DIRECTV ECHOSTAR

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Karen Douglas
Commissioner and Presiding Member
Efficiency Policy Committee
Submitted by email to Docket@energy.state.ca.us

RE: Comments for Docket No. 11-AAER-1, Rulemaking Proceedings on Appliance Efficiency Regulations – Phase II.

Dear Commissioner Douglas,

DIRECTV, Inc.[1] and EchoStar Corporation[2] are pleased to have this opportunity to follow-up the presentations[3] our respective companies made at the CEC Scoping Workshop of Aug 31st. These joint comments, which are limited to the topic of service provider set-top boxes, are intended to provide further information to the CEC in support of possible future proceedings to amend the California Appliance Efficiency Regulations.

The California Energy Commission's Broad Proposal to Regulate Set-Top Boxes is Unnecessary and Wasteful Given the U.S. Department of Energy's Ongoing Rulemaking.

The U.S. Department of Energy (DOE) has tentatively determined that set-top boxes and network equipment qualify as a covered product under Part A of Title III of the Energy Policy and Conservation Act (EPCA), as amended. DOE has tentatively determined that set-top boxes and network equipment meet the criteria for covered products because classifying products of such type as covered products is necessary or appropriate to carry out the purposes of EPCA, and the average U.S. household energy use

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[1] With National Headquarters located in Los Angeles, DIRECTV is the 14th largest employer in California and has more than 5,000 employees and approximately 30 facilities located throughout the state, which includes both the U.S. and Latin America Broadcast Centers.

[2] EchoStar Corporation (NASDAQ:SATS), a leading set-top box manufacturer, and its sister company, DISH Network (NASDAQ:DISH), a national satellite MVPD, are responsible for over 7000 jobs in the state of California.

[3] http://www.energy.ca.gov/appliances/2011rulemaking/documents/2011-08-31_workshop/presentations/DIRECTV_Presentation.pdf " and http://www.energy.ca.gov/appliances/2011rulemaking/documents/2011-08-31_workshop/presentations/EchoStar_Presentation_2011-08-31.pdf.

for set-top boxes and network equipment is likely to exceed 100 kilowatt-hours (kWh) per year. 76 Fed. Reg. 34914. Accordingly, DOE has opened and is currently engaged in a process to determine the proper rules, regulations and guidelines that should govern the energy consumed by set-top boxes.

The DOE process is very thorough and will be comprised of a test procedure for measuring the energy efficiency, energy use or estimated annual operating cost of set-top boxes and network equipment during a representative average use cycle or period of use that is not unduly burdensome to conduct. DOE will then issue a notice of proposed rulemaking where (as in this instant process) interested parties will be allowed to present oral and written data, views, and arguments with respect to such procedures. In prescribing new test procedures, DOE takes into account relevant information including technological developments relating to energy use or energy efficiency of set-top boxes and network equipment—just as does the CEC.

Because of our national delivery platforms, DIRECTV and EchoStar are both actively involved in the DOE proceeding and believe that the comprehensive nature of the process is preferable to a state-by-state approach that the CEC process represents.

Action on this issue by the CEC is unnecessary in light of the federal rulemaking. It is also wasteful to the extent that California taxpayer, ratepayer, and customer monies would be spent in pursuit of such a duplicative regulation. We urge the Commission to defer to the federal rulemaking already underway and participate directly and actively in that rulemaking—the same rulemaking in which interested parties to this rulemaking are already engaged.

California Regulation of Satellite Set-Top Boxes Would Be Preempted by Federal Law.

Attempted regulation of satellite set-top boxes would be especially wasteful because it would be preempted by federal law. Of course, if and when DOE declares set-top boxes to be "covered products" for purposes of EPCA, state energy regulation of those products is *automatically* preempted, absent a waiver which would be difficult for the State to obtain. 42 U.S.C. § 6297.

