

May 26, 2016

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington DC 20554

Re: Ex Parte Communication, MB Docket Nos. 15-216, 10-71

Dear Ms. Dortch:

DISH Network Corporation, the nation's fourth largest pay TV distributor,<sup>1</sup> complained recently in Commission meetings that the "retransmission consent regime is broken" because broadcasters are using consumers "as sacrificial pawns."<sup>2</sup> This assertion is remarkable coming from DISH, the communications industry's ultimate regulatory profiteer and catalyst for half of all retransmission consent disputes. The Commission should see DISH's retransmission consent advocacy – and that of its front group, the American Television Alliance (ATVA) – for exactly what it is: another in a long string of attempts to manipulate the Commission's good intentions to gain competitive advantages. The most effective way for the Commission to reduce retransmission consent disputes is to close its good faith negotiation proceeding and instruct DISH to work at least as hard on reaching retransmission consent agreements as it has on seeking regulatory favors in Washington.

DISH has a long and sordid history of bending and attempting to bend laws and rules to its advantage. Fortunately, courts have not viewed these actions favorably. For example, in 2006, the Eleventh Circuit Court of Appeals determined that DISH had shown a pattern and practice of violating the law restricting retransmission of distant broadcast signals "in every way

---

<sup>1</sup> As measured by subscribers and accounting for the recently approved mega-merger of Charter Communications, Time Warner Cable and Bright House Communications, which created the third-largest multichannel video programming distributor (MVPD) in the country. The only other larger MVPDs are the combined AT&T/DirecTV and Comcast. See Mike Farrell, "Eat or Be Eaten: Consolidation Creates A Top-Heavy List of 25 Largest MVPDs," Multichannel News, at 8-10 (Aug. 17, 2015).

<sup>2</sup> *Ex Parte Presentation* of DISH Network Corporation, MB Docket No. 15-216, *et al.*, at 2 (May 9, 2016).

1771 N Street NW  
Washington DC 20036 2800  
Phone 202 429 5300

imaginable.”<sup>3</sup> The appeals court found “no indication” that DISH “was ever interested in complying” with the law,<sup>4</sup> after the lower court found that DISH had knowingly delivered out-of-market distant signals illegally to hundreds of thousands of subscribers.<sup>5</sup>

Add to that a 2009 lawsuit for improperly marketing, promoting and selling its services,<sup>6</sup> a 2014 lawsuit brought by the Department of Justice against DISH, on behalf of the Federal Trade Commission, for making more than 55 million calls in violation of the Telephone Consumer Protection Act,<sup>7</sup> and a 2015 multi-million-dollar settlement related to allegations it misled customers about prices.<sup>8</sup> As a cover story in *The Hollywood Reporter* confirmed, “DISH employees, adversaries and analysts say no one exploits the judicial system like [DISH’s CEO] does to gain a competitive advantage.”<sup>9</sup>

DISH’s exploits at the FCC, however, make its judicial follies seem tame. The most recent apple of its regulatory arbitrage eye has been spectrum. Just last year, the Commission sanctioned DISH for attempting to pervert a program designed to benefit small companies to gain an unwarranted discount in the AWS-3 auction. After an investigation, the Commission determined that two of the auction’s biggest winners– SNR Wireless and Northstar Wireless – were nothing more than shell companies under DISH’s *de facto* control. Accordingly, the Commission eventually denied DISH billions of dollars of bidding discounts and DISH, in turn, selectively defaulted on certain of its winning bids.<sup>10</sup>

DISH’s AWS-3 arbitrage attempt comes on the heels of two successful forays into using the Commission to create corporate value. For example, in 2012, after intense pressure and a litany of buildout promises from DISH, the Commission, overnight, more than doubled the value

---

<sup>3</sup> *CBS Broad., Inc. v. EchoStar Communs. Corp.*, 450 F.3d 505, 527 (11th Cir. 2006) (EchoStar was the parent company of DISH Network at the time. The two companies have since demerged.).

<sup>4</sup> *Id.*

<sup>5</sup> See *CBS Broad., Inc. v. EchoStar Communs. Corp.*, 276 F. Supp. 2d 1237, 1249 (S.D.Fla. 2003).

