

September 21, 2016

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42; Commercial Availability of Navigation Devices, CS Docket No. 97-80*

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, EchoStar Technologies L.L.C. ("EchoStar") and DISH Network L.L.C. ("DISH") submit this letter summarizing the meetings below on September 19, 2016 regarding the above-captioned proceeding:

- A meeting with Gigi Sohn, Counselor to Chairman Wheeler; Jessica Almond, Legal Advisor, Media, Public Safety and Enforcement for Chairman Wheeler; Scott Jordan, Chief Technology Officer (by telephone); John Williams, Senior Counselor to the General Counsel; Eric Feigenbaum, Director of Outreach and Strategy, Office of Media Relations; and Stephen Klein, Legal Intern. EchoStar was represented by Jennifer Manner, Chris Tirpak, and Michael Nilsson (Harris, Wiltshire and Grannis LLP ("HWG"), outside counsel for EchoStar). DISH was represented by Alison Minea and Hadass Kogan.
- A meeting with Howard Symons, General Counsel; John Williams, Senior Counselor to the General Counsel; and Marilyn Sohn, Deputy Associate General Counsel (by telephone). EchoStar was represented by Jennifer Manner, Chris Tirpak, and Michael Nilsson, HWG. DISH was represented by Alison Minea and Hadass Kogan.
- A meeting with David Grossman, Chief of Staff and Media Policy Advisor for Commissioner Clyburn. EchoStar was represented by Jennifer Manner, Chris Tirpak, and Michael Nilsson, HWG. DISH was represented by Alison Minea and Hadass Kogan.
- A meeting with Robin Colwell, Chief of Staff and Senior Legal Advisor, Media for Commissioner O'Rielly. EchoStar was represented by Jennifer Manner, Chris Tirpak, and Michael Nilsson, HWG. DISH was represented by Alison Minea and Hadass Kogan.

Consistent with EchoStar and DISH’s comments, replies, and *ex parte* filings (most recently on September 8, 2016),¹ the parties explained that the Commission, among other things, has failed to provide adequate notice in the record to support new set-top box regulations applicable to direct broadcast satellite (“DBS”) providers.

As all parties in this proceeding seem to agree, satellite multichannel video programming distributor (“MVPD”) systems use a one-way architecture and thus must deliver their services in a fundamentally different way than do cable and telco MVPDs. In order to perform many of the functions provided by cloud-attached servers in a two-way system (such as cable), satellite operators in a one-way architecture must support those functions in the set-top box in each subscriber’s home.

Both the Downloadable Security Technical Advisory Committee (“DSTAC”)² and the *Notice* expressly recognized that “DBS providers specifically will be required to have equipment of some kind in the home to deliver the three Information Flows over their one-way network.”³ Yet, having recognized that the only way for satellite carriers to comply with the proposed rules would be to deploy such a gateway device, and despite clear guidance from the DSTAC that additional work is needed,⁴ the *Notice* did not seek comment on the issues related to such a device, or propose actual rules to govern its design and operation.

EchoStar and DISH raised this gateway device issue and many others in their initial comments and reply comments—as well as in several *ex parte* submissions prior to this week.⁵

¹ See, e.g., Letter from Jennifer Manner, EchoStar, and Alison Minea, DISH, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 8, 2016) (“*DISH/EchoStar September 8 Ex Parte*”).

² See, e.g., DSTAC WG3 Report at 35, Aug. 28, 2015 (“in order to provide a uniform mechanism for competitive navigation device integration, some form of gateway device will continue to remain a practical necessity for unidirectional distribution networks under any security scheme suggested that complies with the DSTAC’s charter”), available at <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>.

³ See *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-42 & CS Docket No. 97-80, FCC 16-18, ¶ 65 (rel. Feb. 18, 2016) (“*Notice*”).

⁴ DSTAC WG3 report at 13 (“Specifications would need to be developed to address how this intermittent, unreliable communications path would function in a standard way. Would there be one box with IP connectivity that would proxy for other boxes in the home? Would each box have its own IP connection through a customer-provided gateway? How would IP connectivity be established and maintained in a secure or reliable manner? These would be important factors that would need to be decided upon for the design of such a DBS gateway.”)

⁵ Letter from Jeffrey Blum, DISH, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (May 9, 2016); Letter from William Wiltshire, Harris, Wiltshire & Grannis LLP, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (June 8, 2016) (meeting with Media Bureau, OET, OGC); Letter from William Wiltshire, Harris, Wiltshire & Grannis LLP, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (June 30, 2016) (meeting with OET); *DISH/EchoStar September 8 Ex Parte*; Letter from Jennifer Manner, EchoStar, and Alison Minea, DISH, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 19, 2016) (meeting with Media Bureau).

