

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

In the Matter of)	
)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014)	MB Docket No. 15-216
)	
)	
Totality of the Circumstances Test)	

REPLY COMMENTS OF DISH NETWORK L.L.C.

DISH Network L.L.C. (“DISH”) submits these reply comments in response to the Notice of Proposed Rulemaking (“*Notice*” or “*NPRM*”) in the above-captioned proceeding in support of the Commission’s review of the good faith rules for retransmission consent negotiations.¹

Consistent with the directive provided by the STELA Reauthorization Act of 2014 (“*STELAR*”), DISH urges the Commission to update its rules governing the totality of the circumstances test for good faith retransmission consent negotiations to better reflect current marketplace considerations.

An overhaul of the good faith rules is critical, because the rules on the books today² are outdated and not nearly strong enough to combat the variety of ways that a broadcaster can exercise its leverage to extract higher fees and force blackouts. Indeed, in passing *STELAR*, Congress recognized the need to address the broken retransmission consent regime by, among

¹ See Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, *Notice of Proposed Rulemaking*, FCC 15-109, MB Docket No. 15-216 (rel. Sept. 2, 2015).

² 47 C.F.R. §76.65.

other things, instructing the Commission to “conduct a ‘robust examination’ of practices used by parties in retransmission consent negotiations.”³

To effectuate this review, DISH supports fully the proposed updates to the good faith rules submitted by the American Television Alliance (“ATVA”), and urges the Commission to define the seven negotiating tactics identified by the ATVA as *per se* bad faith.⁴ These include: online blocking, forced bundling, withholding retransmission consent leading up to and/or during marquee events, preventing the importation of out-of-market signals, ceding the right to negotiate, imposing equipment restrictions, and charging for subscribers that receive service via an off-air antenna.⁵ In support of these proposals, DISH includes the attached Declaration of Melisa Ordonez, Director of Local Programming for DISH, which provides evidence and data related to DISH’s experiences negotiating with broadcasters who have engaged in these tactics.

Respectfully submitted,

/s/
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January 14, 2016

³ *NPRM* ¶ 1.

⁴ *See* Comments of the American Television Alliance, MB Docket No. 15-216 (Dec. 1, 2015) (“ATVA Comments”).

⁵ *Id.*

DECLARATION OF MELISA ORDONEZ

1. I, Melisa Ordonez, being over 18 years of age, swear and affirm as follows:
2. I make this declaration using facts of which I have personal knowledge and based on information provided to me, and in connection with the Federal Communications Commission's ("FCC") proceeding implementing Section 103 of the STELA Reauthorization Act of 2014 ("STELAR").
3. I am currently the Director of Local Programming for DISH. In that capacity, I am responsible for negotiating retransmission consent agreements on behalf of DISH with every local broadcast station in the United States. I have been with DISH's programming team since November 2007.
4. During my eight years with DISH, I have worked as the lead negotiator in the company's efforts to negotiate renewals of its retransmission consent agreements with every local broadcast station in the country. I have negotiated a retransmission consent agreement with each local broadcast station at least two times, and I have negotiated with some broadcast stations three times.
5. During my time negotiating with local broadcast stations on behalf of DISH, I have increasingly seen broadcasters engage in anti-competitive and anti-consumer tactics when seeking to reach a deal for carriage.
6. In particular, I have seen a rise in broadcasters engaging in the following behaviors to increase their leverage when negotiating for retransmission consent agreements with DISH: forced bundling; threatening to withhold retransmission consent leading up to and/or during marquee events; preventing the importation of out-of-market signals; ceding the right to negotiate; imposing equipment restrictions on lawful functionalities;

and charging for subscribers that receive service via an off-air antenna. I believe the FCC should, at a minimum, define these tactics as *per se* violations of the Commission's rules governing good faith retransmission consent negotiations.

7. **Forced Bundling:** In at least 75 percent of the retransmission consent agreements that I negotiate, broadcasters require DISH to carry at least one multicast, cable channel, or duplicative station as a condition of obtaining retransmission consent for the broadcaster's primary signal. In the last year alone, more than 65 broadcasters have required DISH to carry at least one additional station in order to receive consent for retransmitting the station's primary signal.
8. **Marquee Events:** In my experience, it is extremely common for a broadcaster to negotiate a contract expiration during seasons that are tied to popular sporting or other television events. Most broadcasters negotiate for their contracts to expire in the fall (keyed to the football season), in March (keyed to the college basketball season), in the end of January (keyed to the airing of the Super Bowl), or in May (keyed to broadcast network season finale airings). As a result, only about five percent of the retransmission consent agreements that DISH enters into with broadcasters actually expire over the summer, when there are minimal marquee events. The expiration of a retransmission consent agreement so close to marquee events provides broadcasters with increased leverage during negotiations, because they are able to threaten to deliberately cut off consumers from highly rated events.
9. **Importation of Out-of-Market Signals:** In my experience, broadcasters are not willing to grant any sort of waiver sufficient to permit households not qualifying as "unserved households" to receive same-network distant signals in cases where retransmission

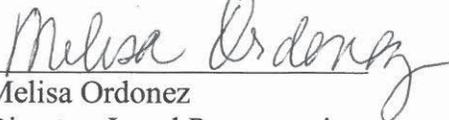
consent negotiations continue past the contract expiration and thus broadcaster signals are blacked out to customers. Several of DISH's agreements with broadcasters expressly prohibit DISH from importing or exporting broadcast signals at any time, or place limitations on certain distribution rights (including DISH's right to retransmit a station within its significantly viewed area). The stations included in these agreements account for at least 30 percent of all broadcast stations DISH carries pursuant to retransmission consent. In cases where import/export rights are not expressly prohibited by contract, I have found it is because broadcasters are unwilling to entertain the idea of granting such waivers.

10. **Ceding the Right to Negotiate:** In the last year, DISH has encountered at least five different negotiations in which broadcasters have negotiated for broadcast stations that they do not own or control. The stations included in these negotiations account for at least 21 percent of all broadcast stations DISH carries under retransmission consent agreements. Broadcasters of varying sizes have engaged in such tactics.
11. **Equipment Restrictions:** DISH has been required to place limits on our subscribers' use of lawful devices and functionalities as a condition to reaching a retransmission consent agreement with a variety of large station groups. For example, broadcasters have required DISH to limit the DVR functionalities it provides to customers, including, among other things, placing limits on DISH's ability to provide legal AutoHop technology to our customers. A broadcast station group has also attempted to prohibit DISH from including technology in our set-top boxes that allows customers to access the broadcaster's signal over-the-air.

12. **Charging for Subscribers that Do Not Receive Service:** In my experience, it is common practice for station groups to demand that DISH pay per-subscriber fees for viewers of the broadcaster's retransmitted signal, as well as for DMA residents who choose to receive the broadcaster's station over-the-air in a given DMA.
13. All of the tactics described above provide broadcasters with additional market power in their negotiations with DISH, which enables them to threaten blackouts and raise prices dramatically.
14. FCC action to, at a minimum, define the tactics listed above as *per se* violations of the rules governing good faith retransmission consent negotiations will facilitate better negotiations, help lower prices for retransmission consent, decrease the likelihood of consumer blackouts, and serve the public interest.

The foregoing declaration has been prepared using facts of which I have personal knowledge and based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge, and belief.

Executed on January 14, 2016


Melisa Ordonez
Director, Local Programming
DISH Network L.L.C.