

**THE SATELLITE HOME VIEWER IMPROVEMENT
REAUTHORIZATION ACT OF 2004**

HEARING
BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND
THE INTERNET
OF THE
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COMMERCE
HOUSE OF REPRESENTATIVES
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CONTENTS

	Page
Testimony of:	
Gore, Eloise, Assistant Division Chief, Media Bureau, Policy Division, Federal Communications Commission	10
Hartenstein, Eddy W., Vice Chairman, The DIRECTV Group, Inc	21
Lee, Robert G., President and General Manager, WDBJ-tv2807, on behalf of the National Association of Broadcasters	25
Moskowitz, David K., Senior Vice President and General Counsel, Echostar Communications Corporation	14
Wright, Frank, National Religious Broadcasters	32
Additional material submitted for the record:	
DIRECTV, response for the record	69
Gore, Eloise, Assistant Division Chief, Media Bureau, Policy Division, Federal Communications Commission, letter dated April 19, 2004, en- closing response for the record	67

THE SATELLITE HOME VIEWER IMPROVEMENT REAUTHORIZATION ACT OF 2004

THURSDAY, APRIL 1, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2123, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Stearns, Whitfield, Shimkus, Buyer, Bass, Walden, Terry, Barton (ex officio), Markey, McCarthy, Doyle, Gonzalez, Boucher, Rush, and Dingell (ex officio).

Staff present: Howard Waltzman, majority counsel; Neil Fried, majority counsel; Will Nordwind, majority counsel and policy coordinator; Jaylyn Jensen, majority professional staff; Will Carty, legislative clerk; Gregg Rothschild, minority counsel; and Peter Filon, minority counsel.

Mr. UPTON. Good afternoon. Today we are holding a legislative hearing on a staff discussion draft concerning the reauthorization of the Satellite Home Viewer Improvement Act, SHVIA. The staff discussion draft is entitled "The Satellite Home Viewer Improvement Reauthorization Act," or SHVIRA. Is that right? SHVIRA.

I want to thank the staff on both sides of the aisle for the many hours that they have toiled producing this draft for our review today. I commend the staff for attempting to carefully balance the equities or inequities on all sides. For sure, this draft serves as a very useful tool for us to continue soliciting input as we work together on a final product for introduction and markup in the not-too-distant future.

This legislative hearing follows on the heels of the SHVIA oversight hearing, which the subcommittee held on March 10. At that hearing we reaffirmed the great success of Congress' past legislative efforts in helping to make DBS such a big hit with the American consumer. Of course, everyone recognizes the intermodal competition which DBS has spurred in the MVPD marketplace, which, if the many different TV commercials are any indication, is hot and heavy.

As we know, portions of SHVIA are set to expire on December 31 of this year, so we must act this year. Time is of the essence, and there is no time like the present to examine all aspects of SHVIA and to consider modifications which may be warranted.

The staff discussion draft addresses a number of issues. With respect to the two-dish issue, the draft would require all local stations to be included on a single dish, although that single dish could be the second dish. A DBS provider would have 180 days from enactment to comply, and it could receive one FCC waiver per market for an additional 180 days, if it can demonstrate that capacity constraints prevent it from moving all of the stations onto one dish, and that it would, therefore, be forced to stop providing local service in the market.

With respect to the waiver and testing process for addressing whether a consumer is eligible to receive a distant network signal, we are told that shortcomings in the FCC's predictive model lead it to predict that some consumers can receive an analog signal over the air even though they can't.

The FCC tells us that revising the model to account for the signal interference will help. The draft would require the FCC to revise its model within 6 months to account for interference and would allow it to improve other aspects of both the model and the waiver process.

With respect to good faith negotiations and the exclusivity provisions of SHVIA, the draft would extend until December 1, 2009, the broadcasters' obligation to negotiate retransmission in good faith, as well as the prohibition on exclusive deals. The draft would also apply the good faith obligation to both cable and satellite providers.

With respect to distant digital signals, the draft would require the FCC to provide a report to Congress by December 31, 2005, that proposes a model for determining who would be unserved by an over-the-air digital signal as of December 31, 2006—a year later.

With respect to the distant signal license and retransmission consent exemption, the draft would extend both provisions in SHVIA to December 31, 2009. And with respect to significantly viewed and market modification issues, the draft would allow satellite to carry the same out-of-market stations that cable can carry based on the FCC significantly viewed and market modification rules.

And with respect to grandfathered subscribers and termination of distant signal service, the draft would require new subscribers to stop taking distant signal service once their provider began offering local-into-local service.

Current subscribers who only have distant signal service, however, could continue taking distant signal service, even if their provider started offering local-into-local service. Once a current subscriber, however, elects to take the local-into-local service, they would then have to forego their distant signal service.

We are anxious to hear the feedback on this staff discussion draft from all of our witnesses today, and work with members on both sides of the aisle as we move ahead after today's hearing to introduce a bill to markup in the subcommittee, hopefully the week after we get back from the April district work period.

I want to thank the staff on both sides of the aisle. I also want to thank our colleagues and staff on the Judiciary Committee for their work as well. I look forward to hearing from today's witnesses, and I yield for an opening statement to the ranking mem-

ber of the subcommittee, my friend from Massachusetts, Mr. Markey.

Mr. MARKEY. Thank you very much. And I want to commend you for calling this hearing on draft legislation addressing issues in the video competition marketplace, and in particular matters related to the Satellite Home Viewer Improvement Act of 1999.

As we act to modify that Act, the subcommittee should aim to fulfill and enhance the cornerstones of telecommunications policy—namely, universal service, diversity, and localism. In the past, we have promoted universal service through the delivery of distant signals to those who reside in so-called white areas, where local over-the-air broadcast signals do not adequately reach.

To enhance localism, back in 1999, I offered the so-called local-to-local amendment in the satellite subcommittee markup, which for the first time granted to satellite operators the right to carry local broadcast stations in local markets. In addition to the benefits of localism, another key reason why I offered the local-to-local amendment was to enhance competition to cable.

Testimony that we were receiving at the time was that the chief reason that consumers were giving retailers for not switching from cable to satellite service was the lack of local broadcast stations as part of a seamless satellite package.

The chief consumer who was complaining was my father, who said that it would just be a pain if he had to keep switching the A/B switch over to the local broadcasters. And it was just a pain, and he said, “Eddie, is there any way you could change it so that on the satellite dish I could get channels 4, 5, 7, 56, 38, and watch the Red Sox and Bruins.”

So I said, “Yes, I can, Pop.” And so that was where my amendment came from.

My amendment came from my father’s desire to keep it all in one package, and that is now coming up to 5 years ago, which seems like ancient history given how much that one amendment has helped to dramatically increase the penetration of the satellite industry across our country.

And I am proud of that dramatic rise in satellite consumers, due to the advent of local to local. It has helped satellite providers offer a more comparable service to cable operators and more effectively compete in the marketplace to a point where EchoStar and DirecTV combine now to garner approximately a 20 percent market share.

Today we have a staff discussion draft, proposed revisions, and additions to the Act. I believe that, once again, we should approach these draft provisions and ascertain whether they fulfill long-standing policy objectives as well as explore other ideas for promoting universal service, diversity, and localism.

Consumer interest should be paramount as we seek to resolve these issues in a timely fashion in the coming weeks.

We have an all-star list of witnesses, Mr. Chairman. I commend you on that, and I yield back the balance of my time.

Mr. UPTON. Thank you.

Mr. Walden.

Mr. WALDEN. Well, thank you very much, Mr. Chairman. I will keep my remarks brief.

There are probably at least three issues that I look forward to hearing more about and making sure that are addressed appropriately in this legislation. The first, obviously, is the two-dish issue, and I look forward to hearing more about whether it should be programmed on the first dish or the second dish, and the implications of same.

Also, the issue of how we build out local into local, because I think that is essential. It is a service people want, and it is one that I want to see build out fully across the country.

And the third is with respect to affiliate agreements in DMAs. I think it is an important principle that we need to look at closely, because it is a little hard for us to have the local stations remain viable, frankly, if all their network programming is available an hour earlier or an hour later, or whatever, from a network affiliate outside of the market.

And so I think these are principles that we need to look at carefully. And I know your legislation begins to address these, and I look forward to hearing more about them.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. I will focus my remarks this afternoon on two matters. First, I am concerned by the provision in the draft bill that would require that all local-into-local service reside on a single satellite dish on the premises of the subscriber.

Passage of that provision will cause wide disruption of existing services, force a retreat from dozens of markets in the offering of local-into-local service, and delay the provision of local-into-local service into new markets around the country. And for this high cost, there will be no appreciable new benefits conferred.

EchoStar presently offers the second dish for free, and offers free installation in the 42 markets where a second dish is needed. Therefore, there is absolutely no disadvantage to the customer who resides in any of these 42 markets. If the provision requiring one dish is removed from the bill, EchoStar will expand local TV services to a total of 150 markets by the end of the year; 110 markets are served today.

The addition of 40 new markets this year will be broadly welcomed by the residents of the medium-sized cities and the rural areas who are awaiting the arrival of local television service in order to improve their television viewing. If a one-dish requirement is adopted, these markets will not get local service this year.

I hope that the committee will not frustrate the expectations of EchoStar viewers that local service will arrive soon by approving a one-dish requirement that produces little obvious gain.

Second, I see an obvious way to promote good public policy by accepting together one key recommendation of the broadcast industry and one key recommendation of the DBS industry.

Here is the suggested arrangement. When local TV signals are provided by satellite in a given market, viewers in that market who want network programming would have to subscribe to the local stations. They would lose their right to subscribe to a distant network signal. The availability of the analog local station signals would be judged on a subscriber-by-subscriber basis for purposes of

applying this provision. The TV industry has advanced this sensible proposal.

On the digital side, high definition signals could be delivered by satellite to viewers who cannot get an HD signal delivered over the air from the local broadcast station. As the local station powers up to serve a larger share of its market with high definition, the importation of distant, high definition signals would be removed—again, judged on a subscriber-by-subscriber basis.

The DBS industry has suggested an approach that is similar to this arrangement. Adopting both parts of this arrangement would well serve TV viewers and would stimulate the digital television transition. Both the TV and the DBS industries would achieve one of their key policy goals, and I hope our witnesses today will comment on the merits of a proposal that I think represents balance and would represent good public policy.

Thank you, Mr. Chairman. I yield back.

Mr. UPTON. Mr. Buyer.

[No response.]

Mr. Terry.

Mr. TERRY. I will pass.

Mr. UPTON. Ms. McCarthy.

Ms. MCCARTHY. I pass.

Mr. UPTON. Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman, and I also will be brief. I extend my thanks to you and, of course, ranking member Markey for getting this legislation down the road so quickly and efficiently, in such a bipartisan fashion.

Also, my thanks to Chairman Barton and ranking member Dingell for their assistance when it comes to Section 101.

When I came on this committee, I was told that many of these issues wouldn't be really Democratic and Republican in nature; they would be regional. And I assumed that would be mostly on the Energy side. And, of course, after hearing Rick right now I realize that it also extends even to dish TV.

And what I am getting at is simply the Hispanic Caucus has really grappled with this particular problem for some time, which has never been adequately addressed. For the first time having this mandate basically that all local stations be carried on a single dish does prove to be incredibly beneficial to the Spanish-speaking audiences out there, and Spanish-language television.

And I will give you an example of what is occurring in Texas. On local-to-local offerings in the San Antonio, Dallas/Fort Worth, and Houston markets—the three largest media markets in all of Texas—of the 11 stations bumped to a second dish in those markets nine were Spanish-language. This is long in coming.

And like I said, I don't think we ever—by agreement were able to do a whole lot, and I understand whenever we come up with a remedy someone else may be inconvenienced. But in the whole, this is a positive development and one that is welcomed. And, again, I extend my thanks to those individuals that were so helpful in making sure that this problem was addressed at this time in this piece of legislation.

And I yield back.

Mr. UPTON. Mr. Bass.

Mr. BASS. Thank you, Mr. Chairman, and I want to especially thank the staff of this committee for working with us to address a satellite issue that is unique to my home State of New Hampshire.

I also want to stress the importance that we all agree on the need to protect and maintain a viable and free over-the-air broadcast industry. And, last, that we keep in mind that digital transmission be a goal as we go forward with this—one of our goals as we go forward with this legislation.

And I appreciate the witnesses that we have today and look forward to their testimony.

Mr. UPTON. Mr. Dingell is recognized for an opening statement.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy, and I commend you for holding the hearing that we are holding today to reauthorize the Satellite Home Viewer Improvement Act of 1999.

The draft legislation before us attempts to further two important policy goals and to address several consumer concerns that have arisen since the Congress last authorized this statute in 1999. First, the draft seeks to strengthen the ability of the satellite companies to compete with cable providers in the video marketplace by providing satellite companies with increased regulatory parity.

Second, it attempts to foster localism by continuing to ensure that consumers receive all local broadcast signals when such signals are made available. There is a dearth of competition in the multi-channel video marketplace, and consumers are paying the price in the form of higher cable rates.

As the satellite companies work harder to roll out a competitive service, which includes local broadcast signals in a growing number of markets, these companies must be permitted to provide consumers with the same programming as does cable. Accordingly, the staff draft affords the satellite competitors the same ability as cable to compete provided consumers with broadcast network signals that are significantly viewed in markets served by the satellite company.

Local broadcasters, whether they are local affiliates of a major character, public broadcasters, independent, foreign language, or religious, play an important role in providing programming geared to their local communities. This is a concept of localism which benefits communities by ensuring that they will receive their own news, weather, sports, and other content matters that are most important to them.

Programming that is important, for example, to a person in Denver may not necessarily be the same programming that is important to a Detroit. I think these matters are important in order to foster this very important goal of localism.

When the Congress last authorized this statute it required a satellite competitor to offer all local broadcast signals in each market where it offers local into local, and to offer such signals in a non-discriminatory manner.

In my view, this provision called "Carry One, Carry All" was the cornerstone of the 1999 reauthorization, and it was a matter which I pushed very strongly. Since that time, however, Congress and the FCC, or the Federal Communications Commission, have heard from consumers and broadcasters alike that one of the satellite

competitors has engaged in a pattern and practice of not providing its consumers with all local broadcast signals in a given market, and on occasion has affirmatively told consumers that such signals are unavailable or are available only at additional cost.

In my view, this is not constant with the law, with the intention of the committee, or the Congress, and it is certainly probably illegal. The Congress cannot condone such behavior, and I will try and see to it that this legislation reflects that concern.

Accordingly, the staff draft requires that all local broadcast stations be received by consumers through a single satellite dish. I would note, however, that the draft provides substantial flexibility with regard to the deadline for compliance with this requirement in order to minimize the disruptions to current subscribers of the service.

I would also note that the draft does not specify that a satellite provider is required to offer all programming on only one dish. Such communities as this situation occurs in may find that the companies will use any number of dishes, so long as the local broadcast stations are all received on the same dish. That raises some questions.

The draft will also promote localism by prohibiting the provision of distant signals in a market once a satellite provider begins offering local-into-local service in that market. Importantly, the provision allows consumers who are currently receiving distant signals to continue to receive such signals unless they choose to begin receiving the local-into-local service.

As you are aware, the draft we are discussing today is simply that: a draft. And I am interested in the testimony of our witnesses today.

Localism and the health of the local broadcast industry is of paramount importance to me, and I believe also to the country, and it should direct how we continue our efforts to shape a bill. We can also work to strengthen the ability of the satellite companies to compete fairly and aggressively in the marketplace.

In conclusion, I want to commend you, Mr. Chairman, and thank you for the fine cooperation which you have extended to us in this matter so far. We will look forward to working with you in trying to accomplish some of the purposes that I set forth in my opening statement.

I yield back the balance of my time.

Mr. UPTON. Thank you, Mr. Dingell.

Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman, for convening this hearing today, so that we can, again, examine some of the important issues surrounding reauthorization of this legislation. I also want to thank the witnesses who are here today to testify to help us gain a greater understanding of the many concerns involved in this reauthorization and how we should proceed.

I believe this committee has an inherent responsibility to put the needs and desires of consumers at the forefront of our thoughts. I have consistently supported efforts to increase competition in all aspects of the media and telecommunications industries, because true competition leads to greater value and choice for consumers.

The growth of the satellite industry since 1999 has given consumers more options and, in turn, yielded greater competition between the cable and satellite industries. As we proceed in reauthorizing the Satellite Home Viewer Improvement Act, I have no doubt that we can again strike a proper balance between the cable, satellite, and broadcast interests, which will produce positive outcomes for our constituents.

I know we have a draft before us today that aims to find this balance, and I look forward to hearing from the witnesses as to whether they believe we have been successful in this regard.

We are here today because some vital portions of the SHVIA of 1999 will expire unless Congress reauthorizes them by December 31. The compulsory license authorizing satellite carriers to retransmit distant network stations, PBS stations, and superstations to satellite subscribers, the current royalty rates, the exemption for RVs and commercial trucks, and the grandfather for satellite subscribers in the Grade B contour who received distant broadcast signals prior to October 31, 1999, are just some of the major issues this committee must address.

I look forward to hearing from witnesses to hear their thoughts on the merits of extending or making permanent these expiring provisions. I understand that the draft before us today extends the compulsory license authorizing satellite carriers to retransmit distant network signals for another 5 years, thereby enabling Congress to revisit the issue as digital television transition progresses and the satellite service continues to evolve.

However, I believe that in order to truly establish a level playing field between the cable and satellite industries we should act to make this license permanent. Furthermore, the technological advances in the broadcast industry require us to take a wider look at this law beyond those expiring provisions to ensure that the law maintains a proper balance and fosters competition.

So I welcome this hearing today, look forward to working with the other members of this committee as we move forward. I understand that the Judiciary Committee is also working on some of the vital issues facing satellite, cable, and broadcast industries. And I hope that as we fulfill our legislative responsibilities we remain diligent in protecting our jurisdiction.

This is an issue of major importance to the American people, and it will shape the future of the television industry and this country for many years to come. I have no doubt that we can, again, find a proper balance that will allow competing industries and interests to continue to innovate and remain competitive, which in turn, Mr. Chairman, will ultimately benefit the consumers that we serve.

Thank you very much.

Mr. UPTON. Thank you, Mr. Doyle.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Mr. Chairman, for holding this hearing on staff's discussion draft of legislation to reauthorize SHVIA, the Satellite Home Viewer Improvement Act of 1999. I stress that this is only a discussion draft. A bill has not yet been introduced, and discussions on this legislation will continue.

One of the provisions of Title I would allow satellite operators to continue using multiple dishes to offer service, but only so long as they provide all local broadcast stations on a single dish. Currently, EchoStar, unlike DirecTV, splits local broadcasters between two dishes in some markets. EchoStar argues it must do so because of capacity constraints. Broadcasters argue that this practice is discriminatory. The discussion draft would put an end to this practice. I hope the witnesses will address this issue in their testimony today.

Another provision in Title I would require the FCC to propose to Congress by December 31, 2005, a model for determining who would be unserved by over-the-air digital signals as of Dec. 31, 2006, the target date for the completion of the DTV transition and for turning off analog broadcasts. This is just a report, and Congress need not act if doing so would still be premature in light of the status of the transition at that time.

One provision of Title II seeks to replicate for satellite the “significantly viewed” and “market modification” rules that apply to cable. These provisions would afford satellite operators similar flexibility as cable enjoys to provide a consumer with in-state broadcasts even though Nielsen considers that consumer to be in another state’s market. In considering this provision, we must be careful to examine what impact it would have on satellite operators’ incentives to roll out additional local-into-local service.

Title II would also require satellite operators to stop offering distant signals in a market once the satellite operators provide local-into-local service in that market. Congress authorized distant-signal service so that consumers who could not receive local signals over the air could at least receive national network feeds from other markets. Once the consumer can receive their local broadcast network over satellite, however, there is much less reason to offer such service. To minimize disruption, the staff draft would grandfather some consumers who currently receive only distant-signal service, allowing them to continue doing so until they decided to opt for local signals.

I thank the witnesses for their participation, and look forward to a constructive discussion today.

I yield back.

Mr. UPTON. That concludes the opening statements from the members. I would note—make a motion for the record that all members not here that wish to put their opening remarks into the record can do so under unanimous consent.

At this point, we are ready for our panel. We are joined by a very distinguished panel, Ms. Eloise Gore, Assistant Division Chief from the Media Bureau Policy Division from the FCC; Mr. David Moskowitz, welcome back, Senior VP and General Counsel of EchoStar Communications System; Mr. Eddy Hartenstein, welcome back again, Vice Chair of DirecTV; Mr. Robert Lee, President and General Manager of WDBJ-TV in Roanoke, on behalf of the National Association of Broadcasters, welcome you back; and Dr. Frank Wright, President of the National Religious Broadcasters from Manassas, Virginia.

We appreciate your testimony arriving in advance of the hearing today. We will try to limit your remarks to no more than 5 minutes. Your testimony will be made part of the record in its entirety.

Ms. Gore, we will start with you. Welcome.

STATEMENTS OF ELOISE GORE, ASSISTANT DIVISION CHIEF, MEDIA BUREAU, POLICY DIVISION, FEDERAL COMMUNICATIONS COMMISSION; DAVID K. MOSKOWITZ, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, ECHOSTAR COMMUNICATIONS CORPORATION; EDDY W. HARTENSTEIN, VICE CHAIRMAN, THE DIRECTV GROUP, INC.; ROBERT G. LEE, PRESIDENT AND GENERAL MANAGER, WDBJ-TV2807, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS; AND FRANK WRIGHT, NATIONAL RELIGIOUS BROADCASTERS

Ms. GORE. Thank you very much. Good afternoon, Chairman Upton, ranking member Markey, and members of the subcommittee. I am Eloise Gore, Assistant Chief of the Policy Division of the Federal Communication Commission's Media Bureau.

I am very pleased to appear before you today to provide technical assistance as you consider potential modifications to the Satellite Home Viewer Improvement Act. I should note from the outset that the views expressed today are mine and those of my colleagues in the Media Bureau, and do not represent the views of the FCC Chairman or any FCC Commissioner.

By way of background, very briefly, I came to the Commission over 7 years ago and started working on these issues when it was just SHVA. I gathered further experience through the SHVIA years with the Commission's implementation of that law, beginning in 1999, and with 13 or so proceedings in the year 2000. Now I am delighted to continue as Congress takes up the issues in the SHVIRA.

In a nutshell, satellite-related issues are one of the primary functions of my job. I have firsthand knowledge in how the law currently works, because I often deal with consumers, the broadcasting industry, the satellite industry, when these issues arise. And I frequently have been—have had the pleasure to provide assistance to the congressional offices and committee staff with regard to this area of the law.

I have submitted a written statement for the record that provides more detail concerning the FCC rules, and I will be very happy to take any questions you have.

Thank you.

[The prepared statement of Eloise Gore follows:]

PREPARED STATEMENT OF ELOISE GORE, ASSISTANT DIVISION CHIEF, POLICY DIVISION, MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Good Afternoon, Chairman Upton, Ranking Member Markey, and members of the Subcommittee. As Assistant Division Chief of the Policy Division of the Federal Communications Commission's Media Bureau, I am pleased to appear before you today to provide technical assistance as the Subcommittee considers potential modifications to the Satellite Home Viewer Improvement Act ("SHVIA"). The views expressed in my written statement are mine and those of the FCC Media Bureau staff, and not those of the Federal Communications Commission.

BACKGROUND

The SHVIA law, among other things, authorizes satellite television carriers to provide more television broadcast programming to subscribers by allowing the transmission of local broadcast signals into local markets (*i.e.* "local-into-local"). The law also extended the authority for satellite carriers to provide distant or national broadcast programming to subscribers.

The Federal Communications Commission (“FCC”) was required to implement several provisions of SHVIA within one year of enactment. In addition, the Commission provided a Report to Congress in November 2000,¹ outlining its evaluation of the distant network signal eligibility standard and whether it should be modified or replaced. In that Report, the Commission recommended to Congress that the Grade B signal intensity standard and most of the planning factors used in the model be retained as the basis for predicting whether a household is eligible to receive retransmitted distant TV network signals under SHVIA.²

REAUTHORIZATION ISSUES

There are several provisions in the SHVIA that will expire in the near term absent Congressional action:

- The statutory copyright license to satellite operators that allows the satellite operators to provide signals of distant network affiliates to “unserved” customers;³
- The retransmission consent exemption that allows satellite operators to retransmit distant network signals to an “unserved” household without first obtaining the consent of the station;⁴
- The grandfathering provision for certain distant signal subscribers;⁵ and
- The prohibition on broadcasters engaging in exclusive carriage contracts or failing to negotiate in good faith.⁶

The distant statutory copyright license fee, retransmission consent exemption, and grandfathering provisions will expire on December 31, 2004. The good faith and non-exclusivity requirements will expire on December 31, 2005.

