements unless we receive a request for a refund of a credit balance. Credit balances will be refunded within seven business days of our receipt of such request.
  - d. **Cancellation.** If you cancel your subscription prior to the expiration date, we will send a final billing statement to you. Your cancellation will be effective at the end of the subscription month in which your

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cancellation is received by USSB. If you are a quarterly, semi-annual, or annual subscriber you will receive a pro rata refund for the unused portion of your program package, commencing the first monthly billing period after the subscription month in which your cancellation request is received, provided that you have received the program package for at least one month. When canceling your subscription, you forfeit any discount associated with a long-term package. USSB will calculate your refund by multiplying the number of months of programming you received by USSB's non-discounted full monthly rate. This amount will then be subtracted from the amount you prepaid. Credit balances of less than \$1.00 will be refunded upon request.

- e. **Service Outages.** If your reception of all or substantially all of the Services is interrupted for 24 consecutive hours or more due to shutdown or malfunction of USSB's transmission facilities, USSB's sole liability will be to provide you with a pro rata reduction of the charges for the affected Services in your next billing statement. We will not be liable for any other interruption of Services. You must notify us within 24 hours after any such shutdown or malfunction to be eligible for the reduction of charges.
- f. **Late Charges/Disconnection of Services/Reinstatement of Service.** If you do not make full payment within 45 days after the due date, we reserve the right to reduce or disconnect the Services and charge an administrative fee. If the Services are disconnected because you did not make your payment when due, we reserve the right to require you to pay all unpaid charges, a reconnect fee, a change of service fee and at least one month's advance charges before we reconnect the Services. Clearance of accounts sent for collection will take 7 to 10 working days. It is your responsibility to call USSB Customer Service to have Services turned back on.
- g. **Returned Checks and Costs of Collection.** You agree to pay us handling and all other charges we incur for all checks written to us and returned by your bank. USSB will charge you a \$10 Returned Check Fee for all checks returned due to insufficient funds. To the extent permitted by law, you agree to pay all reasonable costs, including collection agency fees, court costs and attorneys' fees we pay to collect any amounts you owe us.
- h. **Third Party Payment/Collection Prohibited.** USSB does not permit third parties to collect payment for USSB Services unless specifically authorized by USSB. You should not pay for the Services through any third party and, if you do, you remain liable for the charges due pursuant to this Agreement.
- i. **Liability for Unauthorized Use.** You are responsible for any and all Services received on your DSS system, whether or not the purchase is authorized by you. If your DSS system is stolen, you must notify us within five (5) days of such theft, or you will be responsible for charges for Services received on the stolen system.

3. **Subscriber's Additional Rights and Obligations.**

- a. **Services/Equipment.** You agree to use the Services only in your residence for your own private viewing within the United States and not for commercial purposes. You are responsible for obtaining the necessary Equipment to receive the Services. The purchase of DSS hardware and any hardware problems which you may have are and will remain completely separate from the purchase of Services from us.
- b. **Access Cards.** Access Cards are the property of News Datacom, Inc., and any tampering or other unauthorized modification to the Access Card may result in, and subject you to, legal action. Periodically, it may be necessary to change your Access Card as a condition for continuation of Services. In addition, transfer of DSS hardware to a new owner requires issuance of a new Access Card to the new owner. See Section 3(j) below.
- c. **Reissuance of Access Cards.** In the event your Access Card is lost, stolen, defective or damaged, USSB will issue a new Access Card. Your account will be charged a security deposit of \$150.00. If you return the old Access Card to USSB, your account will be credited the amount of the security deposit, less a \$35 Card Replacement Fee. If the Access Card reveals unauthorized tampering or modification, USSB reserves the right to refuse to replace your Access Card and not refund the security deposit.
- d. **Representations/Warranties/Penalties.** You acknowledge and agree that: (i) the address listed on this billing statement is the location of your residence; (ii) if you live in an apartment, condominium or other multiple family dwelling, the address identifies your residence; (iii) you will receive the Services solely for your private viewing; (iv) the Services will not be displayed in a public place or a commercial establishment or offered for resale in any way; and (v) **SERVICES WILL NOT BE RECEIVED OUTSIDE THE UNITED STATES.** We reserve the right to verify the accuracy of the information which you provide to us at any time. Any violation of this provision, including providing us with inaccurate information, is grounds for termination of this Agreement, disconnection of the Services, and may lead to additional legal remedies against you. In addition, unauthorized reception of the Services is a violation of federal law (e.g., 47 U.S.C § 605) and may result in civil and/or criminal penalties.
- e. **Programming Services.**
- (i) **Programming.** USSB reserves the right to change programming services and programming packages and prices.
- (ii) **One Free Month Offer.** To be eligible for the One Free Month offer of USSB's top programming package, or USSB's current retail promotional offer, a customer must be a first time residential DSS purchaser and have not received the One Free Month previously. The One Free Month is intended for the customer's primary DSS unit and is available only upon a first-time account set-up with USSB. USSB may substitute a free month of a different programming package or

discontinue the One Free Month offer entirely. Pay-Per-View Events are not included in the One Free Month offer.