<sup>6</sup> See Steve Raabe, “Dish Network to pay \$5.99 million in suit,” *The Denver Post* (July 17, 2009).

<sup>7</sup> The U.S. District Court for the Central District of Illinois, in December 2014, granted a partial summary judgment against DISH in the case. See Federal Trade Commission, Press Release, “Court Grants Partial Summary Judgment in FTC Case Against Dish Network, Finding the Company Liable for Tens of Millions of Telemarketing Violations” (Jan. 21, 2015), available at: <https://www.ftc.gov/news-events/press-releases/2015/01/court-grants-partial-summary-judgment-ftc-case-against-dish>. See also Megan Geuss, “DOJ and 4 states want \$24 billion in fines from Dish Network for telemarketing,” *ArsTechnica.com* (Jan. 20, 2016) (“Four states and the US Department of Justice (DOJ) are seeking up to \$24 billion in fines from Dish Network after a judge ruled that the company and its contractors made more than 55 million illegal telemarketing calls using recorded messages and phoning people on do-not-call lists.”).

<sup>8</sup> See Howard Pankratz, “Dish will pay \$2M to settle claims consumers were misled about prices,” *The Denver Post* (Jan. 2, 2015).

<sup>9</sup> Eriq Gardner, “Dish Network’s Charlie Ergen Is the Most Hated Man in Hollywood,” *The Hollywood Reporter* (April 2, 2013).

<sup>10</sup> See *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, Memorandum Opinion and Order, 30 FCC Rcd 8887 (2015).

of DISH's 2 GHz spectrum by converting it from satellite to terrestrial use.<sup>11</sup> DISH unabashedly assured the Commission that "it will aggressively build out a broadband network to provide competitive choice and innovative offerings to American consumers."<sup>12</sup> Four years later, DISH has by all accounts made no serious efforts to keep its word. The spectrum continues to lie fallow.

Likewise, in 2013, DISH twisted the Commission's arm into granting a significant extension of the buildout deadlines for the 700 MHz E Block licenses it acquired in 2008<sup>13</sup> and a one-year extension of the build-out deadlines for its AWS-4 licenses.<sup>14</sup> To get what it wanted, DISH leveraged the Commission's desire for 700 MHz band interoperability and its concerns about the success of the H Block spectrum auction scheduled for 2014. DISH had been standing in the way of meaningful 700 MHz interoperability because its E Block licenses, zoned for high-power operations, would have caused interference throughout the lower 700 MHz bands.<sup>15</sup> After initially opposing the change from high to low power for the E Block and feigning yet again that it had big plans for that long fallow spectrum (despite not using it in any way for five years), DISH "relented" and agreed to lower-power operations in exchange for significant buildout extensions for all of its E Block licenses.<sup>16</sup> The Commission also extended deadlines for DISH's AWS-4 spectrum after DISH agreed to participate in the H Block auction (which it won unopposed) and after DISH claimed it needed more time and flexibility to "pursue new strategic initiatives that will facilitate its entry into the wireless market."<sup>17</sup>

And what does the Commission have to show for benefitting DISH and for trusting that it would follow through on its promises to make use of the spectrum? A competitive fifth major wireless carrier? Hardly. A new, experimental LTE-broadcast system? Seems like a fantasy today. Instead, the Commission has a company sitting on 77 MHz of mid-band spectrum with no real plans to build networks or otherwise utilize it commercially. In hindsight, DISH's maneuvering was apparently only intended to buy itself more time to pursue an arbitrage opportunity.

That brings us back to DISH's latest ploy to exact regulatory goodies. This time, DISH is claiming that broadcasters are treating consumers poorly by refusing to grant retransmission consent to

---

<sup>11</sup> See *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102 (2012).

<sup>12</sup> Comments of DISH Network Corporation, WT Docket No. 12-70, *et al.*, at 18 (May 17, 2012).

<sup>13</sup> *Promoting Interoperability in the 700 MHz Commercial Spectrum*, *et al.*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122, 15147 (2013) ("700 MHz Interoperability Order"); see also Dish Network Letter to Chairwoman Mignon Clyburn, WT Docket No. 12-69 (Sept. 10, 2013) ("This regulatory flexibility and certainty is critical to DISH's successful deployment of a terrestrial broadband network, which depends upon its ability to fully utilize both 700 MHz and AWS-4 spectrum and coexist with future adjacent operators in the H Block and portions of the proposed AWS-3 bands.").

