

# THE SATELLITE HOME VIEWER ACT

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## HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS,  
TECHNOLOGY, AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND  
COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

—————  
JUNE 16, 2009  
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**Serial No. 111-51**



Printed for the use of the Committee on Energy and Commerce  
*energycommerce.house.gov*

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U.S. GOVERNMENT PRINTING OFFICE

74-085

WASHINGTON : 2012

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## THE SATELLITE HOME VIEWER ACT

TUESDAY, JUNE 16, 2009

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY,  
AND THE INTERNET,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:07 a.m., in Room 2322 of the Rayburn House Office Building, Hon. Rick Boucher [chairman of the subcommittee] presiding.

Members present: Representatives Boucher, Markey, Eshoo, Weiner, Butterfield, Christensen, Space, McNerney, Stearns, Upton, Deal, Shimkus, Shadegg, Radanovich, Walden, Terry, and Barton (ex officio).

Staff present: Amy Levine, Counsel; Tim Powderly, Counsel; Greg Guice, Counsel; Shawn Chang, Counsel; Roger Sherman, Chief Counsel; Pat Delgado, Chief of Staff; Sarah Fisher, Special Assistant (Waxman); Neil Fried, Minority Counsel; Amy Bender, Minority FCC Detailee; and Garrett Golding, Minority Legislative Analyst.

### **OPENING STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA**

Mr. BOUCHER. Subcommittee will come to order.

Today the subcommittee takes another step toward renewal of The Satellite Home Viewer Act which enables satellite carriers to retransmit distant television signals under certain circumstances. Some provisions of The Communications and Copyright Acts expire at the end of this year, making reauthorization of this measure a must-pass undertaking. At the subcommittee's oversight hearing in February, I indicated that Congress should proceed with the reauthorization in the most straightforward manner possible, and I believe today as I did then that we should avoid in this measure collateral matters such as retransmission consent reform that are relevant to all multi-channel video providers not just to satellite platforms.

The discussion draft that we have under consideration today takes this straightforward approach. It renews for 5 years the provision allowing carriers to deliver a distant network station to homes under specified circumstances which otherwise would expire at the end of this year. It reauthorizes the good faith negotiation requirements in The Communications Act that also otherwise would expire at the end of this year. It provides needed clarifica-

tion regarding the provision by satellite carriers of significantly viewed signals by stating that a significantly viewed signal may only be provided in high-definition format if the satellite carrier is passing through all of the high-definition programming of the corresponding local station, also in high-definition format. It directs the FCC to develop a predictive methodology for the reception of digital signals within six months in order to determine with accuracy which households are eligible to receive distant network signals. It makes technical changes to the Law to reflect the fact that after last Friday, full-power television stations are no longer broadcasting analog signals.

In addition to these changes that are made by the discussion draft that is before us, there are additional matters that we could potentially address. One is developing appropriate incentives to encourage satellite carriers to provide local service in all 210 designated market areas nationwide. Today, DIRECTV offers local service in about 150 markets while DISH will soon offer local service in 182 markets but that still leaves about 28 markets without any service at all. Most of the DMAs that lack local-into-local service today are in rural areas and many of these markets do not have a full complement of network affiliates within the local market. In our parlance they are referred to as short markets.

While I understand that the numbers of subscribers in these unserved rural markets are small, their residents are highly vocal in expressing their views that they should have the same opportunities to receive local programming delivered by satellite as people who live in more densely populated regions. I am hopeful that ongoing discussions among the stakeholders will lead to an arrangement through which all 210 markets will receive local satellite delivered service.

Another matter for possible discussion is whether residents in short markets should be able to receive the programming of networks missing in their local market from an adjacent local market within the State of their residence. While satellite carriers can today import distant signals from any market, they are hindered in their desire to do so by the so-called Grade B believed problem that prevents them from offering distant signals to those households that can receive the signal of an out-of-market network affiliate over the air. That problem as well as the larger short market concern could potentially be successfully addressed by the subcommittee. Stakeholders are currently discussing the short market and local 210 matters, and it is my hope that these conversations will lead to an arrangement whereby we will be able to address both of these concerns when we conduct our subcommittee's markup.

I want to welcome our witnesses this morning and thank them for sharing their views with us. I also want to say thank you to our Republican colleagues, primarily our ranking Republican member from Florida, Mr. Stearns, and his very fine staff for their excellent cooperation and collaboration as we have assembled the bipartisan discussion draft which is before the subcommittee this morning.

And that said, I am pleased to welcome Mr. Stearns for his opening statement.



**OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA**

Mr. STEARNS. Good morning and thank you, Mr. Chairman, and thank you, frankly, for including us in a bipartisan fashion so that we could be instrumental and helpful in developing this draft bill.

I would point out in retrospect, the DTV transition went smoothly by most reports and many of my colleagues had been concerned about it. I think this smooth transition will help everybody realize that there is probably few issues we can talk about anymore about it because it is pretty much good news and we can forward. Some consumers simply need to have their converter boxes rescanned for stations that have moved or might need a different antenna, and some stations may need to increase their broadcast power but basically it appears that we could have saved some money, at least that is our position but the good news is that we can move forward.

Turning to today's topic, I am glad that we have a discussion draft, legislation to reauthorize the satellite television act. The original satellite legislation in 1988 is credited with helping foster competitive video marketplace that we have today to the benefit of all of our consumers. Indeed, one of my district employees tells me how much he enjoys his satellite service and my sense is this sentiment is equally shared by lots of consumers across this country's satellite subscribers. That is why we have to reauthorize this legislation each time it comes up for renewal and that is why the discussion draft before us extends for another 5 years the authority of satellite operators to provide the signals of out-of-market station to subscribers who cannot receive their local stations over the air.

In addition, my colleagues, the draft makes clerical and substantive changes to the statute to reflect the end of analog broadcasting. In particular, it directs the FCC to update for digital broadcasting both the predictive model and on-location testing rules for determining whether a subscriber is eligible for a distant signal.

The draft also rectifies the FCC's poor implementation of the "significantly viewed" provisions. These provisions added to the statute 5 years ago, allow a satellite operator to provide subscribers in a local market with signals from a network affiliate in a nearby market if that nearby affiliate is watched over the air by a significant number of consumers in the local market. The statute prohibited a satellite operator however from carrying the significantly viewed affiliate in high-definition format if it didn't also carry the local affiliate of the same network in high-definition format. The FCC construed that provision to prohibit carriage of the significantly viewed affiliate in high-definition at any moment of the day that the local station was not simply broadcasting in high-definition. Because satellite operators find it difficult to match the transmission formats of the two stations moment-by-moment, they usually choose not to carry significantly viewed stations at all. So to address that, the draft makes clear that a satellite operator may carry the significantly viewed affiliate in high-definition when the local affiliate is not broadcasting in high-definition so long as the satellite operator does carry the local affiliate at high-definition when it is simply available in that format.

An issue not addressed but I am sure will come up today is what to do about consumers who cannot receive programming they truly consider local either because they are missing local affiliates from one or more networks in their market or because they have been assigned to a designated market area which is simply outside their State. My sense is there will be sympathy for such viewers. If we address this issue however, we must do so in a way that clears existing regulatory obstacles rather than creates a whole new set of rules. As I have already mentioned, the video market is robustly competitive. In that environment there should be less interference in the market, not more. Whatever we do, we should ensure that the satellite operator, the out-of-market station and the owners of the content are allowed to freely negotiate. That is the best way to ensure that consumers get as much desirable content as possible at simply the lowest rates. Anything else simply protects one company at the expense of another without really helping the consumers. And at bottom, this legislation is all about the consumers.

So thank you, Mr. Chairman, for holding this hearing. Again, thank you for your allowing us to participate freely.

Mr. BOUCHER. Thank you very much, Mr. Stearns.

The gentleman from Massachusetts, Mr. Markey, former chairman of this subcommittee, is recognized for two minutes.

**OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS**

Mr. MARKEY. Thank you, Mr. Chairman, very much and thank you for having this hearing.

The Satellite Home Viewer Act is a Law that this subcommittee revisits every 5 years to both reauthorize certain aspects of it and to review the applicability of particular provisions in light of changes in the marketplace. For example, it was 10 years ago that I was able to successfully offer the so-called local-into-local amendment that permitted satellite video providers to carry local broadcast stations in local markets providing a major competitive boost to such satellite providers. 5 years ago, the subcommittee made other adjustments to the Law, including adding provisions for the carriage of significantly viewed stations. The issues of short markets and significantly viewed signals must be dealt with in a serious fashion this year and I look forward to working on them.

Clearly, a major change that will need to be factored into this year's legislation is the conversion of the broadcast television industry to digital service. When I held the first Congressional hearing on high-definition TV in this room in September of 1987, and I never imagined that it would take 22 years to reach this moment but it appears that the delay we enacted to move back the date from February resulted in over three million additional households that were able to receive greater education and awareness to occur and for those three million homes to be properly prepared. The fielding of hundreds of thousands of consumer calls was facilitated by the ramp-up in the last few months of critical call center operations.

This is a government program that worked. We made the transition. We have been able to move from analog to digital, compress

the amount of spectrum that was needed, auction off the remaining spectrum for \$20 billion opening up a whole new area for entrepreneurial activity while giving a more flexible technology to consumers that in the years ahead will benefit them. So this has been a success and it proves that the government when it puts its mind to it can work for the benefit of consumers.

I thank you, Mr. Chairman, for conducting this hearing.

Mr. BOUCHER. Thank you very much, Mr. Markey.

The gentleman from Michigan, Mr. Upton, is recognized for two minutes.

Mr. UPTON. Thank you, Mr. Chairman. I want to also commend you and Mr. Stearns and our staffs for working together.

This has been a success and it is critical that we send the proper message to consumers and subscribers and providers that we are going to act in a timely way that will not let this legislation expire. I look forward to working with you as we have had a great relationship over the last number of years as we move this bill through the committee. This is one of the bills that our committee can take credit for in working in a bipartisan manner and I am glad that we continue that trend.

And I yield back.

Mr. BOUCHER. Thank you very much, Mr. Upton.

The gentleman from California, Mr. McNerney, is recognized for two minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman, for convening this hearing to discuss the legislation to reauthorize The Satellite Home Viewer Extension and Reauthorization Act. I would like also to thank the witnesses for coming here today to share their inputs on the legislation.

A tremendous amount of behind-the-scenes work is required every day to ensure that Americans are able to turn on their television sets any time to watch a program. The intricacies of how satellite providers and broadcasters interact are complex. Today's hearing should offer an opportunity to hear thoughtful evaluation of the proposed reforms.

I am excited to be a part of the debate and I look forward to the hearing and the resulting legislation. Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you, Mr. McNerney.

The gentleman from Illinois, Mr. Shimkus, is recognized for two minutes.

**OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS**

Mr. SHIMKUS. Thank you, Mr. Chairman.

I, too, want to kind of highlight the successful transition on Friday. I have only received, I think, four phone calls in my congressional office on the DTV transition and I have five DMAs that kind of cover my congressional district, a great success. Obviously, we have ushered the most significant revolution in television since the advent of color broadcasting. We have cleared 24 megahertz of spectrum for public safety use and that is what I have been focusing on for a long time of providing first-responders with a billion dollar grant program for interoperability. And another thing that has been critical in this whole transition, 84 megahertz of spectrum

nationwide for advanced wireless broadband services and \$20 billion in auction proceeds for the taxpayers.

I also want to thank both government and industry for what they did in promoting this, the National Association of Broadcasters, the National Cable Telecommunications Association, the American Cable Association, DISH Network and DIRECTV, they are here today along with the NTIA and the FCC, because we informed the public and the public was able to respond as we hoped they would. It is important to note that if SHVERA were not reauthorized, there would be more Americans affected by changes to their television broadcast then during the DTV transition. That is the importance to this reauthorization. It is my hope that we will have a frank and open discussion and not move hastily with this important legislation.

I appreciate both Chairman Boucher and Ranking Member Stearns for calling this hearing. I look forward to hearing from the witnesses and I yield back my time, Mr. Chairman.

Mr. BOUCHER. Thank you, Mr. Shimkus.

The gentleman from Georgia, Mr. Deal, is recognized for two minutes.

Mr. DEAL. Thank you, Mr. Chairman. I, too, appreciate you holding the hearing.

If it does make the news, it is unfortunate that some of my folks in North Georgia will have to learn about it by watching Tennessee television.

I have a statement for the record that I will submit and I yield back my time.

[The prepared statement of Mr. Deal follows:]

**OPENING STATEMENT OF  
THE HONORABLE NATHAN DEAL**

**Subcommittee on Communications, Technology, and the Internet  
legislative hearing on a discussion draft of legislation to reauthorize the  
Satellite Home Viewer Act.”**

**JUNE 16, 2009**

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I'd like to thank our witnesses for joining us and I am glad that we are considering the "Satellite Home Viewer Extension and Reauthorization Act" today. It highlights a matter that has concerned me greatly for years; and that is a lack of true consumer choice in the television market.

Because Designated Market Area (DMA's) overlap state lines, hundreds of thousands of television households have little or no access to broadcast TV stations from their own state; and therefore have very limited access to their state news, elections, government and weather programming.

And likewise, individuals who may live across a state or DMA line, but are part of a community on the other side of that line, cannot receive programming that matters to them. I have come to learn that many of our colleagues' districts are also faced with this problem.

I understand the reasoning behind the drawing of the DMA maps, but it seems to be an archaic system. Depending on who you ask, broadcast TV viewers make up around 10-15% of the total viewing audience. It is odd that the other 85-90 percent of the television viewing audience is constrained by a system that is based on the viewing habits of a fraction of that 15%.

I understand the desire of broadcasters to control the distribution of their programming. But it seems absurd to me that in this day and age, that consumers who are willing to pay, are still prevented from watching the content they desire.

The free market has allowed technology to meet consumer demand for content in many ways outside of the world of cable, satellite and broadcast TV. We should strive to foster a framework that allows the free market to meet consumer demands in an equally efficient way for television viewers. I believe this legislation presents us with an opportunity to take steps in that direction and it is my hope that we can make progress towards greater consumer choice in television viewing.

Mr. BOUCHER. Thank you very much, Mr. Deal, and your statement along with that of other members will be included in the record.

The gentleman from California, Mr. Radanovich, is recognized for two minutes.

**OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. RADANOVICH. Thank you, Mr. Chairman. I want to thank you and Mr. Stearns for holding this hearing to review the draft legislation reauthorizing The Satellite Television Act and I appreciate both your leadership and your efforts to reauthorize this bill continuing to provide satellite operators with the authority to provide the signals of out-of-market broadcast ability to subscribers who cannot receive their local affiliates over the air.

My staff and I learned a few years ago when many in my district lost their access to distant signals. We have a large population of constituents who are very vocal satellite subscribers and while this problem has since been addressed, it illustrates the impact and importance of this legislation to me and my constituents, although there are still a few issues that we need to look out.

I look forward to working with the committee in a bipartisan manner towards a product that reflects the best interests of all television viewers. And I want to thank the witnesses for being here today sharing your testimony and, Mr. Chairman, I yield back. Thank you.

Mr. BOUCHER. Thank you very much, Mr. Radanovich.

We are pleased now to turn to our panel of witnesses for this morning and I want to thank each of them again for taking the time to join us here and share their very thoughtful views and comments with us on our discussion draft. Mr. Stanton Dodge is executive vice president and general counsel and secretary for DISH Network. Mr. Derek Chang is the executive vice president for content strategy and development for DIRECTV. Mr. Mike Mountford is the chief executive officer of NPS, one of the companies that is in the business of delivering distant network signals to households that are unserved according to the law's definitions. Mr. Preston Padden is executive vice president for Worldwide Government Relations for the Walt Disney Company. Mr. Paul Karpowicz is the president of Meredith Corporation. He testifies today on behalf of the National Association of Broadcasters.

Without objection, each of your prepared written statements will be made a part of the record. We would welcome your oral summaries and ask that you keep those summaries to approximately five minutes.

Mr. Dodge, we will be pleased to begin with you.

**STATEMENTS OF R. STANTON DODGE, EXECUTIVE VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY, DISH NETWORK; DEREK CHANG, EXECUTIVE VICE PRESIDENT, CONTENT STRATEGY AND DEVELOPMENT, DIRECTV, INC.; MIKE MOUNTFORD, CHIEF EXECUTIVE OFFICER, NPS LLC; PRESTON PADDEN, EXECUTIVE VICE PRESIDENT, WORLDWIDE GOVERNMENT RELATIONS, THE WALT DISNEY COMPANY; AND PAUL KARPOWICZ, PRESIDENT, MEREDITH CORPORATION**

**STATEMENT OF R. STANTON DODGE**

Mr. DODGE. Thank you for the opportunity to testify today regarding renewal of The Satellite Home Viewer Act.

The subcommittee's discussion draft provides a foundation to help shape how satellite TV providers will offer broadcast stations in the digital world, a world that began in earnest over the weekend with the digital transition. For that transition, the Federal Government, Congress, broadcasters, satellite TV providers and other industry leaders came together in a coordinated fashion to further a key national objective. We hope that same spirit of cooperation can carry over to satellite TV's transition from analog to digital rules.

The discussion draft provides a number of key provisions to help with that transition, however standing alone, we believe, it does not go far enough to provide consumers with the access to programming they desire. In each previous iteration of The Satellite Home Viewer Act, Congress has taken incremental and concrete steps to expand the ability of satellite TV providers to offer consumers the services they want while protecting the rights and interests of local broadcasters and content providers. At each juncture, satisfied consumers and enhanced video competition has been the result. Starting from the important building block that you have provided, we have the opportunity to again enhance competition and meet consumers' needs this year with additional reform in two key areas, designated market or DMA reform and serving all 210 markets.

Mr. Chairman, members of Congress have noted that the need for DMA reform to ensure that all customers have access to in-state broadcasters, yet in 43 States today, that is not the case. Similarly, it was provided for four markets in 2004 and importantly consumers benefited but I am not aware of any evidence of harm to broadcasters in those markets. We believe at a minimum, that a full national rollout of that program is now warranted so that all consumers can gain access to key in-state news, information and other programming. This would be a necessary, incremental step but would not address our consumers concerns fully. Broader DMA reform that provides consumers with the ability to receive the local stations of their choosing should remain our long-term objective limited only by what technology allows.

To date, broadcasters have failed to offer constructive DMA reform proposals and instead offer solutions that are consumer unfriendly and technically not possible. It should be highlighted that satellite TV providers and broadcasters have not been able to resolve this consumer issue through private contract arrangements in the decade since local-to-local service was introduced underscoring



the need today for affirmative action by Congress to achieve this result now.

The second area of reform we can achieve this year is serving all 210 markets. Mr. Chairman, you and others on the subcommittee have expressed a desire for satellite delivered local stations at all 210 DMAs. We believe that an incentive-based structure to achieve this result can be accomplished if satellite TV providers and broadcasters are willing to compromise and contribute to serving these economically challenging markets. We pledge our willingness to work with DIRECTV and the broadcasters to find common ground and share your believe that this would be a pro-consumer result.

We serve 178 local markets today by satellite which is more than any other pay TV provider in the nation. We are proud of that investment and are equally excited to report that DISH Network will maintain its leadership position for launching four additional markets in the next month, Marquette, Michigan, Bend, Oregon, Alexandria, Louisiana and Lima, Ohio. That brings the DISH Network total to 182 out of the 210 markets. The upcoming launch of these markets underscores our good faith commitment to continue to extend service to even more local communities provided certain conditions exist.

Critically, each of these four new markets has a local affiliate of each of the big four networks. The vast majority of the remaining 23 markets, however, do not and we are unable to justify the substantial cost of investing in markets who not provide the means to offer a competitively viable service. That said, we are ready to provide service to the remaining markets assuming the broadcasters are willing to partner with DISH Network and DIRECTV to find a commonsense regulatory and financial framework for doing so and that we have successful satellite launches to enable us to do that.

As an industry, DISH Network and DIRECTV have come together with a set of principals that should be included in any solution. First, all satellite providers should enter the digital world with the same set of rights so consumers have true choice across all 210 markets. The regulatory disparities should not dictate consumer choices. For example, in any market missing one or more network affiliate, all satellite TV providers should have the ability to import a missing network affiliate to that entire market regardless of whether there is bleed over from a nearby market.

Second, the finite amount of satellite spectrum available for any video programming should be addressed heads on. As a national provider, DISH Network provides over 1,400 local broadcast stations today. If we move forward towards service in all 210 markets, realistic limits on the amount of local broadcast stations that can be shoehorned into our national satellite platform should be established. Similarly, broadcasters should be obligated to provide a minimum amount of local content to earn satellite carriage.

Finally, making local stations available to all Americans for the first time on any platform is a noble but financially daunting undertaking. To achieve the same result for telephony, our nation has established a \$7 billion a year universal service program and there is an ongoing national dialog on how to fund similar universal broadband coverage. Asking satellite carriers alone to expand to

every market is a substantial burden, a burden that is not being asked of broadcaster, the cable industry or telecos. There should be clear financial commitments from broadcasters to share in the burden of getting local TV service to remote areas for the benefit of our mutual viewers.

In conclusion, increasing the number of communities served by satellite TV providers and the number of households able to receive in-state broadcasters are obtainable and worthy public policy objectives for this year. The discussion draft provides a starting point to achieve these consumer goals but does not go far enough. We stand willing to work with this subcommittee, broadcasters, DIRECTV and the contact community to find the proper balance to accomplish both goals.

Thank you again for inviting me to testify.

[The prepared statement of Mr. Dodge follows:]



Testimony of

**R. Stanton Dodge**

**Executive Vice President and General Counsel**

**DISH Network**

**Before the House Committee on Energy and Commerce  
Subcommittee on Communications, Technology and the Internet**

**June 16, 2009**

Chairman Boucher, Ranking Member Stearns, and Members of the Subcommittee: My name is Stanton Dodge and I am the Executive Vice President and General Counsel of DISH Network. Thank you for the opportunity to testify regarding the renewal of the Satellite Home Viewer Act.

The Subcommittee's discussion draft provides a foundation to help shape how satellite TV providers will offer broadcast stations in the digital world, a world that began in earnest over the weekend with the broadcaster digital transition. For that transition, the federal government, Congress, broadcasters, satellite TV providers, and other industry leaders came together in a coordinated fashion to further a key national objective. We hope that same spirit of cooperation can carry over to satellite TV's corresponding transition, shifting the satellite TV rules from analog to digital.

The discussion draft includes a number of key provisions to help with that transition; however, standing alone it does not go far enough toward providing consumers with access to the programming they desire. In each previous iteration of the Satellite Home Viewer Act, Congress has taken incremental and concrete steps to expand the ability of satellite TV providers to offer consumers the service they want while protecting the rights and interest of local broadcasters. At each juncture, satisfied consumers and enhanced video competition has been the result.

