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**United States Government Accountability Office
Washington, DC 20548**

December 12, 2012

Congressional Committees

Subject: DISH Network Complied with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License

This report responds to the requirement, enacted in the Satellite Television Extension and Localism Act of 2010 (STELA),¹ mandating that the Comptroller General monitor and periodically report on the degree to which DISH Network (DISH)² was complying with the Special Master's³ examination of its compliance with the royalty payment and household eligibility requirements of the Section 119 statutory license.⁴ On March 23, 2012, we issued our first report on this subject;⁵ at the time, we found that DISH was complying with the Special Master's examination. In this report, our second and final report on this subject, we address DISH's compliance through the completion of the Special Master's examination.

To respond to this mandate, we interviewed the Special Master and analyzed documents he provided. We conducted this performance audit from June 2012 to December 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Summary

We found that DISH complied with the Special Master's examination. DISH provided the Special Master with information on its subscribers and royalty payments, and cooperated on a survey of all major network-affiliated broadcast stations nationwide. Since our March 23, 2012, report, the Special Master issued a report noting that there was no substantial evidence of improprieties by DISH regarding the Section 119 statutory license.

¹Pub. L. No. 111-175, § 105, 124 Stat. 1218, (2010) amending title 17, U.S.C. by adding § 119(g)(4)(B)(vii).

²From 1996 through 2008, DISH Network was the media and entertainment arm of EchoStar Communications Corporation. In 2008, EchoStar divested DISH Network. In this report, we refer to DISH Network and its predecessor as DISH.

³A Special Master is appointed by a judge to carry out the duties set out in the order appointing him.

⁴The Special Master's examination and reporting requirements are set out at 17 U.S.C. § 119(g)(4)(B).

⁵GAO, *To Date, DISH Network Is Cooperating with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License*, GAO-12-496R (Washington, D.C.: Mar. 23, 2012).

Background

The four major broadcast networks—ABC, CBS, Fox, and NBC—own or have affiliate television broadcast stations in most local television markets, known as designated market areas (DMA),⁶ throughout the nation. However, some local television markets lack access to one or more of the four major broadcast networks; these markets are referred to as *short markets*. Further, some households are unable to receive an adequate over-the-air signal from one or more of the local stations owned by or affiliated with the four major broadcast networks, typically because these households reside a significant distance from the television station’s broadcast antenna; these households are also *unserved households*.⁷

More than 30 million U.S. households have access to broadcast programming through subscriptions to direct broadcast satellite (DBS) service.⁸ When a DBS operator provides its subscribers access to broadcast programming, it is providing secondary transmission of the programming. Because the broadcast programming is copyright protected, a license is required for the secondary transmission of these works.⁹ Section 119 of title 17 of the United States Code allows DBS operators, such as DISH, to provide distant, out-of-market television broadcast signals to subscribers in short markets and to other unserved households;¹⁰ this is referred to as *distant-into-local service*. In addition, a separate license found at Section 122 of title 17 allows DBS operators to provide local television broadcast signals to subscribers in the same local area; this is referred to as *local-into-local service*. To take advantage of the Section 119 license, DBS operators must deposit with the U.S. Copyright Office a government-set royalty, which is later distributed to copyright owners.¹¹

In 1998, a few years after DISH started providing satellite transmission of broadcast programming to its subscribers, the four major broadcast networks and others filed suit alleging that DISH provided distant, out-of-market television broadcast signals to served households, which were ineligible for such service. In 2006, following a decision by the Eleventh Circuit Court of Appeals, DISH was found to have engaged in a pattern or practice in violation of Section 119 by improperly transmitting distant network signals to ineligible households and was permanently enjoined from providing distant-into-local transmission of all programming originating on stations affiliated with the four major broadcast networks.¹²

In 2010, Congress, through STELA, amended 17 U.S.C. § 119 to provide a remedy permitting DISH to seek relief from the injunction issued under Section 119. By providing local-into-local service in all 210 DMAs, DISH became eligible for recognition as a “qualified

⁶Nielsen Media Research defines the DMAs. According to Nielsen, a DMA identifies an exclusive geographic area of counties in which the home market television stations hold a dominance of total hours viewed. There are 210 DMAs in the United States.

