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September 30, 2008

EX PARTE PRESENTATION

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

Re: **Retrans Quiet Period, *Ex Parte Presentation* in Dockets No. 00-96, 98-120**

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, DISH Network Corporation ("DISH Network") submits this letter summarizing ex parte presentations from yesterday and today in the above-referenced dockets. Eric Sahl, Brad Gillen and the undersigned met yesterday with Rick Chessen in Commissioner Copps' office, and Monica Desai, Eloise Gore, and Lyle Elder of the Media Bureau. Today, separate meetings were held with Commissioner Jonathan Adelstein and his legal advisor Rudy Brioché, Michelle Carey in Chairman Martin's office, and Rosemary Harold in Commissioner McDowell's office.

We expressed our support for a retrans quiet period to ensure that consumers do not lose programming as a result of retransmission consent disputes in the immediate time surrounding the February 2009 digital transition. We stressed that to be effective a retrans quiet period must begin no later than December 2008.

Respectfully submitted,

/s/ Linda Kinney
Linda Kinney

Enclosure

cc: J. Adelstein
R. Brioché
M. Carey
R. Chessen
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August 5, 2008

The Honorable Kevin Martin
Chairman,
Federal Communications Commission
445 12th Street, SW
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Re: Retransmission Consent Reform, Digital Transition Quiet Period Proposal, Docket Nos. 99-363, 07-198, 07-148

The Federal Communications Commission ("Commission") should not allow retransmission consent disputes to undermine the digital transition in February 2009. Small and mid-sized cable providers have requested that the Commission adopt a retransmission consent "quiet period" that would maintain the *status quo* during the fragile period surrounding the digital transition.[1] We agree. Adopting a quiet period for all pay TV providers would ensure that commercial disputes do not disrupt service to consumers and add to the confusion surrounding one of the most difficult technical and operational transitions in U.S. television history.[2] Indeed, failure to adopt a quiet period threatens to undermine the significant ongoing consumer education efforts undertaken by the federal government and private industry. After adopting the quiet period -- which merely shifts potential consumer disruption beyond the digital transition -- the Commission should move forward quickly to reform holistically the retransmission consent process.

Retransmission Consent System is Broken. In recent months, a number of broadcaster/pay TV provider disputes have resulted in public threats and takedowns with consumers losing access to popular programming. In each instance, the central issue has been demands by broadcasters for exponential increases in the size of retransmission consent fees. Indeed, retransmission consent fees have become big business: SNL Kagan projects that retransmission consent fees will reach $1 billion annually by 2010, a remarkable jump from last year's $340 million.[3] Nexstar alone has seen retransmission consent fees jump from $2.8 million for all of 2005 to $4.6 million in the first quarter of 2008 alone (or annualized at $18.4 million).[4] Such astronomical growth in broadcaster fees at the expense of the pay TV industry cannot serve the public interest.

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1 *Establishment of a Digital Transition Quiet Period for Retransmission Consent,* Petition for Expedited Rulemaking (filed Apr. 24, 2008) ("*Petition*").

2 *Id.,* fn 3 (noting that "Petitioners have no objection to extending the same rules to DBS retransmission consents negotiations, and it would make sense to do so.").

3 Mariach, Robert, "Broadcast's $1 Billion Pot of Gold," BROADCASTING AND CABLE (July 7, 2008) ("*$1 Billion Pot of Gold*").

4 *Compare* Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations, Congressional Research Service, CRS-34 (July 9, 2007) ("*CRS Report*") *to* NEXSTAR Broadcasting Group Inc. Earnings Conference Call, FD Wire, 2 (May 7, 2008).

A review of the demands by individual station groups demonstrates how anti-consumer the unchecked broadcaster practices have become. For instance, as noted by the Congressional Research Service, Sinclair recently sought hundreds of dollars in upfront fees per subscriber on top of $1.00 per month fees to access broadcast content. *CRS Report*, CRS-46. As broadcasters seek to extract higher and higher fees from pay TV providers, it is important to note that broadcasters still use public airwaves obtained for free and charge for content they provide over-the-air at no cost. This is also in stark contrast to how the broadcast industry is evolving on other platforms: broadcast content is increasingly made available to consumers online for free on an episode-by-episode basis, yet pay TV providers are required to pay escalating sums for the same content.