Starting from that important building block you have already provided, we have the opportunity to again enhance competition and satisfy consumers this year with additional reform in two key areas, serving all 210 markets and in-state Designated Market Area (“DMA”) reform.

A Path Towards 210 Markets

First, Mr. Chairman, you and others on the Subcommittee have expressed a desire for satellite-delivered local stations in all 210 markets. We believe that an incentive-based structure to achieve this result can be accomplished if satellite TV providers and broadcasters are willing to compromise and contribute to serving these economically-challenging markets. We pledge our willingness to work with DIRECTV and the broadcasters to find common ground, and share your belief that this would be a pro-consumer result.

We serve 178 local markets today by satellite, more than any other pay TV provider in the nation. We are proud of that investment, and are equally excited to report that DISH Network will maintain its leadership position by launching four additional local markets in the next month: Marquette, Michigan; Bend, Oregon; Alexandria, Louisiana, and Lima, Ohio. That brings the DISH Network total to 182 out of 210 markets. The upcoming launch of these markets underscores our good faith commitment to continue to extend service to even more local

communities, provided certain conditions exist. Critically, each of these new markets has a local affiliate of each of the Big 4 networks. The vast majority of the remaining 29 markets that DISH Network does not serve, however, do not. We are unable to justify the substantial cost of investing in markets that do not provide the means to offer a competitively viable service.

That said, we are ready to provide service to these markets if we can all agree on a common sense future framework, and hope broadcasters are willing to partner with DISH Network and DIRECTV to find a regulatory and financial path to serve these remaining communities. As an industry, DISH Network and DIRECTV have come together with a set of principles that should be included in any solution.

1. All satellite providers should enter the digital world with the same set of rights, so consumers have true choice across all 210 markets. Regulatory disparities should not dictate consumer choices. For example, in any market missing one or more network affiliates, all satellite TV providers should have the ability to import a missing network affiliate to that entire market, regardless of whether there is bleed-over from an nearby market. All consumers should have access to ABC, CBS, FOX, and NBC content.

2. The finite amount of satellite spectrum available for video programming should be addressed head-on. As a national provider, DISH Network provides

over 1400 local broadcast stations today. If we move forward towards service in all 210 markets, realistic limits on the amount of local broadcast stations that can be shoe-horned on to a national satellite platform should be established. Cable providers have long had a fixed cap on the amount of their capacity that must be used for local broadcaster carriage, and a comparable cap is now needed for satellite as policy goals shift toward extending service throughout rural America. Similarly, broadcasters should be obligated to provide some local content to earn satellite carriage. Too many stations today have little or no local content or original programming.

3. Making local stations available to all Americans for the first time on any platform is a noble but financially daunting undertaking. To achieve the same result for telephony, our nation has established a seven billion dollar a year universal service program. There is an ongoing national dialogue on how to fund similar universal broadband coverage. With respect to video, broadcasters and cable providers do not offer universal coverage today, and serve a smaller geographic footprint than satellite today. Asking satellite carriers alone to expand further to every market and every consumer is a substantial burden; a burden that is not being asked of broadcasters or the cable industry. Satellite carriers cannot justify the costs of serving these markets alone. There should be clear financial

commitments from broadcasters to share in the burden of getting local TV service to remote areas for the benefit of our mutual viewers.

We believe these joint DIRECTV/DISH Network principles can serve as a foundation to expand the number of markets reached by satellite providers in a way that apportions the substantial cost of 210 markets in an equitable manner across industries. We acknowledge that this is not an opportune time to add costs to any industry, but believe a joint investment in these underserved markets today will help broadcasters in these rural areas long-term.

#### DMA Reform

The second broad area of reform we can achieve this year is DMA reform. Mr. Chairman, you and others on the Subcommittee have also called for targeted DMA reform to ensure that all consumers have access to in-state broadcaster sources, yet in 43 states that is not the case today. Similar relief was provided for four markets in 2004. Importantly, consumers benefited and there is no evidence of harm to broadcasters. We believe that, at a minimum, a full national roll-out is now warranted so that all consumers can gain access to key in-state news, information, and other programming. This would be a necessary and incremental step, but would not address our consumers' concern fully. Broader DMA reform that provides consumers with the ability to receive the local stations of their



choosing should remain our long-term objective limited only by what technology allows.

To date, broadcasters have failed to offer constructive DMA reform proposals and instead offer solutions that are not technically viable. It should be highlighted that satellite TV providers and broadcasters have not been able to resolve this consumer issue through private copyright agreements in the decade since local-into-local service was introduced, underscoring the need for affirmative action by Congress to achieve this result now.

\* \* \*

Increasing the number of communities served by satellite TV providers and the number of households able to receive in-state broadcasters is an attainable and worthy public policy objective this year. The discussion draft provides a starting point to achieve these consumer goals but does not go far enough. We stand willing to work with this Subcommittee, broadcasters, DIRECTV and the content community to find the proper balance to accomplish both goals.

Thank you again for inviting me to testify this morning.

Mr. BOUCHER. Thank you.

**STATEMENT OF DEREK CHANG**

Mr. CHANG. Is this all right?

Mr. BOUCHER. That is pretty good.

Mr. CHANG. I apologize. I am neither an engineer nor an attorney so I may be at a severe disadvantage here.

Chairman Boucher, Ranking Member Stearns and members of the subcommittee, thank you for inviting DIRECTV to testify today regarding the reauthorization of The Satellite Home Viewer Act.

We support the straightforward approach of the subcommittee's draft bill which makes narrow but nonetheless important changes to the law for the delivery of broadcast stations in today's all-digital world. However, if the subcommittee chooses to broaden the draft bill to address other issues we offer the following suggestions. These include modifying the DMA system, allowing distant network stations to be delivered in DMAs with missing affiliates and further improving the significantly viewed rules. I would like to address each of these issues.

First, I would like to discuss improving choice in local service. Throughout the country, viewers in so-called orphan counties on the edges of DMAs cannot receive local broadcast service from within their own State. The 2004 reauthorization allowed consumers in a handful of these orphan counties to gain access to in-state local content. The results have been heralded by consumers and public officials. Even broadcasters who originally opposed these changes found their areas of service expanded and gained revenue from the additional copyright payments. These pilot projects provide Congress with a roadmap for applying this concept nationally. Representative Ross has drafted legislation that seeks to do just that. We urge its adoption. The approach is simple. It would allow consumers in these orphan counties the opportunity to watch their home State programming.

Second, we would ensure that all consumers have access to network programming. Today overall DMAs lack one or more local affiliates. Subscribers in such markets are ineligible for distant signals if they are predicted to receive even a faint signal from a neighboring, out-of-market station. This is known as the great D bleed problem. It prevents subscribers in those markets from getting any network service via satellite. We see no reason why out-of-market stations should deny consumers access to network programming. There is a simple solution. Subscribers should be able to receive distant signals unless they receive a sufficiently strong signal from an in-market station.

Third, I would like to briefly address significantly viewed stations. We applaud your decision to remove the onerous equivalent bandwidth requirement. Yet satellite carriers face another obstacle in offering significantly viewed service, obtaining consent from broadcasters to offer stations outside their DMAs. Some broadcasters tell us that network affiliation agreements prohibit them from granting consent to satellite operators. Others have proven on interest sitting granting consent outside their DMAs even when they grant such consent to cable. We recommend that broadcasters be required to grant consent for significantly viewed carriage on

equal terms and conditions to all distributors seeking such carriage. Alternatively, Congress could remove the retransmission consent requirement and instead compensate broadcasters under the distant signal regime.

Last, Mr. Chairman, you and others have expressed an interest in satellite delivered locals in all 210 DMAs. While DIRECTV does not generally support a universal carriage mandate, we have worked constructively with DISH Network to develop a minimum set of requirements we believe are necessary for any such mandate to be imposed. By way of background, DIRECTV has spent billions of dollars to provide local service to 95 percent of the country. In 10 short years, the satellite industry has reached 98 percent of the country with local service. Broadcast and cable which have been in business since the 1920s and 1940s respectively, have still not reached those numbers. Cable still does not pass nearly four million households, a figure larger than homes and markets without satellite delivered locals. Additionally, there are over 50 DMAs lacking one or more network affiliates leaving almost seven million households without a full complement of network programming.

Universal carriage is a worthy public policy goal but it requires an enormous capital investment that would be difficult if not impossible for us to recoup and while the broadcasters would prefer that the entire burden be placed on satellite operators, this approach is neither economic nor fair to our subscribers who ultimately bear the cost of such mandates. If Congress is to pursue a universal carriage mandate, it must do so in a way that shares the burden more equitably among all parties and accounts for other critical factors in the marketplace. We developed with DISH Network the following set of minimum criteria for your consideration, applying a one-third capacity cap similar to cable's, limiting carriage rights to those stations with local content, requiring broadcasters to shoulder their fair share of the financial burden for expansion of their over-the-air footprint, prohibiting broadcasters from increasing the already substantial cost of such a mandate through retransmission consent fees and as discussed above, addressing the missing affiliate problem and improving the significantly viewed rules.

Mr. Chairman and members of the subcommittee, I thank you and your staff for all of your hard work. I am happy to take your questions.

[The prepared statement of Mr. Chang follows:]

**Written Testimony of  
Derek Chang  
Executive Vice President, Content Strategy and Development  
DIRECTV, Inc.  
Before the House Committee on Energy and Commerce  
Subcommittee on Communications, Technology and the Internet  
June 16, 2009**

Thank you for inviting DIRECTV to discuss the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”). I sit before you today on behalf of more than eighteen million of your constituents. DIRECTV brings them hundreds of channels, amazing picture quality, state-of-the-art innovation, and industry-leading customer service. By doing so, DIRECTV, DISH Network, and others present a real challenge to our cable competitors. The result is better television for everybody.

While DIRECTV can take some of the credit, much of the credit goes to Congress. In 1988, you passed the Satellite Home Viewer Act (“SHVA”), allowing satellite carriers to retransmit broadcast signals for the first time. In 1992, you passed the program access provisions of the Cable Act, giving satellite subscribers access to key cable-owned programming. And in 1999, you passed the Satellite Home Viewer Improvement Act (“SHVIA”), allowing satellite carriers to retransmit *local* broadcast signals for the first time. The result is today’s vibrant competitive video marketplace, which provides consumers more choice and better service than ever before.

This year, you have the opportunity to continue Congress’s commitment to consumers and competition as you consider reauthorization of SHVERA. As you do, we ask you to consider some modest changes that would give consumers access to and more choices for local content. In this regard, Congress should:

- Modify the DMA system to give consumers the stations that truly serve their communities.
- Allow all subscribers in markets missing one or more network affiliates to receive network programming through distant signals and modify how consumers can qualify for distant signals, to ease their burden when local signals are not available to them.
- Fix the significantly viewed rules to offer satellite customers the same choices as cable customers.

Implementing these recommendations will help ensure that your constituents continue to receive more choice and better service.

Moreover, in response to calls for local service in all 210 markets, DIRECTV does not believe that Congress should implement a universal carriage mandate on satellite alone – a mandate that would not apply to broadcasters and cable as well. In just ten years, DIRECTV has invested several billions of dollars to provide local television stations by satellite in 151 local markets, serving 95 percent of American households, and HD local service in 126 markets, serving more than 89 percent of American households. Broadcasters and cable operators, by contrast, have been around for decades and still reach fewer households than can receive local service by satellite. In these circumstances, it is inequitable to place universal carriage burdens only on satellite providers and their subscribers.

While we do not support a universal carriage mandate, we have outlined a set of minimum requirements that must be addressed by Congress should it decide to take such action. In such case, Congress should:

- Apply a capacity cap similar to that which applies to cable.
- Limit carriage rights to those stations with local content.

- Require broadcasters to shoulder their fair share of the financial burden for expansion of their over-the-air footprint.
- Prohibit broadcasters from increasing the already substantial costs of such a mandate through retransmission consent fees.

Any imposition of a universal carriage mandate also makes the need to allow distant signals in markets that are missing a local affiliate, and fixing the significantly viewed rules, even more imperative. It would disserve the public to impose such an uneconomical proposition on satellite and still not be able to offer your constituents a full complement of network signals.

**I. Congress Should Update SHVERA to Improve Consumers' Access to and Choice of Local Stations**

SHVERA permits satellite operators to deliver local stations within their own “local markets,” generally defined in terms of “designated market areas” (or “DMAs”). It also permits satellite operators to provide distant signals to those consumers that cannot receive local signals. We believe Congress should make changes to these licenses to improve consumers’ access to and choice of local stations, and ease the burden on consumers seeking distant signals when local signals are not available.

**A. Addressing Inequities in the DMA System Will Give Viewers the Stations that Truly Serve their Communities**

Congress could begin by modernizing “local markets” and the decades-old DMA system. Nielsen Media Research created DMAs as part of a private subscription service used primarily for advertising purposes. This system was never meant to determine which local signals are available to viewers. Using DMAs for this purpose means that viewers throughout the country cannot receive local news, sports, and entertainment because they happen to live on the wrong side of an arbitrary border.

The problem is most acute in so-called “orphan counties” that are located in one state but placed in a DMA centered in another state. Fulton County, Pennsylvania, for example, is in the Washington, D.C. DMA. But Washington, D.C. newscasts do not run stories about Fulton County. Nor do they typically report emergencies, severe weather, or other public safety issues in Fulton County. Fulton County residents thus receive service that cannot really be described as “local.”

One could solve this problem by allowing satellite and cable operators to offer television stations in “neighboring” DMAs as well as their own DMAs. This would allow, for example, Harrisburg, Pennsylvania stations to be shown in the Washington D.C. DMA, where Fulton County is located. We supported such an approach proposed by Congressman Ross last Congress. In an attempt to balance the interests of broadcasters with those of consumers, however, we would also support a more limited approach that would allow service *only* to orphan counties. Under this approach, Harrisburg stations could be provided only in Fulton County, not throughout the Washington, D.C. DMA. We believe this balanced approach best serves consumers, while also serving the economic interests of the broadcasters.

**B. Simplifying the “Unserved Household” Provision Will Make the Law Fairer and More Understandable For Your Constituents**

Congress could also help consumers by making modest changes to the distant signal license’s “unserved household” restriction. This restriction limits satellite distant signals to those consumers unable to get local signals over-the-air. The process for determining which households are really “unserved,” however, is hopelessly flawed. Satellite carriers think it is far too complicated and expensive. Broadcasters think it

allows satellite carriers to count too many households as unserved. Most importantly, consumers despise the process of computer prediction, waiver, and on-site testing.

We have two suggestions to simplify the license. One concerns the “unserved household” definition generally. The other concerns only those markets in which we offer local stations.

First, Congress should allow distant signals to all subscribers in markets where there is no local affiliate. Some local markets lack one or more local network affiliates. Under today’s rules, subscribers in such markets are nonetheless ineligible for distant signals if they are within the service contour of a neighboring, out-of-market station. This is known as the “Grade B bleed” problem, and it can prevent subscribers from getting any network service via satellite even though there is no local broadcast affiliate in the DMA.

Lafayette, Indiana, for example, has a CBS affiliate but no other affiliates. So one might logically expect DIRECTV to be able to deliver NBC, ABC, and FOX distant signals to Lafayette subscribers. But some subscribers in the Lafayette market are predicted to get one or more faint over-the-air signals from Chicago, Indianapolis, or Champaign. We cannot deliver these subscribers local network programming (because there is none), nor can we deliver them distant network programming unless we obtain permission from each and every broadcaster that technically “serves” a sliver of the market. These antiquated rules deny subscribers access to network programming based on the transmissions of non-Lafayette stations.

There is a solution. The test should be whether a subscriber can receive a sufficiently strong signal *from an in-market station*. We see no reason why out-of-market



stations, whatever their predicted signal contour, should deny consumers in other markets access to distant network signals.

Second, over-the-air qualification is unnecessary in local markets served by satellite. In markets where a satellite carrier offers local service, the criteria for “unserved household” should not be *over-the-air* reception. The test instead should be whether the viewer can get local service *from satellite*. More specifically, subscribers in such markets should be eligible for distant signals only if they are located outside the satellite spot beam on which local channels in a particular market are offered.

This approach has numerous advantages. It is logical because, in markets where subscribers receive local signals over the satellite, over-the-air reception is irrelevant. It is simple because spot-beam coverage is a known quantity. It is fair because spot-beam coverage can be published so everybody knows who’s eligible. Most importantly, it ensures that all subscribers can receive network programming.

**C. Fixing the “Significantly Viewed” Rules will Rescue Congress’s Good Idea from the FCC’s Implementation Mistakes**

Cable operators have long been permitted to offer neighboring “significantly viewed” stations. (For example, certain New York stations are “significantly viewed” in New Haven, Connecticut.) In an explicit attempt to level the playing field with cable, Congress gave satellite carriers similar rights in 2004. Congress also, however, included an “equivalent bandwidth” provision that does not apply to cable. The FCC subsequently interpreted this rule so onerously that it effectively undid Congress’s efforts.

Satellite operators (unlike cable operators) must offer local stations the “equivalent bandwidth” offered to significantly viewed stations. The FCC has interpreted this to mean that DIRECTV must carry local stations in the same format as significantly

viewed stations every moment of the day. This is infeasible. DIRECTV cannot monitor the format of hundreds of station pairs around the clock. Nor can DIRECTV black out signals when, for example, a high-definition ballgame runs late on one station while the other offers standard definition hourly fare. We think the FCC's decision conflicts with Congress's intent to promote cable-satellite parity.

Moreover, obtaining retransmission consent from significantly viewed stations has proven a substantial impediment for satellite carriers. We have been told that some network-affiliation contracts prohibit stations from granting consent to satellite operators for significantly viewed carriage. Other broadcasters have proven uninterested in granting such consent – perhaps in hopes that their neighboring stations also will refuse to do so.

We recommend two changes that would level the playing field with cable. First, remove the equivalent bandwidth requirement. Second, remove the requirement to obtain retransmission consent for stations in significantly viewed areas, treating them like distant signals in this regard. Alternatively, Congress should require that broadcasters treat cable and satellite fairly; if a significantly viewed station gives retransmission consent to a cable provider in the market, then such broadcaster should similarly give retransmission consent to the satellite providers as well. Absent these modifications, satellite operators will remain at a competitive disadvantage, unable to carry signals that cable operators have carried for years.

**II. DBS Should Not Be Unfairly Burdened by a Universal Carriage Mandate that Does Not Similarly Apply to Broadcasters and Cable**

DIRECTV today offers local television stations by satellite in 151 of the 210 local markets in the United States, serving 95 percent of American households. (Along with

DISH Network, we offer local service to 98 percent of American households.) DIRECTV also offers HD local service in 126 markets, serving more than 89 percent of American households. DIRECTV has designed and constructed its satellite fleet to comply with the “carry one, carry all” law, including the FCC’s most recent HD “carry one, carry all” order.

We have devoted several billions of dollars to this effort, and we are working every day to serve more markets. In fact, this year we will launch five new markets. In the meantime, we have developed equipment that allows subscribers in the remaining markets to integrate digital terrestrial broadcast signals seamlessly into their DIRECTV service.

It is troubling that in the face of this enormous investment, the satellite industry is being singled out for a universal carriage mandate. No such requirement exists for either the cable or broadcast industry. And while the satellite industry has reached 98 percent of the country with local service in only 10 short years, broadcast and cable, which have been in business since the 1920’s and 1940’s respectively, still don’t serve the entire country.

According to the FCC’s most recent figures, cable still does not pass 3.8 million households – a figure larger than that of households unable to receive local signals by satellite. The broadcast industry’s track record is worse. Today, there are over 50 DMAs lacking one or more network affiliate, leaving almost 7 million households without a full complement of network programming because broadcasters apparently deemed those markets too small or unimportant to merit *any* service from the missing networks. Moreover, even in markets with a full complement of network affiliates, millions of

viewers live in “white areas” where their broadcasters have chosen not to reach them. Again, these figures dwarf the relatively small (and dwindling) number of households that cannot yet receive satellite-delivered local channels.

If every home in the country is to be given the full spectrum of video programming, many entities should fairly be asked to play their part. Yet the broadcasters would prefer that the entire burden be placed on satellite operators and their subscribers. This is simply unfair to our subscribers, who ultimately bear the cost of such mandates.

If Congress is determined to move forward with a universal carriage mandate, Congress should ensure that satellite subscribers can receive competitive programming choices, and satellite operators do not have to shoulder this burden alone. As described above, allowing all subscribers in markets that are missing a local affiliate to receive distant networks, and fixing the significantly viewed rules is imperative. In addition, the following set of minimum requirements must be addressed by Congress:

- Replace the satellite “carry one, carry all” rules with one-third capacity cap comparable to the cap that applies to cable operators.
- Permit only local stations with at least 20 percent locally-produced programming to assert carriage rights.
- Require local broadcasters to share in the costs of a satellite provider offering local service to each of the markets not currently served by such provider (“Unserved Markets”).
- Prohibit broadcasters from charging additional fees in such markets through the retransmission consent process.

**A. Any New Carriage Requirements Should Have One-Third Capacity Cap Comparable to That For Cable.**

When Congress established the “carry one, carry all,” rules, it did so recognizing that the capacity limitations faced by satellite operators were greater than those faced by cable operators.<sup>1</sup> In light of those limitations, Congress adopted a regime in which satellite operators can choose whether to enter a market, and only then must carry all qualifying stations in that market.<sup>2</sup> Indeed, both Congress and the courts concluded that the “carry one, carry all” regime was constitutional largely because it gave satellite carriers the choice of whether not to serve a particular market.<sup>3</sup>

Cable operators are subject to a mandatory carriage requirement rather than “carry one, carry all,” but they need to carry local commercial television stations only “up to one-third of the aggregate number of usable activated channels of such system[s].”<sup>4</sup> The one-third limitation was the key to the Supreme Court’s finding that the cable must-carry rules were constitutional. In particular, Justice Breyer, whose concurrence constituted the crucial fifth vote for upholding the statute, concluded that “the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers, is limited and will diminish as typical cable system capacity grows over time.”<sup>5</sup>

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<sup>1</sup> 145 Cong. Rec. H11,769 (1999) (joint explanatory statement), 145 Cong Rec H 11769, at \*H11792 (LEXIS) (“To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.”) (“Conference Report”).

<sup>2</sup> 47 U.S.C. § 338(a)(1).

<sup>3</sup> See Conference Report at \*H11795 (“Rather than requiring carriage of stations in the manner of cable’s mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license.”); *SBCA v. FCC*, 275 F.3d 337, 354 (4<sup>th</sup> Cir. 2001) (holding that the carry-one, carry-all rule was content-neutral because “the burdens of the rule do not depend on a satellite carrier’s choice of content, but on its decision to transmit that content by using one set of economic arrangements [e.g., the statutory license] rather than another”).