Moreover, Federal communications law also preempts CEC's proposed activities in this area. In enacting the 1996 Telecommunications Act, Congress intended for "[f]ederal jurisdiction over DBS service [to] ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service." Communications Act of 1995, H.R. Rep. 104-204 at 123 (1995), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt204/pdf/CRPT-104hrpt204-pt1.pdf. It thus promulgated what is now Section 303(v) of the Communications Act, which grants the FCC exclusive jurisdiction vis-à-vis the states over "the provision of direct-to-home satellite services." 47 U.S.C. § 303(v). This, quite plainly, would preempt any attempt by California to regulate satellite set-top boxes.[4]

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[4] The California Attorney General issued an opinion several years ago finding that Section 303(v) preempts only regulation of "technological processes" involved in providing satellite service to consumers, as opposed to contractual and other aspects of the service. Op. of the Cal. A.G., No. 05-207 (rel. Dec. 22, 2005), available at http://ag.ca.gov/opinions/pdfs/05-207.pdf. Even assuming this interpretation would survive judicial scrutiny, the proposed regulation of set-top box power usage would still fall squarely within the field of preemption. Satellite

Calculated Benefits of Regulations Are Not Supported by Current Data or by Future Trends.

At the CEC Workshop, NRDC presented results of a study that was flawed in a number of respects. For example, it focused too heavily on set-top boxes that do not represent the current stock (many of which have not been manufactured for years), it failed to adjust data for multi-room set-top box models that were included in the study, and in many cases it included energy consumption from components other than the set-top box itself. The NRDC then presented a "back of the envelope" calculation of the possible benefit of a regulation upon stock turnover. If this analysis had started with currently manufactured models instead of circa-2006 models, however, this benefit calculation would have been smaller by a factor of five. Similarly, the PG&E analysis presented at the workshop was flawed because it was based on study data from 2006, which (for example) did not capture changes to set-top box features for the mandated US Digital TV transition.

Most significantly, studies by NRDC and PG&E made false assumptions that HD-DVR set-top boxes would be required at more and more TVs which, we believe, lead to inaccurately high projections of future energy needs. DIRECTV and EchoStar have no intention to promulgate such costly subscriber configurations as those assumed by NRDC and PG&E and used as a rationale for regulation. DIRECTV[5] and EchoStar[6] each have multi-room architectures in place today, and beginning this year are deploying new multi-room HD-DVR set-top box architectures in which a single HD-DVR set-top box is networked to either multiple low power "client" set-top boxes or directly to the television. These multi-room architectures result in significant household energy savings, save service providers money, and improve subscribers' enjoyment of their TV services.

DirecTV and EchoStar Encourage CEC to support the EPA Energy Star Set-top Box Program.

All DIRECTV set-top box receivers produced since DIRECTV joined the Set-Top Box program upon its reinstatement in January 2009 comply with the Version 2 ENERGY STAR guidelines and carry the ENERGY STAR label: this includes the full range of customer devices, including basic standard definition (SD) boxes, Digital Video Recorder (DVR), High Definition (HD) and HD-DVR products. Furthermore, about 70% of EchoStar/DISH Network set-top boxes currently installed in California households meet the energy requirements of the ENERGY STAR V2 Set-top Box Program. The ENERGY STAR Version 3 program, which became effective on September 1, 2011, requires an average energy reduction of up to 30% as compared to the Version 2 program which it has replaced. DirecTV has already qualified five set-

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set-top boxes play an absolutely critical role in the "technological processes" that allow satellite service providers to offer consumers advanced services, such as video on demand and a full spectrum of interactive features. Placing limitations upon the operation of that equipment would affect these "technological processes" just as much as regulating the satellites themselves would. Accordingly, the State of California lacks authority to impose such regulations on this "national, interstate" satellite service even under a narrow reading of Section 303(v).

[5] DIRECTV multi-room architecture: http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=578966.

[6] EchoStar multi-room architecture: http://www.satelliteconsumer.com/blog/tag/xip-813/.

top boxes for ENERGY STAR Version 3, and expects to qualify an additional three products by year-end. Industry supports the ENERGY STAR program because the program rewards energy efficiency innovation, accelerates deployments through the service provider program, and is flexible enough to accommodate market, technological, and consumer requirements. DIRECTV and EchoStar recommend that the CEC (and California IOUs) embrace the EPA ENERGY STAR Program for set-top boxes by working with service providers to develop programs that increase deployments of qualified products and awareness of ENERGY STAR among consumers of MVPD services and products.

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DIRECTV and EchoStar appreciate this opportunity to present our views and concerns. In light of the concerns raised above, however, DIRECTV and EchoStar urge the Commission to abandon this rulemaking. We encourage the Commission to defer to the Department of Energy as it develops national rules and regulations concerning the energy efficiency of set-top boxes and network equipment.

Respectfully Submitted,

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