ADDITIONAL POTENTIAL MODIFICATIONS

The following information is provided as additional background for Congress to take into consideration as it considers the issues related to the reauthorization of the SHVIA provisions. The issues raised below are areas that have come up most often with Bureau staff as we deal with inquiries from the industries and consumers with regard to the SHVIA statute and our rules. As Congress considers changes to the SHVIA, it is recommended that you conduct your review keeping the basic tenets of the Act in mind: (1) Fostering fair competition in the Multichannel Video Programming Distributor (“MVPD”) marketplace; and (2) Promoting consumer choice.

(1) FCC Rules for Distant Network Signal Eligibility

Prior to the passage of the SHVIA, the FCC’s Office of Engineering and Technology established, and the FCC adopted, a computer model based on the Individual Location Longley-Rice (ILLR) to predict whether households are served or unserved by local television signals over-the-air.⁷ Congress codified the ILLR model in the SHVIA, and subsequent to enactment, the FCC took steps to improve the prediction technique.⁸ In addition, the FCC’s proceeding allows for continued refinement by the use of additional data as they become available.⁹

Under the SHVIA, if a subscriber disagrees with the ILLR prediction (*e.g.* the model predicts they are “served” when the subscriber does not believe they receive an adequate over-the-air signal), they must follow a specific waiver and testing procedure.¹⁰ First, subscribers that are predicted to be “served” may request a waiver through the satellite television provider and the waiver must be granted by the local broadcast stations that are predicted to transmit a Grade B signal to the subscriber’s home. If local stations deny the waiver, the subscriber may request a signal strength test from their satellite provider. The procedure is completed when the sat-

¹ In the Matter of Technical Standards for Determining eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Improvement Act, Report, ET Docket No. 00-90, 15 FCC Rcd 24,321 (November 29, 2000).

² The one recommended modification was to the planning factor related to “time fading.” The Commission suggested replacing the existing fixed values with location-dependent values determined for the actual receiving locations using the Individual Location Longley-Rice prediction model. *Id.* at 2.

³ 17 U.S.C. § 119.

⁴ 47 U.S.C. § 325(b)(2)(C).

⁵ 17 U.S.C. § 119(e).

⁶ 47 U.S.C. § 325(b)(2)(C).

⁷ In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity, CS Docket No. 98-201, 14 FCC Rcd 2654 (February 2, 1999).

⁸ 15 FCC Rcd 12,118 (2000).

⁹ *Id.* at 12,129.

¹⁰ 47 U.S.C. § 339(c)(4).

ellite provider and broadcaster identify a party to conduct the test, and the test takes place at the subscriber's residence. If the station and the satellite provider are unable to agree upon someone to conduct a test, a tester is to be designated by an independent and neutral entity identified by the Commission. The FCC designated the American Radio Relay League ("ARRL") to participate in these circumstances. Unless the parties agree otherwise, the costs of the test are to be borne by the losing party.

It is a fair statement to say that the on-site testing procedure established in the SHVIA has not worked as effectively as anticipated. For example, there are issues with finding qualified testers, particularly in rural areas. If a qualified person can be identified, the cost of the transportation to the household requesting the test may exceed the cost of the test itself. Further, the cost of identifying a tester, conducting the test, and possibly paying for the test (depending on the outcome), has resulted in some satellite providers limiting their offer of distant signals only to subscribers that are predicted "unserved" under the ILLR model or who are granted waivers.

With regard to distant *digital* signals, the FCC has not adopted a distant network signal eligibility standard for digital television ("DTV").¹¹ At the time of the Report to Congress in 2000, the Commission determined that it would be premature to construct such an eligibility standard, and deferred consideration until more substantial DTV penetration is achieved and more experience is gained with DTV reception and operation.¹² The Commission understands that this issue will need to be addressed as the DTV transition moves forward.

(2) Satellite Carriage of Local Signals

In the SHVIA, the Congress established a new statutory license for local-into-local carriage and charged the Commission with implementing carriage requirements. Overall, local-into-local has been a benefit to consumers, the broadcast stations, and the satellite carriers, and thereby has improved the competitive offerings in the markets in which local-into-local is available—now over 100 markets. The local-into-local provisions do not expire, but one related issue has been raised for consideration. The existing SHVIA provides that with respect to channel positioning for satellite carriage of local signals, a carrier is required to carry the local signals on contiguous channels and provide access to the signals at a "nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu."¹³

FCC Action Regarding Channel Positioning for Satellite Carriage

The SHVIA does not expressly address the number of dishes that may be needed to receive all the local signals in a market. As part of the FCC Report and Order implementing the SHVIA's broadcast signal carriage requirements in November 2000,¹⁴ the Commission generally discussed the anti-discrimination language of Section 338(d) and concluded that Section 338(d) "bars satellite carriers from requiring subscribers to purchase additional equipment when television stations from one market are segregated and carried on separate satellites."¹⁵ However, the Commission did not prohibit a satellite carrier from requiring a subscriber to pay for an additional dish in order to receive all television stations from a single market. Thus, the corresponding FCC rule states:

Within a market, no satellite carrier shall provide local-into-local service in a manner that requires subscribers to obtain additional equipment at their own expense or for an additional carrier charge in order to obtain one or more local television broadcast signals if such equipment is not required for the receipt of other local television broadcast signals.¹⁶

The Commission further clarified the issue in an Order on Reconsideration where it stated that Congressional intent was clear that satellite carriers could not require subscribers to obtain an additional dish to receive some, but not all, local signals, if the requirement created discriminatory effects.¹⁷

On April 4, 2002, the FCC Media Bureau released a Declaratory Ruling and Order in response to a joint Emergency Petition from the National Association of

¹¹ Report to Congress, *supra* n. 1, at ¶ 2.

¹² *Id.*

¹³ 47 U.S.C. § 338(d) and 47 C.F.R. § 76.66 (i).

¹⁴ Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues; Retransmission Consent Issues, 16 FCC Rcd 1918 (2000).

¹⁵ *Id.* at 1961.

¹⁶ 47 C.F.R. § 76.66(i)(4).

¹⁷ Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Order on Reconsideration, 16 FCC Rcd 16544 (2001).

Broadcasters (“NAB”) and the Association of Local Television Stations (“ALTV”).¹⁸ NAB and ALTV requested that the Commission address the issue of satellite carriage of certain television stations that required subscribers to obtain a second satellite dish for some but not all of the stations in the market. NAB and ALTV were concerned that EchoStar’s “Two Dish” plan was discriminatory, and did not comply with the requirements of SHVIA or FCC rules. The Media Bureau issued a Declaratory Ruling that EchoStar’s “Two Dish” plan, as implemented, violated the Act and Commission rules,¹⁹ and required that EchoStar remedy the unlawful discriminatory actions.²⁰ The Declaratory Ruling noted that it may be possible to offer certain local stations by use of a second antenna without engaging in prohibited discriminatory conduct.²¹ The Bureau’s Declaratory Ruling currently is under review by the full Commission pursuant to several Applications for Review.²²

Alternatives for Consideration

FCC Media Bureau staff has provided technical assistance to Committee staff with regard to this issue. (1) Congress could choose to clarify how satellite providers can provide all local signals using two dishes in a non-discriminatory way, possibly through an “automatic installation” requirement; or (2) Congress could determine that all local signals must be available on the same satellite dish. Under the first alternative, Congress could require that, when a subscriber signs up for the local station package, if two dish antennas are needed to receive all the local stations, the satellite provider must provide and install the second dish unless the subscriber expressly waives the installation. Under the second alternative, a satellite carrier could offer all local stations using one or more dish antennas but all the stations must be available on one, or the other, dish antenna. In this latter situation, the second antenna need not be offered free of charge. Another issue of potential concern, with this second option is whether some local-into-local markets would be dropped due to capacity constraints, and if potential new local-into-local markets would have to be delayed or never served as a result.²³

(3) Modifications to Local Market Definitions

Currently, SHVIA provides that satellite operators may only retransmit “local” television stations to the subscribers that reside within the borders of the Designated Market Area (“DMA”) to which the local stations are assigned.²⁴ This provision results in some situations in which satellite subscribers are not permitted to receive the local signals of the stations that are licensed to their state because they may reside in an area that is assigned to an adjacent, “out-of-state” DMA.²⁵ Additionally, there are many DMAs that have fewer than 4 affiliates assigned to them, and would be of limited utility to subscribers.²⁶ These issues were raised during the Subcommittee’s March 10, 2004 hearing.

FCC Rules Regarding Local Market Definitions

Nielsen Media Research is the private entity that designates the borders of each DMA. The FCC does not have the authority under SHVIA to modify DMAs to take into account some of these situations discussed above. The SHVIA did address one of the situations in which a DMA covers more than one state by requiring carriage of both stations affiliated with the same network when the stations are in the same DMA and licensed in different states.²⁷ However, this provision does not resolve all of the different circumstances experienced in this area.

¹⁸ Declaratory Ruling and Order, CSR-5865-Z, DA-02-765 (April 4, 2002).

¹⁹ *Id.* at 8.

²⁰ *Id.* at 18.

²¹ *Id.* at 8.

²² See Application for Review of the Association of Public Television Stations and the Public Broadcasting Service, CSR-5865-Z (May 6, 2002).

²³ EchoStar has indicated that if there is a one-dish requirement, many local-into-local markets may be dropped due to capacity constraints. Mr. David Moskowitz testified in response to a question during the March 10, 2004 hearing before the Subcommittee that “a lot” of markets would not be served, and possibly 30-40 local-into-local markets would likely be dropped if all local signals were required to be on one dish.

²⁴ 17 U.S.C. § 122(j).

²⁵ *E.g.* Patrick County, VA is the only Virginia county assigned to the Greensboro-Winston Salem, NC DMA.

²⁶ *E.g.* Zanesville, OH DMA is one county and one station (NBC affiliate); Jackson, TN DMA is five counties and two stations (ABC and UPN affiliates).

²⁷ Generally, the SHVIA does not require carriage of more than one local commercial station in a market that is affiliated with a particular network. See 47 U.S.C. § 338(c)(1). SHVIA provides an exception to this substantial duplication provision for stations affiliated with the same

In the cable context, the Commission can modify markets under existing cable rules.²⁸ Further, other cable rules allow that if a local television station meets specific requirements and, thus is considered “significantly viewed,”²⁹ the station is considered “local” to the cable system for copyright purposes and may be carried on the cable system. Cable systems do not have to pay the distant copyright royalty fee for “significantly viewed” stations.³⁰ The FCC’s network non-duplication and syndicated exclusivity rules do not apply,³¹ and carriage of these “significantly viewed” stations on the cable systems is not subject to mandatory carriage.

Alternatives for Consideration

To address some of the issues surrounding local market definitions, FCC staff believes there may be several alternatives: (1) Congress could decide to amend Section 122 of the Copyright law to provide the FCC with authority to modify markets and include some “distant” signals in limited circumstances, similar to existing cable rules, which would require carriage of these out-of-market stations; (2) Section 122 could be amended to specify that satellite carriers may retransmit network affiliates from an adjacent, but “distant,” market if there is no affiliate of that network in the “local” DMA or if the adjacent affiliate is from the same state as a county that is assigned to an out-of-state DMA; or (3) Congress could determine that the FCC’s “significantly viewed” rules be modified to apply to satellite operators to permit, but not require, carriage of out-of-market stations with their retransmission consent in some circumstance. These options could create some parity between cable and satellite in this regard. However, it is not clear that these alternatives will solve all of the problems experienced by some satellite subscribers.

CONCLUSION

While not every issue raised in the SHVIA reauthorization process must be addressed, Congress has the opportunity to review many issues that impact the subscribers and the industries. The Commission will implement any statutory changes that Congress decides to make, and the staff of the FCC is available to provide technical assistance on existing rules.

Mr. UPTON. Thank you.
Mr. Moskowitz.

STATEMENT OF DAVID K. MOSKOWITZ

Mr. MOSKOWITZ. Good afternoon, Chairman Upton, member—ranking member Markey, and distinguished members of the subcommittee. My name is David Moskowitz, and I am the Senior Vice President and General Counsel for EchoStar. Thank you for allowing me to testify.

I also want to thank this committee for including key items in the recently circulated SHVIA discussion draft. Among these are the provisions allowing satellite to offer significantly viewed channels, which will make the same programming available to our customers that their neighbors currently watch off air or through cable.

Further, directing the FCC to improve the waiver and signal testing procedures and to improve the ILLR model are also positive steps. More is, however, necessary. While the inclusion of interference in the ILLR model is important to accurately predict picture quality, the model should also take into account ghosting.

Consumers simply don’t understand why current law says they get a good off-air picture when personal experience tells them that ghosting makes off-air reception impossible. Moreover, the anti-

network when they are licensed to communities in different states. *Id.* This provision does not, however, change the DMA designation of a station or permit retransmission of a station from another DMA.

²⁸ 47 C.F.R. § 76.59.

²⁹ See 47 C.F.R. § 76.54 and § 76.5(i).

³⁰ 17 U.S.C. § 111.

³¹ 47 C.F.R. § 76.92(f) and § 76.106(a).

quated 1950's Grade B standard is hopelessly out of tune with consumer expectations in the 21st century. Congress should direct the FCC to overhaul the standard.

Consumers also rely on the congressionally provided grandfather clause to continue receiving the channels they have watched for over 5 years, but that provision is missing from the current draft. We urge the continued protection of the rights of these consumers.

There are also several provisions included in the draft which concern us. To begin, EchoStar's two-dish solution puts scarce spectrum to its fullest use and maximizes the number of markets where we can offer local channels by satellite.

During the time period immediately after enactment of Must Carry, there were, admittedly, details left to be worked out, but EchoStar's two-dish system for the last 2 years does everything that could reasonably be expected to balance these important public interest goals and provide fairness to broadcasters.

And let us be clear: Dr. Wright's proposed remarks are just plain misinformed, and I look forward to helping everyone to understand the facts today. Among other things, EchoStar offers the second dish and installation absolutely free to the customer, and there is no additional monthly charge for the wing channels.

Further, once the second dish is installed, the viewing experience is completely transparent to the consumer. The channels from both dishes have contiguous numbers in our program guide, and with the push of a single button on their remote the consumer can equally tune to channels received from either dish.

Elimination of this solution would have wide-ranging implications. EchoStar intends to provide local channels to at least 40 additional markets during 2004. If the legislation does not change, EchoStar would instead have to use the capacity earmarked for that purpose to comply with the change in law.

Congress will deny consumers in communities like Cheyenne, Wyoming, and other small markets any alternative to high cable rates and poor customer service. While that alone would be a terrible outcome, it is only the beginning of the harm. Millions of consumers currently receiving local channels would also need to have a new dish installed, ignoring the stampede of consumer anger resulting from the mandated—congressionally mandated purchase and installation of new equipment.

When the transition occurs, hundreds of thousands would ultimately lose their local channels. Experience tells us that large numbers of customers will not heed the warning of the imminent loss of their channels until they actually disappear.

Alternatively, a congressionally mandated obligation to make the two-dish experience transparent to the consumer in the manner EchoStar has implemented would protect the policy interests of local stations without causing the enormous harm that would otherwise result. We urge the committee to reexamine this provision.

The language that would take distant network channels away from consumers who receive local channels by satellite is also somewhat troubling. If stations would just spend on plant upgrades a small portion of their aggregate value of several hundreds of billions of dollars, then distant channels would not be necessary. But

where consumers have to pay to get the channels, then consumers should have choice in the programming that they purchase.

If Congress insists on taking this choice away from consumers, then it is all the more reason that Congress should provide consumers with the opportunity to view high definition network programming by satellite today. The committee should direct the FCC to establish a digital predictive model this year.

Satellite carriers are uniquely positioned to be a catalyst to Congress' digital transition goals. We can make network HD programming immediately available to every household in America that can't receive the programming off air.

We urge you not to give a gift of an additional 3 years to the broadcasters. When broadcasters provide the HD signal off air, consumers would receive that programming instead. With digital off-air tuners already included in our HD receivers, nothing could be easier. Moreover, in rural markets that don't have all local network affiliates, consumers will never watch their HD networks missing in their communities unless Congress enacts an HD distant license.

Mr. Chairman, I would like to thank you for allowing me to testify this afternoon, and I very much look forward to a give-and-take and your questions.

[The prepared statement of David K. Moskowitz follows:]

PREPARED STATEMENT OF DAVID K. MOSKOWITZ, SENIOR VICE PRESIDENT AND
GENERAL COUNSEL, ECHO STAR COMMUNICATIONS CORPORATION

Thank you Chairman Upton, Representative Markey, and distinguished members of the Subcommittee, on behalf of EchoStar Communications Corporation, I want to thank you for inviting our company again to discuss with you the Satellite Home Viewer Improvement Act. My name is David Moskowitz, and I am Senior Vice President and General Counsel of EchoStar Communications Corporation.

The reauthorization of the Satellite Home Viewer Improvement Act offers Congress the chance to continue many of the established and proven provisions of the Act which promote competition in the multichannel video programming distributors ("MVPD") market. There are also opportunities to remove regulatory provisions that are not imposed upon cable that make satellite a less attractive option for potential consumers in certain markets. And looking toward the future, Congress can modify the Act to allow DBS to provide more advanced services to the American consumer. One of EchoStar's principal objectives is to ensure that the satellite industry is able to meet consumer demand and compete more effectively with other MVPD providers.

Upon review of the draft legislation that the Committee released earlier this week, we feel that the Committee has taken positive steps toward increasing consumer choice and enhancing competition. However, we have grave concerns with some of the provisions included in the draft that we hope to work with the Committee to address.

The Availability of Local-into-Local and 2-Dish

EchoStar shares the goal of many members of Congress to make local-into-local service available in more markets. EchoStar has sought to satisfy consumer demand for local service by initially lobbying Congress for rights to offer the signals in the late 1990s, and then investing billions of dollars in satellite technology to launch local markets as quickly as possible. Through investment and innovation EchoStar Communications today offers more local broadcasters' signals nationwide than any other cable or satellite TV provider.

EchoStar Chairman and CEO Charlie Ergen envisioned that DBS industry would provide local-into-local service and compete with cable nationwide in the mid-1990s. It was almost seven years ago that Mr. Ergen testified before this committee explaining that DBS needed to the rights to offer local service. Our company lobbied for this right for two years, and were pleased that Congress granted the satellite TV industry the rights to offer local-into-local service in the Satellite Home Viewer Improvement Act of 1999.

DISH Network was the first satellite TV provider to offer local channels with a roll-out of 13 markets. In less than five years since passage of SHVIA, EchoStar's DISH Network has launched local service in 110 television markets; serving more than 85% of the country. One of the greatest hurdles in continuing to offer local-into-local service in more markets is the scarcity of spectrum for DBS services. In spite of our limited spectrum, our company has invested hundreds of millions of dollars to build and launch spot beam satellites which make more efficient use of spectrum allowing us to increase the rollout of local markets. In addition, EchoStar has instituted a 2-dish solution in order to ensure that no spectrum that could be used to launch an additional local market, is left unused in one of the spotbeams. The use of 2-dishes has allowed us to deliver local-into-local into as many markets as possible, consistent with Congressional direction.

Unlike regular satellites which broadcast satellite TV service nationwide, spot beam satellites allow for spectrum to be reused in different markets across the country. A spot beam satellite is similar to a flash light shined from orbit that covers a particular region of the country. The spot beam can only carry a limited number of channels. In most cases today, the most popular channels in three television markets are provided in a spot beam with the less popular channels being offered on a wing satellite. The spot beam cannot offer all three local markets on one dish because of spectrum limitations. There just is not enough channel capacity. At most two of the three markets could be carried. So if only two markets are provided in the spotbeam the left over spectrum in the beam would go to waste. And because the wing slots are filled to capacity, there is no way to migrate the additional market to the wing slot. There just isn't the spectrum available. Thus a one-dish solution at this time would require that certain markets are taken down. The total number would be substantial.

Of the 110 markets where local service is available, 42 are 2-dish markets. In these markets EchoStar has a customer base of over two million subscribers. Under the Committee's proposal, the elimination of our two-dish system will force us to take drastic measures that will hurt consumers and stifle competition. If the two-dish system is eliminated, over 30 markets will be taken off the air because the capacity of our satellites will be tapped out once we move all signals to one dish—the bandwidth is just not there to ensure that consumers receive all the programming that they currently receive under the two-dish system. Additionally, competition will be curtailed in the 40 markets that EchoStar had planned to enter over the next year if this provision goes into effect because EchoStar will be unable to utilize its two-dish system with its maximizing spectrum effect, to provide service in these areas. Lastly, the provision will be a logistical nightmare and practically impossible to accomplish. Over two million EchoStar customers will need to have a new dish installed and the end result will be that these consumers will lose programming. Broadcasters have said that the viewing experience of consumers should be uniform and identical. However, small broadcasters have not invested the necessary capital to increase their signal power and make the viewing experience identical. EchoStar should not be asked to do more.

With that being said, our company has made specific efforts to ensure that consumers are provided full information of the fact that the second dish was available free of any charge. There is a seamless appearance for consumers who use two dishes. In addition we go to great lengths to notify our consumers of the second dish offer. The following are some of the steps we've taken to make our subscribers aware of the second-dish:

- 1) Clarifying on our web site which stations need a free second dish for reception;
- 2) Writing to all subscribers in existing 2-dish markets to better explain the program and encourage them to call our 800 number to receive a free second dish;
- 3) Amending our point-of-purchase materials and other items provided local retailers and resellers in 2-dish markets to make clear that a free second dish was required to receive some of the local stations;
- 4) Upgrading our software to ensure that if a subscriber without a second dish dials into a channel transmitting from the second satellite, s/he is informed that they are not receiving a signal they could be, and directing them to call our 800 number to order a free second dish; and
- 5) Revise our training for our **C**ustomer **S**ervice **R**epresentatives to ensure that they are providing accurate information to customers concerning the free second dish program.

We urge Congress not to cause disruptions in millions of consumers' service by requiring EchoStar's DISH Network to take down local markets. Congress should not penalize consumers as a result of the DBS industry's innovation in the face of limited spectrum, by requiring the migration of all consumers to one dish.

Regulatory Parity

Regarding regulatory parity, the Committee's draft language is certainly an excellent first step. The inclusion of language that directs the FCC to review and take steps to improve the procedures for requesting and requiring waivers as well as for signal tests is both timely and constructive. Improvements to the ILLR model is also a good first step. However, what will immediately benefit consumers and enhance competition is the elimination of the antiquated Grade B standard and the implementation of an updated predictive model now rather than at some time in the future.

Carriage of Broadcast Signals

The Committee's draft also does a good job addressing carriage issues. Similar to competitors, DBS providers need the ability to offer a full complement of broadcast station programming. As DBS providers continue to offer more and more local-into-local services in the 210 DMAs, there are at least 50 markets that do not have a full complement of local affiliates of the major networks. Currently, the law does not allow DBS providers to make available to subscribers a broadcast station from a neighboring DMA in those circumstances to ensure that subscribers get the whole complement of broadcast stations. This is because the local-into-local license contained in Section 122 of the Copyright Act only allows DBS operators to retransmit local stations back into the DMA where they are broadcast. Cable, on the other hand, can fill in holes in local station affiliate offerings with neighboring stations and routinely adds network affiliates and other broadcast stations so that its subscribers have the full line-up of major network and other popular stations. The inability of DBS providers to offer subscribers a full complement of broadcast signals leaves them at a serious disadvantage vis-à-vis cable in competing for customers and is inconsistent with the FCC's policy objective of ensuring that consumers have access to all of the major broadcast networks.

The Committee draft legislation does take a positive step in its extension of the "significantly viewed" and market modification exceptions to DBS operators. We believe this provision will help level the playing field between cable operators and DBS providers if the procedures by which new stations are added are even handed manner. It is important to ensure that all subscribers with a community eligible to receive a significantly viewed signal qualify as unserved households under section 119.

Waiver, Signal Strength Testing Process and Predictive Model

Again, the Committee's draft legislation on these issues is a step in the right direction. Certainly, the current waiver and signal strength testing process for the receipt of distant network signals by those who are predicted to receive a Grade B over-the-air signal, but who nonetheless do not receive a clear picture, needs to be revisited. While the provisions in the draft legislation are good, we recommend narrowing the waiver process to only permit consumers receiving a weak Grade B signal to request a signal strength test. We also recommend clarifying the law to prohibit broadcasters from revoking waivers once given as long as the subscriber receives continuous service from their DBS provider. Further, the rules should be clarified to eliminate consumer confusion when a subscriber is predicted to receive the same network signal from two local affiliates of different DMAs by requiring a waiver only from the network station in the subscriber's DMA. This will eliminate the need for customers to get multiple waivers from affiliates of the same network.

We also applaud the proposed requirement of taking interference into account and making other improvements to the grade B predictive model. In addition to those improvements, it is important to change the Grade B standard, which was developed in 1950's, to better define what consumers today view as a signal of acceptable quality. Any predictive model should also take into consideration the problems of "ghosting."

