



June 8, 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:

On June 7, 2016, EchoStar Technologies L.L.C. ("EchoStar") and DISH Network L.L.C. ("DISH") met with FCC Chief Technologist Scott Jordan, Deputy Chief Economist Jonathan Levy, Antonio Sweet and intern Lainie Rowland of the Office of Strategic Planning and Policy; Media Bureau Chief Bill Lake, Deputy Chiefs Mary Beth Murphy and Michelle Carey, Associate Chief Nancy Murphy, and Chief Economist Susan Singer; Martha Heller, Chief of the Media Bureau's Policy Division; Assistant Division Chiefs Brendan Murray and Maria Mullarkey; Division attorney advisors Kathy Berthot and Lyle Elder; Media Bureau interns Andrew Manley, Kelsie Rutherford, Arian Attar, and Anne Russell; and John Williams, Matthew Collins, and Susan Aaron (by phone) from the Office of General Counsel.

EchoStar was represented by Jennifer A. Manner, Senior Vice President, Regulatory Affairs; John Card II, Director of Standards and Technology; and Deborah Broderon, Communications Regulatory Counsel and Director. DISH was represented by Alison Minea, Director and Senior Counsel, Regulatory Affairs.

In the meeting, EchoStar/DISH distributed the attached talking points. Consistent with its filings in this proceeding, EchoStar/DISH discussed the lack of notice and opportunity for meaningful comment by satellite providers on key provisions of the Commission's proposed competitive set-top box regime as required under the Administrative Procedure Act. We also reviewed the technological differences that would make the Commission's proposed competitive set-top box regime unworkable for satellite operators. EchoStar/DISH observed that the Commission's proposals could also degrade customer service and cause consumer confusion, and would be likely to result in customers being frustrated at the inability of their MVPD to solve basic problems with third party navigation devices.

This letter is submitted consistent with the Commission's ex parte rules.¹ Please direct any questions concerning this filing to the undersigned.

Sincerely,

/s/ Jennifer A. Manner

Jennifer A. Manner
Senior Vice President, Regulatory Affairs
EchoStar Technologies L.L.C.
11717 Exploration Lane
Germantown, MD 20876
301-428-5893

cc: Scott Jordan
Jonathan Levy
Antonio Sweet
Lainie Rowland
Bill Lake
Mary Beth Murphy
Michelle Carey
Nancy Murphy
Susan Singer
Martha Heller
Brendan Murray
Maria Mullarkey
Kathy Berthot
Lyle Elder
Andrew Manley
Kelsie Rutherford
Arian Attar
Anne Russell
John Williams
Matthew Collins
Susan Aaron

¹ 47 C.F.R. § 1.1206(b)(2).

The Record in the Competitive Set-Top Box Proceeding Demonstrates that Action is Unwarranted and Significant Open Issues Remain before Any Action Can Be Taken

June 7, 2016

The Video Market is Characterized by Competition

- DISH and EchoStar compete in a video market characterized by innovation and competition. In 1992, when Section 629 was enacted, the only options for viewing video programming were over-the-air broadcasting and analog cable systems. Today, consumers can choose from a wide array of viewing options, including facilities-based competitors such as Direct Broadcast Satellite (“DBS”) systems, telcos, and other overbuilders, as well as dozens if not hundreds of over-the-top video providers from a wide variety of competitors.
- Despite the robust competition and innovation described in the record so far, the FCC proposes a complex and incomplete regulatory plan for which there is no demonstrated need.
- The proposed competitive set-top box regime is unworkable for satellite operators, and flawed with respect to all MVPDs. The FCC’s proposal would threaten, as oppose to increase, competition in the video marketplace, harming consumers.

Technological Differences and Lack of Notice Mean the FCC Cannot Adopt Its Proposals for Satellite MVPDs

- Satellite MVPDs deliver their television service via a one-way transmission path. In order to perform many functions provided by two-way system networks, satellite operators must support those functions in the set-top box in each subscriber’s home. This means that some form of satellite gateway device must be available in each subscriber’s home in any regime mandating access for competitive set-top boxes.