<sup>4</sup> 47 U.S.C. § 534(b)(1)(B).

<sup>5</sup> *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. at 180, 228 (“*Turner II*”)(Breyer, J., concurring); see also *id.* at 219 (“While we acknowledge appellants’ criticism of any rationale that more is better, the scheme in question does not place limitless must-carry obligations on cable system operators.”).

The same concerns that led Congress to limit satellite carriage requirements still apply today. Last year, the FCC “recognize[d] that satellite carriers face unique capacity, uplink, and ground facility construction issues” in connection with offering local service.<sup>6</sup> It concluded that, if faced with onerous carriage requirements, satellite carriers might be “forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity.”<sup>7</sup>

If Congress were to change satellite local carriage requirements from “carry one, carry all” to “must carry,” it must not impose higher burdens on satellite (which has comparatively less capacity) than it did on cable (which has comparatively more capacity). Any new rules for satellite should therefore include a one-third capacity cap comparable to the cable cap found in Section 614(B)(1)(b) of the Communications Act.

**B. Local Stations Should Provide its Viewers with a Minimum of 20 Percent Locally-Produced Programming In Order to Assert Carriage Rights**

One of Congress’ goals in establishing the must-carry rules was to “preserve[e] the benefits of free, over-the-air local broadcast television”<sup>8</sup> and the corresponding interest in “promoting the widespread dissemination of information from a multiplicity of sources.”<sup>9</sup> Yet, today, the vast majority of the programming offered by “local” broadcasters is not local at all. It is instead national network or syndicated programming. It is overly burdensome and inefficient for satellite providers to utilize sparse satellite capacity to carry the same programming on hundreds of different channels. If a station

<sup>6</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Rcd. 5351, ¶ 7 (2008) (“*Satellite HD Carriage Order*”).

<sup>7</sup> *Id.*, ¶ 8 (citations omitted).

<sup>8</sup> *See Turner II*, 520 U.S. at 235; *SBCA*, 275 F.3d at 356, 363.

cannot commit to a minimum of 20 percent of local programming, there should be no corresponding carriage obligation for that station. In such cases, consumers should be able to continue to receive the national programming they desire through distant signals.

**C. Local Broadcasters Should Share in the Costs of Providing Local Service in Unserved Markets**

If Congress were to impose a universal carriage mandate, broadcasters should pay their fair share of the costs of expanding their coverage area in the Unserved Markets. DIRECTV has already spent billions of dollars to serve 95 percent of the country with local broadcast signals by satellite. DIRECTV also has provided (at great expense) a seamless method for its subscribers to integrate over-the-air signals with its satellite-delivered service. Yet broadcasters have shown far more interest in increasing their coverage by riding on the investments of others rather than investing in their own facilities. The significant costs of providing local-into-local in the smaller markets – much of which will never be recouped – should not be placed on satellite subscribers alone.

Today, if a broadcaster wants carriage on DIRECTV, its only obligation is to provide us with a good quality signal at our local collection facility (“LCF”) in their market. For broadcasters, this is a non-obligation, as we can usually pick up the signals over-the-air. DIRECTV pays for the cost of the LCF – often paying a local broadcaster to lease space at their station for the needed equipment. DIRECTV pays the cost of the fiber backhaul to one of its centralized uplink centers. DIRECTV pays for the cost of uplinking the station to its satellites. DIRECTV pays for the costs of the building, launching and operating these satellites. The broadcaster bears no burden whatsoever.

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<sup>9</sup> *Turner II*, 520 U.S. at 189-90

These financial and operational burdens are substantial, particularly when measured against DIRECTV's inability to recoup its costs in the smallest markets. In order to serve the remaining markets, DIRECTV estimates the cost of the satellite and uplink facilities to be an additional \$200 million beyond what has already been spent to date. The current costs of the LCF and fiber backhaul generally average about \$2.7 million per market on a non-recurring basis, and an additional \$1-2 million a year.

DIRECTV simply requests that, if satellite carriers are asked to serve the smallest markets, broadcasters share in this burden by providing a good quality signal at one of DIRECTV's centralized uplink centers, rather than the LCF. It is our understanding that this was precisely the proposal that Capitol Broadcasting once put forth when asking for carriage of local stations by satellite in all 210 markets. To the extent local broadcasters cannot afford this investment and recurring cost, the government can assist by allowing broadcasters to apply for a rural fiber subsidy. As part of the recent stimulus package (not to mention the Universal Service Fund and other existing programs), the government is spending billions to subsidize otherwise uneconomic investment to reach rural areas or otherwise isolated consumers. It is inconsistent to ask satellite operators to make similarly expensive and, in many cases, uneconomic investments without similar aid.

**D. Local Broadcasters Should Not Increase the Cost of Satellite-Provided Local Service by Charging Retransmission Consent Fees**

Given the substantial cost of serving the remaining markets, any Congressional mandate should prevent broadcasters from adding to those costs in these Unserved Markets through the retransmission consent process. Broadcasters clearly benefit through the increased number of viewers and consequently their potential for advertising revenue. That, after all, is why they seek a universal video service mandate. Indeed,



NAB and radio broadcasters justify not paying fees to record labels for the right to rebroadcast their songs because of the audience reach that broadcasters provide to the artists. The same principle holds true for satellite retransmission of broadcast signals. Any government universal carriage mandate should not permit broadcasters to obtain additional, windfall profits in the form of fees to satellite subscribers.

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Mr. Chairman and members of the Committee, please allow me to end where I began. Consumers throughout America – whether they subscribe to satellite or not – are better off because of the legislation you and your Committee championed over the years. I ask you to keep those same consumers in mind as you consider SHVERA reauthorization this year.

Thank you once again for allowing me to testify. I would be happy to take any of your questions.

Mr. BOUCHER. Thank you very much, Mr. Chang.  
Mr. Mountford.

**STATEMENT OF MICHAEL MOUNTFORD**

Mr. MOUNTFORD. Chairman Boucher, Ranking Member Stearns and members of the subcommittee, I am Michael Mountford, CEO of National Programming Services LLC and we do business as AllAmericanDirect.com.

Mr. Chairman, before I get started, I just want to mention that I have been in this industry for 26 years and no one has done more for satellite TV consumers, especially rural satellite TV consumers than you, so thank you.

I am pleased to have the opportunity to testify here today on behalf of not only my company but also frustrated consumers everywhere. From my experience, consumers want their local stations first and foremost however thousands of people have come to our Web site to urge you, Congress, to allow them to purchase distant network signals without restrictions. They have several reasons. Maybe they have elderly parents who live in a different city. Maybe they have a child who goes to a school somewhere else in the country. Heck, you guys probably want to check in on your districts once in awhile, don't you? These customers don't understand and these consumers don't understand why they can't purchase this product like they can purchase the New York Times or a Chicago radio station, for example. This country was built on the principle of the freedom of information. Consumers want that freedom and they don't understand why Congress won't grant them those rights.

I understand the concern about localism and I would like to suggest a simple solution, allow the consumers to purchase distant networks only after they purchase the local channel of the same network. This is allowed under the current legislation for significantly viewed stations from adjacent markets. Why not expand that?

I urge Congress to take this bold step now and lift the restrictions on distant networks because if you don't, more and more constituents are going to be frustrated by these rules and they will be asking you, how could you have passed such a law. Hopefully, you will agree with me that lifting the restrictions is the best solution however please let me comment on the draft legislation. It calls for a predictive model which we agree is the best way to determine eligibility. The most important thing about a predictive model is viewability standard. The analog model right now calls for 90 percent viewability—that means 10 percent non-viewability. This would allow for 12 30-second interruptions during an hour program and with digital the interruptions are outages, they are gone. Clearly, that is unacceptable while viewing the digital signal.

We urge Congress to require the FCC to adopt a minimum viewability standard of 99 percent, better would be better. Even at that rate, it would allow for 12 3-second interruptions in an hour program. We urge the committee to ensure that no additional expense be required of the consumer to get their local networks. Congress did an excellent job with the digital conversion coupons. In the same spirit, we urge you to direct the FCC not to require addi-

tional equipment purchases by the consumer to get network programming. It just wouldn't be fair.

The waiver system was put into the legislation because it is universally known a predicted model cannot be perfect and it will not be perfect. The waiver system as it exists today is broken and needs to be changed. Your constituents are being denied service without the proper appeal envisioned by the legislation. Thirty-four percent of all the stations we submit waivers to deny over 90 percent of those submittals. In essence, a third of the stations are denying all the waivers that come to them except for maybe a friend, a relative or after a call from a congressional office. That is not the spirit of the law. That is not fair to your constituents.

Fortunately, the digital conversion allows for us a simpler, less expensive, more consumer-friendly waiver system that works in this way. A consumer who is denied by the predicted model can sign an affidavit under penalties of perjury and fines that they do not receive the signal. The provider can temporarily authorize that consumer and submit the consumer information to the broadcaster. The broadcaster can challenge by sending a clerical employee or a contractor to the home to view the signal for about 10 minutes. That is all it takes. With digital, the signal is either there or not there. It is not like analog where you see ghosting and artifacts. It is very simple.

So in closing, I would urge you to listen to your constituents and lift the restrictions on distant networks signals. Require the FCC to adopt a 99 percent or better viewability standard in the predictive model, and fix the waiver system.

Thank you very much.

[The prepared statement of Mr. Mountford follows:]

**Testimony before the Committee on Energy and Commerce  
Subcommittee on Communications, Technology, and the Internet**

**Hearing on Discussion Draft of Legislation to Reauthorize the Satellite Home  
Viewer Act**

**June 16, 2009**

**Michael Mountford  
Chief Executive Officer  
National Programming Service**

Chairman Boucher, Ranking Member Stearns and other Members of the Subcommittee, I am Mike Mountford, CEO of National Programming Service (“NPS”). I have been involved in the satellite communications business for two decades. I have been with the company that is now NPS since 1998. I am pleased to have the opportunity to testify before you today on the discussion draft of legislation to reauthorize the Satellite Home Viewer Extension and Re-Authorization Act of 2004 (“SHVERA”) and appreciate the chance to share with you and the members of this subcommittee my insights on the satellite television business.

NPS is a small business located in Indianapolis, Indiana that has been serving the direct-to-home satellite industry for the past two decades by offering satellite reception equipment, consumer electronics and programming to customers through its sales agents and website. Since 2006, NPS has been offering distant network signals to DISH Network subscribers that qualify as unserved households. The company has approximately 115,000 subscribers to this distant network service nationwide. It is this aspect of NPS’s business that is relevant to this hearing.

Since the enactment of SHVERA, the paradigm for the retransmission of local broadcast programming has shifted dramatically in the wake of the digital transition and the rise in broadband Internet availability. Satellite programming providers are facing competition, not just from cable providers and over-the-air programming, but also from a plethora of media sources, including the Internet and wireless video services. The reauthorization of SHVERA should reflect the realities and capabilities of video technologies available today and in the near

future, and allow the benefits that satellite television has brought to American consumers to continue to exist in the new era of digital television.

In my testimony today, I urge you to consider lifting the restrictions on satellite-delivered distant network signals in the new legislation. Such restrictions are no longer necessary in an era where local programming can be made available, without restriction, through other means. Alternatively, if these restrictions cannot be removed in this reauthorization, Congress should ensure that consumers that truly do not have access to an over-the-air network signal be able to subscribe to a satellite distant network service without having to endure the currently existing burdensome and frustrating process. Instead, the new legislation should require the Federal Communications Commission (“FCC”) to adopt a model that accurately predicts the availability of an over-the-air signal at a household location. In cases where such a predictive model does not correctly identify an unserved household, the consumer residing in the unserved household should be able to certify that he or she does not receive a local network signal over the air and subscribe to a distant network service. The local broadcaster should, of course, have the right to verify the subscriber’s certification; however, the burden would be on the local broadcaster to prove that the subscriber does receive a viewable over-the-air signal.

**Congress Should Lift All Restrictions on Satellite-Delivered Distant Network Signals.**

Although previous reauthorizations of the Satellite Home Viewer Act have contracted the ability of satellite carriers to carry distant signals, it is now time to lift many, if not all, of these restrictions. Currently, households that cannot receive a local digital network signal may be ineligible to subscribe to satellite-delivered distant network signals unless an actual signal test is performed at the household location, and the results indicate that the household is “unserved.” Such signal tests are expensive and require a technician to be deployed to the

viewer's location. Because actual signal tests were not required for analog signals under SHVERA, this is not a common practice in the industry, and testing resources are scarce and expensive. Moreover, while the FCC has commenced a proceeding to develop signal testing methodologies; there currently are no rules in place establishing how such testing must be conducted. Therefore, the consumer's only other alternative is to request a waiver from the local broadcast station. The waiver process requires the satellite provider to request a waiver of the distant network restrictions with respect to a certain customer. The local station may accept or deny the request within 30 days. In NPS's experience, over 1/3 of the local broadcast stations from which NPS has requested such waiver simply deny the request without even considering the ability of the customer to receive an over-the-air signal.<sup>1</sup>

Restrictions on satellite-delivered distant network signals hinder the ability of satellite providers to compete with cable providers – which are not subject to such restrictions – and other programming media. Most notably, since SHVERA was enacted, broadband technology has become pervasive, and broadcast network content is widely available on-line. Technologies, such as Digital Video Recorders (DVR) and Slingbox, allow consumers to shift the time and place they watch broadcast network programming. Viewers are no longer limited to watching their local programming when it is aired by their local broadcast stations.

Consumers should be permitted to choose the technology by which they access network programming. Additionally, consumers in areas not reached by cable or that do not have the necessary broadband capabilities or technical know-how should also be able to access distant network programming. The satellite restrictions create a competitive disparity between

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<sup>1</sup> Approximately six percent of the network affiliates from which NPS has requested waivers have denied 100 percent of the requests, and approximately 28 percent of the

satellite carriers and cable operators, as acknowledged by the Copyright Office.<sup>2</sup> Satellite programming providers should not be unfairly disadvantaged by the law as they compete with these other technologies.

The distant signal restrictions, and the resulting anti-competitive impact, ultimately hurt consumer interests. There are a variety of reasons why consumers may wish to obtain distant broadcast channels via satellite. In our increasingly mobile society, consumers want access to local news and content from distant markets. As Internet-based video applications have proliferated, local content and broadcast network programming are increasingly available on-line. Thus, it is unreasonable to restrict satellite providers from retransmitting distant network programming, while such restrictions do not apply to other video delivery technologies. Therefore, restrictions on the ability of satellite providers to deliver distant network signals should be removed in the SHVERA reauthorization statute.

These and other arguments for lifting the satellite restrictions are discussed in detail in a white paper called: *Loosening the Ties: Why Congress Should Eliminate the Distant Network Signal Restriction on the Direct-to-Home Satellite Television Industry*, by John Windhausen of Telepoly Consulting. I respectfully request permission to submit this paper, attached as Exhibit A, into the record.

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network affiliates from which NPS has requested waivers have denied between 90 to 100 percent of such requests.

<sup>2</sup> See Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, A Report of the Register of Copyrights, June 2008.



**Congress Should Adopt Consumer-Friendly Approaches that Permit Households Unable to Receive an Over-the-Air Signal to Subscribe to Distant Network Signals**

If Congress decides for some reason that it is not feasible to lift all distant network restrictions, NPS urges Congress, at a minimum, to ensure that the manner in which consumers are determined to be eligible for distant network signals reflects a consumer-friendly approach. NPS has advocated that the FCC develop and adopt a predictive model for digital signals.<sup>3</sup> However, Congress did not authorize the FCC to do so under the currently-enacted version of SHVERA. The FCC should be authorized to adopt a predictive model appropriate for digital signals in the new legislation.

Further, consumers may still be unable to receive an over-the-air local network signal even though a predictive model indicates that they are “served” by a local signal. Thus, the new legislation should permit customers that are truly unserved to subscribe to a satellite distant network signal, without being denied such a signal at the local broadcaster’s whim.

Specifically, Congress should direct the FCC to develop and adopt a predictive model appropriate for digital signals and that accurately predicts whether a consumer is able to receive a digital network signal at his or her viewing location. Further, in those instances where a consumer does not receive an over-the-air signal but is unable to be qualified as an unserved household using the predictive model, the consumer should nonetheless be able to receive a distant network signal upon certifying under penalty of perjury, and substantial fines that he or she does not receive an over-the-air signal.

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<sup>3</sup> Letter from James H. Barker, III, Counsel to National Programming Service, to Marlene H. Dortch, Secretary, FCC, re: *Ex Parte* Submission of National Programming Service, Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004, ET Docket No. 06-94, DTV Consumer Education Initiative, MB Docket No. 07-148 (Mar. 7, 2008) (“NPS *Ex Parte* Letter”).

□ **The FCC should be directed to adopt an accurate predictive model for digital signals**

SHVERA did not provide the FCC authority to develop or adopt a predictive model for digital signals. Thus, consumers without an over-the-air local network signal are currently subjected to expensive and time consuming test procedures or must seek a distant signal waiver from the local network station through a burdensome and unreliable process. A more reliable predictive model would reduce the frustration experienced by consumers that are unable to receive an over-the-air digital signal and the costs, frustration and delay associated with digital testing procedures.

In its report to Congress regarding the digital signal measurement, the FCC endorses the use of a predictive model for digital signals and recommends that such a model be based on the Individual Longley-Rice (“ILLR”) model.<sup>4</sup> Congress previously adopted requirements for an analog predictive model based on the FCC’s endorsement of a predictive measurement as a substitute for an actual signal measurement at a viewer location.<sup>5</sup> The FCC concluded that a predictive model gives “the industries and consumers a means of determining eligibility for satellite-delivered network service that minimizes the need for on-site testing”<sup>6</sup> and recognized that taking actual measurements at individual viewer locations requires time, money

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<sup>4</sup> See Report to Congress, “Study of Digital Television Field Strength Standards and Testing Procedures,” ET Docket No. 05-182, 20 FCC Rcd 19504 ¶ 132 (rel. Dec. 9, 2005) (“SHVERA Report”).

<sup>5</sup> *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*, Report and Order, 14 FCC Rcd 2654 ¶ 64 (1999) (“SHVA Report and Order”).

<sup>6</sup> SHVA Report and Order at ¶ 7.

and other resources that often outweigh the benefits.<sup>7</sup> Currently, the predictive model is the predominant method used to determine a household's eligibility for distant analog signals, and there is a lack of signal testing providers, rendering on-site testing resources scarce and costly.

The FCC has acknowledged that any predictive model adopted for digital signals "should provide output that is as accurate as possible; anything less would diminish its value as a tool for determining whether a household is able to receive off-the-air digital television signals."<sup>8</sup> The predictive model currently used for analog television signals accounts for terrain features such as hills, buildings and vegetation in order to predict more accurately whether a signal can be received at a particular household location. The FCC has recommended that similar provisions be incorporated into a digital predictive model, concluding that these adjustments take into account factors that "could legitimately prevent a station from serving its potential digital service area."<sup>9</sup>

While I am pleased that the draft legislation authorizes the FCC to conduct a rulemaking to adopt a digital predictive model, I am concerned that it does not give the agency sufficient guidance in this matter. Congress should direct the FCC to increase the accuracy of the ILLR model for purposes of predicting whether a household is "unserved" under the satellite carrier compulsory copyright license found in Section 119 of the Copyright Act. Because the model is intended to predict which households are presumptively served and because determinations that impact the ability of a household to obtain a distant signal, the model should be as accurate as possible.

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<sup>7</sup> *Id.* at ¶ 65.

<sup>8</sup> SHVERA Report at ¶ 148.

<sup>9</sup> *Id.* at ¶¶ 144, 148.

Specifically, the current ILLR model proposed by the FCC for digital signals is based on an assumption that a household is considered to be “served” if it is likely to get an acceptable signal 90 percent of the time.<sup>10</sup> In real terms, a consumer located at the edge of a station’s signal getting an acceptable signal at least 90 percent of the time could experience up to 12 outages lasting on average 30 seconds in any given hour. This level of picture quality is unacceptable to consumers who have invested in digital televisions and converters and who expect a television picture that is largely uninterrupted.

NPS proposes that the FCC be directed to adopt an ILLR model that reflects a higher percentage of availability. Increasing the standard for the availability of an acceptable signal from 90 percent to 99 percent would reflect a more consumer-friendly approach. The FCC has acknowledged that households at the edge of a station’s service area (measured at the 90 percent availability level) would need to mount their antennas at a higher location or use a higher gain antenna or an amplifier at the antenna.<sup>11</sup> Consumers, however, should not be required to employ expensive and time-consuming solutions to receive an over-the-air digital signal.

A predictive model that ensures with a high degree of accuracy that customers are solidly within the digital signal contour and can receive reliable service will minimize the number of households that are actually unable to receive an over-the-air signal but that do not meet the eligibility criteria for an “unserved household” under Section 119 of the Copyright Act. Increasing the standard to a 99 percent availability assumption would reduce the average outages

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<sup>10</sup> The currently proposed digital ILLR model incorporates a digital noise-limited service standard of F(50,90), meaning that an acceptable television picture and sound service is available at 50 percent of the locations for 90 percent of the time at locations on the outer edge of a station’s service contour.

<sup>11</sup> SHVERA Report at ¶ 91.

to 12 per hour lasting 3 seconds each. At this standard, the viewer would still be able to detect fleeting outages; however, most would consider the picture quality overall to be watchable. However, even once the modified ILLR has been established, the FCC must continue to assess the accuracy of the model and make the appropriate adjustments and corrections on an ongoing basis.

- **A consumer should be qualified as unserved if he or she signs a declaration under penalty of perjury and fines regarding the inability to receive an over-the-air signal**

The waiver system was put into the legislation because it is universally accepted that a predictive model can not be perfect. Unfortunately the waiver system is broken and needs to be changed. Rural Americans are being denied service without being allow the proper waiver consideration envisioned in the legislation.

Several local broadcasters are simply not abiding by the spirit of the law. We have been selling distant networks since December 1, 2006, about two and one half years, and during that time we have had over 450,000 waivers denied. That is three times the amount of customers we currently have.

Thirty-four percent of all the stations we have submitted waivers to deny over 90% of the submittals. In essence over a third of all the stations are denying all the waivers that come to them. They may approve a waiver for a relative, friend or after a call from a congressional office, but at this rate of acceptance it is obvious they are not doing the necessary diligence to ascertain whether the consumer is unserved.

That is not the spirit of the law. It is not fair or right to the rural American consumer some of whom could be your constituents. We urge you to change the waiver system.

NPS proposes that a consumer who signs a declaration certifying under penalty of perjury that he or she resides in a location that is unable to receive an over-the-air signal of a local network station should be deemed to be an “unserved household” for purposes of qualifying for a distant network signal. This backstop procedure is consistent with the provisions in the current law governing users of recreational vehicles.