<sup>14</sup> *DISH Network Corp. Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) of the Commission's Rules and Request for Extension of Time*, Memorandum Opinion and Order, 28 FCC Rcd 16787 (2013); see also DISH Network, Petition for Waiver of Sections 27.5(j) and 27.53(h)(2)(ii) of the Commission's Rules and Request for Extension of Time, WT Docket No. 13-225 (Sept. 9, 2013) ("DISH AWS-4 Petition").

<sup>15</sup> 700 MHz Interoperability Order at ¶16.

<sup>16</sup> *Id.* at ¶¶55-59.

<sup>17</sup> DISH AWS-4 Petition at 3.

MVPDs when acceptable terms are not reached.<sup>18</sup> DISH and ATVA have implored the Commission to craft a host of new good faith rules that will quell what they characterize as a surfeit of broadcaster bad behavior. Never mind, says DISH, that it alone was involved in half of all retransmission consent disputes in 2015.<sup>19</sup> Only DISH has the gall to approach the Commission seeking favors when it is the primary driver of disputes. But DISH is counting on the Commission to overlook its conduct and instead focus on fixing a “problem” that DISH, with help from ATVA, manufactured and amplified. It is the ultimate irony that DISH, after years of engaging in bad faith behavior that blocked the Commission’s ability to serve the interests of consumers, now insists that the FCC must handcuff broadcasters in order to protect consumers.

It is time for the Commission to proclaim itself closed for business for those who seek regulatory rewards for their own bad behavior. DISH needs a time out. Its documented history of serial duplicity strongly suggests DISH is willing to say and do anything necessary to gain a regulatory advantage. On the issue of retransmission consent, that means creating disputes, playing the role of a victim and pleading with the Commission to limit how broadcasters can negotiate so that companies like DISH can pay less and gain more. The many broadcasters that have never had a retransmission consent impasse with any MVPD other than DISH, and have seen DISH’s sleight-of-hand up close, are all too familiar with this company’s disingenuous behavior.<sup>20</sup>

There is simply no question that if the Commission ultimately decides to change the good faith rules in a manner that disadvantages broadcasters, it will benefit players like DISH most of all. DISH has repeatedly shown that it will read (and bend) Commission rules in the most self-serving manner. Opening the door to more good faith complaints is the perfect invitation for DISH to abuse the system (as it had done in the past),<sup>21</sup> to harass broadcasters, especially smaller ones, into submission, and to yet again exploit the Commission’s honorable intentions for its own selfish gains.

Respectfully submitted,

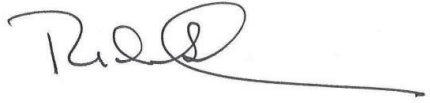
---

<sup>18</sup> See, e.g., Reply Comments of DISH Network L.L.C., MB Docket No. 15-216 (Jan. 14, 2016); see also, Comments of the American Television Alliance, MB Docket No. 15-216 (Dec. 1, 2015).

<sup>19</sup> See Atif Zubair, *2015 retrans roundup: Industry consolidation leads to larger renewals, high-profile disputes*, SNL Kagan (Jan. 22, 2016).

<sup>20</sup> See, e.g., *Ex Parte* Communication on behalf of Morgan Murphy Media, MB Docket Nos. 10-71, 12-1 (Aug. 18, 2015) (pointing out that DISH engaged in certain negotiating tactics with Morgan Murphy that DISH simultaneously complained to the FCC constituted bad faith when allegedly engaged in by a different broadcaster in a dispute with DISH).

<sup>21</sup> In one of its few retransmission consent good faith decisions, the Commission found that EchoStar, in bringing a good faith complaint against a broadcaster, had “failed in its duty of candor to the Commission” and admonished EchoStar for “an abuse of the Commission’s processes.” *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070, 15075-76 (2001) (also finding that Young Broadcasting had not violated its duty to negotiate in good faith).

A handwritten signature in black ink, appearing to read 'Rick Kaplan', with a long horizontal flourish extending to the right.

Rick Kaplan  
General Counsel and Executive Vice President  
Legal and Regulatory Affairs  
National Association of Broadcasters