- (iii) **Multiple Receiver Discount.** Additional Receivers are required to be directly and continuously connected to the same land-based telephone line as the primary Receiver in order to receive a discount on secondary Receivers. In so doing, you are eligible to receive the programming on your second Receiver for a nominal monthly service fee.
- f. **Mobile Units.** Mobile units, (cabins, trailers, etc.) are not eligible for a multiple Receiver discount unless continuously connected to the same land-based telephone line as the primary Receiver.
- g. **Renewals/Changes in Services.**
  - (i) **Subscription Renewals.** We will continue to provide Services to you (including Services provided for a monthly, quarterly, semi-annual or annual term) for the same term as your previous Services, until you request your Services to be stopped, or request a change in the term for which your Services have been previously provided, or we cancel your Services as provided in this Agreement. With the exception of some promotional offers, unless otherwise stated, all subscriptions will automatically renew.
  - (ii) **Credit Cards.** If you pay for your subscription with a credit card, we will continue to charge that credit card until you notify us (a) to cancel your subscription, (b) to charge your subscription to a different credit card, or (c) to bill you directly. You agree to provide us with the new expiration date when your credit card is renewed. If you do not, we will continue to charge your Services to the credit card you previously authorized. If your credit card issuer rejects a charge to your credit card because your card is expired or terminated, we will bill you directly for your subscription.
  - (iii) **Changes In Your Level of Services.** You may change the Services to which you subscribe. These Services may be upgraded at any time subject to our right to deny or limit Services to you as provided in this Agreement. To downgrade your Services, you must receive programming for a minimum of one (1) month and any requested downgrade of Services will take effect at the start of the next subscription month. Any refunds to be provided to quarterly, semi-annual or annual subscribers who request downgrades will be calculated in the same manner as described in paragraph 2.d above.
  - (iv) **Inactivating Your Account.** You may temporarily shut off your Services after you have been a paying subscriber for at least one month. Your inactivation will become effective at the start of your next subscription month. Upon inactivation, you are still responsible for any outstanding balance on your account.

- h. **Change of Address.** If your address or telephone number changes, you agree to provide us with new information promptly, so that we can continue to provide you Services.
- i. **Transfer of Ownership / Account.** If you sell or transfer your DSS system: (i) It is your responsibility to inform USSB of the transfer of ownership and pay any outstanding balances for programming before your account can be closed; and (ii) You will remain responsible for all new charges incurred using your Access Card unless you have informed USSB that you have sold your DSS system *and* your Access Card has been returned to USSB.
- j. **Responsibilities of New Owner.** If you purchased a used DSS system, you are required to contact USSB, and we will establish a new account and issue a new Access Card to you. Your account will be charged a security deposit of \$150. If you return the old Access Card to USSB, your account will be credited the amount of the security deposit, less a \$35 Card Replacement Fee.
- k. **Telephone Connection.** USSB recommends that the DSS Receiver(s) be directly and continuously connected to a land-based telephone line. Information regarding the programming Services that you have ordered is transmitted via the telephone line. During the short information transmission period, you may not have the ability to use this telephone line. USSB is able to provide you programming on all secondary Receivers for a nominal monthly service fee so long as your DSS Receiver and all secondary Receivers are continuously connected to the same land-based telephone line as your primary Receiver. If the DSS Receiver(s) is not so connected, or if the Receiver(s) is connected to a phone line other than that which you have identified, or if the telephone line is not performing in accordance with USSB's requirements, USSB may, at its discretion, inactivate your Services, or charge full price for Services on all secondary Receivers. If Services are inactivated, you are still responsible for payment of all outstanding balances for Services received through the date of inactivation. Use of the remote control for ordering Pay-Per-View events will require a continuous telephone connection.

4. **USSB's Additional Rights and Obligations.**

- a. **USSB Approval.** All orders for Services are subject to USSB's approval.
- b. **Change In Programs or Services.** We reserve the right to rearrange, black out, terminate, discontinue, cancel, revise, add, delete, substitute or otherwise change the programming and/or the Services at any time without notice, and to make appropriate price adjustments, if any, in our sole discretion.
- c. **Content of Programming Material.** We make no representations whatsoever concerning the content of the Services or accuracy of any programming information you receive through the Services. No refunds will be given based on the content of the programming or events.
- d. **Pay-Per-View Events.** To use your remote control to order Pay-Per-View events, and obtain any special discounts which may apply associated

with ordering through your remote control, you must meet certain criteria. Your DSS system must be continuously connected to the same land-based telephone line indicated on your account, and a call back from USSB to the Receiver must be successful. Your DSS System test will take place within the first 30 days of the date you set up your account. If you have questions on using your remote control to order Pay-Per-View events, please call our Customer Service Center. If your account is 45 days or more past due, Pay-Per-View privileges will be revoked until your account is brought current. USSB reserves the right to black out programming as well as Pay-Per-View events in a given geographical location at any given time. Customer circumvention of such blackouts may result in legal action. USSB is not responsible for the content of Pay-Per-View events. Commercial establishments cannot lawfully obtain Pay-Per-View events under a residential account. Some Pay-Per-View events may be available to commercial accounts, but under separate authorization from USSB. Commercial theft of service is subject to civil and criminal penalties.