Moreover, the viewability of a digital signal can be determined more objectively than an analog signal. Unlike an analog signal which results in a degraded picture as the signal becomes weaker, a weaker digital signal results in the loss of the television picture entirely (commonly referred to as the “cliff effect”). Thus, the viewability of a digital signal is an accurate reflection of whether the signal is received at a given location. Therefore, a certification by a viewer of the viewability of a digital signal at his or her location serves as a good proxy for determining whether the strength of the digital signal is sufficient at the viewer’s location.

The burden should be placed on the local network station to challenge the certification through a simple and cost-effective verification test. The verification test should consist solely of an objective determination of the viewability of the local network signal at the consumer’s premises.<sup>12</sup> Due to the nature of digital television signals, watching the picture at the

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<sup>12</sup> There is support for a “viewability” standard in the FCC’s precedent. The FCC has relied on a viewability standard in a related context in order to protect the ability of television viewers to watch broadcast signals. Cable operators are required to carry broadcast signals without “material degradation.” 47 U.S.C. § 534(b)(4)(A). In interpreting this requirement for digital signals, the FCC adopted a subjective standard, requiring a digital broadcast signal to be carried on a cable system such that, “when compared to the broadcast signal, ‘the difference is not really perceptible to the viewer.’” Because material degradation relates to the picture quality received by the consumer, the FCC concluded that a subjective standard was appropriate and rejected an objective standard strictly requiring cable operators to carry all content bits within a digital broadcast signal. *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 ¶ 7 (2007).

location in question renders an accurate determination of whether a household is served or unserved. Thus, the verification test would consist of a local station employee, or agent, watching the television picture for a prescribed period of time and counting the number and duration of the outage. The verification test should not, however, require any technical measurements of signal strength. Additionally, the test should not subject consumers to burdensome requirements or require installation of expensive equipment. The proposed verification test is simple and inexpensive and does not require a trained technician. Permitting consumers to certify that they are unserved, while providing local stations the opportunity to verify that the consumer does not receive an over-the-air signal at his or her location, minimizes the burdens on the consumer and allows the station to adequately protect its interests.

#### **Conclusion**

Satellite television providers face considerable barriers in trying to compete with other multichannel video providers. Satellite providers may only provide distant network television signals to households that are “unserved” by over-the-air broadcast stations, representing less than 5% of the total market. Cable operators, on the other hand, may carry distant signals to virtually any household in the country. The distant signal restriction no longer makes sense. Any consumer with a broadband Internet connection can obtain any programming they want on-line, including from the television networks’ own web sites.

The distant network signal restriction has long outlived any justification it may have had when it was adopted over 20 years ago. Congress should eliminate the distant network signal restriction so that DTH providers are permitted to compete on a level playing field with cable operators. The distant signal restriction prevents consumers from obtaining the

programming that they desire. The distant signal restriction has become obsolete with advent of Internet-based video. The distant signal restriction is anticompetitive and unfairly burdens satellite operators with rules that do not apply to cable operators. Lifting the distant signal restriction is unlikely to cause economic hardship to local broadcasters. Local broadcasters can take advantage of new revenues streams from the Internet and from HDTV.

Thank you for the opportunity to appear before you today to discuss these important issues, and I would be happy to answer any questions you might have.



**Appendix A**

**LOOSENING THE TIES:  
WHY CONGRESS SHOULD ELIMINATE  
THE DISTANT NETWORK SIGNAL RESTRICTION ON THE  
DIRECT-TO-HOME SATELLITE TELEVISION INDUSTRY**

**by John Windhausen, Jr.  
President, Telepoly Consulting**

**June 15, 2009**

**This paper was commissioned by National Programming Services.**

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**Executive Summary.**

Under current law, satellite television providers operate under an enormous handicap in trying to compete with cable providers. Satellite providers may only provide distant network television signals to households that are theoretically “unserved” by over-the-air broadcast stations, representing less than 5% of the total market. In contrast, cable operators may carry distant signals to virtually any household in the country. The distant signal restriction has become nonsensical. Any consumer with a broadband Internet connection can obtain any programming they want on-line, including from the television networks’ own web sites. The distant signal restriction was originally intended to protect local broadcasting stations from competition. Now that local broadcast stations have been handed digital spectrum and are expecting to generate significant new revenue streams from a variety of new technologies, there is little reason to protect them from competition.

The legal imbalance between satellite television and cable providers is glaring. Continuing to tie the hands of satellite broadcasters is an unjustified barrier to marketplace competition. The current policy effectively subsidizes the local broadcasting industry and favors the dominant cable industry at the expense of the nascent satellite industry. Congress should eliminate the distant signal restriction in the upcoming satellite re-authorization act and restore the right of consumers, not regulators, to make their own television programming choices.

## I. Introduction

Satellite television provides enormous benefits for American consumers. Direct-to-Home (DTH)<sup>13</sup> satellites offer a variety of program options, more affordable prices, and greater convenience than either cable or telephone company video offerings. Satellite providers have greatly increased their television services while maintaining fairly stable prices; in contrast, the price of basic cable television service has risen by 122% over the past 13 years, a rate far faster than the 34.3% increase in inflation over that same period.<sup>14</sup> For these reasons, the satellite DTH industry has grown substantially over the last few years and now serves approximately 30% of all homes that subscribe to a provider of multi-channel video service.

Unfortunately, DTH satellite providers must operate under rules that inhibit their ability to compete, rules that do not apply to their competitors. In particular, DTH satellite providers are barred from providing “distant” (out-of-market)<sup>15</sup> network broadcast programming to the vast majority of households in the U.S. DTH satellite providers may only provide distant network signals to households in “unserved” areas. While the exact number of households in “unserved” areas is not known, it is certainly less than 5 percent of all homes.<sup>16</sup> This means that DTH satellite providers are not allowed to

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<sup>13</sup> Although the terms Direct-to-Home (DTH) and Direct Broadcast Satellite (DBS) are often used interchangeably, this paper uses the broader term Direct-to-Home to encompass satellites operating in the C band as well as the Ku and Ka bands.

<sup>14</sup> “Report on Cable Industry Prices,” In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, released January 16, 2009, para. 2, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-53A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-53A1.pdf).

<sup>15</sup> Distant network signals are broadcast station signals that originate outside the television market in which a consumer lives.

<sup>16</sup> DirecTV estimates that nearly 1 million consumers rely on receipt of distant network signals today, while the National Association of Broadcasters (NAB) estimates that the number of DTH subscribers that receive distant network signals today is about 2% of the 31 million DTH subscribers. If it is assumed that approximately 30% of consumers in unserved areas subscribe to DTH service (roughly the national average), the total number of households in unserved areas would be between 2 million and 3.3 Million, or about 1.7% to 3% of all households. See, Testimony of K. James Yager, Barrington Broadcasting, on behalf of the NAB, before the Subcommittee on Communications,

provide the same program offerings as their cable competitors to at least 95% of consumers. Ironically, the same distant network signals that DTH providers may not carry are increasingly available over the Internet. For these reasons, the U.S. Copyright Office in 2008 found that the distant signal eligibility requirements “create a competitive disparity between satellite carriers and cable operators” and should be eliminated.<sup>17</sup>

The broadcast industry alleges that the distant network signal restriction on DTH satellite providers is necessary to protect localism and local broadcast stations. While preserving localism is important, the restriction on the DTH industry is not necessary for that purpose and actually injurious to consumers and competition. Allowing consumers the convenience of watching distant signals is unlikely to cause the dramatic harm to local broadcasting that the broadcasting industry fears. Local news and other local programming remain extremely popular, and the idea that consumers would abandon their local station completely is contrary to the evidence. Furthermore, local broadcasting stations’ revenues have consistently grown and are likely to expand even further in the near future. The transition to High-Definition Television (HDTV) gives local broadcasters an invaluable opportunity to deploy new services and generate additional advertising revenue, especially by multicasting several programming channels. Local broadcasters can also develop innovative uses of the Internet for their programming, just as the national networks are doing. Rather than imposing anti-competitive restrictions on satellite providers, local broadcasters should focus on enhancing the services that they provide to consumers.

Finally, the restriction on DTH satellite providers prevents the free flow of information, one of core principles of our democratic society. The current restrictions are antithetical to a society that values freedom of speech, consumer choice and the diversity of information. In fact, there may well be constitutional issues involved in continuing to restrict the freedom of satellite providers to carry the programs over their networks as they see fit.

Thus, there is little if any reason to prevent consumers from watching television signals from other markets, such as where they grew up or used to live. It is impossible to protect local broadcasters from

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Technology and the Internet of the House Committee on Energy and Commerce,  
February 24, 2009.

the march of progress. And there is less reason than ever to tie the hands of DTH satellite providers by imposing artificial restrictions that bar them from providing programming that their consumers can receive from other providers.

Fortunately, Congress has an opportunity this year to correct the competitive imbalance that prevents DTH satellites from providing the full range of services provided by other multi-channel video providers. The compulsory license that allows satellite providers to transmit programming expires on Dec. 31, 2009 and must be re-authorized before that date for satellite DTH providers to continue to provide distant signals. Congress can address the competitive disparity and provide consumers with additional programming options by making the distant network signal license in section 119 permanent and eliminating the unserved market limitation.

This paper provides a more detailed examination of the distant network signal restriction. It begins by reviewing the history of satellite television legislation, reviews the current satellite television marketplace, and then provides six reasons why the current distant signal restriction on the DTH satellite industry should be eliminated.<sup>18</sup>

## **II. The Disparity in Current Law Between Satellite and Cable Providers.**

The disparity between cable and satellite regulation is embedded in copyright law. Three statutory licenses in the Copyright Act govern the retransmission of distant and local over-the-air broadcast station signals. The first applies to cable TV systems and the remaining two licenses apply to satellites.

1. Cable License: Section 111 permits a cable operator to retransmit both local and distant signals (television and radio). There is no limit on the number of distant signals that a

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<sup>17</sup> Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, A Report of the Register of Copyrights, June 2008, p.xi. (hereinafter, "Copyright Office Section 109 Report"), available at <http://www.loc.gov/today/pr/2008/08-123.html>.

<sup>18</sup> This paper focuses on the issue of carriage of distant signals and touches only tangentially on royalty payment issues. For a fuller treatment of royalty payment issues, see the Copyright Office Section 109 Report.

cable operator may retransmit (as long as the royalty payment is made). Section 111 allows cable operators to carry local signals without any royalty obligation. Section 111 has not been significantly altered since its adoption in 1976.

2. Distant Network Signal License: Section 119 permits a satellite carrier to retransmit a maximum of two distant television signals (not radio signals) to homes and businesses to persons who reside in unserved households.<sup>19</sup> With a few exceptions, the term "unserved" means a household that cannot receive, through the use of a conventional, stationary outdoor rooftop antenna an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the FCC.<sup>20</sup> Thus, except for the few exceptions, satellite DTH providers may only provide two distant network signals to consumers residing in "unserved" households.
  
3. Local-into-Local License: Section 122 permits satellite carriers to carry local television signals in the stations' local market on a royalty-free basis (without the need to identify and obtain authorization from copyright owners). The section 122 license for local signals is permanent. However, there are several restrictions on the satellite providers' ability to provide these local signals:
  - a) The satellite provider must obtain the "retransmission consent" of the local broadcaster to carry the signal. This often means that the satellite provider must

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<sup>19</sup> The exact language of Section 119(a)(2)(B)(i) is as follows:

- (i) In general.—The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions of the signals of no more than two network stations in a single day for each television network to persons who reside in unserved households. The limitation in this clause shall not apply to secondary transmissions under paragraph (3) [pertaining to "significantly viewed" stations].

<sup>20</sup> The rule used to perform testing of individual locations is inconsistent with this statutory language. Section 73.686(b) of the FCC's rules sets out procedures for testing the Grade B Contour. That section requires tests to be performed using an antenna that is at least 30-feet high (which is not "conventional") and can be rotated (which is not "stationary"). The mismatch between the statutory language for testing individual residences and the FCC's rule reflects the fact that the FCC's Grade B contour rules were developed to prevent broadcast licensees from interfering with each other rather than for determining whether or not an individual household is "served" by a broadcast station network signal.



compensate the network-affiliated local broadcasters before the broadcaster will give its approval.

- b) The satellite provider must be willing to carry all the broadcast stations in a market if it provides one broadcast signal. (“Carry one, carry all”)

The differences between the treatment of distant network signals under the cable license (Section 111) and the satellite license (Section 119) are well-recognized by the FCC. In 2005, the FCC summarized the differences as follows:

67. . . . A cable operator generally may offer any distant broadcast signal to any household by paying the required copyright royalties, obtaining retransmission consent, and complying with the network non-duplication and syndicated exclusivity rules.

68. DBS operators, on the other hand, face greater restrictions in the retransmission of distant signals, especially for subscribers that are considered to be served by broadcast stations over-the-air. Specifically, a DBS operator may not offer distant network signals except to households shown to be “unserved” by network stations. On a going forward basis, a DBS operator will not be permitted to offer distant network signals to any subscriber where local-into-local service is available.<sup>21</sup>

In considering how to harmonize the rules regarding DTH and cable, the FCC considered and rejected applying the satellite DTH rules to cable providers because of practical and technological differences between the two systems.<sup>22</sup> The FCC then suggested instead applying the cable rules to DTH providers. The FCC said

If the cable provisions were applied to DBS, DBS operators would be allowed to retransmit any distant broadcast signals to any subscriber, whether or not the subscriber is considered an unserved household, and whether or not local-into-local service is

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<sup>21</sup> “Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, September 8, 2005, paras. 67-68. (“SHVERA Section 208 Report to Congress”). (available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260936A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf)).

<sup>22</sup> For instance, the FCC said that it was not clear that a cable operator could differentiate in its delivery of signals to households that are “served” as opposed to those that are “unserved”, because cable systems generally provide the same programming to all the households on its system.

provided, subject to retransmission consent and network non-duplication and syndicated exclusivity protection, as is currently permitted under the cable rules.<sup>23</sup>

But the FCC concluded that it did not have the authority to make this change. Instead, it recommended that Congress make changes to both the communications statute and the copyright law to harmonize the two regulatory regimes:

Regulatory parity is generally a worthy goal where disparities are not warranted by special circumstances. Consistent with the different technologies involved, every effort should be made to apply the same rules to cable operators, DBS operators, and other MVPDs. Thus, to the extent the Commission's exclusivity and retransmission consent rules are different with respect to cable and DBS and create distortions in the competitive landscape, we generally recommend that Congress continue its efforts to harmonize applicable laws to the extent feasible in light of differences in technology.

It is precisely this very change recommended by the FCC that Congress should adopt in the new authorization bill.

### **III. A Brief Review of Satellite Television Policy and Legislation.**

Since satellite-delivered television emerged in the 1980's, policy-makers have sought to balance three goals:

1. Encourage competition to cable companies in the provision of multi-channel video programming.
2. Ensure that copyright holders receive fair compensation for their work.
3. Protect local broadcasters as a means of promoting diversity of programming.

The first goal has grown even more important over time, as cable rates continue to rise under the deregulatory approach adopted in 1996. The second goal remains important, although the details of determining the proper amount of compensation are the subject of continuing proceedings. The third goal, however, has become difficult to justify in the face of new technologies and increasing competition. In fact, diversity of programming would be aided by ending the distant network signal

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<sup>23</sup> Id., at para 74.

protections for local broadcasting and by encouraging them to develop more innovative local programming.

The following summarizes the efforts by policy-makers – largely Congress and the Federal Communications Commission (FCC) – to balance these objectives and explains how the disparity in treatment came into being.

#### A. 1988 - The Satellite Home Viewer Act (SHVA)<sup>24</sup>

Satellite television began primarily as a rural service provided by C-band satellites providing non-broadcast (e.g. cable programming) signals to households in areas where traditional, landline cable service was unavailable. C-Band satellites required the installation of large satellite dishes that were difficult to install in suburban and urban areas. Congress passed the Satellite Home Viewer Act (SHVA) of 1988 to give DTH providers the right (by granting them a limited copyright license) to retransmit the signals of distant network broadcast stations. But the license only allowed the transmissions of network signals for private home viewing, and only to “unserved households” that were (theoretically) unable to receive an adequate over-the-air broadcast signal through a conventional rooftop antenna.<sup>25</sup> Congress limited the copyright license to retransmissions to “unserved households”<sup>26</sup> in order to protect local broadcast stations’ ability to serve as the exclusive provider of network programming in their local markets. “Unserved households” were defined in part as those located outside a television station’s

<sup>24</sup> The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) (codified at 17 U.S.C. §§ 111, 119).

<sup>25</sup> SHVA also authorized DTH providers to carry superstations to any household. Since superstations are not affiliated with any network, they do not provide the same programming as network stations and are generally not considered a competitive threat by local broadcast stations. However, since consumers often wish to obtain network programming, the ability to carry superstations to any household is not enough of a benefit to offset the inability to carry network signals.

<sup>26</sup> Section 119(d)(10)(A) of the Copyright act defines an “unserved household” as a “household that cannot receive, through use of a conventional stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network television station affiliated with that network of Grade B intensity as defined by the Federal Commissions Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999.” An “unserved household” can also be one that is subject to one of four statutory waivers or exemptions. See 17 U.S.C. §119(d)(10)(B)-(E).

“Grade B contour,” as defined by the FCC.<sup>27</sup> The Act granted satellite providers permission to carry these network signals as a type of “last resort” for those households that could not receive network television signals any other way.

In enacting SHVA, Congress used the Grade B contour as an approximate measure of determining whether or not a home could receive a broadcast signal, even though the Grade B Contour was not designed for that purpose. The Grade B contour was initially developed by the FCC several decades earlier as a way to determine whether nearby broadcast signals would interfere with each other. In fact, many homes that formally lie inside the Grade B contour cannot receive an adequate broadcast signal.<sup>28</sup>

As a result of the 1988 Act’s limitations, DTH providers were unable to provide network stations to the majority of the nation’s households, including many that were inside the Grade B contour but could not receive an adequate television signal. These households could only be served by the local cable company, to whom the statute effectively conferred a monopoly. In the words of the FCC, “Congress adopted the SHVA as an amendment to the Copyright Act in order to protect the broadcasters’ interests while simultaneously enabling satellite carriers to provide broadcast programming to those satellite subscribers who are unable to obtain broadcast network programming over-the-air.”<sup>29</sup>

<sup>27</sup> The Grade B contour is generally a circle around a television station’s antenna that represents the area in which households can receive an acceptable broadcast signal. Decades ago, the FCC defined the Grade B contour as the area that could deliver an acceptable picture over average terrain to 50 percent of the locations, 50 percent of the time. This definition was later changed by the FCC to 50% of the homes that can receive an acceptable signal 90% of the time. With respect to digital television transmissions, the FCC now uses the “noise limited service contour”, an area that is roughly similar to the Grade B contour. See, <http://www.current.org/dtv/dtv815reception.shtml>, and FCC Cable Services Bureau, report FCC 99-14, CS Docket 98-201, paragraph 33.

<sup>28</sup> In addition, SHVA also limited the definition of “unserved” to those households that subscribed within the past 90 days to a cable service carrying an affiliate of a network. According to then-FCC Chairman Bill Kennard, “Imposing a 90-day waiting period for network station access on those who wished to switch from cable to satellite service placed an unwarranted handicap on satellite carriers in their competition with cable.” See, letter of FCC Chairman Bill Kennard to Congressman Rick Boucher, Nov. 5, 1998, available at <http://www.fcc.gov/Speeches/Kennard/Statements/stwck888.html>. This 90-day waiting period was later eliminated in the SHVIA in 1999.

<sup>29</sup> Report and Order, In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, CS Docket No. 98-201,

#### B. 1994 – Satellite Home Viewer Act Amendments

DirecTV launched the first DBS satellite in 1994, and EchoStar followed a year later. These DBS satellites offered the possibility of providing consumers broadcast and non-broadcast programming using much smaller dishes that could be used in urban and suburban, not just rural, areas.

In 1994, however, Congress had not yet realized the significance of these new satellites. In passing the Satellite Home Viewer Act of 1994, Congress simply extended the section 119 compulsory license for an additional five years and strengthened the hand of broadcasters seeking to enforce the “unserved” restriction.<sup>30</sup> The 1994 Amendments placed the burden of proof that a household was in an unserved area squarely on the satellite DTH provider.<sup>31</sup> The 1994 Amendments included a process to identify these consumers who were receiving satellite service in “served” areas and to terminate their service. The Act also designated a process for increasing the copyright fees paid by satellite carriers for the retransmission of network station and superstation signals. Congress expected that, by raising the fees to “marketplace” levels, the 1994 Act would set the stage for eliminating the compulsory license for distant signals altogether after it expired in 1999.

Over the next few years after passage of the SHVA Amendments, local network broadcasters aggressively challenged satellite carriers who they alleged were providing subscribers with distant network stations inside the local broadcaster's Grade B contour and in violation of the law. Upon receiving a written challenge with respect to a particular subscriber, the satellite provider was required either to turn off the subscriber's network signal or conduct a test at the subscriber's home to determine if the subscriber did in fact receive a signal of Grade B intensity. The cost of the test would be paid up front by the consumer, who would then be reimbursed by either the satellite carrier or the local broadcaster, depending upon the outcome (a “loser pays” provision).

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released Feb. 2, 1999. (available at <http://www.fcc.gov/Bureaus/Cable/Orders/1999/fcc99014.txt>.) (“SHVA Report and Order”).

<sup>30</sup> Satellite Home Viewer Act of 1994 (Public Law 103-369)

<sup>31</sup> The 1994 Amendments added the following provision to section 119(a)(5):  
“(D) In any action brought under this paragraph, the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a network station is for private home viewing to an unserved household.”

While this process had the appearance of fairness, it was skewed in favor of the broadcasters. Because of the up-front costs associated with conducting household tests, and the fact that there were so few testers available, virtually no tests were performed.<sup>32</sup> The satellite DTH provider often was forced to terminate service or face legal action even if a test had not been performed. As a result, many subscribers lost their satellite network service even though they could not receive an over-the-air broadcast signal.<sup>33</sup>

The controversy over these rules, and the DTH providers' inability to provide distant network signals, proved to be a significant deterrent to potential subscribers. Many households were simply not interested in subscribing to satellite if they could not receive network stations.