Transition to Digital Television

The reauthorization of SHVIA offers Congress an opportunity to broaden the existing "unserved household" definition so consumers who cannot otherwise receive a digital television (DTV) signal from their local broadcaster, will have the ability to receive it from their satellite TV provider.

When Congress passed the Telecommunications Act of 1996 it made a pact with the broadcasters that in return for providing them with \$70 billion dollars worth of new spectrum for the broadcast of DTV signals beginning in 1998. In the ensuing 1997 Balanced Budget Act, Congress set a deadline for the analog spectrum to be returned once the transition was complete. By regulation, the commercial broadcasters were to be offering digital service in all 210 designated television markets

(DMA) by May 1, 2002. Non-commercial broadcasters were to be transmitting by May of the following year. The broadcasters were then required to return the analog spectrum by December 31, 2006.

Despite the comprehensive transition framework created by Congress and the Federal Communication Commission's (FCC) many efforts to accelerate the transition, many broadcasters are still failing to provide digital service on par with their analog service. Currently 1,057 TV stations out of 1,688, or nearly two-thirds, are not meeting Congress' expectations for available digital service in local markets according to the FCC. Of these 1,057 stations, 303 are not broadcasting at all and 754 are broadcasting at a low power, serving an area smaller than their analog signal.¹ On a market-by-market basis, consumers in only 17 of 210 markets are able to receive a full complement of over-the-air network digital TV service (NBC, ABC, CBS, FOX, and PBS) similar to analog service.

The broadcasters would like you to believe that their digital TV signal is more widely available. In fact, during recent testimony in front of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, the National Association of Broadcasters claimed that broadcasters have built—and are on-air with—digital television (“DTV”) facilities in 203 markets that serve 99.42% of all U.S. TV households. If we are to believe these statistics, then it is hard to understand why broadcasters are so adamant about preventing the satellite TV industry from serving the remaining 0.58% of households who cannot now receive their service. What is misleading about the 99% statistic is that it merely represents that one broadcaster per market is offering digital service. The broadcasters would have you believe that these broadcasters are offering their service to the entire market, but today the majority of broadcasters are offering their service at low power reaching only a small fraction of the total market. Thus the 99.42% of all U.S. TV households is merely the number of households in those 203 markets and not the number of households that actually can receive the digital service. Finally consumers expect to receive CBS, NBC, ABC, FOX, and PBS in digital and are not satisfied that only one broadcaster in the market is providing service in digital.

The Balanced Budget Act of 1997 provided only a limited number of rationales for extending the December 31, 2006 deadline for broadcasters to return the analog spectrum. The most significant is the so-called “15% rule.” Under that rule, the FCC may grant an extension if at least 15% of households do not have a DTV set or a digital-to-analog converter enabling them to receive the DTV signals of local broadcast stations. Today, less than three years from the 2006 deadline, there is no evidence that the percentage of American homes with compliant sets exceeds even the single digits. The 15% loophole will ensure that broadcasters will squat on both the analog and digital spectrum for years, if not decades to come. New innovations that rely on the redeployment of the analog spectrum will be put on hold and taxpayers across the country will be denied the hundreds of billions of dollars that the auction of the analog spectrum would bring to the U.S. taxpayer.

There is an immediate and practical solution to help ensure that the digital transition does not continue to proceed at today's snail's pace. By allowing satellite TV providers to offer DTV programming to households that are not served with a local over the air signal, Congress would facilitate a demand for digital television sets among satellite TV subscribers. Although these households would be receiving distant network DTV signals rather than local broadcast signals, these consumers would count toward the local broadcaster's 85% take rate because the satellite TV industry's HDTV set top box receivers include over-the-air digital tuners. The network availability of HD service via satellite will also motivate the broadcasters to make their digital signal available to more households sooner, which will accelerate the time in which 85% of the country can receive DTV. Congress will need to direct the FCC to develop a propagation model to predict over-the-air digital reception on a household-by-household basis. The Copyright Office, in its testimony before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property on February 24 agreed by saying “Congress will have to reexamine how to determine what is an un-served household” in a digital world. It is vital that Congress give the Federal Communications Commission direction in the creation of a predictive model for digital television service. The model should take into account that consumers today expect to receive digital service on par with the service available from satellite or cable TV providers and do not expect to pay an unreasonable amount of money to receive such a picture.

¹ FCC, “Summary of DTV Applications Filed and DTV Build Out Status,” February 25, 2004.

Reauthorization of Section 119

Congress allows satellite TV carriers to make distant network programming available to millions of families unable to receive the over-the-air service from their local network affiliates. These “underserved households” number in the millions and reside in every television market across the country. In 1988, Congress passed the Satellite Home Viewer Act which granted the satellite TV industry the same rights afforded the cable TV industry to offer distant network service. The satellite TV industry has since invested billions of dollars to build and launch satellites that now provide service to these families. We urge Congress to extend the compulsory license on a permanent basis to continue to encourage competition in the market and not to frustrate consumers who now receive distant network service.

The broadcasters have argued that consumers should not be eligible for distant network service in markets where local-into-local service is available. We oppose this modification to the existing license. We believe that consumers should have choice in the network programming they must purchase. In the same way that a consumer in Kalamazoo, Michigan can purchase either the Kalamazoo Gazette or the Los Angeles Times, we believe that consumers who do not have adequate access to an over-the-air signal and must pay for their television service should have the option of watching their local broadcaster or a distant broadcaster on their satellite platform. Besides, the modification would penalize satellite carriers for investing in local into local service. Taking away the satellite carrier’s distant network license in areas for which they have made such an investment would be an unjust penalty. Furthermore, the deletion of distant network signals in markets where satellite provides local service would be costly to the consumer. Many satellite TV subscribers have legacy dishes and set top box receivers that would require upgrading in order to switch from distant network service to local service.

In addition it is largely up to the broadcasters to reduce the number of unserved households in their markets by upgrading their facilities. The broadcasters could work to make their own local signal more widely available within their market. This would effectively accomplish their goal of limiting the availability of distant network service in their market. However the broadcasters realize that having their signal delivered by satellite or cable TV is less costly than increasing the power levels of their antennas. Simply put, the broadcasters would rather increase the reach of their signal by sponging off of the investment of the satellite TV industry and limiting the choice of consumers than take proactive steps themselves.

The broadcasters’ proposal would eliminate the incentive for the broadcasters to improve the quality or reach of their free over-the-air signal. With more than 90% of all households receiving their network channels through cable or satellite today, broadcasters acquire less-and-less revenue from households who receive their service over the air. Thus the broadcasters are less responsive to the needs of these consumers. However because the broadcasters would not want these consumers to be eligible for distant network service, the Sec. 119 license creates a market-place check against any incentive of the local broadcasters to allow further deterioration of their over-the-air service. In conclusion, the proposal to limit the availability of distant network service to the markets unserved by local channels via satellite would not improve the availability of free over-the-air service, and could create a disincentive for the broadcasters to continue offering free service of acceptable quality in rural areas.

Section 119 also permits satellite carriers to retransmit non-network broadcast stations to satellite subscribers. These so-called “superstations,” such as WGN, have been a staple of cable system lineups since cable first began making its service available to consumers in the 1970s, and helped drive the growth of the satellite television industry. They continue to be among the most popular program offerings. The statutory license ensures that satellite carriers have the same opportunity as cable to make this popular programming available to satellite subscribers.

Section 119 also allows certain eligible households to continue receiving distant network signals if they subscribed to these signals prior to October 31, 1999. EchoStar strongly supports an extension of the distant network “grandfather” clause. This group of satisfied, long-term customers numbering in several hundreds of thousands has come to rely upon this service for at least the last five years, and in some cases much longer. It makes no sense from a public policy standpoint to disenfranchise consumers by telling them that they can no longer receive this programming.

Finally, the current playing field is not level—as long as the cable industry continues to enjoy a permanent, statutorily granted license, the satellite industry remains at a competitive disadvantage. Therefore, in the interest of parity and Congress’ role and oversight responsibilities in promoting competition in the MVPD

marketplace, we urge the Committee to allow satellite carriers to avail themselves of a license under the same terms as cable.

Conclusion

Mr. Chairman, in closing I would like to reiterate that EchoStar appreciates the efforts of this subcommittee as well as the Congress to ensure that DBS is a true competitor in the MVPD marketplace. With a few exceptions, our experience under the SHVIA has been a positive one. While the DBS industry is growing, it is nowhere close to the size of cable operators. It is therefore essential for Congress to reauthorize the extension of the satellite statutory license, allow more regulatory parity with cable, which still enjoys preferential treatment under the copyright laws, and ensure that the DBS industry is able to compete on a level playing field. We at EchoStar look forward to working with members of this committee and this entire Congress to modernize SHIVA so that we are able to deliver the latest in technology to as many consumers, as quickly as possible.

Mr. UPTON. Thank you.
Mr. Hartenstein.

STATEMENT OF EDDY W. HARTENSTEIN

Mr. HARTENSTEIN. Chairman Upton, Mr. Markey, and members of the subcommittee, my name is Eddy Hartenstein, and I am the Vice Chairman of the DirecTV Group. It is a name we changed since our last visit only a few weeks ago. Thank you for allowing me to once again testify regarding now SHVIRA.

As I reported to you 3 weeks ago, SHVIA is truly one of this committee's success stories. And indeed I believe it was in April 1999, if I may digress, we had a practice of management actually answering the phones. And there is an elderly gentleman from Massachusetts calling me asking about this damn A/B switch, and he said—because I had identified myself as a CSR that day, a customer service rep. He said, “Eddy, can you do something to fix that?”

And I said, “Sir, it will take an act of Congress.”

He said, “Let me take care of it.” Thank you. There you go.

So you understand how appreciative I am of having loyal customers. I will note that he was a customer of ours before certain other members on this committee.

But recently the SHVIRA discussion draft was circulated, and I think while it makes a good start I would like to use the balance of my time to point out the aspects of the draft that are especially helpful, and then perhaps a few that I think could help.

As I indicated earlier, several improvements to the current law are incorporated. It allows us satellite carriers to deliver broadcast signals into all of the markets which cable operators deliver them, the significantly viewed areas. That is great. It extends the good faith bargaining requirements for broadcasters, including the prohibition on exclusive retransmission consent arrangements.

This last provision is particularly important. It prevents, for example, channel 7 here in Washington from cutting an exclusive deal with Comcast and thereby making its signal potentially unavailable to DirecTV, EchoStar, or even StarPower.

It at least begins the process of addressing the needs of consumers who will be unable to receive over-the-air high def signals, although we think the FCC—and we would like to help them—should act more quickly on this issue. And it helps resolve some of the legal uncertainty associated with the splitting of broadcasters in individual markets between two dishes.

All of this is good news in a distribution market that is still, to this day, dominated by cable. There are areas where DirecTV feels—and we would suggest—that the committee consider still making some changes. Among these issues are the permanence of the license.

My first request is very simple. Cable operators have a permanent compulsory license to deliver these broadcast signals. Unless we really enjoy getting together like this every 5 years, I would think satellite operators should also have a permanent license.

Second, and I would classify this the sort of—the no-distant-or-local issue. The draft tells our customers who now receive distant signals legally that they must drop those signals merely because they happen to subscribe to local-into-local service.

To begin with, to the extent that this is a problem, it is a problem that, in large part, will go away naturally. Our customers tend always to prefer local service, and many of them turn away from the distant service once they are given the opportunity when we can present locals.

More fundamentally, we have never thought that Congress would want to be in the business of shutting down anybody's legal service. Your constituents, all of you, would be affected by this provision that they—and how they receive distant network signals legally. They have come to expect them and enjoy them, and they should be able to continue to do so without disruption.

We think the subcommittee should abandon the no-distant-or-local provision outright. However, if it does move into that direction, at an absolute minimum the following changes should make—be provided for. It should allow everyone who legally receives distant signals now to continue doing so.

Next, it should allow everyone who in the future will legally receive distant signals in markets without local service to continue doing so. These changes, we think, would at least minimize some of the worst disruptions of the no-distant-or-local provision as currently drafted.

Our third area of concern relates to the so-called two-dish language in Title I, Section 101. Mr. Chairman, 3 weeks ago I told you and this subcommittee that as far as the two-dish controversy goes the most important thing to DirecTV is legal clarity. There is none now, and there should be. And so, again, I am happy to see the committee take the first steps toward providing this clarity.

But I fear that the bill, as currently drafted, may reach further than the subcommittee and your staff intended. This is because the current language does not distinguish between standard definition and high definition signals. In other words, it prohibits splitting all signals, standard and high definition, in any given market.

This is a problem, and, if unaddressed, it will threaten the transition to digital television and our ability to provide local high def signals into markets. And as you know, DBS operators face significant capacity constraints, particularly as they begin to roll out high def. As a result, we may transmit high def signals, at least to some markets, from so-called other or second locations that would require a second dish.

This type of arrangement is not discriminatory, because in any such market we would place all of the standard def broadcast sig-

nals on one dish, and all of the high definition potentially on a second dish. This is why, as I understand it, the broadcasters do not object to such an arrangement, and certainly the law shouldn't prohibit it.

Once again, Mr. Chairman, Mr. Markey, members of the subcommittee, I would thank you for all that Congress has done to nurture our industry as a vibrant competitor to cable. Your hard work and the hard work of your staff will allow us to continue to do so.

Thank you.

[The prepared statement of Eddy Hartenstein follows:]

PREPARED STATEMENT OF EDDY HARTENSTEIN, VICE CHAIRMAN, THE DIRECTV GROUP

Chairman Upton, Mr. Markey and members of the Subcommittee, my name is Eddy Hartenstein and I am the Vice Chairman of The DIRECTV Group. Thank you for allowing me to testify once again on behalf of DIRECTV regarding the reauthorization of the Satellite Home Viewer Improvement Act ("SHVIA").

Three weeks ago, I reported on the significant progress that that the Direct Broadcast Satellite ("DBS") industry has made as a competitor to cable, and the important role your Subcommittee has had in enabling that progress. I will therefore make my remarks today on this subject brief.

SHVIA is truly one of this Subcommittee's success stories. When SHVIA was enacted in 1999, the DBS industry had 10 million subscribers. In the last five years, that number has more than doubled, reaching 22 million subscribers, of which DIRECTV serves 12 million. The result is that, while cable still has about 66 million subscribers, DBS has played at least some small part in limiting cable price increases and forcing cable companies to provide better customer service, improved content, and digital services. As I testified three weeks ago, none of this would have been possible without more robust DBS competition, and that DBS competition in turn would not have been possible without SHVIA.

So you will understand how appreciative I am to see that this Subcommittee is fully engaged in SHVIA reauthorization. Recently, a SHVIA reauthorization "discussion draft" was circulated. I think this draft makes a good start. And, if I may, I would like to use the balance of my time to point out, first, the aspects of the draft that we think are especially helpful to consumers and competition in the video distribution market; and second, a few aspects of the draft that we think could stand further adjustments.

Positive Aspects of the Draft

SHVIA has been a huge success. So we are very pleased that the Subcommittee recognizes the importance of reauthorizing SHVIA in a timely fashion. And, as I indicated, this draft makes several improvements to current law.

- It allows satellite carriers for the first time to deliver broadcast signals into all of the markets in which cable operators deliver them—including markets where such signals are "significantly viewed." This is a very important provision, which will make DBS more competitive with cable in markets across the country. The provision will also go a long way towards addressing the concerns you have expressed about your constituents' current inability to receive the news and public interest programming most relevant to their lives.
- It extends the good faith bargaining requirements for broadcasters—including the prohibition on exclusive retransmission consent arrangements. At the same time, it imposes a similar (and, we think, reasonable) good-faith negotiation requirement for distributors.
- It at least begins the process of addressing the needs of consumers who will be unable to receive over-the-air high-definition signals.
- And it helps to resolve some of the legal uncertainty associated with the "splitting" of broadcasters in individual markets between two dishes.

All of this is good news for DIRECTV. More importantly, it is good news for competition in a distribution market that is still dominated by cable.

Three Areas Where DIRECTV Seeks Changes

Again DIRECTV believes this draft has much to speak for it. But some other aspects of the draft concern us greatly. If left unchanged, a few provisions threaten to undo at least some—and possibly a great deal—of the DBS success story. So we

hope, Mr. Chairman and Members of the Subcommittee, to work with you and your staffs over the coming weeks to see if we can't make a good draft even better.

Permanent License

My first request to you is a very simple one. Our competitors in the cable industry have a permanent compulsory license to deliver broadcast signals. DIRECTV sees no reason why we, too, shouldn't have a permanent compulsory license. We therefore ask that you make the satellite statutory license permanent.

No-Distant Where Local

The second issue we would like the Subcommittee to address concerns Title II, Section 203—the “no-distant-where-local” provision. The draft tells our customers who now receive distant signals legally that they will have to drop those signals, merely because they happen to subscribe to local-into-local service.

To begin with, to the extent that this is a “problem,” it is a problem that in large measure will go away naturally. We have found that, as we introduce local-into-local service in particular markets, most customers prefer their local stations. Indeed, many customers in those markets naturally begin to “churn” from distant signal service to local service. We expect that trend to continue and accelerate in the future.

More fundamentally, we have never thought that Congress should be in the business of shutting down anybody's legal service. Your constituents who would be affected by this provision receive their distant signals legally. They have come to expect them and enjoy them. They should be able to continue to do so without disruption.

As you can see, we think the entire “no-distant-where-local” idea is a bad one. And we think the Subcommittee should abandon it outright. But if the Subcommittee does move in this direction, it should at an absolute minimum make the following changes:

- It should allow everyone who legally receives distant signals now to continue doing so.
- It should allow everyone who, in the future, will legally receive distant signals in markets without local service to continue doing so.

This, we think, is a simple matter of fairness. I want to be clear—we would not support a “no-distant-where-local” provision even with these changes. But these changes would at least minimize the disruption to your constituents of the “no-distant-where-local” provision.

Two-Dish

The third area where we think the draft needs adjustment concerns the so-called “two-dish” language in Title I, Section 101. Mr. Chairman, three weeks ago I told you that, as far as the two-dish controversy goes, the most important thing to DIRECTV is legal clarity. There is none now, and there should be. And so, again, I am happy to see that the Subcommittee is taking the first steps towards providing this clarity.

I am concerned, however, that the bill as currently drafted may reach further than the Subcommittee intends. This is because the current language does not distinguish between standard- and high-definition signals.

As I understand it, the Subcommittee seeks to prevent satellite operators from, in any single market, putting some standard-definition broadcast signals on one dish while putting others on a second dish. The draft language accomplishes this.

But the language does more. It prohibits splitting *all* signals—standard and high-definition—in any given market. This is a problem, and, if unaddressed, it will threaten the transition to digital television.

As you know, DBS operators face significant capacity constraints, particularly as they begin to roll out high-definition signals, which require far more bandwidth than do standard-definition signals. As a result, DBS operators may transmit high-definition signals (at least to some markets) from so-called “wing-slots.” In order to receive those high-definition signals, customers would need a second dish.

This type of arrangement is not “discriminatory,” because, in any such market, we would place all the standard-definition broadcast signals on one dish, and *all* the high-definition signals on the second dish. This is why, as I understand it, the broadcasters do not object to such an arrangement. Yet the two-dish provision, as written now, would prohibit this arrangement. We think this can be easily fixed, and would be happy to work with your staff to do so.

Once again, Mr. Chairman and Members of the Subcommittee, I would like to thank you for all that Congress has done to nurture the satellite television industry as a vibrant competitor in the MVPD market. Your hard work, and the hard work

of your staff, will allow us to continue to provide the highest quality, best-priced competitive service to our customers. I am happy to take your questions.

Mr. UPTON. Mr. Lee. I would just note for the record we have a little mute button for you up here today.

STATEMENT OF ROBERT G. LEE

Mr. LEE. Thank you, Chairman Upton, ranking member Markey, and members of the subcommittee. I am pleased to represent NAB and America's local television stations here today.

The aim of the current revision of SHVIA, in our estimation, should be, first, to promote the rapid rollout of DBS local-to-local service, which if done properly enhances America's unique system of free, over-the-air community television broadcasting; and, second, to ensure that the distant signal compulsory license, which by its nature threatens localism, is used solely as a last resort.

And, sadly, a third requisite for the SHVIA revision is a set of exceptionally stringent monitoring and enforcement provisions, because as this committee knows from painful experience EchoStar has often ignored and circumvented the existing statute. A Federal judge found just 5 days ago that EchoStar's wilful infringement of network programming enabled it to reap many millions of dollars of unlawful gains.

I commend the staff for the recent draft, which is an important starting point in reaching your goals. In some areas, we, too, think improvements should be made to ensure that DBS is provided—is not provided new opportunities for abuse.

First, we commend the effort to end EchoStar's two-dish scheme. You heard today that putting all local stations on the same dish would require EchoStar to end local to local in some markets. Well, let me say just two things on that issue. If DirecTV, with fewer transponders, can deliver local to local in a non-discriminatory market and all 210 markets, so, too, can EchoStar and its technicians.

Second, competitive pressures from DirecTV and the cable industry will compel EchoStar to find a way to continue providing local into local in markets it now serves.

With regards to Section 102, broadcasters have concerns about how the draft would have the FCC modify the testing and waiver process and the Longley-Rice criteria. DirecTV will offer local to local to 92 percent of U.S. households by year end. Hence, by the time this bill becomes law, this issue will be irrelevant, in the case of DirecTV at least, for 92 percent of its subscribers.

When local to local has reached all 210 markets, it is a moot issue. Additionally, broadcasters already bear the burden of granting a waiver for any request we do not answer within 30 days. In multiple cases, EchoStar has deluged stations with thousands of paper waiver requests at one time in an attempt to exploit this provision of the law.

Moreover, local stations have been responsive to viewers' needs, despite what you hear. Over 7 million waivers have been issued in this country today. In regards to Longley-Rice, as recently as 2000, the FCC technical staff examined and reexamined the system and found it to be an accurate predictor of signal intensity. And, specifi-

cally, the FCC has contemplated and rejected the notion of including station-to-station interference in that model.

If Congress now reintroduced interference in the ILLR model, EchoStar would seek to exploit that change by urging the Federal court in Miami to extend its nearly decade-long violation of copyright law. On digital white areas, broadcasters commend the committee for rejecting this ill-advised proposal.

We do have concerns about the draft's instructions to the FCC to recommend how to define unserved digital households. There are many pieces to the digital television puzzle that still need to fall into place, and we think it would be premature to define unserved digital households as early as 2005. By the time this bill becomes law, that date will only be 18 months away.

And, finally, such a study should also take a hard look at the ability of DBS to offer digital broadcast systems on a local-to-local basis—an idea Mr. Hartenstein has alluded to—which would make the whole issue irrelevant.

In the area of significantly viewed, broadcasters do not oppose properly crafted legislation to permit DBS to carry stations in areas in which stations are significantly viewed. During the last hearing, we heard you, and our industry has sought to work with the staff to find ways to remedy some of these viewing anomalies.

We have since worked with the staff to address those concerns, and we think—we hope the staff will continue to hear from us as we go forward. In its current form, the significantly viewed provision of the draft, however, engenders unintended but severe consequences.

The DBS industry, we think, should only be allowed to deliver a significantly viewed distant signal after its providing local to local in a market. It shouldn't be able to dump Denver stations into Cheyenne without offering Cheyenne locals.

As rural DMAs are likely to be the last to receive local-into-local carriage, the current provision threatens the health and viability of small market stations. And allowing significantly viewed stations before local to local removes incentive for the satellite carriers to bring local carriage to a market.

Any significantly viewed language must contain stringent monitoring and enforcement mechanisms to prevent satellite from breaking the law and signing up ineligible subscribers, and the draft, as we read it, contains no such provisions. Remember, one of these companies sits here today still illegally selling signals to hundreds of thousands of ineligible subscribers. And if you let this company decide for itself how to comply with the law, the fox will truly be guarding the hen house.

Last, the draft must ensure that once a subscriber receives local stations via satellite, there is no distant signal importation.

In sum, I urge you to support a SHVIA that advances the committee's and the industry's shared goal of fostering broadcast localism.

Thank you.

[The prepared statement of Robert G. Lee follows:]

PREPARED STATEMENT OF ROBERT G. LEE, PRESIDENT AND GM, WBDJ TELEVISION,
ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters welcomes the opportunity to comment on the March 29, 2004 staff draft of the "Satellite Home Viewer Improvement Reauthorization Act."