- e. **Denial of Services.** We reserve the right to deny you access to any or all of the Services if you use the Equipment in violation of this Agreement, or if you fail to comply with your obligations under this Agreement.
- f. **Reporting of Information.** Subject to applicable law, you agree to allow us to share your payment history and certain other limited information with others and to provide your name and address to third parties for marketing and other purposes.
- g. **Limitation of Warranties/Liabilities.** USSB is not responsible for any problems or defects with the Equipment you use to receive the Services. You agree to hold the seller and/or manufacturer of the Equipment solely responsible with respect to any such problems or defects. USSB is not responsible for the content of the Services or the accuracy of any information you receive through the Services. We also disclaim any responsibility or liability whatsoever for the Services. **WITHOUT LIMITING THE FOREGOING, WE EXPRESSLY DISCLAIM ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY OTHER EXPRESS OR IMPLIED WARRANTIES OF WHATEVER KIND (STATUTORY, WRITTEN, ORAL OR OTHERWISE) WITH REGARD TO YOUR EQUIPMENT, THE PROGRAMMING AND/OR THE SERVICES.**

**IN THE EVENT OF A BREACH OR TERMINATION BY US OF THIS AGREEMENT FOR ANY REASON, OUR SOLE LIABILITY, AND YOUR SOLE REMEDY, SHALL BE A REFUND TO YOU OF ANY AMOUNTS PAID BY YOU TO US FOR SERVICES NOT RECEIVED. IN NO EVENT SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, NOR SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY OTHER DAMAGES IN EXCESS OF THE REFUND DESCRIBED IN THE PRECEDING SENTENCE.**

- h. **Minimum Level of Service.** As a condition of its provision of certain programming services to you including, without limitation, Pay-Per-View and a la carte programming, USSB may require that you purchase and maintain a minimum level of programming.

**5. Interpretation and Enforcement of This Agreement.**

- a. **Severability.** If any provision of this agreement is held by a court or regulatory authority of competent jurisdiction to be illegal, in conflict with any law or regulation, or unenforceable, as the case may be, that provision may be deleted or modified, without affecting the validity of the other provisions of this Agreement.
- b. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of Minnesota, subject to applicable federal, state or local law. Notwithstanding the foregoing, the United States Arbitration Act, 9 U.S.C.A. §§ 1-16, shall govern the interpretation and enforcement of the arbitration clause contained in Section 5.d hereof.
- c. **Notices.** We will be deemed to have given you notice when such notice is deposited in the U.S. mail addressed to your last known address. Your notice to us is deemed given when received by us at the address identified below. Do not write to us on the bill.
- d. **Arbitration of Disputes.** Upon the request of any party to this Agreement, any dispute, claim or controversy of any kind arising under this Agreement or relating to this Agreement or the Services provided by USSB shall be resolved by arbitration in accordance with the procedures of the commercial arbitration rules of the American Arbitration Association. The arbitrator or arbitrators shall have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the Terms of this Agreement.

**TO RECEIVE ADDITIONAL PROGRAMMING**

You can call 1-800-204-USSB to get the latest USSB programming information.

**QUESTIONS ABOUT YOUR BILL**

If you have a question relating to your bill or the Services, please write to us on a separate piece of paper - **NOT ON THE BILL**; our bills are electronically processed and any message written on them will be delayed in reaching us. Send all correspondence to: U.S. Satellite Broadcasting, Customer Service Manager, USSB, P.O. Box 1954, Voorhees, NJ 08043-9054. Always include your account number on any correspondence with USSB. You also may call us at 1-800-204-USSB.

**THE ABOVE TERMS ARE SUBJECT TO ANY AND ALL APPLICABLE FEDERAL, STATE AND LOCAL GOVERNMENTAL REQUIREMENTS AND ARE LIMITED AS NECESSARY TO CONFORM THERETO. THE ABOVE TERMS ARE SUBJECT TO CHANGE AT ANY TIME.**

ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-K-212

FILED  
UNITED STATES DISTRICT COURT  
DENVER, COLO

OCT 06 2000

JAMES R. MANSPEAKER

ECHOSTAR COMMUNICATIONS CORPORATION,  
a Nevada corporation; ECHOSTAR SATELLITE  
CORPORATION, a Colorado corporation; and ECHOSTAR  
TECHNOLOGIES CORPORATION, a Texas corporation,

Plaintiffs,

v.

DIRECTV ENTERPRISES, Inc., a Delaware corporation;  
DIRECTV, Inc., a California corporation;  
DIRECTV MERCHANDISING, Inc., a Delaware corporation;  
DIRECTV OPERATIONS, Inc., a California corporation;  
HUGHES NETWORK SYSTEMS, a Delaware corporation; and  
THOMSON CONSUMER ELECTRONICS, Inc.,  
d/b/a RCA, a Delaware corporation,

Defendants.