**C. 1999 – The FCC Adopts a Predictive Model to Enforce the Distant Network Signal Limitation.**

In 1999, just before the 5-year extension of the distant signal license was to expire, the FCC re-considered the use of the Grade B contour standard for enforcing the distant signal limitation. The FCC recognized that the Grade B contour was originally designed to define station service areas and to determine the proper allotments for television channels, not for making individualized decisions concerning whether or not a household was “served.” Nevertheless, the FCC refused to alter the standard. Instead, it adopted a new predictive model (called the Individual Location Longley-Rice (ILLR) model) to use as a proxy for determining whether a home was or was not served. The FCC expressed the belief that use of a predictive model would reduce costs, create more certainty, and reduce confusion for consumers.<sup>34</sup> If the FCC's predictive model indicated that a consumer could receive an adequate analog signal over the air – making the consumer ineligible for analog distant signal service – the consumer could challenge that prediction by requesting an on-location signal-strength test. Either the satellite DTH provider or the broadcaster would pay for the test, depending on who “lost.”

**D. 1999 – The Satellite Home Viewer Improvement Act (SHVIA)**

<sup>32</sup> The FCC also noted that “anecdotal evidence suggests that both satellite carriers and broadcasters are disinclined to conduct tests, even when they are likely to win, because the tests could annoy their customers and generate ill-will.” See, SHVA Report and Order, para. 90.

<sup>33</sup> The process was reversed for those households residing outside the Grade B contour. In those cases, the broadcaster paid for the test. In reality, there were far more households residing inside the Grade B contour than outside the Grade B contour, which meant the satellite DTH provider had the higher burden and cost. See Satellite Home Viewer Act of 1994, Section 2(5) (adding new subsection (a)(8)).

The SHVA was a copyright law designed to balance the rights of copyright owners and users. It was not a communications law and did not include as an express purpose the need to increase competition among multi-channel video programming distributors (MVPDs).

This changed in 1999 with the passage of the Satellite Home Viewer Improvements Act (SHVIA), which revised and replaced the statutory provisions of SHVA.<sup>35</sup> The increasing popularity of satellite DTH services, combined with the dramatic increase in complaints from consumers who lost their television service because of the broadcasters' overly aggressive enforcement actions, convinced legislators to adopt a more positive view of the satellite DTH industry. Rather than allowing the compulsory license to expire, SHVIA officially endorsed competition as a central purpose of satellite policy, re-authorized the satellite compulsory license for another five years, and strengthened the rights of satellite providers to compete against cable providers.

SHVIA created a new permanent license in Section 122 to allow DTH providers to deliver local broadcast signals into local markets (so-called "local into local")<sup>36</sup> Technological innovations in the 1990's and additional frequency allocations by the FCC allowed satellite carriers to increase their channel capacity and offer local broadcast signals in many markets. SHVIA allowed satellite carriers for the first time to retransmit a local broadcast station's signal into that station's local market without obtaining the authorization of those holding copyrights in the individual programs broadcast by that station. Furthermore, the right to carry local signals was allowed without distinction between network and non-network signals and without distinguishing between served and unserved households.

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<sup>34</sup> SHVA Report and Order, para. 65.

<sup>35</sup> The Satellite Home Viewer Improvement Act of 1999, Pub.L. No 106-113, 113 Stat. 1501 (1999) (codified in scattered sections of 17 and 47 U.S.C.). The SHVIA was enacted on November 29, 1999, as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers).

<sup>36</sup> Unlike satellite carriers, cable operators have never been required to obtain copyright clearances for transmitting local broadcast programming. Before 1976, cable operators were not subject to the copyright laws; their retransmission of local broadcast signals was not considered to be a "performance" that triggered application of the copyright protections. This situation changed only slightly in the 1976 Copyright Act. In that Act, Congress determined that a cable company's retransmission of local broadcast signals should indeed be considered a "performance" but simultaneously granted cable operators a statutory compulsory license that allows them to retransmit broadcast television signals without securing authorization from each and every program copyright holder. See 17 U.S.C. §111(c).

SHVIA extended the compulsory copyright license for distant signals for an additional five years to the end of 2004 (and also granted an exception to retransmission consent for these signals). As in prior Acts, SHVIA also permitted satellite carriers to retransmit non-network superstation signals to all (served and unserved) households in all markets. SHVIA also abandoned the marketplace standard for setting royalty rates and reduced the royalty fees for network station signals by 45% and for superstation signals by 30%.

Unfortunately, SHVIA retained the distant signal limitation that bars satellite DTH providers from providing distant network signals to “served” households.<sup>37</sup> Although Congress cast some doubt on the validity of the Grade B contour as the proper standard, it also codified the ILLR predictive model and directed that it be used “in determining presumptively whether a person resides in an unserved household”.<sup>38</sup> SHVIA also established a process that allows consumers to seek a “waiver” if the predictive model indicated that the consumer was in a “served” area. The statute requires the waiver request to be submitted to the local broadcast station.<sup>39</sup> If the local broadcast station denies the waiver (as was most often the case), and if the consumer wishes to challenge that finding, the statute directs the network station and satellite carrier to select a qualified and independent third party to conduct the signal test for that consumer’s location. Because it was often difficult for the two sides to agree on an independent tester, the FCC later chose the American Radio Relay League (ARRL) to serve as the independent and neutral entity to perform the testing functions specified in SHVIA.<sup>40</sup>

The process changes enacted by Congress in SHVIA had little impact. As a practical matter, very few consumers have been willing to incur the up-front cost and time-consuming process of challenging the FCC’s predictive model. Furthermore, several observers noted that there were no qualified testers available to perform the on-site testing. Consumers did not know where to look to find such testers.

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<sup>37</sup> While SHVIA left in place the distant network signal limitation, SHVIA included a grandfather provision to allow those consumers who had been receiving distant signals as of Oct. 31, 1999 or had their distant signals terminated after July 11, 1998 to continue receiving such distant signals, provided they could not receive over-the-air signals of Grade A intensity. A signal of Grade A intensity is a circle that is closer to the transmitter than the Grade B contour and reflects a more powerful signal than a signal of Grade B intensity.

<sup>38</sup> See Section 119(a)(2)(B)(ii).

<sup>39</sup> See Section 339(c)(4)(B).

<sup>40</sup> See, *In the Matter of 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,(FCC 00-185), para. 23.



The difficulty of the tests were magnified by the FCC's rules that required testers to raise an antenna 30 feet in the air to measure the availability of television signals. The FCC itself acknowledged the difficulties of its testing process as follows:

The Commission's current method of measuring the field strength of over-the-air signals in a station service area requires a so-called 100-foot mobile run. The run typically involves a truck with a 30-foot antenna that takes continuous measurements while being driven a distance of 100 feet. The antenna must be rotated to the best receiving position, and engineers record factors that might affect signals, such as topography, height and type of vegetation, buildings, obstacles, and weather. If overhead obstacles get in the way, a cluster of measurements must be taken at locations within 200 feet of each other. This elaborate procedure can cost several hundred dollars each time it is performed. This is an expensive proposition for a satellite company or a consumer who wants to prove that a household is unserved by over-the-air signals. When multiplied over hundreds of households at the outer edges of a station's service area, the cost may become prohibitive and may prevent many truly unserved consumers from receiving broadcast network service.

In addition to the difficulties inherent in this test, many of its assumptions may not hold in individual situations. For example, many homes do not have antennas 30 feet above the ground, especially if they are one-story homes. . . . [R]equiring clusters of tests and a 100-foot mobile run ignores the fact that homes are stationary and that reception may vary considerably over a mobile run on a nearby street.<sup>41</sup>

Because of the inherent limitations of the FCC's predictive model and the lack of qualified testers and testing procedures, many households were inaccurately considered "served". As a result, many consumers were not able to receive distant network signals from either the satellite DTH provider or the local broadcaster.

Even though SHVIA codified the ILLR predictive model, Congress expressed some discomfort with the Grade B contour as a standard for identifying unserved areas. SHVIA directed the FCC to evaluate all other standards and factors for determining whether or not a household was "unserved."<sup>42</sup> In a subsequent proceeding, the FCC once again recognized that the Grade B contour was not "created or

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<sup>41</sup> Notice of Proposed Rulemaking, In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, CS Docket No. 98-201, Nov. 17, 1998, paras. 38-39.

<sup>42</sup> See section 339(c)(1).

intended for evaluating service quality in individual households.”<sup>43</sup> Nevertheless, the FCC refused to abandon the Grade B contour standard and made only minor refinement of the standard.

The addition of the Section 122 license allowing DTH providers for the first time to carry local television signals into local markets was supported by both the broadcast and satellite DTH industries. However, the law contained two provisions sought only by the local broadcasters:

1. First, the law requires the DTH provider to obtain the consent of the local broadcaster before providing the local signal (a policy known as “retransmission consent”). This allows the local broadcaster to refuse to allow carriage by the satellite company unless the satellite firm agrees to pay some form of compensation.<sup>44</sup>
2. Second, the law also added the “carry one, carry all” rule. This rule says that if a DTH provider chooses to provide one local broadcast station to consumers in that same local market, it must carry ALL the local television broadcast stations located within that local market.<sup>45</sup> For instance, if a satellite DTH provider wishes to provide Channel 5 in Washington, D.C. to consumers living within the Washington, D.C. viewing area, the DTH provider must also carry all the other local broadcasting stations in the D.C. area to D.C. area households.<sup>46</sup> Congress chose this regime theoretically to promote the diversity of programming, but the effect was to protect small local broadcasting stations.

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<sup>43</sup> See, Report, In the Matter of Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Improvement Act, ET Docket No. 00-90, , Released Nov. 29, 2000, (FCC 00-416) para. 8.

<sup>44</sup> Congress granted similar “retransmission consent” rights to broadcasters when carried by local cable companies in the 1992 Cable Act. See 47 U.S.C. §325(b).

<sup>45</sup> SHVIA defines the “local market” as the designated market area (“DMA”) established by Nielsen Media Research.

<sup>46</sup> There are some exceptions to the “carry one, carry all” requirement. For instance, a DTH provider is not required to carry local commercial stations whose signals substantially duplicate those of another station in the same market. In addition, satellite carriers are not required to carry more than one affiliate of a given network in any local market unless the market contains two affiliates of the same network that are licensed to serve communities in different states. 47 U.S.C. §338(c)(1). Also, the statute instructs the FCC to issue regulations limiting satellite carriers’ obligations to carry multiple noncommercial broadcast stations in the same market. 47 U.S.C. §338(c)(2).

The DTH industry challenged the “carry one, carry all” rule in court, alleging that it unconstitutionally infringes on the DTH providers’ first amendment rights and that it imposes an uncompensated “taking.” The court denied the appeal and upheld the law, largely on the theory that a DTH provider can voluntarily choose whether or not to carry a local broadcast station signal and thereby accepts the requirement to carry all other stations.<sup>47</sup> In truth, however, satellite DTH providers have virtually no choice but to carry at least some local broadcast signals if they are to compete with the dominant cable firm.

Through SHVIA, Congress sought to place satellite carriers on a more equal footing with local cable operators regarding local broadcast programming, and give consumers more and better choices in selecting a multichannel video program distributor. Unfortunately, by retaining the prohibition on providing distant network signals to consumers within the Grade B Contour, a limitation not faced by the cable industry, SHVIA failed to correct the regulatory disparity initiated several years earlier.

#### E. 2004 – The Satellite Home Viewer Extension and Re-Authorization Act (SHVERA)

In December 2004, Congress passed the Satellite Home Viewer Extension and Re-Authorization Act (SHVERA), which again amended the 1988 copyright laws and the Communications Act.<sup>48</sup> As in prior Acts, SHVERA extended the compulsory copyright license for distant network signals (and the exception to the retransmission consent rules) for an additional five years to December 31, 2009.<sup>49</sup> But SHVERA also included a complex set of rules to further *limit* the importation of distant network signals into local television markets. For instance, the law requires satellite DTH carriers to phase out the retransmission of distant signals in markets where they offer local-into-local service. In other words, households that can receive local-into-local

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<sup>47</sup> See, *Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337 (4<sup>th</sup> Cir. 2001)

<sup>48</sup> SHVERA can be found at Title IX of the Consolidated Appropriations Act, 2005 (H.R. 4818), codified at 47 U.S.C. 338, 339, and 340.

<sup>49</sup> Unlike prior acts, SHVERA did not set the royalty rates for carriage of distant signals because the copyright owners and satellite carriers negotiated new rates.

satellite signals are not able to receive distant network signals (even if they are unserved by over-the-air television signals).

In two respects, SHVERA expanded the rights of satellite providers. First, it allowed for the delivery of superstation signals to commercial establishments. Second, SHVERA created a slight exception to the distant network signal ban for “significantly viewed”, out-of-market signals. “Significantly viewed” signals are those that technically originate outside a local market but are nevertheless viewed by a significant number of households in that local market. For example, a household in Silver Spring, Maryland may be located in the Washington, D.C. DMA but may frequently view signals from Baltimore. The Baltimore signals may be carried by the local cable operator in Silver Spring, but, prior to 2004, could not be carried by the DTH provider. SHVERA established a copyright license that allows satellite providers to carry these out-of-market “significantly viewed” channels if it obtains retransmission consent of the broadcast station, and provided that the local station affiliated with the same network as the significantly viewed station is offered as well. As in the cable context, satellite carriers pay copyright royalty fees for the retransmission of significantly viewed stations. Satellite carriers are not required to carry out-of-market significantly viewed stations, and, if they do wish to carry them, retransmission consent is required.<sup>50</sup>

#### IV. The Satellite Television Market

The DTH industry originated in the 1980’s with satellites operating only in the “C-band”.<sup>51</sup> C-band satellites require consumers to use large satellite dishes that are 6 to 10 feet in diameter, and thus were limited to providing service to customers in rural areas. During the 1990s, direct broadcast satellite

<sup>50</sup> The copyright provisions in SHVERA also modified the copyright law to recognize the difference between analog and digital signals. In general, if a satellite carrier offers local-into-local digital signals in a market, it is not allowed to offer distant digital signals to subscribers in that market, unless it was offering such distant digital signals prior to commencing local-into-local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the distant digital signal of the network with which the station is affiliated if it is offered by the subscriber’s satellite carrier. If the satellite carrier offers local-into-local analog service, a subscriber must receive that service in order to qualify for distant digital signals. A household that qualifies for distant signal service can receive only signals from stations located in the same time zone or in a later time zone, not in an earlier time zone.

<sup>51</sup> C-band service is defined as “a service that is licensed by the Federal Communications Commission and operates in the Fixed Satellite Service under part 25 of title 47 of the Code of Federal Regulations.” 17 U.S.C. § 119(a)(2)(B)(iii)(II).

service was initiated, enabling consumers to use much smaller dishes and giving consumers in urban and suburban areas a competitive choice of multi-channel video programming providers.

**A. DTH Technology and Background.**

Providers of DTH satellite service deliver television programming by uplinking video signals to satellites orbiting in space and then beaming those signals to receiving dishes connected to subscribers' television sets. DTH satellite providers often subsidize the consumer's costs of obtaining the satellite dish and the set-top box required to receive programming. DBS satellites operate in the 12.2-12.7 GHz band.

DTH is primarily a national service. The satellites currently used by DTH satellite providers occupy one of three positions in the Earth's orbit. The FCC licenses the use of 32 frequencies at each orbital slot; thus, there are 96 total frequencies that satellite carriers can use to reach satellite subscribers across the United States. With the aid of compression technologies, DTH satellite providers have the ability to carry several hundred channels of television programming. Every television channel carried on these satellites is beamed to the homes of all subscribers; however, channels that individual subscribers do not pay to receive, or are not allowed to receive, are blocked by the equipment at the subscriber's home.

**B. DTH Market Share**

The DBS market has increased significantly over the past decade. There are now two facilities-based U.S. DBS operators: DIRECTV and EchoStar (which markets itself as the "DISH Network").<sup>52</sup> DIRECTV and EchoStar both offer service to all states, including Hawaii and Alaska.<sup>53</sup> As of the end of 2008,

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<sup>52</sup> Some of the following information is taken from the FCC's most recent report on video competition, formally known as the Thirteenth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Report, MB Docket No. 06-189, FCC 07-206 (released January 16, 2009). The issuance of this 13<sup>th</sup> Video Competition Report, however, was long delayed and is based on 2006 data.

<sup>53</sup> DBS providers are required, if technically feasible, to serve the entire United States, including Alaska and Hawaii. 47 CFR §25.148(c).

approximately 31.3 million U.S. households subscribed to DTH service (17.6M for DirecTV and 13.7M for Dish Network/EchoStar).<sup>54</sup>

While the DBS market is growing rapidly, the C-band market is shrinking. The FCC reports that the number of C-band subscribers declined 45% between June 2005 and June 2006, and declined another 38.3% in the last six months of 2006. Some C-band operators are migrating to provide DBS services. National Programming Service, LLC (NPS), headquartered in Indianapolis, Indiana, began providing C-band satellite television service in 1986. In 2006, NPS began offering distant signals to former EchoStar subscribers by leasing satellite capacity from EchoStar.<sup>55</sup> Superstar/Netlink is another C-band provider providing DBS service.

The total number of MVPD households is expected to increase somewhat over the next five years as the nation converts to High-Definition Television (HDTV). Nevertheless, the market shares of the various industries are likely to be fairly stable. SNL Kagan predicts that the market share of cable firms will decline slightly from 64% to 59% in 2012, telephone companies may increase their share from 3% to 9%, while the market share of the DTH industry is expected to drop somewhat to 27%.<sup>56</sup>

### C. DTH Services

DTH providers offer a variety of attractive programming packages and services. Both DirecTV and EchoStar provide numerous Spanish language packages, packages for Hawaii and Alaska, and a variety of digital and High-Definition TV (HD) offerings. DBS providers offer prices that are generally much less expensive than cable operators. For instance, EchoStar offers a promotional price of \$9.99 per month

<sup>54</sup> US: Digital Service Provider Scorecard; Rider Research, March 5, 2009. These figures also appear on the web site of the Satellite Broadcasting and Communications Association of America (SBCA), available at <http://www.sbca.com/index.asp>.

<sup>55</sup> EchoStar is barred from providing any distant network programming as a result of its violation of the distant signal limitations. *See, CBS v. EchoStar*, 472 F.Supp.2d 1367 (S.D. Fla. 2006).

I. <sup>56</sup>"MULTICHANNEL VIDEO SERVICES TO GROW SLOWLY OVER NEXT FIVE YEARS; MULTICHANNEL VIDEO SUBSCRIBERS SHOULD ACCOUNT FOR ALMOST 89% OF TV HOUSEHOLDS IN FIVE YEARS, ACCORDING TO A REPORT FROM SNL KAGAN," BY K.C. JONES  
INFORMATIONWEEK, MAY 16, 2008  
([HTTP://WWW.INFORMATIONWEEK.COM/NEWS/PERSONAL\\_TECH/TV\\_THEATER/SHOWARTICLE.JHTML?ARTICLEID=207800667](http://www.informationweek.com/news/personal_tech/tv_theater/showarticle.jhtml?articleid=207800667)).

for six month, and offers a “family-friendly” package of programming for only \$19.99 per month, while DirecTV offers a “family” package of 50+ digital channels at \$29.99 per month.

Most, but not all, markets can receive local-into-local broadcast signals from their satellite provider. As of June 2008, DirecTV offers local-into-local service in 150 markets and provides HD local-into-local service in 119 markets.<sup>57</sup> EchoStar offers local-into-local service in 178 markets and HD local-into-local service in 104 markets.<sup>58</sup>

Both providers are expanding their offering of DVR services, which allow viewers to control their viewing experience in a variety of ways. For instance, a DVR can be used to record pay-per-view movies, and it can be used to mark the consumer’s favorite scenes and jump back and forth between them. In addition, both providers are offering set-top boxes that provide multiple interactive applications, which are particularly attractive to sports viewers and gaming enthusiasts.

#### **D. Distant Network Signal Services.**

NPS is the primary provider of Distant Network Signals in the U.S. NPS offers distant network signals to qualified subscribers of the Dish Network either as a separate package of channels or at a per channel price. NPS (d/b/a All American Direct) offers individual distant networks at \$3.49 per month and the four primary network signals (ABC, CBS, NBC and Fox) for \$12.99 per month.<sup>59</sup>

DirecTV is permitted to offer distant network signals, but its web site does not advertise the availability of these services and points out the challenges that consumers may encounter in determining whether or not they may qualify to receive distant network signals:

Federal legislation allows consumers to arrange a digital signal strength test to verify whether the predictive model used to determine DNS [Distant Network Signal] eligibility is correct. If the test indicates that your location cannot receive a sufficiently strong signal from your local stations,

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<sup>57</sup> Testimony of Bob Gabrielli, Senior Vice President, Broadcasting Operations and Distribution, DIRECTV, before the Communications, Technology and the Internet Subcommittee of the House Committee on Energy and Commerce, February 24, 2009.

<sup>58</sup> Testimony of Charlie Ergen, President and CEO, DISH Network, before the Senate Judiciary Committee, Feb. 25, 2009.

<sup>59</sup> See, <https://www.mydistantnetworks.com/faq.php>.

DIRECTV may add DNS service to your account. DIRECTV will provide you with information about testing requirements but you must make all the necessary arrangements and pay for any associated costs. (Pricing varies but typically runs between \$150 and \$500.)<sup>60</sup>

DirecTV provides consumers with a form to request assistance in having its location tested. The form suggests that it may be difficult to find testers and that results of the test will take from four to six weeks.<sup>61</sup>

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<http://www.directv.com/DTVAPP/customer/faqPage.jsp?assetId=P4700010&Id=196006063#category4>.

<sup>61</sup> See, <http://www.directv.com/DNS/DNS%20Fullfilment%20Letter.pdf>.



**E. Other Important Data concerning the Video Marketplace**

|   |  |
|---|--|
| Number of TV households (2009):                                 | 114.5 Million <sup>62</sup>  |
| Number of Households subscribing to a MVPD service (June 2008): | 97.7 Million <sup>63</sup> (about 87% of all TV households)              |
| Cable Subscribers:  | 64.6 Million (66% of all MVPD subscribers)<br>(56% of all TV households) |
| DTH subscribers:  | 31.0 Million (32% of all MVPD subscribers)<br>(27% of all TV households) |

**V. Six Reasons Why Congress Should Eliminate the Distant Signal Restriction.**

The distant network signal restriction has long outlived any justification it may have had when it was adopted over 20 years ago. For the following reasons, Congress should eliminate the distant network signal restriction now so that DTH providers are permitted to compete on a level playing field with cable operators.

**A. The distant signal restriction prevents consumers from obtaining the programming that they desire.**

There are many reasons why consumers enjoy the opportunity to view a distant signal. In this increasingly mobile society, consumers often attend school, work and settle in areas of the country that are far from where they grew up; yet they would like to remain up-to-speed on the developments in their "home" community. Many other consumers have parents or other relatives in distant locations and would like to stay abreast of the latest developments in that region by tuning to that local station's news or weather. Or, if there is an interesting story in a particular local area (a natural disaster, a police

<sup>62</sup> According to the Television Bureau of Advertising (available at [http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02\\_TVHouseholds.asp](http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02_TVHouseholds.asp).)