The Digital Transition is at Risk. Going forward, the demands – and the prevalence of disputes – will only increase in the time between now and the February digital transition. The American Cable Association accurately notes that thousands of retransmission consent agreements expire at the end of 2008.[5] Absent corrective Commission action, consumers will lose access to broadcast programming on pay TV platforms for days, weeks, or months immediately preceding and following the transition. Given the timing of agreements, this is most likely to happen in January 2009, weeks before the final February 2009 transition date. Despite the best efforts of pay TV providers to educate their consumers, commercial disputes resulting in takedowns of programming will be linked to the digital transition by consumers, causing confusion and potentially unnecessary expenditures of money on digital televisions or digital-to-analog converter boxes. The negative effects on a successful transition are being felt already: a few broadcasters have refused to participate – absent increased payment for digital rights – in the satellite industry's infrastructure efforts to transition over 1400 broadcasters from analog to digital. The Commission should require broadcasters to participate actively in the substantial transition efforts of the pay TV industry by allowing all pay TV providers to retransmit broadcasters' digital signal in place of their analog signal immediately. The focus of all affected industries should be on minimizing unnecessary disruption of broadcast services.

Digital Transition Quiet Period. We urge the Commission to establish a "quiet period" as proposed by mid-sized and small cable companies, which would preserve the status quo by requiring both broadcasters and pay TV providers to maintain their existing carriage agreements through May 31, 2009. *See e.g., Petition* at 13-18. This is a common sense and pro-consumer means to separate out digital transition-related disruptions from commercial disputes between broadcasters and pay TV providers. All broadcast stations carried on pay TV platforms today should be available beyond the transition to reduce consumer confusion at this critical time. This temporary bridge would help ensure a successful digital transition and allow both broadcasters and pay TV providers to focus their attention on transition-related issues, such as consumer education. Specifically, the commercial agreements and carriage terms between broadcasters and pay TV providers for analog signals would be transferred to the carriage of broadcasters' digital signals until such time as a new agreement between the parties can be reached. We hope this consumer protection can be in place in advance of the Wilmington, North Carolina, digital cutover in September, 2008.

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[5] Letter from Matthew M. Polka, ACA, to Chairman Kevin Martin, FCC (July 8, 2008).

Broader Review of Retransmission Consent Rules. The Commission should use this quiet period as an opportunity to revisit its retransmission consent rules and ensure that all pay TV providers and broadcasters have the regulatory tools and protections necessary for the operation of an equitable and fair market. The Congressional Research Service last year noted the reasonableness of a Commission "review of its retransmission consent complaint process." *CRS Report*, CRS-66. That review – some of which is ongoing in other fora – should focus on the following key issues:

Eliminate the Forced Bundling and Tying of Programming. The Commission should act swiftly in the wholesale programming proceeding to require broadcasters to offer each programming network on a stand-alone basis.[6] The opportunity to negotiate each individual broadcast and cable network property separately would help ensure that more equitable deals are reached for both broadcasters and pay TV providers.

Bolster the Good Faith Standard. The Commission should ensure that broadcast misconduct and anti-competitive and anti-consumer conduct is addressed sufficiently within the good faith requirement of the retransmission consent rules. Broadcasters too often view the current rules as providing no substantive check on their conduct in carriage negotiations, which leads to unreasonable price increases. Egregious conduct and demands of broadcasters should be restricted as clear violations of the good faith requirement in the Act. To protect consumers, the Commission should also consider adopting a standstill provision that would prevent the disruption of programming while the Commission reviews the merits of any good faith complaints, and should additionally examine the incorporation of binding arbitration into the retransmission consent process.[7]

Protect Competitive and Small Pay TV Providers. Only the largest cable providers have sufficient scope and penetration to negotiate a potentially fair carriage deal with broadcasters today.[8] Satellite companies, small cable companies, telephone companies, and cable overbuilders have little leverage to refuse the high fees demanded by broadcasters. Broadcasting & Cable explained recently that "[w]hen retrans[mission consent] fever first erupted several years ago, broadcasters targeted small cable operators, satellite TV and new entrants such as Verizon FiOS with the first wave of deals. These

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6 Comments of DISH Network, MB Docket No. 07-198, 3-4 (Jan. 4, 2008); Reply Comments of DISH Network MB Docket No. 07-198, 8 (Feb. 12, 2008).

7 We note that the Media Bureau found that it was without authority to grant "interim carriage … absent a finding of violation" of the Commission's good faith rules. *Mediacom Comm. Corp. v. Sinclair Broadcast Group, Inc.*, Order, DA 07-66, ¶ 3 (Jan. 12, 2007). The Bureau similarly found that it lacked authority to "require the parties to submit to binding arbitration." *Id.* In doing so, the Bureau did "strongly encourage" both parties to agree to binding arbitration. The Mediacom/Sinclair dispute was an adjudication, not a rulemaking. In light of the current broadcaster practices and the importance of the digital transition, the Commission has ample authority in a rulemaking setting to ensure that consumers are not adversely affected during the pendency of a Commission adjudication, and that its procedural rules encourage market-based efficient resolution of carriage disputes.