As NAB has stressed in its prior testimony, the goals established by Congress for the Satellite Home Viewer Act and its progeny are to ensure *both* that free, over-the-air network broadcast television programming will be widely available to American television households, *and* that satellite retransmission of television broadcast stations will not jeopardize the strong public interest in maintaining free, over-the-air local television broadcasting. Towards these ends, the aim of the current revision of SHVIA should be (1) to promote the rapid rollout of DBS local-to-local service, which—if done properly—enhances America's unique system of free, over-the-air, local television broadcasting, and (2) to ensure that the distant-signal compulsory license, which by its nature threatens localism, is used solely as a last resort. Sadly, a third requisite for the SHVIA revision is a set of exceptionally stringent monitoring and enforcement provisions, because—as the Committee knows from painful experience—one of the two DBS companies, EchoStar, has a penchant for ignoring and circumventing statutory provisions relating to the carriage of broadcast signals. (In connection with SHVIA in particular, a federal judge found just five days ago that EchoStar's "willful infringement" of network programming enabled it to "reap many millions of dollars" of unlawful gains.)

For the Committee's convenience, this testimony addresses the sections of the March 29 staff draft in the order in which they appear in the draft.

1. Stopping EchoStar's Discriminatory Two-Dish Scheme

As the Committee is aware, EchoStar has made a mockery of the "carry one, carry all" principle by carrying Spanish-language, religious, public, and other stations in many markets in a way that renders them invisible to almost all of EchoStar's customers. Section 101 of the draft bill commendably seeks to put an end to this grossly improper practice. While NAB appreciates the need expressed in the Committee's draft for a period of transition for the benefit of consumers, EchoStar is on notice *today* that it needs to stop this egregious form of discrimination. Therefore, allowing EchoStar as much as a year after enactment (and as much as 21 months from now) to continue this discrimination is unnecessary and inappropriate.

In addition, to ensure that EchoStar does not benefit from the time needed for the FCC to consider an application by EchoStar for an extension of the deadline, the Committee should set a short deadline (say, 60 days) for the FCC to decide whether to grant an extension, and should provide that the time period during which the FCC considers such a request should be counted as part of the 180-day extension period. Finally, to create marketplace incentives to push EchoStar to stop this abuse at the earliest possible moment, the FCC should be permitted to grant an extension only if no other satellite carrier offers local-to-local on a one-dish basis in the local market.

2. Changes to the ILLR, Waiver, and Testing Procedures

NAB is gravely concerned that Section 102 of the Act would do tremendous damage to the goals the Act was designed to promote.

First, draft Section 339(c)(6)(A)(iii) would direct the FCC to modify its regulations concerning the grant of waivers by broadcasters—and, strikingly, would do so without giving any direction to the FCC about the purpose of these modifications. Enacting this provision would be a grave mistake. At the outset, to the extent this provision is directed to unfounded allegations that stations unnecessarily withhold waivers, it should be noted that nationally, stations have granted over seven million waivers. Moreover, many waiver denials are in response to abusive EchoStar practices.

With the rapid rollout of local-to-local, there will be no need whatsoever for the distant-signal compulsory license at all for the overwhelming majority of U.S. television households—much less for cumbersome new regulation of the waiver process. By the time this new Act goes into effect, for example, DirecTV will offer local-to-local to at least 130 DMAs covering 92% of all U.S. television households. By as early as 2006 and no later than 2008, DirecTV will offer local service in all 210 DMAs. And for its part, EchoStar already offers local-to-local to 85% of American TV households, and will be driven by competition with DirecTV and cable to expand that percentage still further by adding still more markets. The relevance of the distant-signal license *at all*, therefore, is only to a small—and quickly shrinking—percentage of television households.

Any effort to further regulate the waiver process even in non-local-to-local markets would be ill-advised. In the SHVIA, Congress *already* put enormous pressure on broadcasters by subjecting them to the type of “negative option” regime that Congress normally condemns: if a station does not respond to a waiver request within 30 days, the waiver is deemed granted. In addition, the waiver process is now carried out very efficiently through an electronic system developed and managed by Decisionmark Corporation, in which both broadcasters and satellite carriers participate.

The *procedure* for processing waivers is therefore in no need of improvement. And any *substantive* regulation of the waiver process—for example, telling stations that they *must* grant waivers under certain circumstances—would simply be a backdoor method of changing the standard for which households are considered “unserved.” Both Congress and the FCC have long ago determined—and reaffirmed after repeated reevaluations—that the *objective* Grade B intensity standard is the right test. Any effort to impose a *subjective* standard would be a nightmare, as all of us know from the years when the satellite industry unlawfully employed just such a standard.

Second, draft Section 339(c)(6)(A)(iii) would also direct the FCC—again, without any guiding standards—to modify its regulations concerning testing. The draft amendments do not take into account that it makes no sense for *any* tests to be done for any subscriber who can receive local-to-local service from his or her carrier—and nearly all subscribers *will* be able to by the time this law goes into effect. And even in the dwindling number of non-local-to-local markets, the draft amendments do not take into account that it is a tremendous waste of scarce resources to perform signal intensity tests for subscribers who obviously receive a strong signal from their local stations.

NAB respectfully suggests that to the extent that consumers complain about the existing standards for receiving distant signals, the overwhelming majority of problems arise because their satellite carriers have not ensured that the consumers have a properly functioning rooftop antenna. If one resides 50 miles from a TV tower, for example, neither a set of rabbit ears nor a creaky old rooftop antenna last used in the 1970’s is likely to generate a high-quality picture on one’s television set. But in many cases, satellite companies have done nothing more to help their subscribers receive local, over-the-air signals.

Third, sections 339(c)(6)(i) and (ii) would direct the FCC to make further modifications to the ILLR model, including changing the model to take into account the effects of interference. This provision is extremely puzzling, because the FCC has already *exhaustively* examined the ILLR model on two different occasions.

When courts began ordering turnoffs of illegal distant subscribers in 1998, the FCC commenced a proceeding to address, among other things, how to predict which subscribers can get a Grade B signal. Both satellite carriers, broadcasters, and other interested parties provided the FCC with a mountain of technical materials concerning prediction of signal strength at subscriber households. In February 1999, after reviewing all of these submissions, the FCC adopted the Individual Location Longley-Rice (“ILLR”) model, and said: “We believe ILLR is an accurate, practical, and readily available model for determining signal intensity at individual locations.” *In Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act—Part 73—Definition and Measurement of Signals of Grade B Intensity*, CS Dkt. No. 98-201 (released Feb. 2, 1999).

In the SHVIA, enacted in November 1999, Congress directed the FCC to examine any possible ways to make the ILLR model even more accurate. 47 U.S.C. § 339(c)(3). In early 2000, the FCC did exactly that, after reviewing a second massive set of filings by satellite carriers, broadcasters, and others. In May 2000, the Commission announced that, based on the detailed technical data submitted by the parties, it was amending the ILLR model in certain respects to make it even more accurate. *In Re Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, ET Docket No. 00-11 (released May 26, 2000). The Commission explained that the revised ILLR model “will provide a reliable and presumptive means for determining whether the over-the-air signal of a network affiliated television station can be received at an individual location.” *Id.*, ¶ 1.

In the revised ILLR model it announced in May 2000, the FCC added consideration of land use and land cover to the ILLR formula, in those cases (namely, for UHF stations) in which doing so would increase the accuracy of the model. The Commission also dropped consideration of interference from the ILLR model, a decision that made good sense since (1) interference is not relevant to whether a viewer receives a Grade B intensity signal from the desired station, (2) the effects of interference can be minimized or eliminated by using a properly-oriented rooftop antenna

with a high front-to-back ratio, (3) there is no practical way to *test* for the presence of interference, and (4) to the extent interference is relevant, broadcasters have voluntarily granted many millions of waivers to subscribers in “borderline” situations.

True to form, EchoStar knowingly and intentionally broke the law by continuing to use interference in its own ILLR runs after the FCC eliminated interference from the ILLR model in May 2000. Here is what the United States District Court for the Southern District of Florida found after a lengthy trial last year:

“[T]he Court finds that EchoStar’s use of interference after May 2000 was improper. In May 2000, the FCC issued a First Report and Order in which it made certain modifications to the ILLR model and published a detailed ‘cookbook’ prescribing, on a step-by-step basis, how the model is to be employed. FCC First Report & Order, May 2000 at A-2. The FCC’s detailed directions explained how to calculate whether an individual household was unserved. Although the FCC had previously indicated that interference was to be included in the ILLR model, the FCC’s May 2000 order changed the use of interference. The FCC reaffirmed the point when it later issued OET (Office of Engineering and Technology) Bulletin 72 in July 2002, which repeated the same ‘cookbook’ directions, again excluding any consideration of interference.

Consideration of interference can only help EchoStar by treating a subscriber with a relatively weak (but above Grade B) signal as unserved because of the predicted presence of interfering signals from other stations. The FCC is aware of the issue of interference, since in another ‘cookbook’ about how to use the Longley-Rice model for a different purpose, it provided specific directions on how to take interference into account. *See* OET Bulletin 69 (‘Longley-Rice Methodology for Evaluating TV Coverage and Interference’) (July 1997). Had the FCC wished to include interference in the current ILLR model, it would have done so.

Further, EchoStar was advised by Decisionmark of the FCC’s May 2000 ruling that the ILLR model no longer included interference. In fact, Mark Castagneri of EchoStar sent an email dated July 27, 2000 to several other EchoStar employees, attaching a memo prepared by Jane Schlegel of Decisionmark. In that memo, Ms. Schlegel indicated that ‘[i]nterference calculations were eliminated.’ Additionally, in a follow-up email dated July 31, 2000, Mr. Castagneri indicated that ‘[b]asically, interference is out and LU/LC is in for calculating signal strength.’ Mr. Castagneri attached an earlier email from Ken Franken of Decisionmark making the same ‘cookbook’ point discussed above—that the FCC-prescribed recipe for ILLR analysis precludes use of interference. Mr. Franken’s email indicated that the FCC official most knowledgeable about the ILLR program, Bob Eckert, agreed that interference was no longer part of the ILLR model after the May 2000 Order.

Accordingly, *EchoStar’s use of interference at all times after August 2000 (at the latest) was in knowing violation of applicable legal standards.”*
CBS Broadcasting, Inc. v. EchoStar Communications Corp., 276 F. Supp. 2d 1237, 124950 (S.D. Fla. 2003) (emphasis added).

For Congress to direct the FCC to reverse its long-standing position on the role of interference in the ILLR model would thus not only be wrong as a matter of policy, but would send precisely the wrong message to the satellite industry: that when a DBS company knowingly and deliberately breaks the law to increase its own profits, and when a federal court properly condemns the company for doing so, Congress will come to the company’s rescue to declare that the lawbreaking was perfectly acceptable. There can be no doubt that, were Congress to change the rules late in the fourth quarter (after EchoStar has broken them), EchoStar would seek to exploit that change by urging the courts to extend—for still more months and years—its nearly decade-long violations of the Copyright Act.

3. Good faith requirement for retransmission consent negotiations.

Although the NAB believes that the duty currently imposed by the Act on broadcasters to negotiate in good faith about retransmission consent is unnecessary and has led to harassing litigation by EchoStar, broadcasters certainly agree with the Committee that if this provision is to be extended, it should equally be imposed on cable systems and satellite carriers.

The draft version of Section 103 would also extend the prohibition against exclusive grants of retransmission consent. While Congress has elsewhere banned exclusivity by *vertically integrated* companies, most local broadcasters are not vertically integrated. Since the very purpose of the copyright laws is to grant exclusivity to copyright owners, NAB respectfully suggests that it is inappropriate to extend a blanket prohibition on exclusivity on all local broadcasters.

4. Standard for over-the-air digital service.

As draft Section 104 appears to recognize, a “digital white area” standard will be relevant, if ever, only *after* the transition to digital-only television broadcasting is completed. (NAB has previously shown that the DBS industry proposal to allow importation of distant digital signals *before* analog broadcasting ceases would be a recipe for mischief, further abuse, and illegal conduct.)

If the Committee wishes to have the FCC examine whether there will someday be a need for a “digital white area” standard, and if so what that standard might be, it should make absolutely clear that the FCC’s role is merely to *recommend* a change in the law, and not to implement a change in law itself. Although this appears to be the intent of the draft, that point should be made clearer and more explicit in the language of the provision. In addition, if the FCC is to study this issue, it should also examine the status of the DBS industry’s efforts to deliver digital broadcasts on a local-to-local basis, and consider what can be done to spur those efforts. (NAB believes that, through innovative use of existing technological tools, DBS firms can readily offer local-to-local digital service in all 210 markets.) To the extent that DBS firms offer local-to-local digital service, of course, the very concept of a “digitally unserved household” becomes an anachronism.

Any FCC study of this topic should also be timed to be most useful to Congress. At present, the broadcast industry, and the Commission, are still very much in the steep part of the learning curve about the propagation characteristics of digital television broadcasts. In addition, for reasons beyond the control of broadcasters, the transition to digital-only broadcasting is not likely to be complete for several years. The Committee should therefore avoid forcing the FCC to deliver a premature judgment about a future “digital white area” standard, particularly when there may be little or no need whatsoever for such a standard given the likely rollout of digital local-to-local service.

5. Extension of exception to retransmission consent.

Under the Act as now in force, the ability of broadcasters to insist on obtaining retransmission consent is overridden in the case of “unserved households.” That exception, however, expires as of the end of 2004. NAB respectfully submits that there is no reason to continue to interfere with the free market in this way. There is no doubt that satellite carriers can find an ABC station, a CBS station, a Fox station, and an NBC station, to consent to being delivered to “unserved households” in other markets. But there is no reason to deny all network stations the possibility of obtaining marketplace consideration for their consent. Moreover, this exception provides an unfair advantage to satellite over cable, which must seek retransmission consent for any distant signal.

6. Significantly viewed stations.

While NAB does not oppose a properly-crafted legislation to permit DBS firms to carry broadcast television stations in areas in which the FCC has determined that the stations are “significantly viewed” under the Commission’s regulations, draft Section 340 of the Communications Act lacks several crucial provisions without which local television stations could be severely injured and satellite would enjoy an unfair advantage over cable. While a number of adjustments are recommended, the following issues are crucial.

- As currently drafted, the provision contains nothing to prevent EchoStar from turning a new authority to deliver “significantly viewed” stations into an excuse to engage in a new wave of national lawbreaking. (To put this issue in perspective: right now, in April 2004, EchoStar is continuing, every day, to violate Congress’ absolutely clear prohibition against delivering distant signals to “served” households.) It is not difficult to imagine, for example, EchoStar claiming that Washington, D.C. stations are “significantly viewed” in Raleigh, North Carolina—claims no more outrageous than many others that EchoStar has made over the years. Any “significantly-viewed” provision therefore needs stringent reporting and enforcement provisions that will, to the extent possible, ensure compliance with the law.

- Congress enacted just such a reporting and enforcement provision in the SHVIA, which imposed severe penalties on any satellite carrier that delivered a station on a local-to-local basis without first obtaining retransmission consent from the station. See 47 U.S.C. § 325(e). The FCC’s implementing regulations are equally potent. NAB suggests that the Committee look to Section 325(e) as a model for new enforcement provisions applicable to carriage of significantly viewed stations.

- The punishment for violations of the new “significantly-viewed” provision should fit the crime. For example, if EchoStar carries a station in an area in which the FCC has not determined that the station is significantly viewed, after receiving no-

tice of the violation, it should forfeit the privilege of delivering stations in that market to “significantly viewed” areas outside the market.

- If the FCC determines that a station is no longer significantly viewed in a defined geographic area, the Section 122 compulsory license permitting carriage of that station should expire shortly afterwards.

- Under the staff draft, DBS firms could import significantly viewed signals into markets in which they do not offer local-to-local. This would be a disaster. *First*, if a DBS firm could deliver out-of-market stations into DMAs in which it does *not* offer local-to-local, the carrier’s subscribers in the latter markets would see an *out-of-town* station on their DBS lineup, but would not see their own local stations. Particularly because the DMAs in which local-to-local is not yet available are generally small markets, the economic health, and even the viability, of free, over-the-air local stations could be threatened as out-of-town stations siphoned off their local viewers.

In addition, allowing importation of signals into non-local-to-local markets would damage the incentives for the DBS firms to continue expanding the number of markets they serve with local-to-local. In some small markets, DirecTV and EchoStar could get much of the benefit of local-to-local by relying on the “significantly-viewed” exception to deliver stations from neighboring markets. As a result, the satellite carriers would have much less reason to invest in providing true local-to-local service in currently unserved markets.

- On a technical note, any change to the “core” sections of Section 119 will necessitate several related changes to other provisions to make the revised section work.

- The draft could be read to allow DBS companies to determine for themselves which stations are significantly viewed, rather than relying on the FCC’s determinations about which stations have that status in particular communities. Accordingly, NAB recommends that the draft be clarifying to provide that only the FCC has that authority.

- NAB questions the necessity for providing for “market modifications” in the DBS context, and recommends that the provision be dropped.

- If Congress allows DBS firms to deliver out-of-market network stations to “significantly viewed” areas, it should do so only into areas in which a local affiliate of the same network is carried on a local-to-local basis. (This will provide incentives to establish new network affiliates in those markets.) In addition, to prevent DBS from gaining an unfair advantage over cable, the draft should direct the FCC to allow broadcasters to make elections between retransmission consent and mandatory carriage on a community-by-community basis, rather than facing an all-or-nothing decision across an entire DMA, as FCC regulations currently dictate.

7. If local, no distant.

NAB commends the Committee for its effort to end the distant-signal compulsory license for viewers who can receive their own local stations by satellite from their DBS company. While NAB appreciates the Committee’s desire to minimize consumer disruption, we respectfully suggest that there is no need to “grandfather” any subscriber’s ability to receive distant signals once local stations are offered to that subscriber. The only reason a subscriber would elect to continue receiving distant rather than local ABC, CBS, Fox, and NBC stations would be to time-shift (*e.g.*, watching Jay Leno at 8:30 p.m. on the West Coast by viewing an East Coast station) or to view out-of-town sports (*e.g.*, watching an out-of-town NFL game for which one would otherwise need to purchase NFL Sunday Ticket). Since the distant-signal license has always been intended to be only a lifeline to get network programming to subscribers who otherwise have no access to it, there is no principled justification for this new form of grandfathering. And it is always unwise to specify a *future*, rather than a past, date for grandfathering, since doing so creates incentives for satellite companies such as EchoStar to encourage as many subscribers as possible to subscribe to distant stations “before it is too late.”

Nor is there likely to be any substantial consumer ruckus over the termination of distant signals to subscribers who can receive local-to-local service. As part of a last-minute “cleanup campaign” before trial in the CBS Broadcasting case, EchoStar turned off distant signals to subscribers in several local-to-local markets in early 2002. Broadcasters heard virtually no complaints from the affected consumers at the time, and we understand the same to be true of Congress. Because the subscribers will at all times have satellite-delivered access to programming such as the “March Madness” NCAA playoffs, *American Idol*, *The Apprentice*, and *Alias*, the circumstances here bear no resemblance to the conditions that led Congress to adopt a limited grandfathering provision in 1999.

There are also important drafting issues about this provision, even if the Committee were to conclude (incorrectly in NAB’s view) that some form of grandfathering here is appropriate. For example, read literally (as courts generally

do), draft Section 339(a)(1)(B)(ii) provides that any distant-signal subscriber as of the date of enactment “may continue to receive service under the statutory license of section 119.” That broad language would appear to allow EchoStar to continue serving *ineligible* distant-signal subscribers—even after a court finding, following a 10-day trial, that EchoStar is continuing illegally to serve hundreds of thousands of such ineligible subscribers. This problem can be corrected through redrafting.

There is no reason to delay the effectiveness of this provision until six months after the date of enactment. The satellite companies are on notice *now* that this change in law is coming down the track, and can start implementing the transition from distant to local signals now. In many cases, this will be as simple as flicking a switch.

Finally, we urge the Committee to consider a more far-reaching version of this important reform: to terminate the distant-signal license if *either* satellite carrier offers local-to-local service (including an affiliate of the relevant network) in the relevant market. This approach would create strong incentives for both DBS firms to roll out local-to-local as quickly as possible, lest they lose subscribers to their DBS rival. And it would quicken the pace at which EchoStar will match DirecTV’s commitment to deliver local-to-local in all 210 markets, by taking away from EchoStar the crutch of being able to offer distant signals to any households in those markets.

CONCLUSION

NAB thanks the Subcommittee for the opportunity to present its views on the staff draft, and looks forward to working with the Subcommittee to craft the best possible legislation.

Mr. UPTON. Thank you very much.
Dr. Wright.

STATEMENT OF FRANK WRIGHT

Mr. WRIGHT. Thank you, Mr. Chairman, Mr. Markey, and members of the subcommittee. The National Religious Broadcasters, or NRB, is an international association of Christian communicators involved in radio, television, internet, and film. We currently have more than 1,700 member organizations representing millions of viewers, listeners, and readers.

Recently published research that was quoted by the President when he addressed our convention last year indicate that 141 million Americans listen to religious broadcasting at least once a month. All that is to say that many of our members have a significant stake in the draft legislation under consideration today.

With your permission, Mr. Chairman, I would like to limit my remarks today to the good, the bad, and the ugly. First, the good. Thanks, in no small part to the wisdom of the Congress, the Satellite Home Viewer Improvement Act has been a very beneficial piece of legislation. Every member of the witnesses testifying today are in agreement on that.

By allowing DBS providers to retransmit the programming of local market broadcast stations, the television viewer benefits, and benefits greatly, from the enhanced choices available. And by requiring that such offerings are made in a non-discriminatory fashion, the interests of local broadcasters are protected as well, at least in theory, which leads us to the bad.

The two-dish strategy employed by EchoStar to fulfill its carry one, carry all requirements we believe is both discriminatory and harmful. This arrangement places the DBS provider in the position of making basic programming decisions for the viewer, instead of allowing the viewer to exercise his or her own choice.

When EchoStar casts a disfavored broadcast station into the outer darkness of one of its wing satellites, it is engaging in the very cherrypicking that the Congress expressly prohibited.

As we turn our attention to the ugly, my metaphor unfortunately begins to break down, as they all do. Here I am referring to the implementation of the Act by the FCC. Of course, I mean no disrespect, but the FCC's unwillingness to firmly address the discriminatory nature of EchoStar's two-dish strategy leaves us with a decidedly unappealing outcome.

As the committee knows, the FCC issued a declaratory ruling concluding that EchoStar's two-dish plan fails to comply with SHVIA, yet nearly 2 years later this matter is still not resolved. For these reasons and others, I commend this committee for its desire to strengthen SHVIA through the reauthorization process.

Yet with all due respect, Mr. Chairman, when I look at the staff discussion draft, I still see a bit of the good, the bad, and the ugly. First, the good. The good, of course, is I believe a very, very powerful good—the requirement that all broadcast stations be carried on a single dish at last fulfills the intent of the original legislation, which is to require that local-into-local service be provided “on contiguous channels and provide access to such station signals at a non-discriminatory price and in a non-discriminatory manner.”

The bad, however, is also noteworthy, and specifically I am referring to the temporary market-by-market waiver specified in Section 101, subsection C. In my view, this waiver addresses a so-called capacity constraint that, in point of fact, does not exist and is not relevant.

The reason the capacity question is not relevant is because this legislation does not require that any additional stations be added to a satellite lineup in order to fulfill its requirements. Not one. The only question is: how will the broadcast stations be distributed across the available satellites?

Fulfilling the provisions of this Reauthorization Act has nothing to do with capacity, because sufficient capacity must already be in place before EchoStar can initiate local-into-local service in a given DMA.

Capacity, therefore, not being a relevant factor, the temporary market waivers detailed in the discussion draft of the Reauthorization Act are not necessary. And, in fact, in our judgment such waivers can only lead to substantial implementation delays when we have already witnessed years of implementation delays to this point.

The NRB is pleased to offer its strong support for the draft language with the one qualification that we believe the temporary waiver provision is both unnecessary and perhaps even counterproductive.

Thank you for listening to me today.

[The prepared statement of Frank Wright follows:]

PREPARED STATEMENT OF FRANK WRIGHT, PRESIDENT, NATIONAL RELIGIOUS
BROADCASTERS

OVERVIEW OF DISCRIMINATORY SATELLITE CARRIAGE PRACTICES

On November 29, 1999, Congress enacted the Satellite Home Viewer Improvement Act (“SHVIA”), which authorized satellite carriers to retransmit the program-

ming of local broadcast television stations to viewers in a station's local market. This is referred to as "local into local" service. In enacting SHVIA, Congress intended that satellite carriers provide service to the public "in a way that is convenient and practically accessible for consumers." (*Joint Explanatory Statement of the Committee of Conference*, 145 Cong. Rec. S14708, 14711 (Nov. 17, 1999)). To that end Congress included a requirement that satellite carriers

retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on *contiguous channels* and provide access to such station's signals *at a non-discriminatory price and in a non-discriminatory manner* on any navigational device, on-screen program guide, or menu. (47 U.S.C. § 338(d) *emphasis added*).

