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

In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming	)	MB Docket No. 07-269

COMMENTS OF DISH NETWORK L.L.C.

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DISH Network L.L.C. ("DISH") provides input on the Commission's annual review of the status of video competition. DISH has continued to improve and expand its satellite TV service this past year offering consumers a critical competitive and affordable pay TV option nationwide.

Despite the significant investment and success of competitive forces in the video industry – particularly the continued leadership position of satellite TV providers, the rise of major telco video offerings, and the growth in online video –dominant players remain. Cable companies still maintain dominant competitive positions in their territories, and have clear incentives to block competition from satellite and telco providers. The most effective means for cable companies to thwart video competition remains limiting access to vertically integrated programming. Network broadcasters have an even stronger hold over their markets, dictating carriage terms and pushing their own national cable networks on to pay TV platforms. The Commission should remain vigilant in its essential role to protect the inroads made by competitive video providers to date, and ensure that consumers continue to benefit from additional competitive choices and options going forward.

One clear opportunity to improve consumer choice in the video market this year is Congress's examination of Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"). Key provisions of that statute are scheduled to sunset this year. First, Congress has the opportunity to address the broken retransmission consent regime in its consideration of a new good faith standard, which expires at year's end. Broadcasters' escalating demands of cash for carriage for free over-the-air content have clear anti-consumer results. At a minimum, what conduct violates the "good faith" standard should be revisited, and key consumer protections, including a standstill provision, should be implemented.

Second, too many households are forced to receive local broadcast stations from designated market areas ("DMAs") that are not "local" or relevant to their lives. Technology has provided consumers with an increased and evolving ability to control when and what they watch, but the antiquated DMA-based approach to broadcaster carriage has foreclosed efforts to extend that same degree of flexibility and consumer choice to local news, weather, and sports. Common sense adjacent DMA reform is long overdue.

The Commission should also ensure that the emerging mobile video market offers potential providers a level regulatory playing field with consistent technical and operating rules. The gatekeepers of the living room TV and the cell phone business should not be permitted to extend their reach to the nascent mobile video market.

DISH REMAINS A KEY COMPETITOR IN THE VIDEO PROGRAMMING MARKET

DISH remains the third largest pay TV provider in the nation and continues to offer consumers a value-based affordable national offering, while also expanding its leading role in the delivery of high definition ("HD") programming and mobility options. As of March 31, 2009, DISH had 13.58 million subscribers, a slight decrease from the 13.79 million subscribers in June 2008.[1] In addition to direct sales and independent retailer networks, complementary bundling relationships with telephone providers – including Windstream and Frontier – offer subscribers data and voice services.

DISH has continued its leading role in the delivery of local broadcast stations. Since June 2008, DISH has launched two additional standard definition ("SD") markets: Bend, Oregon and Marquette, Michigan. DISH now provides local service to 180 markets including Puerto Rico, covering over 97 percent of U.S. households. In all, DISH retransmits over 1400 local broadcast stations nationwide, far more than any other video provider. Two additional SD market launches are planned for 2009: Alexandria, Louisiana, and Lima, Ohio.

DISH also increased substantially the number of local markets with some broadcast stations in HD from 61 in June 2008 to 150 today, covering 92 percent of households nationwide. A similar focus on expanding the availability of national HD networks occurred in this same time frame. The number of national HD networks sold to subscribers jumped from 48 in June 2008 to 116 today, not including an additional 25 HD regional sports networks.

[1] DISH has not yet publicly released the second quarter 2009 data requested in the *Notice*.

The ability to expand greatly the amount of local markets and national networks in HD is a direct result of new satellites, redeployed satellites, as well as the continued roll-out and enhancements of advanced compression and modulation technologies. Specifically, DISH expanded available capacity with the launch of two new satellites: the Echo 11 satellite in July 2008 and the Canadian Ciel 2 satellite in December 2008.[2] The successful launch of those satellites provided DISH the ability to expand its operations from non-U.S. orbital locations. Specifically, the Echo 8 satellite was freed for redeployment to the Mexican 77° W.L. orbital location, and the Echo 6 satellite was redeployed to the Canadian 72.7° W.L. orbital location. Two additional satellite launches are expected later this year, the Canadian Nimiq 5 satellite and the Echo 14 satellite.

With respect to programming, DISH offers consumers six core programming packages, including a special family friendly package, five different Spanish-language services, as well as other international offerings: 170 channels in 28 languages.[3] DISH has continued its leading role in providing affordable options to consumers with the introduction of introductory pricing of $14.99 for a package of 100 channels, including local channels. DISH also remains a leader in cutting edge programming options becoming the first pay TV provider to offer a HD-only programming packages with the introduction of TurboHD in August 2008, and the first pay TV provider to provide on-demand programming in 1080p

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2 During this same time, DISH did lose some capacity and fleet flexibility with the unexpected failure of the Echo 2 satellite in July 2008.