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AND RELATED COUNTERCLAIMS

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**EXCERPTS OF FACTUAL AUTHORITIES  
IN SUPPORT OF  
DIRECTV DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON  
ECHOSTAR'S ANTITRUST CLAIMS  
(COUNTS 1, 2, 3, 4, 5, 6, 7 and 10, 11, 12 AND 13)**

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## APPENDIX OF FULL FACTUAL AUTHORITIES

- A. Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (February 1, 2000), available on the FCC web site  
<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6010953141](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010953141)>.
- B. Declaration of Michael Schwimmer (November 24, 1997), *attached to EchoStar Communications Corporation, Program Access Complaint*, FCC File No. CSR-5165-P (November 24, 1997).
- C. Comments of EchoStar Communications Corporation, *In re Policies and Rules for the Direct Broadcast Satellite Service*, FCC IB Docket No. 98-21 (April 6, 1998), available on the FCC web site  
<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=2034510001](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2034510001)>.
- D. Reply Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (January 21, 2000), available on the FCC web site  
<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6010952522](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010952522)>.
- E. Federal Communications Commission Office of Plans and Policy, Working Paper No. 26: *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996 (rel. June 27, 1991), available on Westlaw (1991 WL 640551).
- F. Federal Communications Commission, Report and Order, *In re Amendment of Parts 73 and 76 of the Commission's Rules*, FCC GEN. Docket No. 87-24, 3 FCC Rcd. 5299 (rel. July 15, 1988), available on Westlaw (1998 WL 486817) and Lexis (1988 FCC LEXIS 1329).

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- G. Charles W. Ergen, Testimony Before the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate (January 27, 1999), available on Westlaw (1999 WL 32965).
- H. Charles W. Ergen, Testimony Before the Commerce Committee, U.S. Senate (July 28, 1998), available on Westlaw (1998 WL 526888).
- I. Charles W. Ergen, Testimony Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives (April 1, 1998), available on Westlaw (1998 WL 798847).
- J. Charles W. Ergen, Testimony Before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives (February 4, 1998), available on Westlaw (1998 WL 61501).
- K. Charles W. Ergen, Testimony Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives (October 30, 1997), available on Westlaw (1997 WL 683674).
- L. Comments of EchoStar Satellite Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 99-230 (August 6, 1999), available on the FCC web site  
<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6009148730](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6009148730)>.
- M. Comments of EchoStar Communications Corporation, *In re Amendment of Parts 2 and 25 of the Commission's Rules*, FCC ET Docket No. 98-206 (March 2, 1999), available on the FCC web site  
<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6006443772](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006443772)>.
- N. Federal Communications Commission, Sixth Annual Report, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC

CS Docket No. 99-230, 15 FCC Rcd. 978 (rel. January 14, 2000), available on Westlaw (2000 WL 347568) and Lexis (2000 FCC LEXIS 250).

- O. DISH Network, *Programming Overview*, available on DISH Network's web site <[http://www.dishnetwork.com/software/third\\_level\\_content/overview/index.asp](http://www.dishnetwork.com/software/third_level_content/overview/index.asp)>.
- P. DISH Network, *Basic Package Channel List*, available on DISH Network's web site <[http://www.dishnetwork.com/software/third\\_level\\_content/top\\_100/index.asp?package\\_name=America""s%2BTop%2B100%2BCD&view=list](http://www.dishnetwork.com/software/third_level_content/top_100/index.asp?package_name=America)>.
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- R. EchoStar Communications Corporation, Form 10-K for the year ended December 31, 1999, available on the SEC web site <<http://www.sec.gov/Archives/edgar/data/1001082/0001035704-00-000160.txt>>.
- S. EchoStar advertisement, produced by EchoStar [ECC0006563].
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- U. Comments of EchoStar Communications Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 97-141 (July 23, 1997), available on the FCC web site, <[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=1878570001](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1878570001)> and <[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=1878570002](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1878570002)>.
- V. Comments of the United States Department of Justice, *In re Application of MCI Telecommunications Corporation and EchoStar 110 Corporation*, FCC File No. SAT-ASG-19981202-00093 (January 14, 1999).

- W. Federal Communications Commission, First Report, *In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 94-48, 9 FCC Rcd. 7442 (rel. September 28, 1994), available on Westlaw (1994 WL 528274) and Lexis (1994 FCC LEXIS 5322).
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- Z. Federal Communications Commission, Third Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 96-496, 12 FCC Rcd. 4358 (rel. January 2, 1997), available on Westlaw (1997 WL 2451) and Lexis (1997 FCC LEXIS 151).
- AA. Federal Communications Commission, Second Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 95-61, 11 FCC Rcd. 2060 (rel. December 11, 1995), available on Westlaw (1995 WL 733714) and Lexis (1995 FCC LEXIS 7901).
- BB. United States Department of Justice, Complaint, *United States v. Primestar, Inc.* (May 12, 1998), available on the U.S. Department of Justice web site <<http://www.usdoj.gov/atr/cases/f1700/1757.htm>>.