Despite this requirement, with which market competitor DirecTV has complied, EchoStar Communications Corporation ("EchoStar") commenced local into local service by segregating certain independent, public television, Spanish-language, and religious stations from the network-affiliated stations in a market. To accomplish this, EchoStar placed the network-affiliated stations on the same satellites that carry EchoStar's other programming (e.g. ESPN, CNN, MTV), while placing the "disfavored" stations on a secondary satellite. In addition to being more difficult to receive (because it is lower in the sky relative to the horizon), the secondary satellite requires the installation of a second satellite dish in order to be received by an EchoStar subscriber. Naturally, few subscribers have been willing or able to put a second dish on their roof to obtain what is in some markets only one additional local station, effectively relegating those disfavored stations to a form of satellite solitary confinement. According to a report filed by EchoStar with the FCC in September 2002, after nearly two years of this two-dish segregation, barely 1.5% of EchoStar subscribers had installed a second dish to receive all of the local signals to which they are entitled, and for which they paid.

On April 4, 2002, the FCC determined that EchoStar's two-dish scheme, as implemented, violated SHVIA because it discriminated against some, but not all, stations on the basis of price, contiguous channel placement and electronic program guide treatment. The FCC ordered EchoStar to immediately correct this discrimination, presenting it with a variety of options for doing so. As part of that proceeding, EchoStar argued that a two-dish scheme was necessary in most markets because of satellite capacity constraints and customer expectations on non-interrupted service. It is noteworthy that DirecTV has alleged no such capacity constraints as it initiates local into local service in various markets.

Since that time, EchoStar has successfully launched two new satellites with additional spot beam capacity, eliminating capacity constraints. Yet, as EchoStar has initiated local into local service in additional Designated Market Areas, it has continued to employ its discriminatory two-dish scheme.

There are, of course, natural subscriber disincentives associated with this two-dish scheme, not the least of which are (a) the inconvenience of ordering and accepting installation of a second dish, and (b) the placement of a small number of independent stations on the second dish satellite, while the major network-affiliated stations are available on the main satellite without a second dish.

Aside from the natural subscriber disincentives imposed by EchoStar's decision to relegate disfavored stations to a second satellite requiring a second dish, the implementation of the two-dish scheme is inherently discriminatory. The two-dish approach violates SHVIA by: (a) using a pricing scheme that effectively deters subscribers from purchasing some, but not all, local television signals; (b) failing to place all local broadcast stations on contiguous channels to facilitate ease of acquisition; and (c) failing to include the disfavored stations on electronic program guides, giving them the same accessibility as other local stations available on the main satellite.

While the FCC Media Bureau found that EchoStar's two-dish scheme was in fact inherently discriminatory, it has allowed it continue temporarily provided that EchoStar improved its notice to customers that the necessary additional equipment would be installed free of charge. Shortly thereafter, FCC Commissioners Martin and Copps issued a lengthy statement detailing the many ways the Media Bureau decision was inconsistent with SHVIA, congressional intent, and the FCC's own rules.

Despite the fact that multiple parties appealed the Media Bureau decision to FCC in May of 2002, the Commission has still not responded. In fact, in March 2003, DirecTV filed a request with the FCC asking that action on the pending appeals be expedited so that EchoStar is either prevented from unfairly competing against DirecTV through its abuse of SHVIA, or that the FCC clarify whether DirecTV can also commence segregating some local stations to secondary satellites. All the while, EchoStar continues to expand its segregation of local broadcast stations in addi-

tional markets, causing substantial economic harm to the disfavored stations while depriving local viewers of the ready access to local stations promised when SHVIA was enacted.

Recommendation

Given the FCC's continued unwillingness to put an end to this discriminatory practice, which undercuts the economic viability of diverse broadcast voices in local markets, an amendment to SHVIA is required to remove ambiguity, to restore equity, and to put an end to EchoStar's discriminatory practices. Such an amendment must clarify that satellite carriers must provide carriage of all qualified local stations in a market on contiguous channels "received through a single reception antenna and associated equipment." Since this amendment would not prohibit EchoStar from utilizing secondary satellites, but would prohibit the splitting of a particular market's local stations into satellite "haves" and "have nots," it will have zero impact on EchoStar's satellite capacity. It would merely ensure that subscribers who sign up to receive their local stations would actually receive all of their local stations.

Mr. UPTON. Thank you very much. We will now at this point have members ask questions for 5 minutes each.

And, Mr. Hartenstein, in how many of the markets where EchoStar is currently using two dishes do you provide service? Do you know about what that number will be? And where is that number likely to be at the end of the year?

Mr. HARTENSTEIN. I think all but one. But I would have to doublecheck that. I think that is about right.

Mr. UPTON. Do you know which one that is, by the way? We have been trying to figure that out. Do you know?

Mr. HARTENSTEIN. I think it is Grand Junction, the DMA.

Mr. UPTON. Okay. If EchoStar stopped offering local-into-local service in a market rather than end its two-dish practice, would you offer subscribers in that market local-into-local on your one dish?

Mr. HARTENSTEIN. Let me make sure I understand the question. We are not there today only because we just don't have the capacity. I think I would have to answer that in the context of the next satellite that we have coming up, which is hopefully less than 30 days away from launch.

I am not sure where it is in our rollout. I hope—I can get you that answer before the end of this hearing.

Mr. UPTON. Okay. That will be appreciated.

Mr. Lee, in your testimony you stated that modifying the FCC's predictive model in the waiver of testing procedure is a grave mistake. Yet we know that the system doesn't work well, and, as a result, some consumers are ineligible to receive distant signal service, even though you cannot provide them with an over-the-air signal.

How does the FCC fix the system to end the frustration that so many consumers might feel?

Mr. LEE. Mr. Chairman, I am not certain how that happens. I realize you are visited by the executives of both companies and their lobbyists on a regular basis, but I do business in both these words day to day.

About 2 years or more ago, in keeping with what the present law calls for, I had a letter from DirecTV telling me DirecTV had identified a disinterested third-party measurement service, and asking if we would agree to the use of that same third-party measurement service to resolve the question of whether the ILLR prediction is correct in certain cases.

In other words, if I am a new subscriber for satellite, and I ask for a waiver from DirecTV to import distant network signals, I believe the first place the DirecTV customer service representative goes is to a computer screen on which he can look at the predicted signal delivery at that subscriber's address.

If there is any ambiguity at all, and the viewer challenges what the computer model shows, DirecTV is then asked to conduct a measurement. When that occurs and DirecTV orders a measurement at that address, if it is found the subscriber cannot receive my station, I pay for the cost of that measurement.

If that measurement occurs and the viewer is able to pick up my station at the legally prescribed signal level, then Mr. Hartenstein's company pays. That is—

Mr. UPTON. Do you know about what the cost is—what the cost is on average for that?

Mr. LEE. I want to say they bill us something like \$65. And over 2 years we have—it has been necessary for us to pay for two measurements in which you couldn't pick up our station. Now, despite our best efforts, we have never been able to make that kind of deal work with EchoStar. They just don't want to be bothered with doing what the law calls for.

So my suspicion—when you think—

Mr. UPTON. Let me just stop you. First, is that true, Mr. Moskowitz? Have you participated in that?

Mr. MOSKOWITZ. Absolutely not. I could show you dozens of letters where we have sent requests to stations to do tasks, and the stations haven't responded. It doesn't include Mr. Lee's, because to my knowledge the only times we have asked, on a couple of occasions, his station has actually granted the waiver request without the necessity of a test.

The problem isn't that with his station. The problems are—and the heart of the problem isn't really—is only partially that. The other piece of the problem is that what that computer predicts doesn't necessarily bear a real relationship to whether the consumer can get a good signal, even if when you do a test it shows that he gets the required signal strength, because, you know, a person can get a Grade A quality signal and have so much ghosting that the signal is horrendous.

And yet the law says he can't get it, and the consumers are confused by that.

Mr. UPTON. What about an arrangement where the loser would pay? Would you be willing to do that?

Mr. MOSKOWITZ. Well, that is the law today, and while it is—it works sometimes, sometimes it doesn't. Sometimes the station doesn't respond when you ask for a test, No. 1.

No. 2, the smartest time to perform a test would be when you actually go out and do the installation in the first place, but the law doesn't permit that, so it gets very obtrusive for the consumer to actually order a test.

And, No. 3, again, the problem is consumers' expectations. You get a lot of consumers who live in a Grade A area and clearly do, and we know from the predictive model that they do, and we don't want to get a test any more than the station does, because we both

know that there's no question he is going to come out as receiving a Grade A signal.

The problem for those people is not, can I get a test or not. It is helping them—either helping them to understand why the law still uses a 1950's standard that doesn't take into account interference and ghosting, or changing the standard.

Mr. UPTON. Just a yes or no answer to Dr. Wright, because my time has expired. Would you be okay with allowing EchoStar to continue splitting broadcasters between dishes, if we required EchoStar to install both dishes from the very start? Yes or no.

Mr. WRIGHT. If it is yes or no—

Mr. UPTON. You need to turn your—

Mr. WRIGHT. If it is yes or no, it is no.

Mr. UPTON. Okay. Mr. Markey.

Mr. MARKEY. Thank you very much.

Mr. Lee, let us take a public interest broadcaster in a smaller market, a broadcaster who may be similarly airing local news or sports or other items of local interest, but whose market is small and which does not yet have either EchoStar or DirecTV offering local-to-local service in that area.

Right now, the way Congress has set up this process since 1999, in those markets where DirecTV and EchoStar have yet to do local-to-local service, they have to carry all stations, including home shopping stations, in the larger markets, which may be doing no local service, yet filling up their capacity. Or they have to carry other stations in other markets which may also have zero local service.

Is that fair, in your view, to the broadcaster in the smaller market who is actually doing local service? The two DBS companies don't reach that market through enhanced localism, because they are forced by Congress to carry other broadcasters who aren't actually local.

In other words, if instead of relying on distant network signals, our satellite must carry policy is to be a localism-based policy, shouldn't we require the DBS companies to carry the stations that actually offer localism because if they don't have to carry those stations who aren't, they can reach smaller markets with local-to-local service and carry stations who actually are offering an important local voice.

Mr. LEE. Thank you, Mr. Markey. Somewhere in there there must be somebody with the wisdom of Solomon to decide which stations are worthy of carriage and which are not. The DBS industry has asked for parity with cable in carriage requirements, and I believe the cable operators, if I remember correctly, are required to carry all local stations without some subjective judgment about which one is worthwhile and which isn't.

Perhaps a mechanism could be found in which in a given market the DBS company could make a case for why it believes a station is not worthy of carriage.

Mr. MARKEY. Okay. Now, Ms. Gore, any relation?

Ms. GORE. No, Congressman.

Mr. MARKEY. No.

Ms. GORE. Thank you for asking.

Mr. MARKEY. He was a member of this subcommittee.

Let me ask about the Powell plan for deregulation of the broadcast marketplace, which will allow duopolies and triopolies of television stations, amongst other things, in individual markets.

If a local market does have that develop, do you think it is perhaps wise to then allow for importation of more distant signals? Instead of just one distant signal, you could import more to make up for the fact that a couple of companies might now own three different—three TV stations apiece in a local market.

Ms. GORE. Mr. Markey, I have to say that the issues of the ownership provisions are a little bit outside of my particular expertise. But I can try to address your question with respect to bringing in what sometimes people call adjacent markets, stations from adjacent markets, if that is—

Mr. MARKEY. Unless we add more distant signals. Do you understand what I am saying? That because there is such a concentration of power now in the hand of perhaps two station groups, that they would own three TV stations apiece in one market, that we would seek to augment that by having other voices come in, other TV stations come in, so that there would be more diversity, different points of view, that the local viewer would be given access to.

Ms. GORE. This is certainly a new idea, and—

Mr. MARKEY. Well, we are just looking for your personal opinion, not the chairman's or anything. You said it would be your personal opinion. That is all I am looking for. Do you think it might be a good idea?

Ms. GORE. My personal opinion?

Mr. MARKEY. Yes.

Ms. GORE. Well, speaking for the consumers that I talk to on the phone, they are always interested in receiving as many options for viewing as they can get.

Mr. MARKEY. Okay. Thank you. I hope that is not a career-endangering answer.

Ms. GORE. Me, too, Mr. Markey.

Mr. MARKEY. And let me ask—let me ask Mr. Hartenstein and Mr. Moskowitz, if I could, the cable industry since 1984 has had a privacy requirement. That is, they can't reveal to anyone which stations people are flicking back and forth on in the course of a day, which gives, I think, people a lot of confidence that the whole world can't somehow or other buy information or get information about what people are watching at home.

Your industry is not covered by that. The TiVo industry is not covered by that. So you have had new technologies, in other words, introduced since 1984. Is it correct—am I correct in assuming that you wouldn't mind being put under the same privacy laws as the cable industry in terms of revealing the preferences on a daily basis as people are flicking around as to which channels they may be watching that information that can be gleaned from subscribing to your service?

Mr. HARTENSTEIN. At DirecTV, we are very concerned as we speak to our customers every day as to their privacy. So as to what any one consumer is watching at any one time, that is certainly business and information that should stay absolutely private. We totally agree with that.

In terms of mass of consumer appeal and what, you know, the numbers in aggregate of people that watch one or the other—

Mr. MARKEY. No, that would be—

Mr. HARTENSTEIN. [continuing] is totally different.

Mr. MARKEY. So, but the—just the same privacy laws as cable. They can, you know, aggregate information, but they can't disaggregate the information on individuals.

Mr. HARTENSTEIN. Correct.

Mr. STEARNS [presiding]. The time of the gentleman—

Mr. MARKEY. Could Mr. Moskowitz just give us the answer to that as well?

Mr. STEARNS. Okay.

Mr. MOSKOWITZ. We don't do it now, and we would have no problem with being obligated not to do it.

Mr. MARKEY. Thank you so much.

Mr. STEARNS. The time of the gentleman has expired.

The gentleman from Texas, the chairman of the full committee.

Chairman BARTON. Thank you, Mr. Chairman. I just have a few questions.

I assume that everybody at the witness table has had a chance to review the draft of the pending reauthorization bill. Is that correct? In general, is everybody supportive of the thrust of what we are looking at doing in this committee and the Judiciary Committee? I mean, does anybody have any major heartburn with what is in the draft?

I am going to take that as no, if you don't—okay. The gentleman from EchoStar I think wants to make a comment.

Mr. MOSKOWITZ. Thank you. I think that, you know, there are several provisions of the legislation that we think are great and very helpful. There are also some that we think are problematic for EchoStar. Currently, perhaps the most problematic is the obligation to go to one dish, which would displace and require millions of consumers to have new dishes installed—would make it impossible for us this year to enter the 40 new markets that we would otherwise intend to enter and have other far-ranging implications.

Chairman BARTON. When you say "new dishes," you are saying that if we required a one-dish solution that the existing primary dish—that your subscribers couldn't handle it, and that they would have to put in a larger dish. Is that your—

Mr. MOSKOWITZ. That is correct. I have a slide that I think would help illustrate it, if we could perhaps put up—I think it is slide number—

Chairman BARTON. Has the rest of the committee already seen it? I don't—

Mr. MOSKOWITZ. No. No one has seen it.

Chairman BARTON. Oh, okay.

Mr. MOSKOWITZ. It is just an example—

Chairman BARTON. I don't want to hold up the rest of—

Mr. MOSKOWITZ. Okay. I will just explain it. It is just an example of a market where we use a spot beam to provide all of the channels in all four of those markets today, but we have some of those on a wing slot. If we are required to put them all in that spot beam, we simply can't fit them all in. And so Paducah would end up leaving the spot beam.

To keep Paducah on the air, the only thing we could do is move it to a new satellite at a new slot, so every consumer in Paducah who gets our service would have to have a new dish installed. When you multiply that times every one of our spot beams where those issues occur, you are talking about millions of consumers who would need a new dish pointed at a new satellite at a new location.

Chairman BARTON. Now, if we maintain current regulation, the current statute, and didn't require what is called the one-dish solution, under current law you are required to provide a second dish free of charge if it is requested. Isn't that true?

Mr. MOSKOWITZ. Absolutely.

Chairman BARTON. How widely is that known? To what lengths does your company go to publicize this second dish is free? Because I did not know that until I was briefed on this hearing that that was available. Do you have it in the tiny print, if you get a magnifying glass and read it upside down? Or do you actually go to some lengths to let some people know that?

Mr. MOSKOWITZ. Congressman, we did several things. First, when the FCC first asked us to do that, we sent a letter to every local consumer who—every consumer we had who got local channels and told them about it.

Second, all of our point-of-purchase material includes the—that statement. I don't know, because I haven't reviewed our literature, whether it is in the mouse type, or whether it is in big type.

Chairman BARTON. My guess is it is not prominently displayed, and that is just—that is a guess.

Mr. MOSKOWITZ. I don't want to give it up, but it is certainly possible.

Chairman BARTON. Let me ask the gentleman that represents DirecTV. You have all of your signals on one dish right now, isn't that correct?

Mr. HARTENSTEIN. That is correct.

Chairman BARTON. And that is possible because of the height of the satellite that does the retransmission. Is there a technical reason for that?

Mr. HARTENSTEIN. No. That was a business reason and an interpretive reason that we took away from the earlier legislation. In any market where we have launched locals, we certainly abide by the carry one, carry all. But we have chosen, because of, we believe, the intent of the law—even though it is not clear, the FCC has not clarified it for almost 2 years—to stay with the one-dish solution.

And as I testified about 3 weeks ago to this subcommittee, we are only seeking clarity.

Chairman BARTON. Okay. And go back to the gentleman from EchoStar, because my time is about to expire. What is the capacity right now in your satellite for the one dish? How many channels can you put on that?

Mr. MOSKOWITZ. Right. It is—to simplify it, the fact that we do two dish for 40 markets is the reason why we are in 110 markets today and DirecTV is in, what, 80, Eddy?

Mr. HARTENSTEIN. We are about 64.

Mr. MOSKOWITZ. Sixty-four compared to 110. So we are in an additional 50 markets providing fully effective competition, because we do two dish in 40 of those markets.

Chairman BARTON. My guess is he could be in those same markets if he wanted to. Is that correct or incorrect?

Mr. HARTENSTEIN. It is not quite an apples to apples comparison. EchoStar has two spot beam satellites up and operating today. We only have our first. As I indicated earlier, we are getting or launching our second spot beam satellite in about 30 more days, May 2 to be exact. And at that time we will be able to, with the addition of just that additional satellite, get to just over 100 markets as well—again, doing it on a one dish per market basis.

Chairman BARTON. Okay. And just to conclude, the gentlelady that represents the FCC, do you support the draft language as it is—your agency?

Ms. GORE. We have reviewed—I can't speak for the agency, as I said.

Chairman BARTON. Well, you are here to speak for the agency. That is the whole purpose of having you here, I thought. Is that not correct?

Ms. GORE. Well, I am doing my best to speak for the Bureau. And we have reviewed the legislation. We have been working with the staff members, and we would be happy to go on doing that. And it is a question of what exactly the committee and the Congress would like to—

Chairman BARTON. I am not asking what the Congress—we know what the Congress wants to do. I am asking: does the FCC support the draft legislation? If it doesn't, what do you want changed? Do you need—if you need to go back and ask Chairman Powell and the other Commissioners, do so.

But we are getting ready to move this to markup in subcommittee and full committee, and it would be helpful to have the administration's position on it.

Ms. GORE. There are certain language changes that we have been talking about with the staff to be clear on exactly what the statute would provide. As far as the underlying substance, yes, Congressman, I would have to go back to the chairman and the other commissioners to give you an agency position.

Chairman BARTON. If you will do that, we would appreciate it. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman.

Mr. Moskowitz, let me begin my questions with you. The draft bill asks the Federal Communications Commission to adjust the Longley-Rice model that is the current model that is used for determining whether or not a particular subscriber can get a good over-the-air signal, and it is that test that determines whether or not the subscriber can get a distant signal imported.

One of the things that the draft asks the Commission to do is take into account interference, which is something that existing Longley-Rice does not. Are there any other things that we should be asking the Commission to take into consideration?

Mr. MOSKOWITZ. Yes, Congressman. I think there are two primarily. First, the FCC should take into account ghosting, which is the single biggest reason why consumers are confused, because

they get what is classified by the law as a good signal when they know they can't see a darn thing.

And, second, the law should really revise the Grade B standard, which was developed in the 1950's consistent with consumer expectations at that time, which are completely inconsistent with consumer expectations today.

Mr. BOUCHER. What do consumers expect today that they did not expect in the 1950's?

Mr. MOSKOWITZ. I think they expect the kind of signal that they can get from satellite, that they can get from cable, which is a picture that is clear, free of ghosting, and is easily viewed.

Mr. BOUCHER. Okay. Thank you. Let me ask you for your clarification also. There were some comments made earlier to the effect that some consumers who are in one of your markets that requires a second dish may not be told of the availability of the second dish, may perhaps be told that the stations that are carried on that second dish are not even available, or may perhaps be told that they are available only for an additional charge.

Now, I gather from what you have said that that is not your practice. Would you just clarify that for us, please?

Mr. MOSKOWITZ. Thank you, Congressman. It absolutely is not our practice. We never charge for the additional channels. We always provide both the hardware and the installation at absolutely no cost, and we do indeed include in all of our point-of-purchase material information to that effect.

Our CSRs are supposed to—our customer service representatives are supposed to explain that to consumers at the time of purchase as well. With 15,000 of them, sometimes they manage to do it. I suspect that sometimes they don't, but we do try to police that.

Mr. BOUCHER. Okay. Finally, in the time that I have, let me ask you, Mr. Moskowitz, Mr. Hartenstein, and also Mr. Lee, to comment on the proposal that I made in my opening statement, which is to achieve a balance and promote good policy, while enabling both the DBS industry and the broadcasters to achieve some of their key policy objectives.

Basically, under the structure that I am recommending, no distant signals on the analog side—what is currently being imported under the license—could come into the market once individual consumers have available to them, through the company to which they subscribe, a local signal. And so local signals would supplant distant signals with regard to analog transmission.

And then, in return, distant high definition signals could be brought into the market until such point in time as the local broadcaster powers up and makes its own digital signal available to that particular household. And eligibility, again, would be measured on a household-by-household basis.

This gives both industries something they have been asking for. It asks both industries to concede something that they have been opposing. And so my question to you is: does this strike the right balance? Would you be willing to support this kind of balanced arrangement?

Let us begin with Mr. Moskowitz.

Mr. MOSKOWITZ. We would be anxious to sit down with the NAB and discuss that as a basis for moving forward. I think it has enor-

mous merit. I think it is extremely important to consumers to be able to receive HD network programming today when it is not offered by the local affiliate, and I think as a general matter our customers, when they receive local channels, when they actually receive local channels by satellite, you know, aren't very interested in receiving their distant analog channels as well, provided that they are not disenfranchised from channels they already get.

Mr. BOUCHER. Mr. Hartenstein.

Mr. HARTENSTEIN. Thank you, Congressman. We would always be interested in sitting down as a satellite industry and broadcasters together. The B in DBS and the B in NAB are common. I think—I don't want to repeat my statements. I am concerned about expectations of consumers and taking away something that they have, that they have legally. On the flip side, we would—I think in the same way as cable today would not know the adjective "digital" were it not for us that actually started it relative to television—we are big promoters of high def and accelerating that quickly.

Mr. BOUCHER. So you would be willing to engage in this discussion also.

Mr. HARTENSTEIN. Yes, sir.

Mr. BOUCHER. Thank you.

Mr. Lee, very quickly in the time remaining.

Mr. LEE. Thank you, Mr. Boucher. I am so grateful you came back into the room. With all due respect, I can't think of how many times I have sat in your office and you have given me great ideas, or you have sat in mine and given me great ideas. But the notion you put forward a few minutes ago is one of the most wrong-headed things I have ever heard you come up with.

Now, if you would like, I—

Mr. BOUCHER. Well, so much for the spirit of compromise.

Mr. LEE. If you would like, I will be blunt.

Mr. STEARNS. The gentleman's time has expired, so if you will just finish up, and then we will move on.

Mr. LEE. This notion of creating a new digital white space, without knowing exactly where we are going, undercuts the hundreds of millions of dollars local stations from Amarillo to Augusta have spent to launch digital television.

And if it is in the public interest to take viewers of your constituents out of local viewing and move them into watching New York stations, then I know that is what you are going to do. But as Mr. Franks from CBS said when we were here last month, why on earth would you want to encourage your constituents to watch New York and Los Angeles television stations? I don't get it.

Mr. BOUCHER. Mr. Chairman, let me—

Mr. STEARNS. Sum up.

Mr. BOUCHER. [continuing] ask unanimous consent for 15 seconds, if I may.

Mr. Lee, let me—

Mr. STEARNS. By unanimous consent, so ordered.

Mr. BOUCHER. Let me just be sure that you understood what I was proposing. I am recommending that when you serve that particular viewer with a digital high def signal that you would have the sole right to serve, and any distant signal importation would

end at that point. I just wanted to be sure you understood that was part of the proposal.