⁷The Federal Communications Commission categorizes television broadcast signals by grades of signal strength, with Grade A being the strongest. An unserved household is unable to receive a signal of Grade B strength or better. Unserved households include homes of all types, including recreational vehicles and commercial trucks.

⁸In addition to DBS service, over 55 million households have access to broadcast programming through subscriptions to cable service.

⁹This is the right to show the copyright-protected work in public. 17 U.S.C. § 106(4).

¹⁰With a statutory license, the DBS operator does not need to obtain the copyright holder’s permission for the secondary transmission as long as it follows the regulations and pays the Copyright Office the required royalty.

¹¹The statutory licenses permit the public performance of the copyright-protected works in exchange for payment of royalties established using processes defined by statute.

¹²*CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 450 F.3d 505 (11th Cir. 2006).

carrier” and to then request that the court waive its injunction. On June 30, 2010, DISH filed an Application for Certification with the Federal Communications Commission (FCC) requesting qualified carrier status under Section 119, which FCC granted on September 1, 2010. However, as a further condition for approval, STELA directed the court to appoint a Special Master to conduct a compliance examination of DISH. On November 24, 2010, in accord with 17 U.S.C. § 119(g)(4)(B), the District Court for the Southern District of Florida appointed a Special Master under rule 53 of the Federal Rules of Civil Procedure to perform the required examination and report his findings to the court. The Special Master was required to examine and file a report on DISH’s compliance with the household eligibility requirements associated with the Section 119 license and the royalty payments to the Copyright Office. If the qualified carrier (DISH) was found to have willfully made a secondary transmission in violation of the statute, the waiver would be lifted and the permanent injunction would be reinstated.

DISH Complied with the Special Master’s Examination

We found that DISH complied with the Special Master’s examination, which consisted of examining DISH’s compliance with the royalty payment and household eligibility requirements of the license under Section 119. During his examination, the Special Master held regular meetings with DISH and representatives of the four major networks and their affiliates. The Special Master reported that DISH provided monthly reports of its distant, out-of-market signals; its Copyright Office submissions; and its auditor’s report. DISH also provided GAO with the same information, as we requested. As we discussed in our March 23, 2012, report, DISH and representatives of the four major networks and their affiliates collaborated on a survey of all major network-affiliated broadcast stations nationwide; the purpose of the survey was to determine whether any problem existed with DISH’s services to eligible subscribers. The Special Master told us that DISH fully responded to the 20 instances where a survey respondent raised a question about the importation of distant signals, which were found to be without merit. The Special Master told us that he was impressed with how well the parties of both sides—DISH and representatives of the four major networks and their affiliates—worked together on the effort and that they provided all the documents that he requested to conduct his examination.

In his July 23, 2012, report, the Special Master found that the documentation and information provided by DISH, the networks, the associations, and the major content providers showed (1) no substantial evidence of delivery by DISH of distant signals to any persons other than eligible subscribers and (2) no improprieties in the calculation and payment of royalties under DISH’s statutory license. The Special Master concluded that there was no substantial evidence that a copyright holder could bring a successful action, under the provisions of 17 U.S.C. § 119, against DISH for infringement. The court directed that the Clerk of the District Court for the Southern District of Florida transmit the Special Master’s report to Congress in accordance with 17 U.S.C. § 119. According to the Clerk’s office, this matter is considered to be closed.

Agency and Third-Party Comments

We provided a draft of this report to DISH Network, the Federal Communications Commission, and the Special Master for review and comment. The Special Master noted that the draft report appeared to represent correctly the underlying facts and the conclusions set forth in his analysis and report, and that it appeared to accurately summarize his July 23, 2012, report. The Federal Communications Commission and DISH Network did not provide comments.

We are sending copies of this report to DISH Network; the Chairman, Federal Communications Commission; and the Special Master. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staffs have questions about this report, please contact me at (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Mike Clements (Assistant Director), Martha Chow, and Bert Japikse.



Mark Goldstein
Director
Physical Infrastructure Issues

List of Addresses

The Honorable Patrick J. Leahy
Chairman
The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate

The Honorable John D. Rockefeller
Chairman
The Honorable Kay Bailey Hutchison
Ranking Member
Committee on Commerce, Science, and Transportation
U.S. Senate

The Honorable Lamar Smith
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

The Honorable Fred Upton
Chairman
The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
House of Representatives

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