- CC. Reply Comments of the Staff of the Federal Trade Commission, *In re Satellite Carrier Compulsory License*, Copyright Office Docket No. RM 98-1 (March 1998), available on the FTC web site <<http://www.ftc.gov/os/1998/9803/dbscom.htm>>.
- DD. United States General Accounting Office, Report to the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate, *Telecommunications: The Changing Status of Competition to Cable Television*, GAO/RCED-99-158 (July 1999).
- EE. Joint Explanatory Statement of the Committee of Conference on the Intellectual Property and Communications Omnibus Reform Act of 1999, H.R. 1554, 145 Cong. Rec. H11792-811, produced by EchoStar [ECC0077221-77248]. This document is also available on Westlaw (145 Cong. Rec. H11769, 1999 WL 1015352).
- FF. Petition to Dismiss or Deny of EchoStar Communications Corporation, *In re Application of TCI Satellite Entertainment, Inc., and PRIMESTAR, Inc.*, FCC File No. 91-SAT-TC-97 (August 22, 1997).
- GG. Petition of EchoStar Communications Corporation to Dismiss or Deny, *In re Application of MCI Telecommunications Corp. and PRIMESTAR LHC, Inc.*, FCC File No. 106-SAT-AL-97 (September 25, 1997).
- HH. Federal Communications Commission, Order on Reconsideration, *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, FCC File No. CSR-5138-P, 14 FCC Rcd. 10480 (rel. June 30, 1999), available on Westlaw (1999 WL 436222) and Lexis (1999 FCC LEXIS 2992).
- II. Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Comcast Corp.*, FCC File No. CSR-5244-P, 14 FCC Rcd. 2089 (rel. January 26, 1999), available on Westlaw (1999 WL 27028) and Lexis (1999 FCC LEXIS 307).

- JJ. Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Speedvision Network, LLC*, FCC File No. CSR-5364-P, 14 FCC Rcd. 9327 (rel. June 14, 1999), available on Westlaw (1999 WL 381800) and Lexis (1999 FCC LEXIS 2698).
- KK. PrimeTime 24 Joint Venture, Complaint, *PrimeTime 24 Joint Venture v. EchoStar Communications Corp.*, 98 Civ. 6738 (S.D.N.Y. September 23, 1998), produced by EchoStar [ECC0072761-72907].
- LL. EchoStar Communications Corporation et al., Defendants' Original Answer, Affirmative Defenses and Counterclaims, *PrimeTime 24 Joint Venture v. EchoStar Communications Corp.*, 98 Civ. 6738 (S.D.N.Y. February 22, 1999), produced by EchoStar [ECC0073093-73163].
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- NN. EchoStar 110 Corp. and MCI Telecommunications Corp., Application for Consent to Assignment of Authorizations and Request for Expedited Consideration, *In re Application of MCI Telecommunications Corp. and EchoStar 110 Corp.* (December 2, 1998).
- OO. Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Fox/Liberty Networks, LLC*, FCC File No. CSR-5165-P, 13 FCC Rcd. 7394 (rel. April 17, 1998), available on Westlaw (1998 WL 177559) and Lexis (1998 FCC LEXIS 1844).
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QQ. Comments of EchoStar Satellite Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 00-132 (September 8, 2000), available on the FCC web site  
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RR. EchoStar advertisement,  
<<http://retailer.echostar.com/marketing/ads/previews/DumpCable.jpg>>.

Exhibit A

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FOR PUBLIC INSPECTION

**EXHIBIT A**

Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (February 1, 2000), available on the FCC web site

<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6010953141](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010953141)>.

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**Exhibit A**

**Page 1**

FOR PUBLIC INSPECTION

DOCKET FILE COPY ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEB 01 2000  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

\_\_\_\_\_  
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In the Matter of  
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)  
Implementation of the Satellite Home  
)  
Viewer Improvement Act of 1999;  
)  
Retransmission Consent Issues  
)  
\_\_\_\_\_

CS Docket No. 99-363

To: The Commission

**COMMENTS OF ECHOSTAR SATELLITE CORPORATION TO SECTION III**

EchoStar Satellite Corporation ("EchoStar") hereby submits its comments to Section III of the above captioned Notice of Proposed Rule Making ("NPRM").<sup>1</sup> Section III of the NPRM concerns the provision of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")<sup>2</sup> instructing the Commission to implement rules and procedures governing broadcasters' election of must-carry or retransmission-consent status for satellite carriage. In offering these comments, EchoStar emphasizes that it fully reserves its view that, in contrast with

<sup>1</sup> *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues*, CS Docket No. 99-363, Notice of Proposed Rule Making, FCC 99-406 (rel. Dec. 22, 1999) ("NPRM").

<sup>2</sup> Act of Nov. 29, 1999, Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including SHVIA, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA")) (codified in scattered sections of 17 and 47 U.S.C.).

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Exhibit A

Page 2

cable must-carry, the statutory satellite must-carry requirement is an unwarranted and excessive restriction on the satellite carriers' First Amendment rights.

Indeed, in promulgating satellite election rules, the Commission should take into account the same fundamental differences between satellite and cable must-carry that make satellite must-carry constitutionally indefensible: broadcast stations do not need to be protected from the market power of satellite carriers for the simple reason that satellite carriers do not have market power; and must-carry is more onerous for satellite carriers because carrying one local station in one local market requires the devotion of nationwide capacity. These differences suggest the need for a separate body of election rules customized to satellite must-carry and to the particular burdens confronted by satellite carriers seeking to comply with the statutory requirement.

Unlike cable must-carry, the SHVIA's requirement is triggered by the *request* of the broadcast station seeking carriage. This latter provision suggests a requirement of an affirmative request, meaning that the Commission should not apply here the cable rules' presumption of must-carry election where the broadcaster fails to act. EchoStar recognizes that the Commission enacted this provision to protect cable operators in case a television station were to try to hold out and withhold consent having failed to exercise its election rights. No less protection should be available to satellite carriers. At the same time, the default must-carry election rule might create an untenable situation for a satellite carrier in light of the burdens caused by satellite must-carry. To alleviate that risk the Commission should rule that, where a broadcaster has failed to make a timely carriage request at the election time, the satellite carrier should be entitled to ascribe to the broadcaster whichever election would best facilitate the

Exhibit B

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FOR PUBLIC INSPECTION

**EXHIBIT B**

Declaration of Michael Schwimmer (November 24, 1997), *attached to* EchoStar Communications Corporation, Program Access Complaint, FCC File No. CSR-5165-P (November 24, 1997).