Yet the record reflects *no* input from other parties to address these issues with any specificity. The only meaningful material in the record about how any new rules might apply to one-way DBS systems consists of the basic questions that EchoStar and DISH have been asking all along. Below are some of the fundamental concerns that EchoStar and DISH have raised during this proceeding, including in our *September 8 ex parte*:

1. Implementation of either the FCC's original proposed rules in the *Notice* or an apps-based regime will require a DBS gateway device in the home. DISH is required by the terms of its licenses with content providers to, among other things, detect and enforce restrictions on subscriber usage, and is able to do so because it provides (directly or through specific business agreements) all navigation devices. How will the FCC rules address such contractual requirements? Will it require DISH and others to abrogate their existing obligations in order to comply with new rules and how will the FCC address this? *As an initial matter, DISH and EchoStar are unaware of any statutory authority the Commission could rely on to require such abrogation. Regardless of the authority issue, DISH and EchoStar cannot estimate the feasibility, cost, burden, and/or consumer impact associated with complying with any new rules without knowing the answer to these questions. There is no input on this issue in the record upon which the Commission could approve final rules.*
2. Since a gateway device is required for satellite, will DBS providers be able to charge for the gateway device? What functionality can the gateway device include? Can it include premium services, like a DVR? *As an initial matter, DISH and EchoStar are unaware of any statutory authority the Commission could rely on to limit DISH's ability to make these offerings to its customers, or compel DISH and EchoStar to include or exclude certain functionality in any gateway device. Regardless of the authority issue, DISH and EchoStar cannot estimate the feasibility, cost, burden, and/or consumer impact associated with complying with any new rules without knowing the answer to these questions. There is no input on this issue in the record upon which the Commission could approve final rules.*
3. Digital rights management ("DRM") systems are designed to work with a securely managed, centralized license server. Not all DRM systems, however, have a license server that can be embedded in a unidirectional, non-Internet-connected DBS gateway. What entity should the FCC require to be responsible for managing DRM, trust infrastructure, system requirements and licensing among MVPDs, device manufacturers, DRM providers, and consumers? For example, when a third party manufacturer has chosen an encrypted media extensions ("EME") DRM that does not support a DBS gateway embedded solution, what will happen? What labeling is the FCC proposing to inform consumers the device will not work on a unidirectional system? Should third party manufacturers be responsible for using DRM software that supports a DBS gateway? *DISH and EchoStar do not know how necessary DRM software would work on non-connected boxes and, thus, cannot estimate the feasibility, cost, burden, and/or consumer impact associated with complying with any new rules without knowing the answer to these questions.*

4. How will third party devices running HTML5 apps (or any apps) and the associated EME DRM interfaces be updated and maintained by manufacturers in the event of, e.g., DRM breaches or critical updates? Will this be the responsibility of the device manufacturer? What remedy will the consumer have when the manufacturer no longer supports the device but DRM updates are needed to comply with programming contract provisions? If the manufacturer is responsible for updating the DRM software, how long will they have to comply? Who is responsible for the costs of updating the DRM software? If the manufacturer fails to properly update the DRM software and the MVPD receives customer complaints because they cannot receive their programming, can the MVPD seek compensation from the manufacturer for incurring costs associated with dealing with customer complaints? *DISH and EchoStar do not know how non-connected devices would receive updates, and, thus, cannot estimate the feasibility, cost, burden, and/or consumer impact associated with complying with any new rules without knowing the answer to these questions.*

5. When a critical security update is needed, how will third party device and DRM software updates be distributed in a unidirectional DBS system? In other words, if the third party navigation device is not connected to the Internet, what rules does the FCC plan to adopt that will govern security and other important updates to devices that may be connected to DISH's one-way satellite TV service? *DISH and EchoStar do not know how non-connected devices would receive security updates, and, thus, cannot estimate the feasibility, cost, burden, and/or consumer impact associated with complying with any new rules without knowing the answer to these questions. There is no input on this issue in the record upon which the Commission could approve final rules.*

If the Commission nonetheless plans to adopt final rules that address these questions, as well as many other questions DISH and EchoStar have raised in their filings, then DISH and EchoStar will have had no opportunity, as required by the Administrative Procedures Act ("APA"), to provide feedback/comment before any rules become final.

* * *

The APA requires the Commission to "describe the range of alternatives being considered with reasonable specificity;" otherwise, "interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making."⁶ Moreover, agencies must consider substantial arguments made on the record in order to make a "rational connection between the facts found and the choice made."⁷

⁶ *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) (internal citations omitted).

⁷ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made. . . . Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.'").

Accordingly, if the Commission chooses to adopt new set-top box regulations in this proceeding, it must at a minimum issue a further notice of proposed rulemaking to allow public comment on how any such regulations would apply to satellite MVPDs.

Respectfully submitted,

/s/ Jennifer Manner
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/s/ Alison A. Minea
Director and Senior Counsel, Regulatory
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DISH Network L.L.C.

cc: Gigi Sohn
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Enclosure