3 A full breakdown of each current DISH offering is available at http://www.dishnetwork.com/packages/default.aspx. DISH also sets aside capacity to eligible public interest programmers. In June 2009, the following channels were carried under the public interest program: 3ABN, V-Me, Starfish Television Network, Alma Vision, Brigham Young University, CoLours TV Network, CSPAN, Class Arts Showcase, EWTN, Free Speech TV, HITN, Link Media, NASA Channel, Northern Arizona University, Panhandle Area Educational Consortium, Documentary Channel, Research Channel, TBN, University of California, KBS Broadcasting, HHS, the Pentagon Channel, KTV, and CTN.

HD resolution programming through its Internet Protocol Video On Demand (IP-VOD) platform.

DISH also seeks to provide consumers with the flexibility to find service offerings that match their needs and budget, including the ability to add local channels a la carte in some packages, and offers additional linear programming on an a la carte basis. DISH's ability to offer greater customization is limited to some degree by carriage deals with its programming partners. A similar focus on consumer flexibility exists with respect to consumer electronic equipment where consumers can buy or lease equipment from DISH. Consumers have the ability to acquire equipment that suits their service needs, including multi-room receivers and digital video recorders.

With respect to mobility, DISH is taking another leadership role. DISH recently announced it would offer the first MVPD set-top box with Sling technology built-in, providing consumers an integrated solution to watch their video programming with full remote control functionalities wherever they are located on a computer or cell phone. Similarly, DISH has rolled out to subscribers a remote access feature to control DVR functionality outside the home.

DISH PLAYED AN ACTIVE ROLE IN THE SUCCESSFUL DIGITAL TRANSITION

DISH worked in close coordination with the Commission and broadcasters on the digital transition. As the provider of video services to over 13 million subscribers, DISH's natural role was to ensure that its subscribers were transition ready and to communicate clearly with subscribers that they did not need to invest in new televisions or converter boxes because DISH's service was already all digital. In addition, DISH took on a broader and more active role by manufacturing and selling three NTIA-approved Coupon Eligible

Converter Boxes available to consumers with $40 government coupons: the DTVPal, the TR-40CRA, and the DTVPal Plus. All three provided analog-pass through functionality and an auto-scan feature that captured any new digital signals available in a household's community. The TR-40CRA was a special limited production box designed to be a low-cost option for consumers with a Manufacturer Suggested Retail Price set at the price of the government coupon, $40. The only out-of-pocket expense for consumers was taxes, and shipping and handling where applicable.

DISH was also a certified retailer under the NTIA program, providing consumers with the ability to purchase these converter boxes directly from DISH online and by phone. For non-subscribers – in addition to the converter boxes – DISH introduced special subscription welcome packages for over-the-air households that preferred selecting a pay TV provider to prepare for the digital transition. Further, a special package for new Hawaii customers was available during Hawaii's January 2009 transition in response to the Commission's focused concern that over-the-air households in Hawaii may not be able to receive their local digital broadcast signals.

CONSUMERS ARE ADVERSELY AFFECTED BY THE CURRENT RETRANSMISSION CONSENT RULES.

The current retransmission consent system is broken to the detriment of consumers, resulting in exponentially higher retransmission consent fees, lost programming, and higher end-user consumer costs. In 2007, retransmission consent fees were approximately $340 million. SNL Kagan projects that retransmission consent fees will reach $1 billion annually by next year.[4] Such astronomical growth for carriage of free over-the-air broadcasters cannot

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[4] Mariach, Robert, "Broadcast's $1 Billion Pot of Gold," Broadcasting and Cable (July 7, 2008) ("*$1 Billion Pot of Gold*")

serve the public interest. The Fisher Communications' broadcast stations were down on DISH for almost six months earlier this year, and a number of other stations were taken down for DISH subscribers last year.

Consumers have also been harmed when pay TV providers refuse to accept excessive broadcaster demands. Broadcasters increasingly force takedowns of their programming during retransmission consent negotiations denying pay TV consumers access to free over-the-air content. ACA noted recently that 20 percent of its members were forced to drop a broadcaster because of retransmission consent disputes. *ACA 2007/2008 MVPD Report Comments* at 14. While many retransmission consent deals expired at the end of December 2008, it is important to highlight that retransmission consent negotiations continue as other deals expire, and the need for Commission action has not passed.