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of  
**ECHOSTAR COMMUNICATIONS CORPORATION**

Complainant

v.

**FOX/LIBERTY NETWORKS, LLC**  
**FX NETWORKS, LLC**

Defendants

**EXPEDITED CONSIDERATION**  
**REQUESTED**

File No. CSR - \_\_\_\_\_

Prohibited Exclusivity  
Discrimination  
Unfair Practices

**PROGRAM ACCESS COMPLAINT**

David K. Moskowitz  
Senior Vice President and General Counsel  
EchoStar Communications Corporation  
90 Inverness Circle East  
Englewood, CO 80112

Philip L. Malet  
Pantelis Michalopoulos  
Marc A. Paul  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036  
202/429-3000

Counsel for EchoStar Communications Corporation

Dated: November 24, 1997

Page 15

Exhibit B

DTV 264896

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

FCC00000388

**DECLARATION OF MICHAEL S. SCHWIMMER**

My name is Michael S. Schwimmer. I hereby declare the following:

1. I am Vice President of Programming for EchoStar Communications Corporation ("EchoStar"). Since July 10, 1997, I have been responsible for EchoStar's programming and licensing, including the negotiations with program suppliers.
2. EchoStar is a provider of Direct Broadcast Satellite ("DBS") programming services in the United States. EchoStar operates two DBS satellites that allow it to provide approximately 120 channels of digital television programming to subscribers throughout the continental U.S. Accordingly, EchoStar competes against cable operators in each and every cable franchise area. EchoStar recently launched its third DBS satellite. EchoStar's address is 90 Inverness Circle East, P.O. Box 6552, Englewood, CO 80155. EchoStar's telephone number is (303) 799-8222.
3. FX Networks, LLC ("FX") distributes what it calls "the best primetime on cable," including such syndicated shows as "The X Files," "NYPD Blue," and "In Living Color," as well as regional Major League Baseball action. See FX Networks Website (visited Nov. 20-21, 1997) <[http://www.fxnetworks.com/htmls/fx\\_splash.htm](http://www.fxnetworks.com/htmls/fx_splash.htm)>, <[http://208.206.43.104/main\\_ge.htm](http://208.206.43.104/main_ge.htm)> (Exhibit B). As a multichannel video programming distributor, EchoStar competes directly for subscribers with cable operators. Accordingly, EchoStar needs to carry popular programming, such as the programming controlled by FX, in order to compete and remain competitive with cable operators.

Page 42

DTV 264923

Exhibit B

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

FCC00000389

FOR PUBLIC INSPECTION

Exhibit C

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FOR PUBLIC INSPECTION

## EXHIBIT C

Comments of EchoStar Communications Corporation, *In re Policies and Rules for the Direct Broadcast Satellite Service*, FCC IB Docket No. 98-21 (April 6, 1998), available on the FCC web site

<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=2034510001](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2034510001)>.

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Exhibit C

Page 59

FOR PUBLIC INSPECTION

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

\_\_\_\_\_) )  
In the Matter of: ) )  
Policies and Rules for the ) )  
Direct Broadcast Satellite Service ) )  
\_\_\_\_\_) )

IB Docket No. 98-21

**COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION**

David K. Moskowitz  
Senior Vice President and General Counsel  
**EchoStar Communications Corporation**  
5701 South Santa Fe  
Littleton, CO 80120  
(303) 723-1000

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Pantelis Michalopoulos  
Marc A. Paul

**Steptoe & Johnson LLP**  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
202-429-3000

*Counsel to EchoStar  
Communications Corporation*

Dated: April 6, 1998

FCC000000392

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Exhibit C

FOR PUBLIC INSPECTION

## SUMMARY

EchoStar Communications Corporation ("EchoStar") hereby files these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter. EchoStar applauds the Commission's efforts to streamline Direct Broadcast Satellite ("DBS") regulations. Reducing the regulatory burdens that DBS providers face will increase the likelihood of effective competition in the multichannel video programming distribution ("MVPD") market.

EchoStar agrees with the Commission's proposal to harmonize application requirements for all satellite services, including DBS. Similarly, EchoStar supports the Commission's proposal to grant a construction permit, launch authorization and license for DBS space station facilities through one process. Consolidating these proceedings will conserve both Commission and private resources. At the same time, the Commission should be mindful of, and preserve, the nature of DBS as a lightly regulated service, and should not allow procedural simplification to import substantive changes that would interfere with that nature, such as many of the technical requirements of Part 25.