<sup>63</sup> According to SNL Kagan (available at <http://cable.tmcnet.com/topics/cable/articles/39876-snl-kagan-cable-operator-revenues-poised-growth.htm>.)

situation, a local election), a subscriber may wish to watch the local news in that area to obtain up-to-date or detailed information that he/she could not obtain from the local broadcast station where he/she resides. The current distant signal restriction effectively bars most consumers from obtaining distant broadcast channels from satellite television providers (even though the cable operator is permitted to carry these channels).

Another reason a subscriber may be interested in receiving a distant signal is to obtain access to network programming at a different time of day (i.e. "time-shifting"). For instance, a viewer on the West Coast may prefer to watch "The Late Show with David Letterman" at 8:30 p.m. Pacific Time from an East Coast local broadcast station, rather than wait to watch the show on the local West Coast station at 11:30 p.m. Although such "time-shifting" can also be accomplished through the use of a DVR, time-shifting is a convenience for consumers without a DVR and enhances the overall level of television viewership.

One of the realities of life in the United States is the increasing mobility of American consumers. According to the U.S. Census Bureau, 40% of the American population lives in a state that is different from where they were born.<sup>64</sup> This represents a steady increase from 36.1% in 1980 and 38.2% in 1990. Although comparing the state of residence to the state of birth is not a precise indicator of one's programming tastes, it is a significant piece of evidence that Americans would enjoy the opportunity to view the programming in another state in addition to their local programming.

**B. The distant signal restriction has become obsolete with advent of Internet-based video.**

While satellite providers may not transmit distant network programming, the exact same programming is increasingly available on the Internet. In fact, each of the four major networks offers streaming versions of the full episodes of its television shows for free on the Internet, simply by going to their web sites (cbs.com; nbc.com; abc.com; fox.com). It is curious, and perhaps contradictory, for the major television networks to claim that satellite distribution of distant signals would undermine local broadcasting, when the networks themselves are bypassing their network affiliates by offering

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<sup>64</sup> See, the "State of Residence by State of Birth" tables provided by the U.S. Census, available at <http://www.census.gov/population/www/socdemo/migrate.html>.

programming directly to consumers through the Internet. Apparently, the television networks are confident that their local stations can withstand the growth of this alternative channel of programming.

Of course, the television networks are not the only ones to offer this programming over the Internet. YouTube has expanded its library of full-length movies and TV shows that it offers online, thereby moving beyond the home-produced video clips.<sup>65</sup> Web sites such as "TVchannelsfree.com" and "WiFiTV.com" offer hundreds of local television channels, including some network affiliates, that require no user registration or fee.<sup>66</sup> The web site <http://www.seabreezecomputers.com/tips/tv.htm> lists a variety of different web sites that offer full-length television shows, generally free of charge. Anyone who has a broadband connection, or has the means to acquire a broadband connection, can receive network television programming that satellite broadcasters are not allowed to carry.<sup>67</sup>

Several other sites offer television programming over the Internet for a small charge. Apple's iTunes Music Store and Amazon's Unbox allow consumers to purchase programs for \$1.99 per episode (analog) or \$2.99 for digital (high-definition). Downloading the programs allows the consumer to own the program and transfer it to a memory stick for viewing on other computers or television sets. The programs are usually offered without advertisements. SlingMedia allows consumers to use a set-top box (called a "Slingbox") at their home to receive and then send programs out over their home broadband connection through the Internet to the user, no matter where he or she may be located.

In addition, providers of set-top boxes allow television programming to be downloaded for viewing on television sets. Apple TV, Unbox, Xbox Live, Playstation, Vudu, Blockbuster and Netflix are all developing or deploying set-top boxes that enable downloading and viewing of television shows. The major networks are also partnering with YouTube, AOL, Joost, MSN, MSpace and Hulu to make their programs

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<sup>65</sup> Its long-form videos are available at <http://www.youtube.com/shows>.

<sup>66</sup> See, <http://www.tvchannelsfree.com/channels/13/USA-local-TV>.

<sup>67</sup> According to the National Cable and Telecommunications Association (NCTA)(citing data from SNL Kagan), over 92% of households in American have access to broadband services today. This percentage may be even higher if satellite broadband and telephone company broadband connections are included. See, "Moving the Needle on Broadband: Stimulus Strategies to Spur Adoption and Extend Access Across America," issued by NCTA, March 17, 2009, p. 1 available at

available on-line. Sports leagues are also beginning to develop their own web presence for streaming live games, often through web portals.<sup>68</sup>

Mobile phone providers are jumping into the programming market as well. AT&T's Mobile TV,<sup>69</sup> Verizon's V CAST Mobile TV and Sprint's Power Vision both offer cellular service customers the option of watching programming on their mobile phone. SlingMedia is planning to roll out television programs to the iPhone and iPod Touch in the near future. The use of mobile broadband services is likely to become even more popular with the emergence of next-generation 4G wireless technologies.

The increasing prevalence of Internet-based television sites allows consumers to choose to watch virtually any television program at any time of day or night, as long as they have a broadband connection. Over 50% of American households now have a broadband connection, and this figure is increasing each year. In fact, Microsoft Chairman Bill Gates predicts that Internet-based television viewing will replace standard broadcast television within five years.<sup>70</sup>

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<http://www.ncta.com/PublicationType/WhitePaper/Moving-the-Needle-on-Broadband.aspx>.

<sup>68</sup> See, "Yahoo! And MLB.com Enter Video Distribution and Advertising Sales Partnership," BusinessWire, Apr. 10, 2008. In April, Disney and Hulu announced a major new partnership that will allow Hulu to offer a variety of ABC and other Disney programming on the video streaming site. According to one report, this partnership means that Hulu has now locked up programming from three of the six largest movie production studios. See, "Hulu-Disney Deal Hurts YouTube, Helps Cable," April 30, 2007, available at [http://news.cnet.com/8301-1023\\_3-10231195-93.html](http://news.cnet.com/8301-1023_3-10231195-93.html).

<sup>69</sup> AT&T's web site specifically advertises that its service provides access to network programming: "AT&T Mobile TV brings your favorite prime-time and other full-length TV programs right to your mobile phone! Just press the TV button to enjoy popular programs from CBS, Comedy Central, ESPN, FOX, NBC, MTV and Nickelodeon. The crisp, clear video and audio makes watching AT&T Mobile TV as enjoyable as your home TV." See, <http://www.wireless.att.com/learn/messaging-internet/mobile-tv/mobile-tv-faqs.jsp>.

<sup>70</sup> Microsoft chairman Bill Gates told an audience at the World Economic Forum in Davos, Switzerland, "I'm stunned at how people aren't seeing that with TV, in five years from now, people will laugh at what we've had. . . . In the years ahead, more and more viewers will hanker after the flexibility offered by online video and abandon conventional broadcast television, with its fixed program slots and advertisements that interrupt shows." Ben Hirschler, "Internet To Revolutionize TV in 5 Years: Gates," REUTERS, Jan. 27, 2007, <http://www.reuters.com/article/ousiv/idUSL2791097520070128>.

Limiting the ability of satellite carriers to offer distant signals is a policy that is now obsolete. The distant network signal restriction places satellites at a severe competitive disadvantage compared to Internet-based services and cannot be justified as new technologies give consumers more and more options to watch the programming they want on-line.

**C. The distant signal restriction is anticompetitive and unfairly burdens satellite operators with rules that do not apply to cable operators.**

Cable operators are allowed to carry distant signals to any subscriber, while satellite broadcasters are not. This is a policy that is extremely difficult to justify, given the strong competition between the two industries. Furthermore, telephone companies may also carry distant network programming as a part of their cable services. . Verizon has been seeking and obtaining cable franchises from many districts where it is deploying its FiOS (fiber optic) service. AT&T has instead adopted a business plan (called U-Verse) that offers consumers the ability to order their own video signals on-line<sup>71</sup>. Both companies are permitted to offer distant network signals to their consumers in competition with DTH providers.

In contrast, DTH satellite providers may only provide distant network signals to small minority of households that live in unserved markets. Even in those markets, satellite providers may not provide distant signals if the consumer has "local-into-local" service available from any satellite provider. The effect of this policy is that satellite DTH providers are unable to provide distant network signals to approximately 95% of the nation's households, even though cable, telephone and Internet-based competitors may provide distant network signals to those same consumers.

This disparity harms not only satellite providers; it harms cable subscribers as well. The FCC has noted that cable prices continue to increase, perhaps because cable providers are protected from competition. According to the FCC's most recent report on cable pricing:

The average monthly price of expanded basic service (the combined price of basic cable service and cable programming service) increased by 3.9 percent over the 12 months

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<sup>71</sup> "AT&T U-Verse TV to Include NBC Universal Content.", Nov. 27, 2006, ("Under the agreement, AT&T will distribute to U-verse customers the analog and digital signals of the NBC and Telemundo owned-and-operated broadcast stations, as well as NBCU's cable properties.") See, AT&T Press Release at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23209>.

ending January 1, 2006; by 4.6 percent over the 12 months ending January 1, 2007; and by 5.0 percent over the 12 months ending January 1, 2008. . . . Over this 13-year period, the price of expanded basic service has grown from \$22.35 to \$49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period.<sup>72</sup>

Removing the distant network signal restriction would enhance the ability of satellite DTH providers to provide a competitive check on the prices and practices of the dominant cable industry. Both the FCC and the U.S. Copyright Office have recognized the disparate regulatory treatment of cable and satellite providers, and both agencies have recommended harmonizing the licenses of the two types of competitors.<sup>73</sup>

**D. Lifting the distant signal restriction is unlikely to cause economic hardship to local broadcasters.**

The broadcasting industry maintains that allowing the satellite providers to carry distant network signals will be “destructive” to free local broadcasting.<sup>74</sup> For many reasons, this fear seems to be greatly exaggerated. First, only a small proportion of consumers receive “free” over-the-air television. According to industry statistics, only about 15% of households receive over-the-air television service, and this percentage is likely to decline even further with the implementation of HDTV later this year.<sup>75</sup>

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<sup>72</sup>“Report on Cable Industry Prices,” In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, released January 16, 2009, para. 2.

<sup>73</sup> See, “Copyright Office Section 109 Report”, p. xi; and FCC “SHVERA Section 208 Report to Congress”.

<sup>74</sup> See, for example, the testimony of Mr. Martin D. Franks, Executive Vice President, CBS Television, before the House Subcommittee on Telecommunications and the Internet, March 10, 2004 (“As this Subcommittee has consistently recognized, delivery of distant network stations, like salt in a soup, works well only if used in small amounts, and quickly spoils the broth if overused. . . . [W]hen satellite carriers deliver distant network stations to households that *can* receive their own local network stations, without permission from the local affiliate(s) in the viewer’s area, distant signals quickly become a destructive force, undermining localism and subverting the economics of local broadcasters.”)

<sup>75</sup> The percentage of households receiving free over-the-air television is likely to decline even further with the transition to digital TV. Most industry observers expect many consumers

The broadcasters' concern that eliminating the distant network signal restriction will undermine free local broadcasting is most certainly overstated.

Second, roughly 55% of all television households already receive distant network signals from their cable provider. The broadcasting industry has made no showing that cable carriage of these distant signals has significantly harmed the revenues of local broadcasters.

Third, satellite television providers have a small share of the total television market; satellite DTH providers serve approximately 27% of all television households. While allowing satellite DTH providers to carry distant network signals will allow them to compete more favorably with cable operators, it is highly doubtful that allowing a non-dominant participant in the multi-channel video programming market to carry a few distant signals will have a significant effect on the economics of local broadcasting. Satellite DTH providers and cable operators offer hundreds of channels of programming; allowing satellite providers to carry a few distant network signals is unlikely to cause a massive shift in the number of "eyeballs" viewing the local broadcasting station or their advertising revenues simply because each consumer has so many viewing options.

Fourth, it is unlikely that satellite viewers would abandon their local affiliate even if they have distant network signals available to them. Why? Because, according to NAB President CEO and President David Rehr, consumers love their local television news. As Mr. Rehr explained recently, a study in Spokane Washington found that the households watching local broadcast stations' local news outnumbered those watching cable news by 35,000 to less than 1,000.<sup>76</sup> Consumers tune in to their local television station news precisely because that is the programming that is of most interest to them. Since television viewers are unlikely to abandon their local station, it is extremely difficult to imagine that allowing satellite providers to carry distant network signals would have a "destructive" effect on local broadcasters' revenues.

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will have difficulty receiving the same quality of over-the-air signals when the stations turn off their analog signal and only transmit the digital signal. The lack of transmission quality is likely to encourage more consumers to subscribe to pay services.

<sup>76</sup> Speech by David Rehr, President and CEO of the National Association of Broadcasters (NAB) at the National Press Club, Oct. 4, 2006, available at [http://www.nab.org/AM/Template.cfm?Section=News\\_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937](http://www.nab.org/AM/Template.cfm?Section=News_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937).

The likely result of lifting the distant signal restriction is that viewers will watch the distant network signal on special occasions – such as to watch isolated news stories – and then return to his/her local station for local news and other programming. Rather than taking viewers away from the local affiliate, it may increase the overall amount of viewing. Thus, the financial impact on local broadcasters from allowing satellites to carry distant network signals is likely to be minor, especially in comparison to all the other major technological shifts currently taking place in the market.



**E. Local broadcasters can take advantage of new revenues streams from the Internet and from HDTV.**

Local broadcasters have an enormous opportunity to generate additional revenues from the transition to high-definition television and the other technologies. As described by Mr. Yager in his testimony to the House Commerce Committee earlier this year:

In addition to improved picture quality, the switch to DTV allows local broadcasters flexibility to provide multiple channels of programming (i.e., multicasting) from a six MHz stream and substantially increases the overall amount of free programming. Stations across the country are experimenting with new formats and other ideas for multicast television, including local news, weather and sports programming. As the transition to all-digital television progresses, broadcasters will continue to increase multicast offerings and provide alternatives to the increasingly costly cable and satellite programming.<sup>77</sup>

There are at least six different sources of revenue and cost-cutting measures that can increase the profitability of local television stations over the next few years:

- a. Broadcasters enjoy steadily increasing political advertising revenue, including a record amount of revenue from the most recent 2008 Presidential campaign.<sup>78</sup>
- b. The switch to HDTV allows local broadcasters to “multicast” several channels of programming over their spectrum, which also allows them to sell more advertising.<sup>79</sup>

<sup>77</sup> See, Testimony of K. James Yager, Barrington Broadcasting, on behalf of the NAB, before the Subcommittee on Communications Technology and the Internet of the House Committee on Energy and Commerce, February 24, 2009.

II. <sup>78</sup> SEE, “NEARING RECORD, OBAMA’S AD EFFORT SWAMPS MCCAIN,” OCT. 17, 2008, [HTTP://WWW.NYTIMES.COM/2008/10/18/US/POLITICS/18ADS.HTML](http://www.nytimes.com/2008/10/18/us/politics/18ADS.HTML). (“SENATOR BARACK OBAMA IS DAYS AWAY FROM BREAKING THE ADVERTISING SPENDING RECORD SET BY PRESIDENT BUSH IN THE GENERAL ELECTION FOUR YEARS AGO, HAVING UNLEASHED AN ADVERTISING CAMPAIGN OF A SCALE AND COMPLEXITY UNRIVALED IN THE TELEVISION ERA.”) SEE ALSO, [“PRESIDENTIAL ADS PROVIDE WINDFALL TO LOCAL STATIONS,” [HTTP://WWW.ROANOKE.COM/POLITICS/WB/180256](http://www.roanoke.com/politics/wb/180256)., OUTLOOK 2008: ON-LINE POLITICAL ADVERTISING, (“BROADCAST TELEVISION, CORNERING NEARLY 60 PERCENT OF TOTAL POLITICAL SPENDING, WILL STILL BE THE UNDISPUTED CHAMPION IN THE POLITICAL ADVERTISING SPACE AND MAY SEE SOME FOLLOW-ALONG AD DOLLARS FROM ONLINE COMBO BUYS FROM THE CAMPAIGNS. WITH 95 PERCENT PENETRATION, TV IS STILL THE FASTEST WAY TO REACH THE BROADEST AUDIENCE OF REGISTERED VOTERS.”) AVAILABLE AT [HTTP://WWW.RESEARCHANDMARKETS.COM/REPORTS/586943/2008\\_OUTLOOK\\_ONLINE\\_POLITICAL\\_ADVERTISING](http://www.researchandmarkets.com/reports/586943/2008_OUTLOOK_ONLINE_POLITICAL_ADVERTISING).

- c. Local broadcasters are expecting to generate at least \$2 billion in additional advertising revenue from distributing mobile digital TV on cellphones and other handheld multimedia devices.<sup>80</sup>
- d. Many local broadcasters have reached retransmission consent agreements with cable and satellite operators that generate additional revenue opportunities or reduce costs of promoting their programs. Some broadcasters in small markets are even carrying a different network on their second channel because there is no other affiliate of that network in the market.
- e. Broadcasters are also developing revenue from their web sites. Private label desktop and mobile applications allow broadcasters to customize their delivery of news and information to each individual.
- f. New central-casting technology allows broadcasters to reduce their operational and delivery costs and allow them to operate more efficiently.<sup>81</sup> Centralcasting centralizes the master controls of multiple stations at a single, centralized network operations center.

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<sup>79</sup> See Note 65 above.

<sup>80</sup> Mr. Rehr stated at the most recent NAB convention, that "by 2012, we expect 130 million phones and 25 million media players will be able to receive mobile television. An NAB study concluded that TV broadcasters could see incremental revenue of more than \$2 billion after 2012 with mobile DTV (digital television). I believe, the revenue upside is probably greater than we can even imagine."  
<http://www.lasvegassun.com/news/2009/apr/22/ad-revenue-decline-puts-pressure-broadcast-confere/>.

<sup>81</sup> See, "Traffic Operations in the Centralcasting Environment," published by VCI. ("[U]nlike HDTV, centralcasting has the potential to offer real and immediate benefits including a positive impact on profitability. The centralcasting discussion most often revolves around master control operations and technology including automation, spot insertion, program playback, and networking. This is due to the fact that the consolidation of engineering operations offers the greatest opportunities for controlling expenses and achieving economies of scale") Available at <http://www.broadcastpapers.com/whitepapers/VCITraffic.pdf?CFID=35099502&CFTOKEN=b4470868867044d5-0981337F-F3CC-2D08-FD0D8EFFAC066D6A>.

In sum, there appear to be several opportunities for local broadcasters to reduce costs and expand their revenues as new technologies become available to them. Policy-makers should consider encouraging local broadcasters to pursue these new opportunities rather than shielding them from competition.

**F. Preventing the importation of distant signals to consumers is inconsistent with the free flow of information and raises significant constitutional issues.**

From our nation's inception, the Founding Fathers considered the free flow of information to be one of the most cherished values of democracy. The printing press, the telegraph and telephone, the delivery of mail, and other forms of mass communications have all been accorded respect as essential tools of an informed electorate and a protection against tyranny. Any limitations on the free flow of information must overcome an especially high burden to pass constitutional muster.

The Supreme Court has articulated the test for determining whether or not a regulation unnecessarily burdens commercial speech in the seminal case of *Central Hudson*.<sup>82</sup> Under the test laid out in the *Central Hudson* case, the government must make two showings, first that any regulation of commercial speech must directly advance an important interest and second, that the restriction is no more restrictive of speech than necessary. It is highly doubtful that the ban on providing distant network signals, except to certain unserved customers, would satisfy either prong of this test. As discussed above, there are numerous ways that consumers can obtain distant network signals over the Internet or from their cable provider. Thus the restriction on satellite television providers would not "advance" the important interest in preserving local broadcasting. Furthermore, it is equally unlikely that the distant network signal restriction is no more restrictive of speech than necessary. There are many other ways of promoting the interests of local broadcasting (some of which Congress has already taken, such as the network non-duplication rule, the retransmission consent rules, and the award of digital television spectrum) that can help preserve local television that do not infringe on the first amendment rights of satellite providers.

**VI. Conclusion**

The distant signal restriction has outlived whatever rationale may have justified its initial adoption 20 years ago. Cable prices are rising faster than inflation. The two largest telephone behemoths – AT&T and Verizon – are providing video programming services in more and more local markets. Internet-based video services are proliferating, bypassing the traditional means of providing television service with virtually no regulation. Yet, the distant network signal restriction effectively bars the Direct-to-Home satellite from providing the television programming that consumers desire. It is time for Congress to put an end to the competitive disparity between cable and satellite providers and, as both the FCC and Copyright Office have suggested, eliminate the distant network signal restriction in the upcoming satellite re-authorization legislation.

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1. <sup>82</sup> *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Mr. BOUCHER. Thank you, Mr. Mountford.  
Mr. Padden.

**STATEMENT OF PRESTON PADDEN**

Mr. PADDEN. Thank you, Mr. Chairman and Ranking Member Stearns.

I want to begin by thanking this committee for creating a competitive marketplace for subscription for television. It wasn't all that long ago that I was chatting with many of you about the problem that we only had one provider in the business, the local cable company. And when you think about what this committee has accomplished for the American people and for programmers like our company, it is really remarkable now the amount of competition that we have out there and I think the committee ought to take great pride in that.

I also want to emphasize that we love our satellite customers over here at DIRECTV and DISH. Disney Channel and ESPN were two of the first channels that were willing to license their content to the satellite industry to help them get off the ground. They now carry many, many of our channels. They are excellent customers and we love them very much.

We are appreciative to the committee for its straightforward discussion draft and particularly appreciative that the committee avoided collateral issues such as completely trying to revamp the system of free transmission consent in the context of this legislation. I want to talk just a minute about the underlying compulsory underwrite license. A compulsory license is just what it sounds like. It is a government act that takes private property, in this case our programming, from us and compels us to license it to certain customers designated by the government at a price set by the government.

Now, I know that sounds like something that could only happen in Moscow or Tehran but it actually did happen here in the United States. How did that happen? The answer is that back in 1976, the Congress found that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. A reasonable position back in 1976, and then the satellite industry came along and to be fair, Congress extended the same compulsory copyright license to the satellite industry. But when you extended it to satellite, you put a 6-year sunset on it and you said this committee does not favor interference with workable marketplace relationships for the transfer of exhibition rights in programming. The committee expects that the marketplace and competition will eventually serve the needs of home satellite dish owners.

Well, the good news is there now are workable marketplace mechanisms that can take the place of this government compulsory license. The industry created cable networks. This is after the compulsory license was first adopted and there are now about 500 cable networks, none of which are eligible for the compulsory copyright license which applies to broadcasting. And yet, without the help of the government, the owners of these cable networks managed to get them in front of virtually every man, woman and child in America.