Mr. LEE. Right. And I am sure you understand that the broadcast industry has spent millions of dollars and 5 years in Federal court trying to get what is legally ours back, and the judge finally has these guys in a corner.

Mr. BOUCHER. I understand. Thank you very much.
Thank you, Mr. Chairman.

Mr. STEARNS. The gentleman's time has expired.

The gentleman from Indiana, Mr. Buyer.

Mr. BUYER. Mr. Moskowitz, the last time you were before this committee I had some—an opportunity to look at one of the cases. You and I had a discussion. I gave you an opportunity to rehabilitate. Since that day, I decided based off your testimony that I would do further review. So I am going to discuss some of these cases with you and solicit more of your comment.

In February 2004, there was a ruling that EchoStar engaged in “conscious wrongdoing,” and that you in particular were “evasive.” EchoStar sued an insurance company called Brock Bank. The judge in that case issued a ruling in February of this year, is that correct?

Mr. MOSKOWITZ. Yes, that is correct.

Mr. BUYER. In that order, the judge discussed what EchoStar had done during the discovery process, and the judge found that EchoStar's action “rose to the level of conscious wrongdoing.” Is that correct?

Mr. MOSKOWITZ. No, I don't believe that is correct.

Mr. BUYER. When is the last time you read the order?

Mr. MOSKOWITZ. Probably February.

Mr. BUYER. I welcome your opportunity to go back and read the order.

Mr. MOSKOWITZ. Okay.

Mr. BUYER. The judge also found that your testimony was “evasive.” Is that correct?

Mr. MOSKOWITZ. They said I either wasn't fully prepared and we should have come back later, or I should have been more prepared at the time, yes.

Mr. BUYER. In your answer, are you then saying that I am misquoting the court order when I saw that you were “evasive,” that that was the judge's word?

Mr. MOSKOWITZ. No. I am just saying that it isn't all that was said in that statement.

Mr. BUYER. Then, let me reask the question to you. Yes or no—the judge found that your testimony was “evasive.” That is the judge's word. Is that correct?

Mr. MOSKOWITZ. The word is correct but taken out of context—

Mr. BUYER. Thank you very much.

Mr. MOSKOWITZ. [continuing] and inaccurate.

Mr. BUYER. The word is correct. The testimony was—

Mr. MOSKOWITZ. But inaccurate.

Mr. BUYER. [continuing] “evasive.”

Let me turn to another topic. In a copyright case in Florida, the judge issued findings after trial. He did, didn't he?

Mr. MOSKOWITZ. Yes.

Mr. BUYER. And some of your deposition testimony was played by videotape at the trial, is that correct?

Mr. MOSKOWITZ. That is correct.

Mr. BUYER. The judge found that—this with regard to your deposition testimony, “Further, the court notes that when Mr. Moskowitz, an EchoStar executive who worked closely with SHVIA compliance, was questioned during his deposition about the 1999 decision-mark ILLR analysis, he paused for an unusually long period of time and then answered the question concerning ILLR analysis in a vague manner, unable or unwilling to give any details on the results of the analysis or EchoStar’s actions following the analysis.” Is that an accurate depiction of the judge—what the judge found in that case?

Mr. MOSKOWITZ. Yes, he found that there was a long pause.

Mr. BUYER. Thank you. Given the answer for which you just gave me, is my quote that I read from the judge accurate?

Mr. MOSKOWITZ. Yes, it is.

Mr. BUYER. Thank you. In that same case in Florida, the judge discussed a promise that Mr. Ergan had made to the court, and the court made this finding, “EchoStar executives, including Mr. Ergan and David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, elected to break Mr. Ergan’s promise to the court.” Is this a correct assessment of the findings of that court?

Mr. MOSKOWITZ. No, it is absolutely not accurate.

Mr. BUYER. So the quote from which I just read to you from the findings of the court you say is inaccurate.

Mr. MOSKOWITZ. I say that Mr. Ergan did not break any promise to the court, and I resent the fact that you are going in this direction, and—

Mr. BUYER. So you would say—

Mr. MOSKOWITZ. And I will defend myself.

Mr. BUYER. So you would say that this quote, then, from the judge’s findings, you have a right to disagree with the judge’s findings, but what I have read to you is “the judge’s findings.” SHVIA didn’t grandfather Grade A subscribers, did it?

Mr. MOSKOWITZ. No, it did not.

Mr. BUYER. Did EchoStar turn off all Grade A subscribers covered by Mr. Ergan’s promise?

Mr. MOSKOWITZ. Mr. Ergan made a promise to run all of the subscribers at a time when—before the 1999 legislation was passed. Mr. Ergan’s promise was overtaken by events in the passage of the 1999 legislation, as specifically noted by the Appeals Court.

Mr. BUYER. The judge found that you didn’t turn off any for compliance reasons, didn’t he?

Mr. MOSKOWITZ. No, he did not. He said that they could not confirm that, and I applaud the NAB, who managed to get a law passed through Congress that said the burden of proof is on the satellite provider to prove that every one of its customers was legal, and we had to do that 5 years after we first signed up those customers. And I agree that that was not—a burden we could not meet, nor was it a burden that DirecTV nor any other satellite carrier was able to meet.

However, the judge also found that we comply with the law today, as did Mr. Lee in his deposition.

Mr. BUYER. But, again, SHVIA didn't grandfather Grade A subscribers.

Mr. MOSKOWITZ. No, it did not.

Mr. BUYER. In the Florida case, Mr. Ergan testified at trial about "alleged mass turnoffs of illegal distant network programming subscribers." Anyway, it appears that the judge, for whatever reason, didn't agree with this testimony.

Mr. MOSKOWITZ. The judge found—

Mr. BUYER. The judge found, "No credible evidence was presented to the court to support the contention that EchoStar turned off distant signals for compliance reasons to any of more than 258,000 former prime-time 24 Grade A subscribers that Decision Mark told EchoStar about in October 1999." That is the findings of the court.

The judge also found that, "Nor is there any credible evidence that EchoStar turned off distant signals for compliance reasons to any of more than 630,000 Grade A subscribers that Decision Mark told EchoStar about at the time." No credible evidence. Now, I am a lawyer, too. That is very powerful. I have sat as a judge before. If I write "no credible evidence," that is a very powerful statement.

Mr. MOSKOWITZ. The judge's ruling does not say we did not turn off Grade A customers. What it says is there is no evidence that we did it for that specific reason. It was—it is indeed—I will say two things. First of all, there is no question that had we to do it again we would do things differently. Absolutely.

Mr. BUYER. Well, yes, I wouldn't be too happy about paying \$4.7 million attorney's fees. Nobody wants to pay attorney's fees to the other side. By the time you finish the case, you can't stand the other side.

Mr. MOSKOWITZ. Statutorily, if they win, they are entitled to them.

Mr. BUYER. I don't care.

Mr. MOSKOWITZ. But I—

Mr. BUYER. Statutorily, it may say that. I am just saying if I have got a company, I am not too excited about paying—

Mr. MOSKOWITZ. But certainly, this was—

Mr. BUYER. [continuing] attorney's fees to the other side.

Mr. MOSKOWITZ. Certainly, this was—this is something that we would do differently in several ways if we had to do it again. There is no question.

Mr. BUYER. So why did we just do this little dance? We did this little dance because I thought I was going to have a productive conversation with you last time, so now we do a little more research, and you see I have to—just myself, I can't speak for any other member, we have to make competent decisions here.

And so what I think is very hard here is I have to be able to weigh your testimony on behalf of EchoStar when, in fact, it just doesn't have a good track record in our court system. So now I have to say, have you danced on the law? Have you disregarded the law? How does your corporation feel "about the law"?

EchoStar's actions sort of remind me of the movie Catch Me if You Can, and that is very disappointing. And so you, sir, are in a

very difficult position, because you have a company that is playing tough with regard to the rules, and the marketplace is a tough place.

But when you come to us now and you say about this two-dish requirement, we have to make some tough judgments here in this bill. And I want to continue to engage with you, because we want to make a competent decision.

I yield back to the chairman.

Mr. STEARNS. Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

The question is directed to Mr. Moskowitz. The question would be: if you are station owner, which would you prefer to be carried on—the first dish or the second dish?

Mr. MOSKOWITZ. I am not a station owner, so—

Mr. GONZALEZ. No, but you are pretty—

Mr. MOSKOWITZ. I suspect I would prefer to be carried on the first dish.

Mr. GONZALEZ. And why would that be?

Mr. MOSKOWITZ. Because if I am, then—

Mr. GONZALEZ. Because most people have one dish.

Mr. MOSKOWITZ. No, that is actually not true. We have several million customers who actually have two dishes installed.

Mr. GONZALEZ. What would be the percentage? Of all your customers, how many have two dishes?

Mr. MOSKOWITZ. How many have two dishes?

Mr. GONZALEZ. Yes. Out of all your customers, what percentage have two dishes?

Mr. MOSKOWITZ. Approximately 20 percent.

Mr. GONZALEZ. Then, I would want to be on that first dish. I mean—

Mr. MOSKOWITZ. Well, they have second dishes for lots of reasons, and our customers—for example, our customers who take foreign language programming would certainly prefer to be on a first dish. But there is not—

Mr. GONZALEZ. Why would they think—

Mr. MOSKOWITZ. [continuing] room for all of it on one dish, and they are happy to take it on a second dish to be able to get it.

Mr. GONZALEZ. But you human nature—

Mr. MOSKOWITZ. As opposed to not having it available.

Mr. GONZALEZ. And human nature being that it is not going to cost you anything—let me get it straight. Maybe I am misinterpreting everything. I just got to this committee.

Mr. MOSKOWITZ. Sure.

Mr. GONZALEZ. It doesn't cost you anything extra to get the second dish.

Mr. MOSKOWITZ. That is correct.

Mr. GONZALEZ. You are going to have more capacity, you are going to have more stations, more available in the household, and people aren't taking advantage of it. That is just contrary to human nature, isn't it?

Mr. MOSKOWITZ. No, I don't think so. I think what it says is that people who don't watch that programming don't bother to get the dish. And those who do watch it do bother to get the dish.

Mr. GONZALEZ. And you are making the determination as to who goes into the second dish, right?

Mr. MOSKOWITZ. Yes, sir. But the consumer makes the determination about whether to get the dish for free or not.

Mr. GONZALEZ. And that is a whole other issue, how we arrive at what the consumer would like to be watching, or is watching, actually.

Mr. MOSKOWITZ. Well, and it is not just at the time of installation. If any time thereafter the consumer changes his mind and says, "You know what? I really wish I had that programming," they can call us up and we will still install it for free.

Mr. GONZALEZ. Why don't you install two dishes to begin with?

Mr. MOSKOWITZ. Because not every consumer wants two dishes, and not everyone wants the programming that is available on that second dish. For example, EchoStar today actually has satellites that look at five different locations, and theoretically a consumer could get five different dishes installed. But they don't do it, because they don't want all of the programming on every one of those dishes. They get the dishes that have the programming they want.

Mr. GONZALEZ. But you would agree that the stations carried on the second dish are at a disadvantage in this particular market, as established by you, by custom and practice.

Mr. MOSKOWITZ. No, I do not agree they are at a disadvantage. I absolutely do not agree with that. I understand that it is a second dish, but beyond a second dish—I think Dr. Wright's answer to the question really gets to the heart of the matter.

If just having a second dish is the be all and end all measurement, then we have a second dish. But if you go at all beyond that and look at, is it provided for free, is the installation free, is it seamless to the customer, is it transparent, can they get either channels for the programming—

Mr. GONZALEZ. But despite all of that, you still only have 20 percent of the market out there.

Mr. MOSKOWITZ. Well, sir, that is actually a number which is greater than the market share that each of these small stations gets in the market combined. But I don't want to mislead you. Not all of that 20 percent is for a second dish for local purposes. They get it for other programming as well.

Mr. GONZALEZ. Okay. Now, the same problems you are encountering—I guess we have got about 1½ minutes. The problems that you are encountering with capacity, and if this particular piece of legislation mandates that you have all locals on one dish—

Mr. MOSKOWITZ. Right.

Mr. GONZALEZ. [continuing] you are saying that will result in not being able to provide service to many other areas in the country.

Mr. MOSKOWITZ. Yes, that is absolutely true.

Mr. GONZALEZ. And so I would imagine that DirecTV would encounter the same technology dilemma.

Mr. MOSKOWITZ. Well, first of all, they have encountered it to some extent. They chose not to provide the additional markets until they could get the additional programming up. They are also, as Mr. Hartenstein indicated, different than EchoStar in that they don't have these wing satellites to even offer it today.

But they are also different in that depending on when you build and launch a satellite, the technology on the satellite is different. So DirecTV is about to launch a satellite with the most advanced—

Mr. GONZALEZ. Well, what if EchoStar had interpreted the Act that all local stations should be carried on one dish. Would you have taken a different technological tact?

Mr. MOSKOWITZ. We could not have to date—what would have happened, if the law had been that to date, we would be, instead of 110 markets today, we would be in about 70 markets. So there would be 40 fewer markets served, markets that DirecTV doesn't serve either.

Mr. GONZALEZ. I recognize that. I am just saying let us just—

Mr. MOSKOWITZ. We would just not have served them yet, and we would build—if that was the law from the start, right, then we would spend the—we would make decisions about balancing and whether to spend an additional \$200 to \$250 million to build/launch an additional satellite that would have the technological capability.

DirecTV hit a sweet spot where they were able to start construction at a time when that technology came of age. We could build a satellite like that today. It would take 3 years to do, but we could do that today.

Mr. GONZALEZ. Okay. My time is up.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman.

I want to go back to EchoStar at this point. Mr. Moskowitz, does your company have plans to launch another satellite, to expand your coverage into other markets?

Mr. MOSKOWITZ. We do.

Mr. WALDEN. And how many markets will you be able to serve at that point when—is it one satellite? Two satellites? What is your plan?

Mr. MOSKOWITZ. It gets a little complicated. We have several satellites that are being launched for a variety of purposes. One of the purposes is to try to provide backup to existing local markets, and potentially to increase the number of local markets. We don't have a satellite designed to deal with a change in the law that would say take the existing markets you have and revamp them.

Mr. WALDEN. Put them on one dish?

Mr. MOSKOWITZ. Right.

Mr. WALDEN. In terms of your priorities, where does it fall to do more local into local? Especially in the smaller markets. What priority is that for your company?

Mr. MOSKOWITZ. Well, that has changed over time. If you had asked me that question a couple of years ago, I would have said, you know, maybe we will get 50 to 80 markets total because—

Mr. WALDEN. Right.

Mr. MOSKOWITZ. [continuing] it doesn't look like we can penetrate any deeper and be profitable, or even close to it. Now I would say that number is much higher, and as technology changes it may get even higher. It is certainly a priority of ours, obviously. We were the first people to do distant network—to do local channels

by satellite. We were the first people to hit 50 markets. We were the first people to hit 100 markets. And we hope to be the first people to hit 150 markets if we are not saddled with a one-dish result of this legislation.

Mr. WALDEN. Okay. Let us say you are not saddled with that. When will you hit all of the markets?

Mr. MOSKOWITZ. We would be in 150 markets by the end of this year, and we don't have any firm plans to get to all 210. We would continue to expand incrementally as we could find capacity, but we don't have a firm plan as to when we will hit 210. We continue to look for capacity, work with the FCC to get additional spectrum, and to look for new technological satellites that would enable us to do it economically.

Mr. WALDEN. Okay. So, then, you will be able to deliver, then, out-of-market affiliate stations into these smaller markets, because you don't do local into local.

Mr. MOSKOWITZ. Yes. Today we can deliver out of market.

Mr. WALDEN. Right.

Mr. MOSKOWITZ. Not where we don't do—it is not tied to whether we do local to local. It is tied to whether the local affiliate has upgraded his plant to the point where he can provide it off air. If he can, we can't. If he can't, we can.

Mr. WALDEN. All right. I don't know. I—yes, I got that.

I guess I want to go back, Mr. Lee, I believe, into your testimony about the judge's decision. I apologize, I had a group of constituents who flew here from 3,000 miles away, and I always try and meet with somebody from 3,000 miles away. And so I was out of the room when Mr. Buyer asked some of his questions.

But I am curious, Mr. Lee, if you could follow up on your comments about EchoStar's "wilful infringement" of network programming that enabled it to reap millions of dollars of unlawful gains. I know those are quotes from the judge, I believe.

Mr. LEE. Yes.

Mr. WALDEN. How do you read this, where, you know, first of all, I represent a very, very rural district that has these markets that are certainly below 150, and probably on out to about 800 I think. And so what is going to happen in markets like mine?

Mr. LEE. Congressman, I am as concerned about that as you are. As Chairman of the CBS Affiliate Association, I represent the interests of the big city station here in Washington, which is not owned by CBS, and small market stations as well. But the litigation involving EchoStar I don't think has any application in the setting you are talking about.

The affiliate associations of ABC, CBS, NBC, Fox, and originally the networks, although they later dropped out of the suit, all sued in Florida to compel EchoStar to comply with existing law.

Mr. WALDEN. Right.

Mr. LEE. And when we talk about all of these unqualified subscribers, and subscribers who are grandfathered, but they can't prove it because they didn't keep any records, that focuses on Miami. Obviously, in parts of the country in which there is mountainous terrain or hilly terrain, reception issues are different from those you find in South Florida.

But there is a pattern, we believe, of consistent—

Mr. WALDEN. Abuse.

Mr. LEE. [continuing] lawlessness among one of the two companies that really concerns us when you then start giving them an opportunity to open new packages to sell. And, frankly, if you look at it in its simplest form, if it costs \$6 a month to subscribe to out-of-market television stations, and you can sell a million of those subscriptions, that is \$6 million a month or \$96 million a year in cashflow for somebody like EchoStar.

Mr. WALDEN. And there is no disincentive to them to do the right—

Mr. LEE. Oh, no. You can pay a lot of lawyer's fees with \$96 million a year in—

Mr. WALDEN. Well, I—

Mr. LEE. [continuing] cash coming in.

Mr. WALDEN. That is my concern, and I am fearful of what happens to small market broadcasters in rural markets who can't even—you know, are having to fight these folks that have deep pockets and are willing to push the envelope out through the edge.

I realize my time has expired, Mr. Chairman. I will follow up later.

Mr. UPTON. Thank you.

Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman.

I think I will ask Ms. Gore a question while Mr. Moskowitz catches his breath.

Ms. Gore, I understand that in May 2000 that the FCC updated the ILLR predictive model to include land use and vegetation to make it more accurate, while in that same proceeding they rejected including interference for a number of reasons. Do you know what those reasons were? And has anything changed today that would reverse the FCC's conclusion on interference?

Ms. GORE. I will try to answer that question. The original model that we did in 1998 for SHVA included interference. And at that time, testing wasn't really done. It had been part of the—a temporary part of SHVA, but it wasn't really in place. Then, when SHVIA was passed and the testing was included, that changed things.

So the proceeding that we did in May 2000 that you are describing was to implement SHVIA, where there was testing. So one of the reasons that we didn't continue to include the interference in the new model was because there was going to be a testing requirement. And it is difficult, for many reasons I can go into if you like, to test for the interference.

So if the idea was to have a predictive model on the one hand and then a follow-up test on the other, you would obviously want to have a test that could measure actually the things that you had predicted. And that would be difficult with the interference in there.

Mr. DOYLE. Thank you.

Mr. Lee, would you like to explain when your station in—how your station and business gets affected when you lose a local viewer to a satellite television company, for whatever reason. How does that affect your business?

Mr. LEE. Oh, sure. At the same time that Congress in the 1920's and 1930's made this decision to place local stations around the country rather than adopt the model of France and have one national signal for a network, it decided we wouldn't charge subscription fees, and that local stations would support themselves by selling advertising time. And so selling commercials is the only source of revenue a station has.

One can demonstrate that in a market with a high penetration of DBS viewing the audience level for local stations declines, which lowers advertising revenues, which lessens the station's ability to serve the public interest with emergency information, local news, weather, and so forth.

When we go to Florida, where the Nielsen diaries end up for tabulation, there was this peculiar pattern in the behavior of DBS subscribers. These people—and our station, I should say, has granted 30,000 waivers over the term of the current SHVA regulation. These viewers who have just insisted they can't pick us up and need distant network signals, when they fill out their Nielsen diaries tend to go to DBS for prime-time programming, and then come back to the local station for local news.

So how they watch us when they can't pick us up I am not quite sure of. But Mr. Moskowitz made a good point a while ago that I am a DBS subscriber myself, and I know it is a great all digital picture. And in the analog world that all local television stations are now migrating out, there is an issue of ghosting from time to time.

But these efforts seem to be—some of these efforts seem to be driven to getting us back into a regime in which the—Mr. Moskowitz would simply have somebody say, "I don't like my picture; therefore, I qualify to watch New York or Los Angeles instead of local television stations." As I said in my testimony earlier, last month, each local station spends a great deal of money now to be an affiliate of ABC or CBS or NBC or Fox, and part of our affiliation agreement with the network says we have exclusivity for that programming within our market area.

I am sorry. I probably gave you a longer answer than you wanted, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Lee.

And, finally, for Mr. Moskowitz and Mr. Hartenstein, can you explain how not knowing whether or not in 5 years you are going to have a compulsory license authorizing retransmission of distant network signals, how does that impact your business, and do you believe it puts you at a competitive disadvantage?

Mr. HARTENSTEIN. I will go first. All, I believe, that DirecTV has asked for is parity with our chief competitor, which is cable. And all of the comments I have made I think go there, as it applies to SHVIRA. We today are able to, and provide on a single dish, some 66 markets of local into local.

Mr. Chairman, you asked me a question early on that I didn't quite understand. We are going to 130 markets by the end of this year, and we have made a commitment as part of the recent merger with—or incorporation of News Corp taking out General Motors to go to all 210 markets by no later than 2008, and perhaps as early as 2006.

We know that requires construction of new satellites. We are ordering those up as we speak, and we intend to do that.

The problem with the smaller markets as you go forward is it is every bit as expensive infrastructure-wise for us to provide service there as it is in a larger market. And having some certainty going forward would be of great comfort to me as management, and, you know, the rest of our company and our shareholders. So it is simply that. We are not asking for anything that I think our chief competitors don't have.

Mr. MOSKOWITZ. I would just concur with Eddy's comments.

Mr. DOYLE. Thank you.

Mr. UPTON. Thank you.

Mr. Terry is recognized for 8 minutes.

Mr. TERRY. Thank you, Mr. Chairman.

Mr. Lee, I am going to ask you a few succinct questions, and you have been very good today about succinct answers. I would appreciate that with my short time here. But I am trying to get a better feel for the relationship of the local affiliate in all of this.

Now, do you—does your station send out—or your digital signal now, I think most everyone is in compliance, very small few that aren't in compliance—

Mr. LEE. There are still a handful of stations who haven't been able to either go to the power they will ultimately use, or start at all, some of which are having to do with the channel coordination with Canada, people in—stations in the northeast, and—

Mr. TERRY. But in Roanoke you are up and running and sending out your digital signal and—

Mr. LEE. Absolutely.

Mr. TERRY. [continuing] whatever—CBS's high def prime-time—

Mr. LEE. And multicasting.

Mr. TERRY. Very good. We will get into that in a different hearing.

Mr. LEE. Yes.

Mr. TERRY. I am sure. Now, then, in your—you enter into an agreement, I assume, with DirecTV or EchoStar for them to carry your signal from your station in Roanoke on their satellite for people in the area.

Mr. LEE. That is correct.

Mr. TERRY. All right. And that is a contractual agreement.

Mr. LEE. Yes, it is.

Mr. TERRY. Do they pay more for the HD programming or signal that you send out?

Mr. LEE. No. The existing law, as I understand it, Congressman, only authorizes—in fact, Mr. Hartenstein's people are just meticulously scrupulous in reminding us that when we send our signal—well, let me start again. The DirecTV collection point at which it picks up all of the stations in our area is in our building. They rent space from us on our tower to pick up the over-the-air signals, rack space to process all the signals, and then fiber it back out to the uplink.

So we have a business relationship in that regard, but it is as to our old channel 7 analog signal.

Mr. TERRY. Right.

Mr. LEE. They don't believe they have authority yet, statutory authority—stop me if I get this wrong, Mr. Hartenstein—to do digital.

Mr. TERRY. Okay. So I am somewhat confused, then. If a DirecTV or EchoStar viewer/consumer—are they getting the HD programming from you, or just the analog?

Mr. LEE. Just the analog.

Mr. TERRY. Okay. They aren't getting—I assume in Roanoke there is cable as well.

Mr. LEE. That is correct.

Mr. TERRY. Is a cable subscriber receiving your station's HD signal through their cable system?

Mr. LEE. Yes. If you think of our area as a doughnut, the hole in the doughnut is cable service operated by Cox Cable, and the doughnut itself is Adelphia. We have a business relationship with Cox for carriage of our analog signal and our digital signal, including the high definition piece of it and the standard definition multicast part as well.