8 From public accounts, even the largest cable companies are now being forced by broadcasters to offer cash compensation for carriage for the first time, underscoring the inequities of today's system. *See e.g.*, Farrell, Mike, "Time Warner Cable Shares Take Another Hit," MULTICHANNEL NEWS (July 25, 2008).

newer companies lacked clout, either nationally or with the heft of concentration in any one local market, so they pay the highest per capita fees." *$1 Billion Pot of Gold*. In more recent deals, those disproportionately high fees are only getting larger. The imbalance in what major cable companies like Comcast and Time Warner Cable pay broadcasters compared to all other pay TV providers is striking. The Commission should ensure that retransmission fees do not adversely affect the ability of companies to compete effectively in the video market with dominant cable companies. The Commission should consider allowing all other pay TV providers to opt into the "market" rate agreed to by the broadcaster and incumbent major cable provider.

Investigate Broadcaster Use of Retransmission Consent Fees. It remains unclear how broadcasters use the windfall payments received from pay TV providers. Broadcasters should be required to provide the Commission with clear evidence and documentation that retransmission consent fees are used to increase the amount of locally based content available to communities. Moreover, the current regime creates the perverse incentive for broadcasters to maximize the number of households dependent upon pay TV providers (and corresponding retransmission consent fees) to view broadcaster content by limiting the reach of free over-the-air broadcasts. The different propagation characteristics of digital signals may only exacerbate this issue after the digital transition.

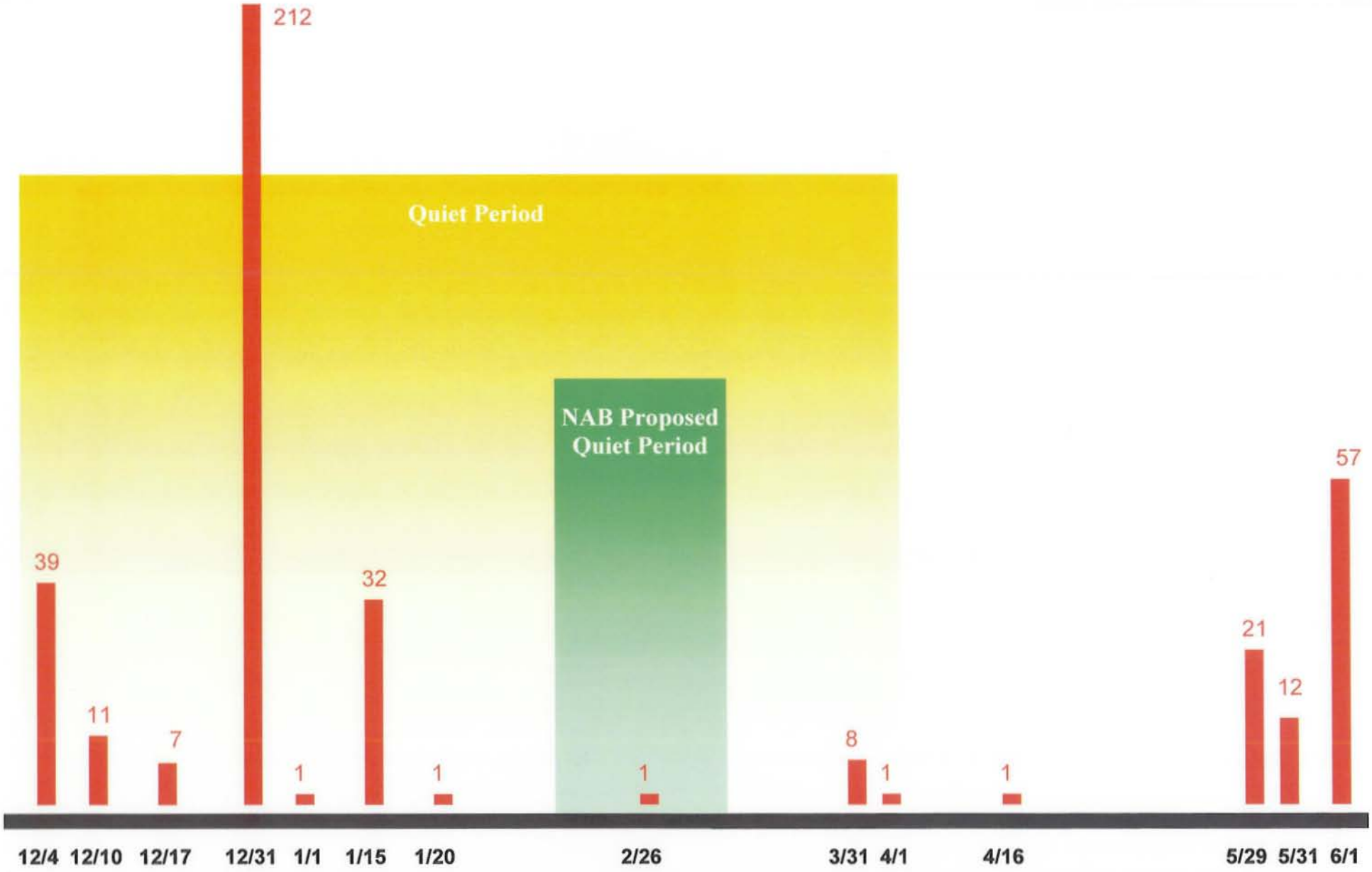
The Commission should take affirmative steps to ensure that the retransmission consent process does not place the digital transition at risk.