- Despite this technological requirement for service, the FCC fails to take into account the very real issues associated with this gateway device that arise with respect to (among other things) Video on Demand (VOD), local advertising, and channel tuning, as well as the need for an interface that would allow both the satellite MVPD devices and the competitive devices to operate at once. Instead, the FCC ignores these issues in proposing a regime focused on two-way systems, ensuring that the Commission cannot adopt a workable solution for satellite MVPDs.
- The *Notice* also expects that all MVPDs will pass along identifying codes to enable third-party navigation devices to convey to consumers the programming that is available. The *Notice* contemplates the use of an “Entertainment Identifier Register ID”, which it characterizes as “a universal unique identifier system for movie and television assets.” Yet, only five U.S. MVPDs are members – and DISH is not a member. No such “universal” identifier exists, nor is there a credible regime in place to manage one.
- As such, the Commission has failed to provide the notice and opportunity for meaningful comment by satellite providers on key provisions of any competitive set-top box regime as required under the Administrative Procedure Act.

Serious Copyright and Contractual Liability Issues Exist

- Yet even putting aside satellite-specific issues, the regime proposed is flawed in several significant respects:
 - The *Notice* ignores potential contractual violations. A typical MVPD contract with a content owner generally permits the MVPD to deliver the content only to its end-user subscriber and devices under the control and security monitoring of

the MVPD, not to a third party. To the extent an MVPD is required to send programming streams to a third party, it could be construed as a violation of its contract.

- MVPDs deliver broadcast programming pursuant to statutory copyright licenses that specifically prohibit willful alteration “through changes, deletions, or additions” to the content of the signal. It is possible that alterations by third-party devices would trigger liability for MVPDs or manufacturers.
- The FCC’s proposals would affect the copyrights of MVPDs. Because most of the video programming that MVPDs provide is available across multiple platforms, MVPDs compete in substantial part on the basis of the “look and feel” of their services. Forcing MVPDs to pass along their service to be sliced and diced by third-party navigation devices would undermine basic copyright protections.
- When Congress authorizes the abrogation of traditional copyright protections, such as through the creation of a statutory license, it does so specifically. Yet Congress did not do so when it promulgated the navigation device provisions of Section 629 nor is such action “ancillary” to the FCC’s jurisdiction over navigation. Similarly, the FCC cannot force MVPDs to violate the contracts they have entered into lawfully.

The Proposed Rules Could Degrade Customer Service and Cause Consumer Confusion

- The proposed rules could dramatically degrade customer service and cause consumer confusion. The significance for a consumer of purchasing a piece of equipment is very different from that of subscribing to a service. The purchase of a set-top box is a one-time transaction. An *MVPD subscriber* has an ongoing relationship with her MVPD that

can last for years, and the profitability of that subscriber to the MVPD depends upon the longevity of that relationship. MVPDs thus have very strong incentives to offer a compelling product and to provide customer support.

- In the context of navigation devices, these differing relationships have real implications. When a subscriber has a problem with her MVPD service, it is often not entirely clear whether the problem originates in the network transmission, the navigation device, the in-home network, the remote control, or somewhere else entirely. However, because of the long-term nature of the relationship, the subscriber will likely call the MVPD.
- At present, the MVPD has comprehensive knowledge of the range of different set-top box models it provides and the technologies available in each one, which greatly streamlines the education process for customer service representatives and enhances their ability to resolve issues quickly. The MVPD cannot support a proliferating range of navigation devices from manufacturers that, by definition, have no relationship with the MVPD.
- Further, because third-party manufacturers typically have no ongoing relationship with purchasers of their equipment, they have no incentive to update devices as necessary to keep up with new features and functions introduced by MVPDs.
- Accordingly, adoption of the FCC's proposed regime will likely result in customers being frustrated at the inability of their MVPD to solve even the most basic problem with their navigation devices, no matter whom the manufacturer is.

There is No Demonstrated Need for FCC Action

- These problems would be insurmountable even if there were a demonstrated need for Commission action. Given that MVPDs, programmers, and over-the-top ("OTT") video

providers (among others) are offering services on more devices than ever before, consumers, competition, and innovation would be best served if the Commission did *not* intervene, but instead allowed these market-based forces to continue to drive the desired result.