Mr. TERRY. All right. So, for example, as a Cox Cable consumer, they were able to watch in Roanoke the Superbowl in high definition.

Mr. LEE. Yes.

Mr. TERRY. But if you are an EchoStar or Direct, they couldn't. It was simply the analog.

Mr. LEE. No, no, no.

Mr. TERRY. All right.

Mr. LEE. The viewer who wanted to watch the Superbowl in high definition, and who was not a Cox Cable subscriber, still had the option of using an outdoor antenna—

Mr. TERRY. An outdoor antenna with a digital tuner.

Mr. LEE. [continuing] to pick up HD and multicasting as well.

Mr. TERRY. All right. And so that is what they would have to do, even though they are purchasing the services from DirecTV or EchoStar.

Mr. LEE. No. The HD service is not available from our station for either EchoStar or DirecTV.

Mr. TERRY. It is just not available.

Mr. LEE. That is correct.

Mr. TERRY. Okay. Well, we have the reverse problem in Omaha. The CBS affiliate there will not allow the cable company to have the HD signal without paying them additional dollars. And so, therefore, as an HD consumer, I was not allowed to watch the Superbowl or the Final Four in HD, although I certainly have the tuner and the equipment.

And it bothers me that there seems to be this schism in the technology, because we are trying to get people to buildup their confidence in HD. And so I think part of what we need to look at here is: are we building consumers' confidence in high definition TV, so we can get to the point where we can take back that analog and create even more certainty within the market?

Mr. LEE. I would suggest that you pray with KMTV and with the Cox people in Omaha about this situation. They will find a solution real quickly. The cable industry initially had absolutely—

Mr. TERRY. I have talked to both of them, and they don't seem to be interested in a solution. So only the consumer gets screwed in Omaha.

Mr. LEE. Well, I am sorry, but I can't control that. Cox didn't have much enthusiasm for HD early on. In fact, the entire cable industry didn't. I think it began to see the success DBS was having with HD and became much more interested. By then, the relationship between KMTV and Cox had become a little rocky, I think.

Mr. TERRY. Yes.

Mr. LEE. And that may be special circumstances, and I am sorry you are caught in them.

Mr. TERRY. Yes. I am very frustrated by that, but I am still trying to get a feel for the local to local, so let me ask the gentleman from EchoStar—in Omaha, it is advertised that if you want to get HD you have got to go to dish. Nebraska Furniture Mart, others, advertise that. But I don't understand.

If I am a dish consumer in the Omaha area, am I getting the local stations by satellite, or is it still a combination of antenna with the satellite?

Mr. MOSKOWITZ. I understand the reason for your confusion. I think I can help clear it up a little.

Mr. TERRY. All right.

Mr. MOSKOWITZ. If you live in Omaha and you are a dish subscriber—and I think actually this applies equally to DirecTV—you can get your local analog stations by satellite. And we also happen to have an arrangement with CBS corporate that allows us to offer CBS high definition specifically in those markets that are either owned and operated by CBS or where the local station consents to it.

Mr. TERRY. Then, in that type of an arrangement, are we getting back into the level of the signal and all of that? I just want to make sure consumers have access to HD.

Mr. MOSKOWITZ. In 90 percent of the markets, the local station refuses to agree to that. And so they don't have that access. The only way that in the near term consumers around the country can have access to HD network channels is if we have a distant network HD channel.

Mr. TERRY. All right. Well, I think we have found an area we need to work on.

Thank you.

Mr. LEE. With all due respect, I disagree. Have you tried an antenna?

Mr. TERRY. Not the high def antenna. I will tell you, I dropped DirecTV and went to Cox, because I was tired of shutting off my satellite box. And I had to put on—I only live—I live on the western side of Omaha, and I still had to have a company come out, put an antenna on top of my roof, have an electrician come out, because we had to power the antenna, and it still didn't come in very well.

So I have an antenna setup that I don't use anymore because I went to Cox Cable. So I don't know if that answered your question or not, but I have not gotten an antenna, because I went to Cox digital specifically to get away from having to switch to a different system.

Mr. LEE. I understand. I never cease to be amazed at the people who see some distinction between putting a satellite dish up on the roof and putting an antenna on the roof. The satellite dish is an antenna to pick up one kind of signal, and the traditional conventional antenna to—

Mr. TERRY. Even though—

Mr. LEE. [continuing] an over-the-air signal.

Mr. TERRY. [continuing] I don't use either, I still have them both. Maybe I can put them on eBay. Can I do that?

Mr. UPTON. Mr. Bass.

Mr. BASS. Thank you, Mr. Chairman.

Well, I have got a couple of questions here, but I would like to get our arms around what is going on in my area of the world, which is New Hampshire. I don't, unfortunately, have any cable service where I live, and I don't have a satellite. So all I have is an antenna.

Now, if I had a dish, could I get local—the local ABC affiliate in high definition? One of you satellite guys answer that.

Mr. HARTENSTEIN. Satellite guy No. 1 here.

Mr. BASS. We can get both satellites there, EchoStar and DirecTV.

Mr. HARTENSTEIN. Sure.

Mr. BASS. Okay.

Mr. HARTENSTEIN. We are both national service.

Mr. BASS. Yes, I thought so.

Mr. HARTENSTEIN. We—DirecTV—have not yet brought local channels to New Hampshire. We hope to soon, as I indicated.

You can get—right now, without cable, the only way you can get it is if you quality under the rules of distant network signals, we can import a signal for you. That would give you the prime-time network programming. That would not give you your local news—

Mr. BASS. Sure.

Mr. HARTENSTEIN. [continuing] sports, and weather.

Mr. BASS. What about EchoStar? Do you know?

Mr. MOSKOWITZ. Well, we offer—my understanding there isn't a New Hampshire DMA in terms of a local station. There are—

Mr. BASS. Yes. We are going to talk about that later. There are three DMAs in New Hampshire.

Mr. MOSKOWITZ. Right.

Mr. BASS. Let us take the southern DMA, and that is a whole—if you sign up—

Mr. MOSKOWITZ. And we do offer those—

Mr. BASS. If you sign up for EchoStar, can you get high definition?

Mr. MOSKOWITZ. No. You can get the analog. You can't get the high def, because they won't allow us to carry it. And because of the bandwidth constraints, it would be very difficult to carry for all of those markets.

Mr. BASS. Okay.

Mr. MOSKOWITZ. If your local station doesn't carry it and we had a high def bill, you would be able to get it—not your local, though, you would get a national.

Mr. BASS. Thanks.

Let me ask Ms. Gore a question here. We have had some difficulty figuring out how DMAs are made up. In fact, we can't figure it out. And I am just curious to know what might be done to fix this problem. Do you know how DMAs are made up?

Ms. GORE. I know that the Nielsen Company makes them based on viewing patterns.

Mr. BASS. And how do we—how do they do that? We can't figure out how DMAs are—we can't even get any information on how DMAs are made up, so—

Ms. GORE. The Nielsen Company, which is a private company—

Mr. BASS. Which communities they put in where, why, how, and so forth.

Ms. GORE. Right. Their explanation for it, which they do spell out in some detail in their publications—and these are publications that they sell—explains how they determine which communities or which counties go in which market, and they explain that this is based on viewing patterns. And they have two different ways of doing the viewing testing.

They have surveys that people fill out, the old Nielsen surveys that some of us remember, and they also have, as I understand it, automatic boxes that check on what people are watching. It depends on whether—what kind of market you are in. But they do sampling, and that is how they determine what people are watching. And for every year they put out a new map and a new list, and there are between 6 and 12, roughly, counties that change every year, but roughly it is the same map every year.

Mr. BASS. Why can't policymakers like us get this information?

Ms. GORE. We at the FCC subscribe to the Nielsen service, and we get the information, and we get the maps. And it is a private company, and they charge for their service. As I understand it, the information is available from other publications as well that people can obtain.

I am happy to work with your staff members if there is any question about where your communities are.

Mr. BASS. But you would recognize that if we are going to—if we are going to work on DMAs and problems associated with, as you may know, we have a unique problem in New Hampshire, because we have three DMAs covering a single viewer area of the State.

And we can't even find out why or how or—and so forth, because Nielsen is a private company, you guys subscribe, we don't, we can't subscribe. Don't you think there should be some mechanism whereby before we—that was as policymakers can have access to this information?

I guess, are you saying that you are willing to make it available to us?

Ms. GORE. Well, as a courtesy, I would be very happy, and have in the past and would continue to be happy, to share the information about what the map says. As a matter of fact, when consumers call our call center, the FCC call center, and they have this kind of question and they are confused about which DMA they are in, our folks on the phone they all have the maps and the information, and they provide the information.

If there is any question at all that you or your staff have about which markets are which, I would be happy to try to answer those. If you have questions about why it is that particular counties are associated with particular DMAs, then those questions might be better directed to the Nielsen Company.

Mr. BASS. Okay. Different subject. Can anyone tell us how many DMAs would be affected by the significantly viewed change in the draft bill that we have before us with and without the local-to-local rule?

Mr. LEE. I would be pleased to help with that, Mr. Bass, if I may.

Mr. BASS. Okay.

Mr. LEE. And as to Nielsen, Nielsen conducts audience surveys in every county in America four times a year—the famous sweeps months we hear about—February, May, July, and November. And then once a year it looks at that total year's viewing and assigns each county in America to a particular television DMA based on, as Ms. Gore said, viewing patterns in that county.

So if in Manchester the predominance of viewing is to WMUR, which, of course, it is, the problem in New Hampshire is that it is the only commercial television station in the State. So the plurality of viewing then accrues to other markets in which there are multiple stations that help create a cumulative number for that.

I will be pleased to share that data with you. I think we have statistics on how many counties change from 1 year to the next, and so forth. And then, as to significantly viewed status, the FCC has published a document which defines which are significantly viewed stations, again, in every county in America. So there can be no ambiguity or no doubt about what the significantly viewed stations are in any State.

Mr. BASS. Any other comments on that question? I am out of time. Let me ask one more, then. Mr. Moskowitz, you testified that if the two-dish law change is put in place, then 30-odd markets would not get local to local as fast. Would allowing carriage of stations from nearby DMAs under the proposed significantly viewed draft also slow local-into-local deployment?

Mr. MOSKOWITZ. No. I can give you further explanation if you would like.

Mr. BASS. That is fine.

Thank you, Mr. Chairman.

Thank you, Mr. Moskowitz.

Mr. TERRY [presiding]. Mr. Walden.

Mr. WALDEN. Well, Mr. Chairman, I just wanted to follow up on a comment from my colleague from New Hampshire, because it is relevant not necessarily to this discussion vis-a-vis Nielsen, but I think it is a relevant public policy question when it comes to the new rules proposed by the Commission when it comes to markets for radio and how those are determined, because if my memory serves me well, we are going to migrate away from a market defined by technical standards and into a market defined by Arbitron.

And Arbitron now is what we will rely upon to determine how many stations are in a particular market. And the disconcerting thing about that is that Arbitron has been known to shift what they consider markets, and in some cases it has done that based

on market pressure because, again, it is a private company that is susceptible—is a subscription-based company.

And so now we are going to turn over to a private company the ability to define markets and may face some of the same peculiarities that you are concerned about here with Nielsen. Isn't that right?

Ms. GORE. Congressman, I am not familiar with the radio rules, but I would be happy to try to get an answer for that—on that for you if you would like.

Mr. WALDEN. Yes. All right.

Thank you, Mr. Chairman. That is the only point I wanted to make on that topic.

Mr. TERRY. All right. Switch?

Mr. UPTON. Yes. I thank my colleague from Nebraska.

I have two brief questions that I want to come back to, and we are just about ready to have votes on the floor as well.

Dr. Wright, I know you didn't get to finish—a chance, I made you do it yes or no, and it was a no. I just want to go back to that and underscore that if EchoStar came and knocked on the door to the subscriber and they said, "We have got the service, and it is—you know, it is going to be a two-dish package. You don't have an option to take one of them off. It is going to be one control. The numbers are going to be in sequence going through." They mandate that that happens, no exceptions. Where are you? Why doesn't that work?

Mr. WRIGHT. Yes.

Mr. UPTON. Play the devil's advocate.

Mr. WRIGHT. Sure. The reason I answered—

Mr. UPTON. I mean, we fix it in this bill, but, you know, it is—again, this is a discussion draft.

Mr. WRIGHT. Sure, sure. The reason I answered the question no the first time was I think the way you phrased it was if Congress mandated that EchoStar—

Mr. UPTON. Oh. You just don't like mandates?

Mr. WRIGHT. Something like that. There is something called personal property rights, and I don't think that you should say whether I have to put two dishes, or maybe three in the future, or five on the top of my house. What if my house sells and the next owner disables some of the equipment?

So that whole two-dish mandate doesn't really solve the question as to whether or not a group of stations are being relegated out on the wing or not. It only—it would certainly help the penetration of EchoStar in terms of its coverage in rolling out the two-dish strategy.

Mr. Moskowitz said that they had now reached 20 percent penetration of the second dish. I really commend them for that. In 2002, in September, EchoStar filed a report with the FCC and said they had reached 1.5 percent penetration at that time. So they have made great progress.

Mr. MOSKOWITZ. I want to be sure—as I told Congressman Gonzalez, those are two different numbers. And I will be happy to talk to you, but I don't want to mislead. Those are two different numbers.

Mr. WRIGHT. Okay. Well, the report that I saw indicated that 1.5 percent of EchoStar subscribers had signed up for that second dish. So if I am a religious broadcaster in one of those small markets, and I am out there on one of those wing satellites, I am out there all by myself. That is the concern.

Mr. UPTON. But, again, if we say in that small community—

Mr. WRIGHT. Oh, I am sorry. I didn't answer your—the way you rephrased the question the second time was different. You said if EchoStar knocked on the door and said, "If you want my service, it is two dishes," the consumer can make that decision whether they want to accept that or not. And I think that is a reasonable requirement.

Mr. UPTON. Okay. Mr. Lee, I have a question for you. As you look at the—where we are today, the current legislation that is on the books, the discussion draft, and I have heard—you know, I read your statement last night, and heard it today, and then the questions that a good number of the members had as we focused on this, it really goes down I think, from the NAB's position thus far, is really the discussion on what you do when you get local to local with the folks that have the—from Michigan, I call them the LAs.

Mr. LEE. Yes.

Mr. UPTON. The West Coast folks that are currently there. What do you do with them? And if I can put words in your mouth maybe, but you tell me whether that works or not, the new—the legislation—the staff discussion legislation, you are in far better shape from your position with this draft than we are under the current legislation.

I don't want to say that it is 90 percent of where you are, but it is a good—it is far more than halfway in terms of better from where we are today. Would you not agree?

Mr. LEE. Yes. I would be remiss if I didn't say how much the NAB appreciates the opportunity to work with staff and to bring the draft bill along as far as it has come. We still think there is work to do, and we still think there is an opportunity for give and take.

Mr. UPTON. Yes. And I don't—I don't deny that at all, and I want to say, too—and I think we might have had this discussion at an earlier point perhaps in the year—and that is, I am one of those members that actually reads and signs all of my legislative mail. I have a pretty good head count in terms of what the mail volume is. There is not a letter that gets out that doesn't have a Fred on it.

And I remember well when this issue first came up in the mid 1990's, that was my highest mail count issue in terms of what our—and, again, my district is I think a microcosm of the country being in southwest Michigan, urban and rural blend, a lot of different things. And I swear we probably heard from every single satellite customer in our district with a very strong opinion that wasn't just a mass mailing. I mean, we really heard from them.

And as I directed the staff, and we sat through a number of hours getting this discussion draft ready, one of the concerns that I have is with those customers that perhaps like—to use my friend Ed Markey's dad, who maybe if he moves to Florida is going to still want to watch the Boston Red Sox. He is not going to want to

watch the Florida Marlins or the Tampa Bay Devilrays, I don't think, but I will let him speak for himself.

And I don't necessarily want to take away—that right away from him, particularly if he is not willing to take the local to local. But once you have a new subscriber that is there, that does get the—does want the local service, local to local, then they are going to lose, as in my case, Los Angeles. And to me, I think that that is a far cry better than where we are under the existing legislation, and it is those consumers that are going to want a choice—

Mr. LEE. Sure.

Mr. UPTON. [continuing] that don't necessarily have it today. But once they get the local to local, then they, in fact, lose that long distance broadcaster—broadcast that comes in, knowing that at some point it is going to all be local to local, just a little longer transition than otherwise.

Mr. LEE. I think you are right. At the top of our wish list would be that the legislation do all possible to encourage local service in all 210 markets. I am—

Mr. UPTON. And I think most of us here on the panel on both sides—the panel being the subcommittee—want that to happen.

Mr. LEE. Yes.

Mr. UPTON. We want the rush to local to local.

Mr. LEE. I am gratified to hear Mr. Hartenstein say today that it is—his company is still committed to doing that by 2008, and by 2006 if possible. After all, that is just around the corner. And I know that EchoStar is a feisty, innovative competitor, and it is just—I find it incredible to believe that DirecTV could arrive at 206 markets with local into local by 2006, and Charlie wouldn't find a way to match it. It is just unthinkable.

And once we get there—I accept Mr. Hartenstein's numbers. He has got a better history on this than I have—that there is an attrition rate that comes into play, and ultimately those subscribers go away. But I think we have to be really careful in this legislation.

We don't open opportunities for EchoStar to go back to the district court in Florida after these overwhelming findings by the U.S. District Court there and look for loopholes to get through, or ways to rig the rules, to continue doing business in whatever way it wants.

Mr. UPTON. Well, I appreciate—Mr. Terry, Mr. Bass, do you have further questions, either one of you?

Mr. TERRY. Yes. Just some additional education here on the two dishes. So if—again, just using my only life experience in this, and that is my hometown, if a consumer in Nebraska has EchoStar, they get two dishes. And as I understand, in Omaha kind of the main affiliates are on disk one—or satellite one, channels 3, 6, and 7, and the PBS station.

Then, even though it is not listed on the sheet that I have from the EchoStar website, then we have the Fox channels, WB, UPN, or whatever the other one is that is on disk—or the second satellite. But as I understand, only a smaller percentage of EchoStar clients have the second dish, and I don't know what that percentage is. Do you know off hand? And in the Omaha metropolitan area?

Mr. MOSKOWITZ. I don't know. It is—

Mr. TERRY. I have heard——

Mr. MOSKOWITZ. [continuing] ball park, it is going to be somewhere between 5 and 15 percent.

Mr. TERRY. Okay. Someone in Omaha told me it was closer to the 5 percent that the consumer has in——

Mr. MOSKOWITZ. Well, in Omaha, there is only one channel on the second dish.

Mr. TERRY. Okay.

Mr. MOSKOWITZ. So in Omaha there are five channels on the main dish, and only one on the second dish.

Mr. TERRY. Okay.

Mr. MOSKOWITZ. So that is—in fact, that would make sense, it would be toward the bottom of that, maybe even lower.

Mr. TERRY. All right. So in Omaha, then, we have the Fox station that is not on either satellite, is that—would that be accurate, since it is not listed on either satellite one or satellite two?

Mr. MOSKOWITZ. No. My guess is that is old information, and that we carry the ABC, NBC, CBS, and Fox, together with one other station in Omaha on the primary satellite. That would be my strong suspicion.

Mr. TERRY. Okay. I am having difficulty figuring out which stations are on one and two, and, of course, then I am concerned that a consumer walks into a retail place to buy your service, and get out there and find out, okay, I was told that everything I want is on the dish—just the first dish, didn't want to clutter up my roof with a second dish, then find out really there is three other stations that we are not getting.

Mr. MOSKOWITZ. Well, and the beauty of that is that if, indeed, that was—first of all, that is not the way we advertise it. But if it did happen, they can come back any time and ask for the second dish.

Mr. TERRY. And get the free one.

Mr. MOSKOWITZ. Free.

Mr. TERRY. Of course, they will have to find out, then. Okay.

Mr. MOSKOWITZ. Well, assuming they go to our channel guide and say, "Gee, where is this other channel"——

Mr. TERRY. Yes. Or——

Mr. MOSKOWITZ. But Omaha is a very——

Mr. TERRY. And Everybody Loves Raymond at 11.

Mr. MOSKOWITZ. That is right.

Mr. TERRY. Yes.

Mr. MOSKOWITZ. Yes.

Mr. TERRY. All right.

Mr. MOSKOWITZ. But Omaha is a good example. We have a map of Omaha, No. 1.

Mr. TERRY. Oh, you came prepared.

Mr. MOSKOWITZ. Because Omaha is a spot—is in a spot beam with one, two, three, four, five other cities. And the reason we were able to do—open those markets—and Omaha is a real good example—is because we could put some of the less viewed channels from those six markets in—on the wing dish.

If we had not, then either Duluth, Omaha, or Sioux Falls wouldn't be on the satellite today, and those consumers wouldn't have local channels available.

Mr. TERRY. They wouldn't have KM—the CBS, ABC, CBS—

Mr. MOSKOWITZ. That is right, because we couldn't do as many unless we had a two-dish solution. Eventually, we would get to that, but it wouldn't be as soon.

Mr. TERRY. All right. But that is also—

Mr. MOSKOWITZ. And if we have to change it, then either Duluth, Omaha, or Sioux Falls—

Mr. TERRY. All right.

Mr. MOSKOWITZ. [continuing] every customer we have in that market is going to have to get a new dish installed and look at a new satellite.

Mr. TERRY. My one concern is with the consumer, and just, again, whether it is HD or whatever, just making it seamless and easy for the consumer here, so that we don't have to put much thought into whether or not disk—or satellite one and satellite two has the stations we want for our viewing habits.

So if—so in regard to that, we either look at, as I see the policy choices here, a single satellite or a mandatory two disks—two satellites, if that is what your technology mandates, so that everything is seamless for the consumer. They don't have to decide—make all these type of decisions about, well, I do want a second disk on my roof, if I want to watch Everybody Loves Raymond at 11, or something.

So I guess that is what we are faced with thinking through this, but I want to ask Dr. Wright, then, if we mandate or allow two satellites on the roof, no question that it is mandated, if that is what their technology allows—and I am going to end with asking you about that technology—but why would that be difficult for you? Because then the consumer buying that satellite service still gets your religious programming.

Mr. WRIGHT. Right.

Mr. TERRY. And they aren't discriminated against.

Mr. WRIGHT. Well, that is the issue. If I may, can we go back to Omaha for just a second and the illustration Mr. Moskowitz made.

Mr. TERRY. Sure.

Mr. WRIGHT. He said there is one satellite—or one channel on the second satellite in Omaha. And I think if you think about it carefully, that explains why the penetration of the second dish is so low. Are you going to go down to your local dealer and sign up for the installer to come out for a second dish to put on your roof and stay home for the half a day that it takes to make that happen to get only one more station on there? And so there is—

Mr. MOSKOWITZ. But you don't have to, because it can be done at the time of the initial install.

Mr. TERRY. I will do the interrupting here. Let us just make the assumption the policy is that we mandate the two satellites, there is no choice. If you do EchoStar, you get the two satellites.

Mr. WRIGHT. Right.

Mr. TERRY. How is that disruptive to you?

Mr. WRIGHT. It would not be if you required all of the local broadcast stations in that market to be carried on one of those two satellites.

Mr. TERRY. But if it is—if I am sitting in my living room on my couch, and it is seamless to me, what is the problem?

Mr. WRIGHT. Right now, my neighbor—and my neighborhood, I live outside in the Virginia countryside—has two dish satellites on his roof. One of them is pointed pretty much up in the southeastern sky. One of them is pointed very low on the horizon to reach one of these wing satellites that are out over the Pacific or over the Atlantic and difficult to reach. There are interference issues and problems.

So it is not as though there are two satellites that receive the exact same quality of transmission.

Mr. TERRY. So the second satellite has other issues with the quality of the signal.

Mr. WRIGHT. Oh, you bet.

Mr. TERRY. All right.

Mr. WRIGHT. You bet.

Mr. TERRY. Let us let DirecTV get in here.

Mr. HARTENSTEIN. If I may, we all at DirecTV have our monthly sales quotas. It is only the first of the month. And since you already have the dish there, if you could wait and not tear it down, 60 days from now we will have all six channels in Omaha, and they will be on the dish that you already have on your home.

On your high def question, I would add—and I think Mr. Moskowitz indicated—we have a high def receiver that enables you to receive high def signals from our satellite. In so doing, we have put a terrestrial high def tuner in that satellite.

And if the broadcasters in your area have been delivering, you know, more than a one watt signal, I dare say, given the terrain and topography of Omaha, you should be able to pick it up. If you had trouble, I am sorry.

Mr. MOSKOWITZ. First, let me add that EchoStar does, indeed, do the same thing with high def. But the—we really need to sit down, Dr. Wright, because the situation you just described with the two dishes—guess what? The one that is pointed almost straight up is the wing satellite, because in Virginia that is the one that is almost overhead. The one that is pointed at a low angle, that is the main satellite.