Respectfully submitted,

/s/ Linda Kinney
Linda Kinney
Vice President, Law and Regulation

cc: Commissioner Robert McDowell
Commissioner Deborah Tate
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Elizabeth Andrion
Krista Witanowski
Cristina Pauze
Amy Blankenship
Rudy Brioche
Rick Chessen
Monica Desai
Cathy Seidel
Rosemary Harold
Eloise Gore
Mary Beth Murphy
Steven J. Horvitz (Petitioners' Counsel)

DISH Network: Expiring Retransmission Consent Stations (12/1/08 to 6/1/09)



Of the 404 retrans stations with expiring DISH deals in the months surrounding the digital transition, NAB's proposed quiet period captures only a single station

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August 14, 2008

EX PARTE PRESENTATION

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Re: **Retrans Quiet Period, *Ex Parte Presentation* in Dockets No. 00-96, 98-120, 07-198, 07-148**

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, DISH Network Corporation ("DISH Network") submits this letter summarizing an ex parte presentation from yesterday in the above-referenced dockets. I had a telephone conversation with Eloise Gore of the Media Bureau advocating for a retrans quiet period to ensure that consumers do not lose programming as a result of retransmission consent disputes in the immediate time surrounding the February 2009 digital transition.

With respect to timing, I urged that the retrans quiet period be structured to capture as many potential retransmission consent disputes around the digital transition as possible to minimize any ill effect on a successful digital transition. Accordingly, the retrans quiet period should begin on December 15, 2008: any broadcast stations carried on pay TV platforms on that date should remain in place up to and through the transition. Both the cable and satellite industries have noted that a sizeable proportion of retransmission consent agreements will end in December 2008. As a practical matter, this means that programming negotiations about the continued carriage of broadcast stations on cable, telco and satellite systems will begin in earnest long before January 2009. Indeed, we are currently in active negotiations with numerous station groups and hope to have our digital deals done well in advance of the transition. Come February 17, however, retrans disputes may well be ongoing with programming unavailable to pay TV subscribers. As a number of parties have noted, the risk that those viewers misunderstand why channels are missing is quite high: consumers may wrongly assume that they are not ready for digital transition and take unnecessary steps and investments in new TVs, converter boxes, or other subscription services.

Yet, if the Commission were to begin the retrans quiet period some time in mid-January (or even later in February as NAB now suggests), the retrans quiet period would be of little consequence and would not protect against this identified (and agreed upon) harm to consumers. Specifically, come mid-January, broadcast stations might be taken down as part of retransmission consent disputes. Freezing the status quo at that point is too late – programming has already been dropped and would not be re-instated until a commercial agreement is reached between the broadcaster and the pay TV provider. DISH Network is

not aware of any instances in which broadcast stations have been dropped as a result of retransmission consent disputes and then returned to the pay TV provider line-up absent a new commercial agreement. The start of any retrans quiet period, therefore, should coincide with the likely starting point of retransmission consent disputes in mid-December.

As for the end point, DISH Network believes that the longer the separation between the February transition date and the end of the retrans quiet period the better for consumers. For that reason, we have been supportive of a May end date as proposed by mid-sized cable providers in April. That said, NAB's proposed March 4 end date may be a satisfactory compromise position as long as the retrans quiet period begins in mid-December.

Respectfully submitted,

/s/ Linda Kinney
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cc: E. Gore