Just to give you one example, we have two networks at our company. One is called ABC and the other is called ABC Family. They actually carry some of the same programs. ABC Family is not eligible for a compulsory copyright license and yet we have signed agreements with these gentlemen at the end of the table to transmit that programming to the American people.

We have a huge self-interest in wanting to get our programming, whether it is ABC or ABC Family in front of every eyeball in America and you can rely on that self-interest that we are going to get the product to everyone. The last time you extended The Satellite Home Viewer Act, you asked the copyright office to conduct a study of the underlying compulsory copyright license. They did that study. They released it last summer and they concluded that the Congress should begin to phase out the compulsory copyright license and associated regulations and we would urge that as this bill goes through the legislative process and all of the relevant committees of jurisdiction, that we take a look at trying to get out of this business of government licensing where it is not necessary.

In the meantime, we urge that you not expand the scope of the compulsory license and in particular, don't adopt the proposal that has been discussed for adjacent markets. We are completely supportive of the idea of getting local in-state news and other local programming to consumers. It can be done today without a compulsory license. All it takes is an agreement between the station and either the cable operator or the satellite operator. There are many cable operators that today carry local news outside of the designated market area to other orphan counties they are called, in the State. For example, our Philadelphia station news is carried down in Harrisburg and recently two of the leading Little Rock local news stations sent letters to DIRECTV and DISH openly offering to sit down and work out arrangements to retransmit their local news in the Shreveport market.

The problem with the adjacent market proposal is the proponents are talking about bringing the entire signal of the adjacent market station, not just the local programming. Our affiliation agreements with our affiliates give them exclusive rights to the network programming in their market. We have 220 affiliates across the country. We only own 10 of those stations ourselves and we are here today to stand shoulder to shoulder with our affiliates for the exclusive rights we have granted them and say to you please do not abrogate our contracts. Please do not duplicate the programming of the local affiliate. It serves no public interest for consumers to be able to watch Desperate Housewives on two different channels at the same time.

We are fully supportive of bringing in the local news and local programming. That can be done without expanding the compulsory license.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Padden follows:]

Testimony of Preston R. Padden  
Executive Vice President, Worldwide Government Relations  
The Walt Disney Company

Before the Subcommittee on Communications, Technology and the Internet  
Committee on Energy and Commerce  
U.S. House of Representatives

June 16, 2009

Good morning Chairman Boucher, Ranking Member Stearns and Members of the Subcommittee. My name is Preston Padden, I am Executive Vice President, Worldwide Government Relations for The Walt Disney Company and I am very grateful for the opportunity to appear here today. Disney produces creative content including filmed entertainment and television programs, operates the ABC Television broadcast network, owns 10-local TV stations, operates non-broadcast networks such as ESPN, Disney Channel and ABC Family, owns and operates theme parks and is generally regarded as a leading provider of family entertainment. I appreciate the opportunity to share the views of our company on legislation to reauthorize the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA).

As this Subcommittee continues to examine the reauthorization and the future of satellite television, it is worth taking a step back to consider where we've been and how we got to where we are today. As you know, Congress enacted the Satellite Home Viewers Act of 1988 twenty-one years ago to spur the growth of a nascent satellite industry as an effective competitor to cable. It did so after determining that "satellite retransmission of broadcast signals for sale to home earth station owners is probably not exempt from copyright liability under [then] present law." H.R. Rep. No. 887, 100<sup>th</sup> Cong. 2d Sess., pt. 2, at 13 (1988). And it acted on the same assumption that drove the adoption of the cable compulsory license, namely "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 1476, 94<sup>th</sup> Cong., 2d Sess., at 89 (1976). Thus, this Committee determined "that the public interest best will be served by creating an interim statutory solution that will allow carriers of broadcast signals to serve home satellite antenna users until marketplace solutions to this problem can be developed." H.R. Rep. No. 887 at 13. At the same time, this Committee noted that it "does not favor interference with workable marketplace relationships for the transfer of exhibition rights in programming," and that by adopting a six-year sunset on the new satellite compulsory license<sup>1</sup> "the Committee expects that the marketplace and competition will eventually serve the needs of home satellite dish owners." *Id.* at 15.

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<sup>1</sup> In referencing the "satellite license(s)", "statutory licenses," and "compulsory licenses," I use these terms as a form of short-hand reference to the overall statutory scheme, embodied in both the Copyright Act and the Communications Act, in which the government makes determinations as to carriage of broadcast network stations and superstations by satellite providers. I do so recognizing that in this complex area there are some elements of this statutory scheme that will fall within the jurisdiction of this Subcommittee and others that fall within the jurisdiction of the Judiciary Committee.

That was twenty-one years ago. Since then, the satellite license has been renewed three times, most recently in 2004. With each renewal, the license has been expanded to place the government increasingly in the disfavored role of decision-maker with respect to exhibition rights in broadcast programming. Rather than serve the intended purpose of providing a sunset to temporary marketplace interference, the periodic renewal of the satellite license has proven to be a vehicle for the slow but steady expansion of the government's incursion in an otherwise workable marketplace for multichannel video programming.

At the same time, we have seen a truly remarkable explosion in the competitive market for multichannel video programming. Today, satellite services account for more than one quarter of all multichannel video programming delivery (MVPD) subscribers and demonstrate a consistent annual subscriber growth rate. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report of the FCC, FCC 07-206, MB Docket No. 06-189 (2009). These satellite services, like cable systems, license all but a small handful of their programming channels directly in the marketplace. In fact, the FCC reports that in 2006 there were more than 550 non-broadcast networks, none of which are licensed through the cable or satellite compulsory license. *Id.* Where not subject to statutory license, broadcast programming is also being licensed in arms-length transactions for video-on-demand on cable systems, for Internet streaming and download, for transmission to mobile devices, and for other uses. In fact, broadcast is the only form of video distribution subject to government set, compulsory distribution terms.

This Committee is right to look upon statutory licensing schemes as disfavored. Such schemes are rightly disfavored because they are market distorting and operate in derogation of the Constitutionally-based principle that the public's interest in access to expressive works is best served by market-based incentives resulting from meaningful and clearly-defined exclusive rights. While statutory licenses may be seen as a means of lowering transactions costs in cases of inefficient or failed markets, government rate-setting and administration are traditionally inefficient, involve higher transactions costs, and are far less flexible than private-sector negotiations in functioning markets. *See* Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies: Property Rights, Contracts, and Markets"* (Cato Policy Analysis No. 508, 2004).

As Congress considers further reauthorization of the satellite license and related statutory amendments, it should carefully review whether the policy justifications that formed the basis for enactment of the satellite licenses continue to exist today and whether the goals articulated by Congress twenty-one years ago have been achieved. I note that the Copyright Office undertook a detailed review of those very questions in the 2008 report mandated by the last SHVERA reauthorization and came to the conclusions that both the cable and satellite industries "are no longer nascent entities in need of government subsidies through a statutory licensing system" and that they "have substantial market power and are able to negotiate private agreements with copyright owners." U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS 219 (2008). The Copyright Office's principal recommendation was "that Congress move toward abolishing Section 111 and Section 119 of the [Copyright] Act." *Id.*



Let me be clear. I am not here today to call for the immediate repeal of the existing statutory framework. I recognize that the asserted impact the elimination of these statutory licenses might have on licensing practices and expectations needs to be examined and that some period of transition will be needed. I appear today simply to urge that the Committee stay true to the principle this Committee embraced in the very first Satellite Home Viewer Act: That the government's incursion in the marketplace for satellite-delivered broadcast programming be temporary and transitional, and that to the extent Congress continues to act in this area it should take what steps it can to limit the market-distorting aspects of the statutory licenses. Similarly, Congress should emphatically reject the petitions of those who would further expand the scope of the satellite licenses and the role of government as determiner of exhibition rights in broadcast programming. Most importantly, Congress must never let the rights granted to one party under a statutory license trump the rights obtained by other parties through marketplace negotiations.

As to whether the satellite license should be extended, there are a number of market-distorting effects evidenced in the existing satellite licenses that should be taken into account. First and foremost, there is no market-based reason why rights to further transmit broadcast programming via satellite could not, as the Copyright Office concluded, be negotiated directly in the marketplace. This happens every day with MVPD cable and satellite networks. When ABC Family licenses programming for its non-broadcast network, for example, it secures all the rights necessary to license the ABC Family signal to individual satellite and cable systems, including the rights to license performances of those programs through to the viewer. There is no reason that a broadcast network like ABC, which licenses some of the very same programming, or an ABC affiliated broadcast station, could not do the same. Indeed, broadcasters, like all other programmers, have every incentive to negotiate agreements for distribution of their products in as many markets and on as many platforms as possible. ABC already obtains many of these rights for this very reason.

The truth is that the only reason the rights to authorize satellite retransmission of broadcast programming would not be sought by broadcasters is that the satellite licenses take away the incentive to do so. In effect, the statutory licenses take the rights to determine the terms of distribution out of the hands of market participants and place them squarely into the hands of the government. This creates a diminished incentive to negotiate for the right to authorize that which you cannot control. Given today's competitive marketplace for MVPD programming, one might ask whether the fact that broadcast signals continue to be licensed through government-mandated statutory licensing, rather than in the market, reflects a true market failure, or whether whatever failures that may exist in the market are in fact the outgrowth of the statutory licenses themselves.

In another example of market distortion, as argued by the Program Suppliers and the Joint Sports Claimants in testimony before the Copyright Office two years ago, cable and satellite rates determined through the government-run rate-setting process are consistently below those that would have been negotiated in the market. *See In the Matter of Section 109 Report to Congress Regarding Cable and Satellite Statutory Licenses Before the U.S. Copyright Office*, Docket No. 2007-1 (2007) (Program Suppliers' Reply Comments 8-12; Comments of Joint Sports Claimants 2-9); *See also Merges*, supra (noting the problem that compulsory licenses "can easily become outdated and unreflective of supply and demand" and that "[i]n practice, ... compulsory

licensing has led to price stagnation.”). Even those below-market rates have been known to be further reduced by Congress, as occurred in 1999 after the Librarian of Congress implemented new satellite rates set by an arbitration panel for the first time according to a “fair market value” standard. In that case Congress reacted by cutting those rates for network stations by 45 percent. *See* Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999). The end result is a government-mandated and sizeable subsidy for satellite providers paid for by program providers. Significantly, there is no evidence that any of this subsidy is passed on to subscribers.

Finally, even where Congress attempts to reflect market-based determinations in statutory licensing schemes, the licenses tend to make assumptions that may or may not be reflected in fact. For example, the satellite license governing carriage of distant signals assumes territorial exclusivity in contracts between networks and affiliates as the basis for its “white area” and “no distant if local” limitations, whether or not such negotiated exclusivity actually exists. This reflects a common defect of the license as currently drafted, which is that the license increasingly involves the government in deciding the terms of carriage for television networks and affiliates without an opportunity for the people who invest billions of dollars in the provision of those signals to negotiate over where and how those signals are used by others. Whether it is Congress deciding that distant digital broadcast signals may be carried in analog-served areas, provisions crafted to authorize carriage of stations from one side of a state in markets viewed by those on the other, or even the persistent failure to allow the same retransmission consent rights to go into effect with respect to satellite carriage of broadcast signals as exist with respect to carriage by cable providers, the satellite license continues to expand its reach in supplanting the rights of copyright owners, television networks and affiliates in controlling how their products are used by other commercial entities.

Some of these market distortions are inherent in statutory licensing. Others are the result of the particular implementation. Assuming the license is further extended, I encourage this Subcommittee to act to ensure that in those areas within its jurisdiction the license is implemented narrowly and in a fashion that avoids any unnecessary marketplace interference.

With this in mind I wish to comment on a few specific proposals that have been raised in this Subcommittee.

#### *Adjacent Market Proposals*

The first is the so-called “adjacent market” proposal to allow cable and satellite providers to deliver in-state news, weather, and public affairs programming throughout a state, regardless of DMA lines. The Walt Disney Company is strongly committed to widespread access to the highest quality news and other local programming. Our owned stations are consistently ranked as leaders in their communities based on their commitment to localism and the quality of their local programming. Given the substantial investment we make in the creation of such programming, we welcome opportunities to reach broader audiences through new or expanded distribution channels.

We commend those who seek to broaden access to in-state news and public affairs programming and support these goals. At the same time, I want to make clear to the Members of this Subcommittee that it would be both unnecessary and contrary to the public interest to pursue these goals in a way that undermines the basic economic dynamics that have generated decades of investment in television program production and that remain key to the ongoing vitality of the broadcast television industry and to the availability of quality content to over-the-air television viewers.

The nature and extent of broadcast exclusivity remains a core element of the economics of the advertising-supported broadcast and television production industries. If cable and satellite providers are permitted to import duplicative network and syndicated programming in conflict with the exclusivity parameters granted by program providers, the economic framework for supporting investment in programming will fall apart. This would further undermine the broadcast industry and diminish the quality and diversity of programming available to over-the-air viewers.

The economics are simple. Local advertisers pay broadcasters for access to viewers within their DMA. Broadcasters use this advertising revenue to pay program providers, who in turn use that revenue to support their ongoing production costs. This revenue also goes to support the overall operation of the station, including production of local news and public affairs programming.

A displaced viewer who watches a program on an imported out-of-market station results in a loss of local advertising revenue that will not be made up elsewhere. The in-market station will collect less revenue from its local advertisers, because it offers the advertiser fewer viewers. And the out-of-market station does not collect any incremental revenue from its local advertisers who are not interested in reaching out-of-market viewers.

This reduction in revenues also results in the broadcaster's reduced ability to pay for programming content. Thus, the fiscal foundations of both program producers and local stations are harmed. I would like to submit for the record a letter to Chairman Waxman from the CEO's of The Walt Disney Company, NBC Universal, The Fox Networks Group and CBS urging the Congress not to expand the statutory license to allow satellite carriers to duplicate the programming available on local broadcast stations.

Even more importantly, this reduction in revenue will lead to significant harm to the local station's viewers. A broadcaster facing less revenue will be forced to cut costs elsewhere. This may well lead to a reduced ability to cover the news, weather, and public affairs programming in the local area. The over-the-air viewers – who do not have access to television news from out-of-market stations – will suffer perhaps the greatest harm.

While there is never a good time to negatively affect advertising revenue, there could never be a worse time than right now. Earlier this month, Nielsen reported that first quarter 2009 television "spot" advertising expenditures dropped 16 percent in the top 100 television markets and a stunning 29 percent in smaller broadcast markets. See Nielsen News Release, U.S. Ad Spending Fell 12% in the First Quarter, June 8, 2009 (available at [http://enr.us.nielsen.com/main/news/news\\_releases/2009/june/us\\_ad\\_spending\\_fell](http://enr.us.nielsen.com/main/news/news_releases/2009/june/us_ad_spending_fell)). Our own local TV

revenues reflect an even greater drop in local advertising, particularly by automobile manufacturers and dealers, home builders, and financial institutions. It's not clear why Congress would want to exacerbate the challenges for this industry by adopting an adjacent market proposal. One need only look at the thickness of your local newspaper – if your home town still has one – to realize the negative impact of reduced advertising revenue on the health of media.

While the harm to the viewers, broadcasters, and producers of content is apparent, it is not at all clear what legitimate public interest is served by abrogating freely negotiated contracts to provide the ability for local viewers to watch imported duplicative network or syndicated programming. Some have suggested that the adjacent market proposals are intended to provide consumers with more “choices” for programming. No one is made better off when the government overrides contracted-for expectations – and with it the economic underpinnings of the broadcast television marketplace – simply to enable viewers in one market to watch Grey’s Anatomy from another out-of-market station. What “choice” is there in watching the same program on two different channels?

Fortunately, these results are unnecessary to achieve the goal of increasing access to in-state local programming. For one thing, as the creator of its own news and public affairs programming, a broadcast station may license this programming to cable and satellite services beyond its DMA. No change in the law is necessary to enable this to happen. For example, I am told that the Comcast cable systems in Abingdon, Glade Springs, and Saltville, Virginia – located as you know, Mr. Chairman, in the Tri-Cities Tennessee/Virginia market – import the local newscasts of WDBJ-TV located in the Roanoke, Virginia market. Time Warner Cable in Robeson and Scotland Counties in North Carolina – located in the Myrtle Beach, South Carolina market – import the local news and weather programming from WECT-TV in Wilmington, North Carolina. The local news of WPVI – our ABC Owned Station in Philadelphia – is carried by cable systems in the Harrisburg television market. These are just illustrative examples. Local broadcasters have offered to negotiate similar arrangements with satellite carriers given the strong economic incentives to licensing news and public affairs programming through as many distribution channels and to as many viewers as possible. For example, I offer for inclusion in the record letters to the satellite companies from two leading local stations in Little Rock, Arkansas – KTHV and KATV – offering to license their local news for satellite delivery to throughout Arkansas.

If this Subcommittee chooses nonetheless to legislate regarding adjacent markets, it should do so consistent with the principle set forth twenty-one years ago disfavoring “interference with workable marketplace relationships for the transfer of exhibition rights in programming.” The good news is that Congress can achieve this goal of broader distribution of in-state news, public affairs and sports programming while protecting consumers and program providers, even if acting by legislation. It simply needs to apply rules regarding network non-duplication, syndicated exclusivity and sports blackout when adjacent market stations are brought into a local market, and require satellite and cable providers to obtain retransmission consent from these stations. If the Subcommittee goes this route, however, it should limit the disincentives to contractual licensing of local news, public affairs and sports programming, by limiting any adjacent market provision to only a very small percentage of households in an affected market so that compulsory licensing in this area remains the exception rather than the rule. What Congress

should not – and need not – do is abrogate privately negotiated contracts to enable consumers to watch duplicative out-of-market network, syndicated and sports programming.

***Short Market Proposals***

Another issue under consideration by this Subcommittee relates to so-called “short markets,” where one or more networks do not have affiliated stations. As a general matter the existing law would enable the carriage of an out-of-market network station in markets where there is no station affiliated with the same network. In those markets every household would be considered “unserved” by an over-the-air station affiliated with that network and would be eligible for distant signal reception in accordance with the terms of the statute. I understand the difficulty animating the so-called “short market” proposals, however, is that in some cases signals from neighboring markets bleed in to the “short markets,” creating a situation where some number of households are considered technically “served” because they are able to receive an over-the-air signal of grade B intensity or better from a station affiliated with the same network. The statute deems those households “served” even though they remain unable to receive *any* over-the-air signal from a station affiliated with that network in their own market.

Let me say just two things about “short markets.” First, there currently exist only about a dozen markets in which there is no ABC-affiliated station. ABC, like other networks, favors carriage of its programming in as many markets as possible. In a market where there is no ABC-affiliated station, we are open to negotiated arrangements to affiliate with a digital multicast channel of an existing station serving that market. We have successfully negotiated such arrangements in several markets already and believe this aspect of the digital transition may provide a real benefit to consumers by further reducing, if not eliminating, the number of “short markets.”

Second, the circumstances prompting the current proposals serve as a good example of how the current statutory license distorts marketplace arrangements and puts the government in the position of making carriage determinations. Network non-duplication and syndicated exclusivity rules protect bargained-for exclusivity where it exists in network affiliation and program syndication agreements. Those rules reinforce marketplace arrangements, but have no bearing in “short markets” where those arrangements are entirely lacking. The satellite license, on the other hand, is apparently operating to prevent distant signal importation into these markets even in the absence of any bargained-for broadcast exclusivity. In essence, the satellite license is operating to create territorial exclusivity for neighboring market stations in certain areas of these “short markets” where they have not obtained – or likely even sought – contractual exclusivity. Without taking a position on any specific legislative proposal, and recognizing that new affiliations with local digital multiplex broadcast signals may eliminate the phenomenon of “short markets,” we would be happy to work with the Committee on appropriate legislation to deal with this issue.

*Digital Signal Strength Standard and Predictive Model*

Among the issues Congress *should* address in conjunction with any extension of the section 119 license is the lack of a meaningful definition for “unserved households” in the post-digital-transition world. While Congress in 2004 anticipated the digital transition, including by specifying a minimum signal strength standard for acceptable reception of a local digital signal, it left unaltered the definition of an “unserved household” under Section 119. That definition is intended – with only limited exceptions – to prevent the importation of duplicative distant network station signals for receipt by households that are able to receive a signal over the air from a local station affiliated with the same network. As it exists today, that definition remains rooted entirely in the ability of a household to receive, via a roof-top antenna, a signal of grade B intensity or better. As you know, Mr. Chairman, the grade B intensity standard is a measurement standard for analog signals.

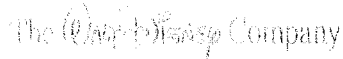
The unanticipated result is that as of last Friday, when all full-power television stations were required to cease transmitting analog signals, virtually every household in America became technically “unserved” under the definition contained in Section 119. This creates a circumstance where satellite carriers might attempt to assert that nothing in the Copyright Act or the Communications Act prevents them from delivering duplicative, distant digital network station programming to these households, regardless of whether they are actually served by a digital signal of a local station affiliated with the same network. Not only would such a result be unintended, it would clearly run contrary to the fundamental policy determinations made by Congress and this Committee when adopting a satellite license aimed at households truly unserved by local network stations.

I understand that DirecTV and National Programming Service/All American Direct – the provider of distant network signals to eligible EchoStar subscribers – have committed in writing not to seek to exploit this potential loophole in the law. In any event, Congress should take the opportunity now to remedy this anomaly by amending the definition of an “unserved household” to add a standard for what constitutes an acceptable over-the-air *digital* signal. Such standard should be based on the digital “noise limited” intensity standard established by the FCC in Section 73.622(e)(1) of its Rules. Moreover, Congress should direct the FCC to adopt a predictive model for determining the ability of a household to receive an adequate digital signal, mirroring the existing scheme embodied in the statute and the FCC rules for predicting eligibility to receive distant *analog* signals. As you know, the FCC has already recommended to Congress a predictive model for digital signal reception. *See* ET Docket No. 05-182, FCC 05-199 (Dec. 9, 2005). Congress need only direct the FCC to adopt by regulation a new predictive model for digital signal reception based on its earlier recommendation.

Even with an expanded definition of “unserved household” to accommodate the switch to digital broadcasting, Congress should retain for now the elements of the existing definition and clarify that they continue to apply to analog signals. Retention of a standard for determining the “unserved” status with respect to analog signals is necessary because low power stations and translators continue to transmit analog signals even after the transition to digital for full power stations. Those households that receive such a signal meeting the required signal intensity standard remain “served” for purposes of the satellite license.