The only check on broadcaster conduct in retransmission consent negotiations is the obligation to negotiate in "good faith." Section 325 of the Communications Act requires the Commission to promulgate regulations that prohibit broadcasters and MVPDs from "failing to negotiate in good faith for retransmission consent." 47 U.S.C. § 325(b)(3)(C)(ii). That section grants the Commission authority to determine the standards to which parties engaged in negotiations over retransmission consent agreements must adhere.[5] The Commission issued rules pursuant to that authority defining a two-part test for good faith. First, the Commission has articulated a set of objective standards, the violation of any one of which

[5] *See* First Report and Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445, ¶24 (2000) ("*Good Faith Order*") ("We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.").

constitutes a per se violation of the duty to negotiate in good faith.[6] Alternatively, the Commission will consider the "totality of the circumstances of a particular retransmission consent negotiation" to determine whether a broadcaster has violated its duty to negotiate in good faith.[7]

In practice, despite clear congressional intent to provide some oversight of broadcaster conduct in retransmission consent negotiations, broadcasters too often view the current rules as providing no check on their conduct in carriage negotiations, which leads to unreasonable and anti-consumer demands. Egregious conduct and demands of broadcasters should be restricted as clear violations of the good faith requirement. The good faith obligation should provide a regulatory check against excessive demands like Fisher's call for an 80 percent increase in licensing fees.[8]

The good faith standard is set to expire at year's end and is currently under review by Congress. Nine years of experience suggests that a tougher standard is warranted. It strains credibility to believe that not a single broadcaster has acted in bad faith in the thousands of retransmission consent negotiations conducted under this standard. A fresh approach should be adopted to check broadcaster misconduct and take affirmative steps to insulate consumers from retransmission consent disputes. Consumers should not be deprived of free over-the-air programming because of commercial disputes between broadcasters and pay TV providers.

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[6] *See id.* ¶ 31. Among those standards, broadcasters (i) cannot refuse to negotiate over retransmission consent; (ii) must appoint a negotiating representative with authority to bargain; (iii) must agree to meet at reasonable times and places and cannot act in a manner that would unduly delay the course of negotiations; (iv) may not put forth a single, unilateral proposal; and (v) must provide considered reasons for rejecting a proposal. *See* 47 C.F.R. § 76.65(b)(1).

[7] *Id.* § 76.65(b)(2).

[8] *DISH Network Drops Fisher Stations*, Puget Sound Business Journal, Dec. 18, 2008, http://www.bizjournals.com/seattle/stories/2008/12/15/daily28.html.

To protect consumers, a standstill provision should be implemented that would prevent the disruption of programming while broadcasters and pay TV providers negotiate the terms of a new carriage deal. A standstill provision would simply preserve the status quo until a new carriage agreement is reached.

Further rationalization of the broadcaster/pay TV carriage relationships is warranted to address arbitrary designated market areas ("DMAs") lines that dictate what broadcast stations are local to DISH subscribers. In over 40 states, some residents receive out-of-state "locals" because of how the DMA map is drawn. Consumer groups, including Public Knowledge, have highlighted that "[t]oday, the TV channels consumers in rural areas receive are often governed by artificial market boundaries, rather than by communities of interest."[9] There are a number of proposals to provide consumers the flexibility to receive in-state or adjacent market locals to complement the locals forced upon them today. In 2004, Congress provided such flexibility in four markets. Based on that experience, similar adjacent market reform is appropriate nationwide. Congressman Mike Ross (D-Ark.) correctly notes that "[t]he time has come to stop delivering 21st century technologies with 1950's business practices. Americans should not be bound by outdated laws that prevent them from receiving their home-state programming. Everyone who wishes to receive their local channels in their home state should have the option to do so." *Id.*

THE NASCENT MOBILE VIDEO MARKET SHOULD HAVE A LEVEL REGULATORY PLAYING FIELD.

An increasing number of entities seek to provide video to consumers on mobile devices, telephones, automobiles, and laptop computers. Broadcasters this week promoted their own mobile video offerings through the Open Mobile Video Coalition. The rise of

[9] "Ross Introduces Split-Market Bill," BROADCASTING AND CABLE (July 14, 2009).

mobile video applications across platforms will raise a host of regulatory challenges. Mobile video providers will utilize the Internet, DBS/DARS spectrum, wireless spectrum, MSS/ATC spectrum, as well as broadcast spectrum, to provide very comparable service offerings. The technical rules governing those services and the regulatory requirements across these platforms are quite divergent. DISH alone has the potential to offer mobile solutions by satellite, over the Internet through Sling technology, and over wireless spectrum with its recently acquired 700 MHz spectrum.

CONCLUSION

Retransmission consent and DMA rules should be updated to reflect current technological and consumer developments. Similarly, the future shape of the mobile video market should not be dictated by outdated and artificial regulatory advantages. Programmers, cell phone providers and other gatekeepers in existing markets should not be permitted to undermine new competitive entrants focused on the mobile video industry.

Respectfully submitted,

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