The NPRM's proposal on cable/DBS cross-ownership restrictions is similarly constructive so long as it is applied to all entities and industries evenhandedly. On the other hand, such a restriction could seriously harm the public interest if it were to be fashioned so as to exempt the entities or transactions to which they should most forcefully be applied. Thus, EchoStar supports, in principle, a cross-ownership restriction as between cable operators and DBS providers. Plainly put, such a restriction would prevent cable operators from co-opting scarce DBS spectrum resources. Such a restriction would be arbitrary, meaningless and indeed harmful if it were not applied to the current effort of PRIMESTAR to acquire the DBS permit of

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of each individual case do not make sense when the relevant product market for DBS providers is the MVPD market, and not necessarily the DBS market or satellite DTH market.<sup>10</sup> Indeed, when reviewing the competitive effects of proposed transactions, the Commission determines the relevant product market by using a methodology similar to that described in the 1992 Merger Guidelines, defining "a product market as a service or group of services for which there are no close demand substitutes."<sup>11</sup> Specifically, "the Commission must consider whether, if, in the absence of a regulation, all carriers raised the price of a particular service or group of services, customers would be able to switch to a substitute service offered at a lower price."<sup>12</sup>

If there was any doubt that the MVPD market was the relevant market at the time of the Commission's DBS rulemaking (when there was only one DBS provider offering a relatively different product), EchoStar has dispelled it with its product offerings. EchoStar competes in the same market as cable operators – albeit from a handicapped position. EchoStar prices its service to beat comparable cable packages and tries to make its offerings as close a substitute for a cable subscription as possible. If any other DBS provider, such as PRIMESTAR, intends to market *its* services as a less-than-close substitute for cable, it should not be allowed to invoke its own plan as evidence that DBS and cable distributors do not compete in the same market.

<sup>10</sup> DBS NPRM at ¶ 60.

<sup>11</sup> In the Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer control of NYNEX Corp. and its Subsidiaries, FCC 97-286 at ¶ 50 (rel. Aug. 14, 1997) ("NYNEX/Bell Atlantic").

<sup>12</sup> Id.

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**EXHIBIT D**

Reply Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (January 21, 2000), available on the FCC web site:

<[https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6010952522](https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010952522)>.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JAN 21 2000  
RECEIVED

In the Matter of  
  
Implementation of the Satellite Home  
Viewer Improvement Act of 1999;  
Retransmission Consent Issues

CS Docket No. 99-363

To: The Commission

REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

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Dated: January 21, 2000

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## SUMMARY

EchoStar Satellite Corporation ("EchoStar") hereby submits its reply comments in this important proceeding to implement the bad faith and exclusive dealing prohibitions that the Commission must impose on broadcasters negotiating local-into-local retransmission consent with satellite carriers under the Satellite Home Viewer Improvement Act of 1999.<sup>1</sup> At the outset, EchoStar notes with grave concern that some of the comments submitted in this proceeding by the National Association of Broadcasters ("NAB") appear themselves to demonstrate a very strong inclination on the part of broadcasters to act in disregard for the good faith mandate of the statute, further reinforcing the need for the Commission to impose rules with teeth in implementation of that mandate. The NAB's defiant stance confirms, if there was any doubt, that this is not an area where the Commission can rely on any "good-Samaritan" incentive of the regulated entities to do the right thing, but rather is an area calling for decisive action to promulgate concrete rules and enforce them aggressively.

These concerns grow, among other things, out of the fact that the NAB evidently views the statutory good faith requirement as a meaningless, "largely hortatory" provision that is incapable of being implemented. Under the statute, the Commission "shall" "prohibit a television broadcast station . . . from engaging in exclusive contracts for carriage or failing to negotiate in good faith . . ."<sup>2</sup> There is nothing hortatory about this provision. When Congress

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<sup>1</sup> Act of Nov. 29, 1999, PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), codified in scattered sections of 17 and 47 U.S.C.

<sup>2</sup> SHVIA, § 1002 (to be codified at 47 U.S.C. § 325(b)) (emphasis supplied).

says "prohibit," it means it – indeed, there is no more explicit way for Congress to establish a prohibition than by using the words "shall" and "prohibit." Nevertheless, the NAB argues that the statutory requirement should not be implemented because it is in its view "essentially impossible" to implement.<sup>3</sup> This is nothing less than a call for the Commission to abdicate its statutory responsibility based on what is described by the NAB as "the extraordinary – indeed, usually insuperable – difficulty of implementing an obligation to negotiate in good faith." Again, however, when Congress imposes an obligation, it must have deemed it capable of being carried out, and it is insulting for the NAB to try to negate congressional intent on grounds of "impossibility." Moreover, if a good faith requirement is generally amorphous, this only makes more acute the need for the agency charged with implementing it to enact concrete, specific rules.

While difficulty would be an improper excuse for failing to implement the statute, the Commission's work is in fact not nearly as difficult as the broadcasters portray it: the NAB makes too little of the fact that the Commission has available to it clear statutory guidance giving specific content to the good faith requirement. Under the statute, differences in terms are not a failure of good faith only so long as they are based on competitive marketplace considerations, meaning clearly that the Commission should find such a failure where a demand for different terms is not based on such considerations. This particular good faith requirement is therefore more specifically defined by Congress here than in most agreements to negotiate in good faith,

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<sup>3</sup> See NAB Comments at 6 ("And in each such exercise, the Commission will be called on to do what courts have found to be essentially impossible: deciding when a party in a normal commercial negotiation – despite strong business reasons to want to make a deal has failed to bargain in good faith.").

by reference to the term "competitive marketplace considerations." The Commission must give concrete content to that term.