So you actually are getting a better look angle—the one you are complaining about is the main satellite. The one that gives the good look angle, that is actually the wing.

Mr. WRIGHT. I will leave the technology to you. But the neighbor complains that the trees and different things interfere, and buildings that are not too distant interfere with the satellite that is pointed at the low angle. If it is the wing or the main, it makes no difference. The quality of the transmission of the two satellites is not the same, which was what Mr. Terry asked about.

Mr. MOSKOWITZ. But what I am saying is that the stations that are on the wing in Virginia actually have the better look angle. It is the ones that are on the main dish that are the harder ones to get there, because of the look angle.

Mr. UPTON. I would recognize the vice chairman of the subcommittee, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman. I will be brief here, because I think everything has been said that needs to be said.

Ms. Gore, I just want to reiterate and talk to you a little bit what the chairman asked—tried to ask you. Do you have staff here with you from the FCC?

Ms. GORE. I have several colleagues here.

Mr. STEARNS. And what is his name?

Ms. GORE. I have several colleagues here.

Mr. STEARNS. Okay. Could you raise your hands if you are with her? So you have got three people with you, right? Is that right? Three people, or four?

Ms. GORE. Actually, I have four.

Mr. STEARNS. Okay. So you have four people here. Let me ask you again what he asked you. You said you could not take a position on the bill, because you are just here, and you are a technical advisor. I think that is what you said. Is that correct?

Ms. GORE. Yes.

Mr. STEARNS. Yes. But then you went on to say that you will recommend changes to the bill, and that you have in mind some changes, I thought you said.

Ms. GORE. No. What I was saying was that I had mentioned—spoken with the staff. There were some technical wording issues that we were—

Mr. STEARNS. Technical wording.

Ms. GORE. [continuing] going to talk about. There were some issues that had to do with exactly what was trying to be achieved. It wasn't a substantive evaluation, but rather how would it work if this is what the committee decides to do.

Mr. STEARNS. But I think what the chairman was asking you—do you have an opinion on this bill? Just yes or no. Do you think—do you favor the bill as it is, or not? Just yes or no.

Ms. GORE. Mr. Stearns, we just got the bill a couple of days. And we have—

Mr. STEARNS. But, I mean, with all those four people behind you, can't they say to you—I mean, the answer I would think would be, "Mr. Stearns, there are some areas we think it could be improved."

Ms. GORE. Okay. That is a good answer.

Mr. STEARNS. Okay.

Okay. Now, Ms. Gore, the answers needs to be, what are those areas? Tell me.

Ms. GORE. I think there are certain areas—I really can only give you my personal opinion.

Mr. STEARNS. No. But you just told me that it needs to be improved, so I am asking—

Ms. GORE. There are areas that need—that could use some—

Mr. STEARNS. I mean, can't your counsel whisper in your ear and say—

Ms. GORE. Well, it is not about that. It is really about having a chance to get this approved by the Commission.

Mr. STEARNS. But you are not totally unaware what this bill is about. I mean—

Ms. GORE. No, I am completely aware of what this bill is about.

Mr. STEARNS. [continuing] this bill has been around some time. So I am just trying to, you know—we are seeking your advice, and we are asking you for all of the testimony today. You have been

here for a couple hours, and you must have formed an opinion. Do you think the bill needs changing?

Ms. GORE. I think that there are some—it depends on what the committee wants to accomplish. And what I have heard today is that—a range of opinions from the committee on what is desired to be accomplished.

And if the primary goal is to have more markets served, then that would perhaps indicate one kind of change. If the primary goal is to eliminate the two-dish distinction, then that might suggest another kind of change or retaining it the way it is.

Mr. STEARNS. Did you hear anything in these 2 hours from any of these witnesses that has changed your mind?

Ms. GORE. No. I was delighted, however, to hear that the representatives from the satellite companies and Mr. Lee would be happy to sit down and consider—well, at least the representatives from the satellite companies would be interested in taking up Mr. Boucher's suggestion. That sounded like a good idea, to try to work—

Mr. STEARNS. So you think Mr. Boucher's suggestion is good, even though Mr. Lee said it was a terrible idea?

Ms. GORE. I believe Mr. Lee said wrong-headed.

Mr. STEARNS. Wrong-headed, yes.

So you think it is a good idea to take up what Mr. Boucher suggested.

Ms. GORE. I can say that my opinion—my personal opinion—

Mr. STEARNS. That is what I want.

Ms. GORE. [continuing] Having something that has balance in it is a very good thing. Having something that provides consumers with choice is a good thing. Having legislation where it is clear what is intended is a good thing, and it sounds like, from what I have heard, everyone is in favor of something that would accomplish the significantly viewed expanded local market notion.

I haven't heard anybody have a tremendous objection to that. There have been a lot of suggestions for ways to revise it around the edges, but the basic concept seems to meet with widespread approval. That sounds like a good idea.

Mr. STEARNS. So the basic bill, as you have heard it, is acceptable. It is just some peripheral types of changes that you see.

Ms. GORE. Mr. Stearns, I have to be clear. I cannot speak for the Commission. I am not authorized to speak for the Commission. I can only apologize to you for—

Mr. STEARNS. No, I understand. But it seems like the Commission could give us a little bit of guidance here. So that is why I am putting you on the spot.

Ms. GORE. We would be happy to give guidance. We would be happy to give technical advice and assistance in understanding what the committee wants to accomplish and in trying to make sure that the bill does that. An opinion from the Commission—

Mr. STEARNS. Okay. Mr. Chairman, I think my point has been made, so thank you.

Mr. UPTON. Thank you.

Mr. Bass.

Mr. BASS. Mr. Chairman, is this the time for me to ask unanimous consent that the discussion draft be considered a committee print and be considered for subcommittee markup?

Mr. UPTON. I don't see any objection from the minority side. April Fool.

April Fool.

I thank the gentleman from New Hampshire.

This almost concludes our hearing. I want to thank all of you for your patience. My colleagues, we are in the midst of a series of votes, so we will adjourn the hearing.

I do want to say one last word. I appreciate the hard work on the staff—by the staff on both sides of the aisle. We do intend to probably mark this bill up once we return from the April—from the Easter break. We will try to do that the first week. We will be talking with Chairman Barton with regard to that.

Appreciate your testimony. Look forward to working with all parties as we move ahead.

Thank you.

[Whereupon, at 4:55 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.
April 19, 2004

The Honorable FRED UPTON, *Chairman*
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
2125 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20510

DEAR CHAIRMAN UPTON:

This letter transmits my written responses to the post-hearing questions posed in connection with my April 1, 2004 appearance before the Subcommittee on Telecommunications and the Internet.

I appreciate the opportunity to respond to the Issues and concerns in which you are interested.

Sincerely,

ELOISE GORE
Assistant Chief, Policy Division
Media Bureau

Attachment

RESPONSES TO QUESTIONS FOR THE RECORD

Question 1. Lafayette, Indiana is within the Grade B contour of its CBS affiliate—the one and only broadcaster in the Designated Market Area—and therefore subscribers are not eligible to receive a distant network signal from other CBS affiliates. In addition, there is no local-into-local service being offered at this point by either DBS [carrier]. In your testimony, you state that on-site testing procedures for a consumer to obtain a Grade B signal waiver “[have] not worked as effectively as anticipated.” You also state that the problems faced in some cases have resulted in satellite providers limiting their offer of distant signals only to subscribers that are predicted “unserved” under the ILLR method (Individual Location Longley-Rice) model.

(a) How can we best remedy the ineffectiveness of the waiver issue?

(b) Should there be further guidance from the Commission on testing procedures? Or do we look for review and improvement of the waiver and testing procedures for the ILLR as the Committee’s proposed draft legislation does?”

Answer to Question 1(a): The FCC Media Bureau staff believes that the waiver procedures outlined in SHVIA, 47 USC § 339, have worked well especially after the FCC helped to address problems that surfaced in the early stages of applying the new waiver procedures.

The waiver procedure provides that subscribers that are predicted by the ILLR to be “served” request a waiver from their satellite carrier, which in turn requests the waiver from the network stations that are predicted to transmit a Grade B intensity signal to the subscriber’s home. The current law permits the station to determine whether or not to grant the waiver but requires a response within 30 days. We believe that the waivers are responded to within the required timeframe, but approximately 85% or more are denied by the network stations. Currently, SHVIA does not require the station to explain its decision when it denies waivers. We rarely, if ever, receive or hear of complaints concerning the procedure or timing for waivers. When we do hear from subscribers, it is when the local broadcast station denies the waiver.

It may be that the subscriber is receiving a Grade B intensity signal but does not have a proper outdoor antenna, as required by the statute (47 USC § 119(d)). Some subscribers do not wish to install an outdoor antenna. Due to the fact that there is no check or limit on the station’s decision to grant or deny the waiver, it may be that some stations are denying waivers even when the subscriber is not receiving a signal of adequate strength.

As outlined in the question, the households in Lafayette are within the Grade B contour of the local station. Thus, according to the statutory copyright provisions in Section 119 of 17 U.S.C., these households may not be eligible for the distant signal of that local station because they are receiving a Grade B signal from the CBS affiliate. Although the local station could grant a waiver, there is no legal obligation to do so. The only way for households that are receiving Grade B signal intensity to qualify for distant signals would be to revise the statutory copyright license in 17 U.S.C. § 119.

Answer to Question 1(b): As I noted in my written statement, the testing procedures outlined in SHVIA have not been as effective as Congress contemplated, and unfortunately, the Commission likely cannot provide much additional guidance to consumers without some changes to the procedure. The discussion draft legislation does require the FCC to review these issues, and make modifications, if necessary.

A primary issue, from my experience, is a possible conflict between two provisions of SHVIA. The law appears to require testing when requested by a subscriber after denial of a waiver. However, the law does not require a satellite company to provide a distant signal at all. Thus, in some cases, we understand that the offer of a distant signal is only made to subscribers who readily qualify as unserved or who receive a waiver. Clarification from Congress on this apparent conflict would be helpful. Additionally, other statutory modifications could be made to modify the testing procedures.

One approach that might reduce the number of tests, or could eliminate the need for testing in many cases, would be to include signal interference in the ILLR. Interference had been included in the ILLR model that the Commission developed under the Satellite Home Viewer Act (SHVA) in 1998, but was removed from the model in 2000 in part due to the testing requirement in the SHVIA. If the testing provision were removed or limited, then the presence of interference in the ILLR model could be effective for some viewers.

Another approach that could possibly reduce the number of test requests would be for Congress to change the statute to allow for a presumption of whether or not to test depending on the predicted signal intensity. For example, if the ILLR model predicts that a household is “served,” but the signal intensity is just over the threshold for service within a specified range, then the statute could provide that a station is expected to grant the waiver or arrange for a signal test. On the other hand, if a household is predicted to far exceed the minimum Grade B strength, then the presumption could be that a waiver is not warranted and the satellite carrier would not be expected to request a test on behalf of the subscriber. These upper and lower marginal parameters could reduce the number of testing situations, and reduce the potential expense to all parties. However, the existing draft language does not appear to provide for such an alternative. Thus, if Congress would like to proceed to modify the testing procedure in this manner, a statutory change would be required.

Question 2. You commented in your testimony that rural areas in particular have a harder time finding testers, and that they are more expensive. Do you have an estimate of that cost? What is the cost in more densely populated areas?

Answer: The Media Bureau does not have an estimate of specific dollar amounts relating to the cost of conducting a signal test. We are aware that there are time, resource and opportunity costs in relation to identifying a qualified tester, then trying to come to agreement between the broadcast station and the satellite carrier, or working with the American Radio Relay League (ARRL) to confirm that a proposed tester is qualified.

We have heard that ARRL has charged \$100 in some cases for its services. The less populated the area, we are told, the harder it is to find someone who is qualified to conduct the test and has the necessary equipment. In addition, in rural contrasted with urban areas, there is greater time and expense of driving to a remote location. We have heard that the cost of the test itself is typically \$100-150, but the truck roll and other expenses can double the cost. Satellite carriers report to us that the total expense exceeds the price they charge for providing the distant signal, and that is why in some cases they drop the distant offer for subscribers who are not predicted "unserved" or who cannot get a waiver from the local network station.

Question 3. Considering how difficult the testing regime can be, what role can the FCC play in helping to mitigate consumer confusion and frustration?

Answer: The FCC Media Bureau has tried to address consumer confusion by explaining the waiver and testing procedures and the law to consumers who contact us, as well as through our consumer Fact Sheets, and we will continue to help consumers in this regard. Additionally, we often explain the copyright complexities to consumers so that they can better understand the basis for the law's restrictions. There are a variety of situations that we frequently hear about. The most common are: (1) Consumers who have tried to receive local stations using an outdoor antenna; (2) Consumers who do not wish to use an outdoor antenna; or (3) Consumers who wish to receive distant stations for purposes of time shifting programming or receiving sporting events from former home communities.

With respect to the first group, we have contacted both the relevant satellite carrier and the stations involved. In some cases this intervention has succeeded in obtaining a test. Unfortunately in some cases, with or without a test, the consumer is receiving a signal of Grade B intensity even if the picture is not as clear as satellite-delivered programming. In such cases, the law provides that the consumer is not eligible for satellite delivery of the distant signal of that network. Ultimately, the main frustration for consumers is that they are not permitted to buy the programming they want to watch, because the law does not permit them to do so.

DIRECTV RESPONSES FOR THE RECORD

Question 1. During our March 10, 2004 hearing on this matter, you indicated that it was DirecTV's goal to provide "Local-into-Local" service in all 210 Designated Market Areas (DMAs) as early as 2006, and no later than 2008. Can you comment further by clarifying whether this will be wholly via satellite, or will it involve some sort of terrestrial solution?

Response. DIRECTV is exploring every plausible approach for providing analog local-into-local service in all 210 DMAs. For example, DIRECTV has entered into an agreement with Telesat to provide service from a Canadian orbital slot until at least 2008. This agreement, which requires regulatory approval from the FCC, will provide significant capacity towards fulfilling these commitments.

Other possibilities include:

- Use of Spaceway's Ka-band satellite capacity
- Reverse-band DBS spectrum;
- Incorporating digital tuners into set-top boxes, mounting a small broadcast antenna at the satellite dish, and seamlessly incorporating signals over-the-air; and
- Other emerging technologies.

At this time, we have ruled out no possibility.

Question 2. EchoStar and DIRECTV have taken very different approaches to two-dish. Why?

Response. We take a different approach than EchoStar for the simple reason that we believe the law compels our approach. Congress's intent in drafting section 338(d), in our view, was to prevent satellite companies from "splitting" broadcasters in a given market, and particularly from exiling less popular and minority broadcasters onto a wing-slot satellite. EchoStar has justified its approach with what we think is an excessively legalistic interpretation of section 338(d)'s anti-discrimination language. We do not believe that there is any way to square the statute's non-discrimination requirement with a service offering that requires subscribers to affirmatively request installation of a second dish in order to receive the full complement of stations being retransmitted in a single market.

Question 3. Please describe any capacity differences between the EchoStar and DIRECTV satellite constellations, as they pertain to carriage of local broadcast stations in local markets.

Response. The relevant difference between EchoStar and DIRECTV is less about capacity than about engineering. EchoStar actually has slightly more transponder

capacity at orbital slots with a view of the continental United States (“full-CONUS”) than does DIRECTV, and significantly greater capacity when its “wing slots” are considered. EchoStar controls 50 CONUS transponders at 110° W.L. and 119° W.L. and 43 quasi-CONUS “wing slot” transponders at 61.5° W.L. and 148° W.L. DIRECTV, by contrast, controls 46 CONUS transponders at 101° W.L., 110° W.L. and 119° W.L. and has no “wing slot” authorizations.

Yet DIRECTV and EchoStar have designed their satellite systems very differently. Both companies use “spot beam” satellites to deliver local channels. (Spot beam satellites are able to, in effect, re-use satellite capacity by transmitting many separate beams to various parts of the country, instead of transmitting a single beam covering the entire country.) But DIRECTV designed its spot-beam satellites to use smaller beams than do EchoStar satellites. In other words, each DIRECTV spot beam covers a smaller geographic area than the comparable EchoStar spot beam.

Because each of its beams covers a larger geographic area, EchoStar can sometimes cover more DMAs with a single spot beam than can DIRECTV. Yet, because any given spot-beam can only carry a specific number of channels, EchoStar often cannot fit every local channel in these DMAs in a single spot-beam. It thus must “exile” some channels to other, wing-slot satellites. DIRECTV, by contrast, faces this problem much less frequently than does EchoStar, because we re-use satellite frequency much more intensely by employing a greater number of smaller spot beams.

Building a satellite with more and smaller spot beams (as DIRECTV has done) is more complex than building one with fewer and larger spot beams. But DIRECTV’s approach allows us to re-use valuable spectrum resources more efficiently and intensively—meaning that we have not needed to “exile” any channel in any DMA. Indeed, once we launch our newest satellite (scheduled for less than a month from now), we will be able to serve significantly more local markets using essentially the same amount of spectrum.

This, we admit, is a very complex and technical subject, and we are happy to bring our engineers in to discuss this in more detail with your staff. But the key point here is that EchoStar’s “capacity constraints” with respect to local service are largely the foreseeable (and almost certainly foreseen) results of its own engineering decisions.

Question 4. Please describe in detail how you carry all of your local broadcast stations today. Specifically, please provide a list, organized by satellite (and, where appropriate, by spot beam) of how you retransmit each local broadcast station that you currently carry.

Response. The table below sets forth the satellites on which we carry all of our local broadcast stations today. Please note, however, that this does not reflect markets that we will add upon launch of our newest satellite, scheduled for next month.

Table 1: DIRECTV Local Markets By Satellite

Markets on D4s at 101-degrees	Launch Date	Markets on D1 at 101-degrees moving to D7S at 119-degrees	Launch Date	Markets on D5 at 119-degrees moving to D7S at 119 degrees	Launch Date
Los Angeles, CA	11/29/99	Richmond, VA	1/16/2003	Hartford, CT	05/15/02
New York, NY	11/29/99	Jackson, MS	5/13/2003	Las Vegas, NV	05/15/02
Denver, CO	12/04/99	Roanoke, VA	6/3/2003	Providence, RI	07/10/02
San Francisco, CA	12/04/99	Wilkes Barre, PA	6/11/2003	Buffalo, NY	07/31/02
Washington DC	12/04/99	Louisville, KY	6/13/2003	Grand Rapids, MI	07/31/02
Atlanta, GA	12/11/99	Des Moines, IA	6/13/2003	Oklahoma City, OK	07/31/02
Detroit, MI	12/11/99	Shreveport, LA	6/18/2003	Norfolk, VA	08/28/02
Miami, FL	12/11/99	Tucson, AZ	6/18/2003	Knoxville, TN	09/18/02
Philadelphia, PA	12/11/99			New Orleans, LA	09/26/02
Phoenix, AZ	12/11/99			Jacksonville, FL	11/06/02
Chicago, IL	12/18/99			Green Bay, WI	5/21/2003
Cleveland, OH	12/18/99				
Dallas	12/18/99				
Houston, TX	12/18/99				
Raleigh-Durham, NC	12/18/99				
Boston, MA	12/29/99				
Greenville, SC-NC	12/29/99				
Minneapolis, MNO	01/15/00				
Tampa, FL	01/15/00				
Orlando, FL	02/05/00				
Seattle, WA	02/05/00				

Table 1: DIRECTV Local Markets By Satellite—Continued

Markets on D4s at 101-degrees	Launch Date	Markets on D1 at 101-degrees moving to D7S at 119-degrees	Launch Date	Markets on D5 at 119-degrees moving to D7S at 119 degrees	Launch Date
Sacramento, CA	03/04/00				
St. Louis, MO	03/04/00				
Salt Lake City, UT	06/02/00				
Baltimore, MD	06/30/00				
Pittsburgh, AP	06/30/00				
San Diego, CA	06/30/00				
Charlotte, NC	07/28/00				
Indianapolis, IN	07/28/00				
Milwaukee, WI	07/28/00				
Portland, OR	08/25/00				
Kansas City, KS	09/13/00				
Nashville, TN	09/13/00				
Cincinnati, OH	09/20/00				
Memphis, TN	09/27/00				
Birmingham, AL	11/01/00				
Greensboro, NC	11/08/00				
San Antonio, TX	11/08/00				
Austin, TX	11/15/00				
Columbus, OH	11/22/00				
West Palm Beach, FL	11/22/00				
Colorado Springs, CO	4/9/2003				
Columbus, MS	7/2/2003				
Columbia, SC	7/15/2003				
Huntsville, AL	7/31/2003				

Question 5. Lafayette, Indiana is DMA 189 out of 210. For satellite subscribers in Lafayette, neither EchoStar nor DirecTV offer local-into-local service.

Can you offer a time frame as to when this service will be offered to Lafayette subscribers?

Response. DIRECTV has publicly stated that it will provide analog local-into-local service in all 210 DMAs—including Lafayette—by 2008 at the latest, and hopefully by 2006. There are, however, too many variables (including the outcome of regulatory proceedings, successful satellite launches, etc.) for us to give a more definitive estimate with respect to any particular DMA.

What are the constraints that prevent either company from offering this service right now?

Response. The primary constraint that prevents DIRECTV from offering this service right now is capacity. As indicated above, DIRECTV is leaving no stone unturned in its efforts to increase its capacity, so that we can serve Lafayette and other unserved DMAs as soon as possible. In addition, the economics of providing this service become more challenging as the DMAs become smaller.

Question 6. Anecdotal evidence suggests that in order to receive local signals using an off-air antenna, some might have to spend approximately \$1,000. Can you explain if there are distance limitations that prevent receiving a clear signal, and the typical antenna size and cost—including installation—needed to receive a clear over-the-air signal?

Response. The question may be referring to high-definition monitors, which, in some cases, used to be sold without digital tuners. In such case, consumers would have to spend significant amounts of money (although not, to DIRECTV's knowledge, as much as \$1,000) to purchase a separate digital tuner. DIRECTV understands, however, that most high-definition monitors now include digital tuners. And every one of DIRECTV's high-definition set-top boxes comes with a built-in digital tuner, with which consumers can seamlessly integrate their over-the-air digital signals and their satellite-delivered channels.

All terrestrial radio services—including television—suffer from “distance” problems. That is, if the receiver is too far away from the transmitter, the receiver will not be able to receive a clear signal. Moreover, obstacles may prevent a receiver from receiving a clear signal (this is also true for satellite receivers). These limitations are often (at least partially) a function of transmitter power limits—which are the subject of FCC regulations that prevent transmitters from interfering with one another and with other radio services. That said, future technological advances may allow broadcasters to “extend the reach” of terrestrial television transmitters.

Question 7. Consumers can get the same national programming whether they are viewing their local affiliate or a distant one, and can time shift if they buy a VCR or DVR. Thus, the only difference is the local content and who gets the advertising. If we allowed you to provide distant signals and local signals so long as you blocked out the distant national programming, would you?

Response. Blocking out national programming in 130 separate DMAs would be a prohibitively difficult and expensive undertaking. Certainly, DIRECTV would not support a Congressional requirement to block out distant national programming.

ADDITIONAL QUESTIONS SUBMITTED BY REP. ELIOT ENGEL

FOR ECHOSTAR

Please describe in detail how you carry all of your local broadcast stations today. Specifically, please provide a list, organized by satellite (and, where appropriate, by spot beam) of how you retransmit each local broadcast station that you currently carry.

Please explain why, if Congress were to require satellite operators to provide all broadcast signals in any individual market through one dish, EchoStar would, as a technical matter, be "required" to drop markets in which it currently provides local-into-local service. Also, please specify exactly which markets would have to be dropped, and why you would have to drop each market.

Please explain why EchoStar could not, as a technical matter, rearrange its programming among its existing satellite constellation to provide service to all of the markets it currently services in conformance with the requirement described above.

EchoStar intends to provide local-into-local service in an additional 40 markets by the end of the year. Please provide a list, organized by satellite (and, where appropriate, by spot beam) describing how EchoStar intended to carry each local station in these additional 40 markets. Furthermore, please explain why EchoStar could not, as a technical matter, rearrange its programming among its existing and future satellites to provide service to each of these additional 40 markets in conformance with a "one-dish" requirements as described above.

FOR DIRECTV

Question. EchoStar and DIRECTV have taken very different approaches to two-dish. Why?

Response. Please see our response to Question 2, above.

Question. Please describe any capacity differences between EchoStar and DIRECTV satellite constellations, as they pertain to carriage of local broadcast stations in local markets.

Response. Please see our response to Question 3, above.

Question. Please describe in detail how you carry all of your local broadcast stations today. Specifically, please provide a list, organized by satellite (and, where appropriate, by spot beam) of how you retransmit each local broadcast station that you currently carry.

Response. Please see our response to Question 4, above.