The NAB tries, again, to negate the competitive marketplace considerations standard. It essentially presses on the Commission the rule "if we demand it, then it must be based on competitive marketplace considerations," based on the vacuous assertion that the broadcasters too have an incentive to reach a deal, and the argument that the market is competitive. Absurdly, the broadcasters try to prove that point by arguing that the market power of cable operators has been lessened by competition from satellite carriers. Ironically, if that were true, it would mean only that the networks now have even *more* bargaining power than before. Regardless of whether the market power of cable operators has lessened (EchoStar believes it has not), the networks' power can only increase with the ability to "whipsaw" one distributor against the other.

In aid of its task of defining what does and does not constitute competitive marketplace considerations, the Commission should indeed look to the retransmission marketplace, where the cable operators have received retransmission consent in exchange for minimal consideration and without making any cash payment, consistent with the Copyright Office's determination that competitive marketplace considerations point to a zero market value for local-into-local retransmissions. Moreover, several factors support the view that, in a competitive marketplace, broadcasters should on balance be willing to grant their retransmission consent to satellite distributors on even better terms than those enjoyed by cable operators.<sup>4</sup> In

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<sup>4</sup> The broadcasters try to bolster their demand for onerous terms by arguing that EchoStar and DIRECTV charge consumers for local signals. That fact is not probative of the value of retransmission consent for several reasons. *First*, most of the consumers subscribing to local signals are generally presumed under existing Grade B standards to receive these signals

(Continued ...)

light of these facts, any attempt by broadcasters to extract more onerous terms than the norm established in myriad retransmission deals with cable operators should be viewed as presumptively not based on competitive marketplace considerations. Also, attempts at extracting value by tying retransmission to carriage of other broadcast signals (including digital signals) should be regarded as *per se* violations of the good faith obligation.

The NAB also exhibits the broadcasters' inclination to disregard the good faith mandate if left unguided by the Commission when it tries to stake out the broadcasters' ability to deny EchoStar *local-into-local* retransmission consent on the ground that EchoStar and the broadcasters are currently involved in copyright litigation over the retransmission of distant signals. The Commission should leave no doubt at all that such behavior would be a blatant refusal to deal that trumps the congressional directive and violates the core of the prohibitions on bad faith and exclusive dealing.

Such a denial of consent is not consistent with good faith negotiations for several reasons: *first*, it ties the question of local-into-local retransmission to distant signal retransmissions in a way not intended by Congress. Congress – which was fully aware of the litigation between EchoStar and the broadcasters pending in Miami – has prescribed carefully

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off the air. The only reason why these consumers purchase a satellite carrier's local signal offering is for value that the satellite carrier creates – far better signal quality, no need for an off-air antenna. There is no basis for the broadcaster to receive any part of that value. Moreover, *second*, consumers within a local Designated Market Area (“DMA”) are already counted for purposes of determining the audience that a local broadcaster can deliver to advertisers and the compensation to be received by the broadcaster – one of the reasons why the Copyright Office has concluded that the market value of local-into-local retransmissions is zero. *Third*, the cable systems' charges for “lifeline” cable (essentially the broadcast channels) are higher (\$10 dollars or more), even as cable operators throughout the country have received retransmission consent for no cash payment and at very little cost.

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defined forms of redress for retransmissions that violate the "unserved household" limitation of Section 119's distant signal license. Self-help by the broadcasters through a denial of local-into-local retransmission consent is not one of these types of redress. The broadcasters should not be allowed to take the law in their hands and, in the process, negate the congressional intent to at last allow local-into-local retransmissions. *Second*, courts have frequently found instances of bad faith in exactly such behavior – attempts to walk out of a deal based on a pending dispute. *Third*, the Commission should perform its statutory duty as the courts perform their respective duties, and there is no basis in the statute for allowing the Commission to stay its hand in carrying out its obligations. In that respect, the Cable Services Bureau's decision in *Speedvision* would be inapposite even if it were correct.<sup>5</sup> *Fourth*, there is no economic justification for the broadcasters to deny local-into-local retransmission based on their allegation that a satellite carrier has violated the limitations of the distant signal copyright license. If anything, local-into-local retransmissions lessen a consumer's interest in receiving distant network signals. Indeed, for years, the broadcasters have been arguing that, instead of revising the antiquated standard for defining which households are eligible to receive distant retransmission and increasing the number of eligible households, Congress should allow local-into-local retransmissions. For broadcasters to now deny their consent to local-into-local retransmissions based on their

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<sup>5</sup> That case would be more comparable if there were a retransmission consent agreement between a broadcaster and a satellite carrier, and the broadcaster had filed a breach of contract action alleging violations of that contract while the satellite carrier had filed a retransmission complaint with the FCC. Even if that were the case, the Commission should resist any attempt by a broadcaster to stall its determinations by inventing a contractual dispute, and the Bureau's decision in *Speedvision* was significantly flawed in that respect. In any event, the broadcasters cannot cite *Speedvision* in the present fundamentally different circumstances as a vehicle for using any federal court litigation to delay the Commission's adjudication of their conduct in the area of local-into-local retransmissions.

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purported concerns with distant retransmissions would turn that prior position on its head and would be an example of disparity in treatment that is not based on competitive marketplace considerations.