Mr. Chairman, there are any number of other proposals that could be discussed. I have touched upon just a few of them here today. We look forward to working with you and with this Subcommittee as you move forward. As you do I urge you quite simply to adhere to the principles enumerated in this Committee two decades ago by seeking studiously to avoid interference with workable marketplace relationships. Those relationships exist in great abundance today in the multi-channel video programming market, and those who invest billions of dollars to produce high-quality, sought-after programming should have the ability to determine where and on what terms that content is licensed and distributed. And most importantly, negotiated arrangements with a local broadcast station should not be trumped and abrogated by a statutory license granted by the government to others. That is the basis on which a healthy broadcast television market has been built. And in the end, it is consumers who benefit when determinations regarding the assignment of exhibition rights in broadcast programming are entrusted to the market, not to the government.

Thank you. I look forward to answering any questions you and the Members of the Subcommittee may have.



April 27, 2009

The Honorable Henry A. Waxman  
 Committee on Energy and Commerce  
 2125 Rayburn House Office Building  
 Washington, D.C. 20515

Dear Chairman Waxman:

We write to express our support for increasing the distribution of locally produced content throughout a particular state, while preserving the vibrancy of television production and its substantial contributions to our economy. Congressman Mike Ross of Arkansas has championed the idea of allowing cable and satellite providers to deliver in-state news, weather, and public affairs programming throughout a state, regardless of DMA lines. We commend Mr. Ross's commitment to consumers, and support these goals. It is critically important, however, that Congress not disrupt or undermine the economic dynamics that have generated decades of investment in television program production – including a heavy concentration in Southern California – in the process of achieving these goals. Fortunately, we believe these objectives are not in conflict.

As you know, tens of thousands of jobs and billions of dollars are at stake in television production. However, Congress can severely damage the vibrancy of this vital industry and cause significant harm to the availability of quality content to over-the-air television viewers if it is overly broad in its approach to addressing Mr. Ross's concerns.

If cable and satellite providers are permitted to import duplicative network, syndicated and sports programming in conflict with exclusive rights granted by copyright holders, the economic framework for supporting investment in programming will fall apart. This would further undermine the broadcast industry, which faces unprecedented economic and competitive challenges, and over-the-air viewers would suffer as a result.

Congress can achieve the goal of broader distribution of in-state news programming while protecting consumers and copyright holders. It simply needs to



apply rules regarding network non-duplication, syndicated exclusivity and sports blackout when adjacent market stations are brought into a local market, and require satellite and cable providers to obtain retransmission consent from these stations.

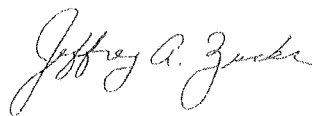
This issue is of vital importance to the future of successful television production in Southern California and elsewhere in the U.S. We respectfully request that you work with Mr. Ross to fashion relief that is sufficiently targeted to achieve his policy goals while protecting consumers as well as content creators and the thousands of Americans who work in this industry.

Sincerely,



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Bob Iger  
President & CEO  
THE WALT DISNEY COMPANY



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Jeffrey A. Zucker  
President & CEO  
NBC UNIVERSAL, INC.



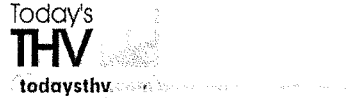
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Tony Vinciguerra  
Chairman & CEO  
FOX NETWORKS GROUP



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Leslie Moonves  
President & CEO  
CBS CORPORATION



March 25, 2009

**Via Fax to 303-723-1999**

Mr. Thomas Cullen  
Executive Vice President, Corporate Development  
Dish Network Corporation  
9601 S. Meridian Blvd.  
Englewood, CO 80112

**Re: Retransmission Consent for Out-of-Market Subscribers – Little Rock**

Dear Mr. Cullen:

I understand that many of your subscribers outside the Little Rock DMA are interested in receiving news and public affairs programming from the State Capital. At KTHV, we believe we produce the best coverage of news and weather that affects all Arkansans. We would be delighted to discuss the possibility of working with you to reach more viewers throughout the state.

This letter will confirm our willingness to sit down with you at your earliest convenience to negotiate a license to retransmit news and public affairs programming produced and broadcast by KTHV.

Very truly yours,

A handwritten signature in cursive script that reads "Larry W. Audas".

Larry W. Audas  
President & General Manager





L. Dale Nicholson  
President & General Manager

**Via Fax to 310-535-5426**

March 25, 2009

Mr. Derek Chang  
Executive Vice President, Content Strategy and Development  
DIRECTV, Inc.  
P.O. Box 92424  
Los Angeles, California 90009

Re: ***Retransmission Consent for Out-of-Market  
Subscribers - Little Rock***

Dear Mr. Chang:

It has come to our attention that that several DirecTV subscribers outside the Little Rock DMA but within the State of Arkansas are interested in receiving KATV's local news, sports and public interest programming. As the dominant news leader for many years in Central Arkansas, we have prided ourselves in bringing the most complete coverage of all events from the state capitol to the majority of Arkansans.

Although DirecTV has never requested carriage of KATV's local programming to those subscribers outside the Little Rock DMA, we would very much welcome the opportunity to discuss with you the options to bring our award-winning local coverage to those of your viewers in Arkansas who may be located within the state in other DMAs. Please let us know when we can meet to negotiate retransmission terms for KATV-produced news, sports and public affairs programming to these subscribers.

Very truly yours,

L. Dale Nicholson  
President and General Manager

KATV, LLC  
Post Office Box 77  
Little Rock, AR  
7 2 2 0 3  
P 501.324.7777  
www.katv.com

Mr. BOUCHER. Thank you, Mr. Padden.  
Mr. Karpowicz.

**STATEMENT OF PAUL KARPOWICZ**

Mr. KARPOWICZ. Chairman Boucher, Ranking Member Stearns and members of the subcommittee, thank you very much for having me here today.

My name is Paul Karpowicz and I am president of the Meredith Broadcasting Group which operates 11 television stations in small, medium and large markets throughout the United States. I testify today in my new role as chairman of the NAB Television Board.

Local broadcasters appreciate the opportunity to talk with you about the issues of importance for local television service we provide to our communities. Chairman Boucher, I want to especially thank you and the committee staff for all of your work on the draft bill. Broadcasters support the discussion draft and look forward to continuing to work with you and other members of the committee as we move forward.

As we discuss the draft legislation today, it is imperative that two principles remain paramount, localism and the respect for relationships that cover the distribution of programming and that have been found by the government to serve the public interest. Meredith Broadcasting, along television stations across the country, works everyday to embody the spirit of localism which Congress has affirmed time and time again as a vital public policy goal. We don't charge our viewers to watch our programming. We rely on payments from advertisers to deliver a free service to your constituents. The draft we are discussing today is a positive step towards updating telecommunications law for the new era of digital broadcasting.

Local broadcasters have stepped up and invested billions of dollars to complete the transition and we are excited about the benefits that digital broadcasting will bring to your constituents. We are particularly appreciative that the draft continues to recognize the value of the DMA structure. The DMA system which is updated every year enables broadcasters to serve every community with highly valuable local programming.

Now for example, our company owns and operates WHNS in Greenville, South Carolina. Now 34 percent of the households in its DMA are located in North Carolina and four percent are in Georgia. WHNS provides locally attuned service to those North Carolina and Georgia communities everyday just as it does the South Carolina communities within its coverage area. The nearest North Carolina television market to these North Carolina counties is Charlotte which is 95 miles away while Greenville is only 25 miles away. These out-of-state communities all share with Greenville the same weather, topography and have very close economic and cultural ties. WHNS serves these communities everyday with the news stories of specific relevance to the region of service that cannot be matched by distant stations.

Now the satellite industry wants to change the law so that they can bring in duplicative network and national syndicated programming. As a practical matter, let me explain what would happen if this were to occur. Our station in Greenville has exclusive rights

from Fox and our syndicators to air popular programming including American Idol, 24 and the Simpsons in its local market. If a satellite or cable operator could import the signal of a FOX station from Charlotte including the exact same primetime programming into the Greenville market, it would significantly reduce our viewership and thus our advertising revenues. As a result, we would have fewer resources to serve the viewers whether they are in South Carolina, North Carolina or Georgia with local programming including news, weather, emergency information and all these other local services our viewers have come to expect. In addition, a satellite or cable operator in a retransmission consent dispute could try to drop the viewers' local station in these North Carolina communities and instead a distant Fox affiliate thereby depriving viewers of local information.

It is important to recognize that cable and satellite carriers can already import news and information into distant in-state counties today without changing the law. Finally, we appreciate the efforts of Congressman Stupak to make sure that no community is denied access to local programming by satellite carriers and we hope to work with the community to address this problem. As you consider reauthorization of SHVERA, I urge you to preserve our ability to serve every local community. We are very appreciative of the important steps reflected in this draft bill and believe the subcommittee is headed in the right direction.

I thank you for your efforts so far and look forward to answering any questions.

[The prepared statement of Mr. Karpowicz follows:]

Testimony of Paul A. Karpowicz  
President, Meredith Broadcasting Group

Before the Subcommittee on Communications, Technology and the Internet  
Committee on Energy and Commerce  
U.S. House of Representatives

June 16, 2009

Good morning, Chairman Boucher, Ranking Member Stearns and Members of the Subcommittee. My name is Paul Karpowicz. I am President of the Meredith Broadcasting Group, which owns and operates 11 television stations in small, medium and large markets throughout the United States. I am also chair of the Television Board of the National Association of Broadcasters (NAB), on whose behalf I appear today.

Local broadcasters appreciate the opportunity to talk with you today about issues of profound importance to the local television service we provide to our communities. Television broadcasters like Meredith urge you to ensure that service to local viewers is not undermined in the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA).

#### **I. THE TWO OVERRIDING PUBLIC INTEREST PRINCIPLES**

Two principles should guide Congress's actions when reauthorizing SHVERA – localism and respect for private-party contractual arrangements entered into in a free marketplace for the distribution of television programming. Both the Federal Communications Commission (FCC) and Congress have found that these principles serve the public interest.

Localism is a bedrock principle rooted in the Communications Act of 1934 (Act) that has guided both Congress and the FCC in implementing communications policy for decades.

Localism has also been an integral part of satellite carriage policies from the outset, in 1988. These policies promoting localism have benefited all Americans, whether they watch television over-the-air or subscribe to cable or satellite.

What does localism mean for the public served by local television broadcasters?

Localism is coverage of matters of importance for local communities, such as local news, school closings, high school sports, severe weather and emergency alerts, local elections and public affairs. Localism is also support for local charities, civic organizations and community events. Local broadcasters help create a sense of community. They address the needs of the public, based on a familiarity with and commitment to local communities.

The second principle is that government policy should respect contractual relationships freely entered into by private parties, especially since it has found that those contracts foster localism, diversity, competition and high quality service to the public. The role of the government is properly to enforce these relationships that serve the public interest, not override them. As the FCC has pointed out: “[W]e do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.”<sup>1</sup> The Act and the FCC’s rules respect and enforce the relationships, freely negotiated among the parties, that create and distribute the diverse mix of broadcast television programming that addresses the needs and interests of the viewers local stations serve throughout the country.

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<sup>1</sup> FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) at ¶ 50 (*FCC Retransmission Report*).

## II. MARKET MODIFICATION PROPOSALS

The first specific issue I wish to address concerns market modification proposals that, while not included in the draft legislation we are discussing today, have been a major topic of debate in connection with SHVERA. These market modification proposals would allow satellite and cable carriers to import distant, but in-state signals, including their *duplicative national* content, into counties located in the same state as the distant stations but in a different state from the local-market stations that serve these counties. While broadcasters are sensitive to the concerns of Members that underlie these proposals, the proposals would not advance localism goals, but would in fact undermine sound public policy and harm consumers. Moreover, Members' concerns can otherwise be addressed without changing the law and without adverse consequences to the viewers of local stations.

My point can be illustrated by two examples. Meredith operates WHNS in Greenville, South Carolina. Thirty-four percent of the households in its Designated Market Area (DMA) are located in North Carolina and four percent in Georgia. WHNS provides locally-attuned service to those North Carolina and Georgia communities, just as it does to the South Carolina communities within its coverage area. The nearest North Carolina city of license to these North Carolina counties is Charlotte, which is 95 miles away from Spotsylvania County, NC. Greenville is only 25 miles away.

These out-of-state communities within WHNS's market have the same weather as Greenville, South Carolina. They share the same topography, and close economic and cultural ties link the in-state and out-of-state counties that comprise the Greenville, Spartanburg, SC/Asheville, NC/Anderson, SC DMA. Accordingly, day after day after day, WHNS airs news stories of specific relevance to these local out-of-state counties. The market modification



proposals would undermine the economic base for this localized service. They would do so (1) by overriding contractual relationships entered into by Greenville market stations with national networks and national syndicators for the distribution of their programming, and (2) by interfering with the retransmission consent process.

Let me explain, as a practical matter, what would occur. WHNS is a Fox affiliate with exclusive rights, from Fox and syndicators, to air popular programming, including *American Idol*, *House*, *24* and *The Simpsons*, in its local market. If a satellite or cable operator could import the signal of a Fox station from Charlotte, NC (including duplicative Fox network and national syndicated programming) into WHNS's market, that would significantly reduce WHNS's viewership and advertising revenues. As a result, WHNS would have fewer resources to serve its viewers (whether located in South Carolina, North Carolina or Georgia) with local programming, including news and emergency information, and other local services. In addition, a satellite or cable operator in a retransmission consent dispute with WHNS could choose to drop our station in these North Carolina communities and instead carry the distant Fox affiliate in Charlotte, thereby depriving local viewers of local information important to them and undermining the retransmission consent negotiation process.

Or consider our Kansas City, MO station, KCTV, 35 percent of whose market population resides in Kansas. Of course, our station in Kansas City provides coverage attuned to the needs of these Kansas viewers. This service to our Kansas viewers, and to our Missouri viewers as well, would be damaged by the market modification proposals that have been floated in connection with SHVERA.

These proposals are touted as enabling viewers to watch programming originated by stations located in their home states, even though these stations may be hundreds of miles away.

To the extent that policymakers want to enable viewer access to in-state news and information, cable and satellite carriers can already import this programming into distant, in-state counties *without any change in the law*, and quite a number of cable systems do so today. For example, the Comcast cable system in Las Cruces, NM, which is located in the El Paso, TX, television market, imports the local news and weather programming of KOAT-TV, Albuquerque, NM. Other examples exist in southwestern Virginia, northeast South Carolina, southwestern Colorado and eastern Tennessee.

The market modification proposals would have a very different effect. They would:

- allow the importation of *duplicative, national* programming into local markets where the local stations have bargained for the exclusive right to show that programming in their home markets. That result would not promote localism goals and in fact would harm the public's local service by fractionalizing the viewer and advertiser base that underwrites the localized services provided by broadcasters to their home-market viewers, in-state and out-of-state;
- allow satellite and cable carriers to replace local station signals with the signals of distant stations affiliated with the same network, thereby undermining the retransmission consent rights of local stations that Congress guaranteed in the 1992 Cable Act, which help support the localized broadcast services on which the public relies;
- override the contractual relationships between local broadcasters and the content community (e.g., between local affiliates and networks and between local affiliates and syndicators) -- thereby eroding the ability of content providers to negotiate fair compensation for their product and the ability of local broadcasters to provide the highest quality programming to their service areas;<sup>2</sup>

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<sup>2</sup> The FCC has found that these contractual arrangements serve the public interest. Thus, in 1988, it reinstated its rules that allow parties in the program distribution chain to rely on and enforce these arrangements. The FCC concluded that broadcasters' "inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way." *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the* (continued...)

- eliminate the retransmission consent rights of distant in-state stations; and
- nullify the distant signal copyright fees required by Congress for the importation of distant signals.

Local television journalism is the most utilized and the most trusted source of news for the American public -- year after year. The threats to its economic viability have not yet progressed as far as the erosion of newspapers' viability. But the trend is rapidly headed in the same direction and with the same dire consequences for the proper and healthy functioning of our democracy. One cannot pick up a daily trade publication without reading about the most recent struggles, caused by harsh economic conditions, of local television station to maintain their local news. The market modification proposals we have been discussing would severely damage local broadcast news -- and local sports, weather, emergency alerts and public affairs, as well. Ninety eight out of the nation's 210 television markets -- nearly 400 stations -- would be impacted by these proposals. And for a great many of these stations, like the Meredith stations in Greenville and Kansas City, 30 percent, 40 percent, even 60 percent of their viewing households reside in other states. The public's localized service would be weakened or destroyed not only for out-of-state counties but also for in-state counties.

In sum, these market modification proposals are not what they seem. They would hurt localism, not serve it. They would not give choice to the viewers, but to the satellite and cable carriers. They would radically disrupt a private marketplace that the government has found effectively serves the goals of localism, competition and diverse and high quality service to the

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*Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988), at ¶ 62. The same considerations apply with equal force to the FCC's network nonduplication rules, which would also be overridden by the market modification proposals.

public. And they would mandate a solution for a problem that doesn't exist under current law. We urge the Committee to continue to resist these proposals.

### III. LOCAL-INTO-LOCAL

The second crucial issue involved in the reauthorization of SHVERA is the local-into-local issue that Congressman Stupak has championed and that a number of you support. The original Communications Act drafted 75 years ago explicitly called for distribution of communications services to as many localities as possible. Localism has been a beacon of communications policy ever since. The satellite legislation of 1999 made it possible for satellite carriers to compete effectively with cable operators by providing the compulsory copyright privileges they needed to retransmit local stations' signals. Satellite operators took advantage of these new capabilities, and the result, as the FCC has repeatedly reported to Congress, was that the satellite operators rapidly became competitive with cable carriers, to the benefit of American consumers. Offering local service also enhanced satellite operator profitability.

But the satellite operators do not provide local-into-local service in all markets. They avoid many smaller markets, so that, today, satellite subscribers in, for example, Columbus, Georgia, cannot receive news, weather and sports from their local-market stations via satellite.

Currently, DirecTV does not serve some 50 smaller markets and EchoStar does not serve some 30 smaller markets. The satellite carriers no longer claim, seriously, that providing local-into-local service is technically impossible. They say it is expensive. But expense is always involved in providing program service to the American public. The principles of localism and universal service for all Americans should prevail. Accordingly, satellite operators should carry

the local stations in *all* of the country's television markets -- small and large, rural and urban, poor and wealthy.

A related issue is short markets, which in satellite-speak means markets not served by local stations that carry the programming of all four major national broadcast networks. With the advent of digital, this problem is rapidly diminishing because local stations, with a primary affiliation with one major network, are using their multicast capacity to carry a second major network (often accompanied by *local* news and informational programming). Thus, WBOC-TV, the CBS affiliate in Salisbury, Maryland, now carries Fox network programming on a multicast channel and presents local news and other localized program services on that channel as well. With the switch to digital last Friday, this trend will continue and the number of short markets should be substantially and rapidly reduced. NAB is committed to cooperating to resolve this issue. It emphasizes that resolution of this issue must be coupled with a full local-into-local requirement.

#### **IV. OTHER PROVISIONS**

The current SHVERA reflects a basically sound approach. The local-into-local compulsory license is permanent and effectively serves the public interest. The distant signal compulsory license, which expires this year, should be phased out in the near future. Requiring local-into-local service, which we strongly urge, would make this step both more possible and more desirable. Congress should also resist the various market modification proposals that are unnecessary to meet their intended goals and that would injure the public's local television service. In addition, Congress should:

- 1) amend the current statute to make clear that “white areas” are to be determined in terms of digital service, not analog service, which as of last Friday no longer exists (except in the case of low power stations), and make other technical language changes to reflect that broadcasters no longer operate in an analog world;
- 2) adopt the digital predictive methodology, recommended by the FCC at Congress’s direction, for determining whether households are unserved; and
- 3) clarify that subscribers receiving network programming on broadcasters’ multicast channels are “served,” and therefore, satellite carriers may not import distant signals containing this duplicative, national programming.

\* \* \*

Finally, broadcasters note that the SHVERA reauthorization process should not be used as a vehicle for re-opening a range of well-established retransmission consent issues. And intentionally or not, the market modification proposals advanced in the context of SHVERA would, in fact, erode local broadcasters’ retransmission consent rights at the expense of the public’s local broadcast service.

In any event, there is no need to change the present retransmission consent process, which works as Congress intended.<sup>3</sup> Congress should continue to rebuff the efforts of the satellite and cable industries to persuade the government to intervene in free-market

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<sup>3</sup> *FCC Retransmission Report* at ¶ 34 (recommending no revisions to statutory or regulatory provisions related to retransmission consent). See also Empiris LLC, Jeffrey A. Eisenach, Ph.D., *The Economics of Retransmission Consent* (March 2009) at Executive Summary (concluding that retransmission consent has achieved Congress’ intended purpose in enacting it, and has “benefited consumers by enriching the quantity, diversity, and quality of available programming, including local broadcast signals”).

retransmission negotiations, which the FCC has expressly found benefit cable/satellite operators, broadcasters and, “[m]ost importantly, consumers.” *FCC Retransmission Report* at ¶ 44.

\* \* \*

Thank you. I look forward to answering any questions that Members of the Subcommittee may have.

Mr. BOUCHER. Thank you very much, Mr. Karpowicz, and thanks to all of the witnesses for their testimony here this morning.

I am going to ask unanimous consent that a variety of letters we have received addressing issues concerning the reauthorization of The Satellite Home Viewer Act be made a part of the record. These have been shared with Mr. Stearns and his staff. Without objection, they will be included.

Mr. Chang, let me begin my questions with you. You had noted in your testimony that in order for service to be provided in the markets that do not have local-into-local service today, those approximately 30 markets across the country that the carrier would have to find a means of getting the broadcast station's signal to its uplink facility and the uplink facility for some of these very rural markets could be hundreds if not more than 1,000 miles away, I would assume. On the other hand, the law as of several years ago required that for every market in which local-into-local services provided that the satellite carrier have a local receive facility within that market in order to receive the signal from the local broadcasters. Why would it not be sufficient to simply take the backhaul to take that local broadcast signal from the unserved market to a nearby market, perhaps an adjacent market where a local receive facility by the satellite carrier would be located? Why would that not be sufficient?

Mr. CHANG. As I said earlier, I am not an engineer so I don't know the details but my understanding is the cost of build out the facilities within each of the markets that we are not serving in addition to the transmission costs.

Mr. BOUCHER. Well, I will grant you that there are costs associated with it but the cost of getting it to something as close as an adjacent market where a receive facility is already in place would be substantially less than the cost of having to take that signal hundreds if not more than a thousand miles to one of the satellite carriers' uplink facilities. So let us assume for the sake of the question that getting it to a receive facility would be satisfactory, Mr. Dodge, would you confirm that it is? Is that a means of getting it to your uplink facility?

Mr. DODGE. I would say that is a constructive suggestion towards reducing the cost but you still have to pay for the fiber from, if you will, the adjacent receive facility back to our uplink facility.

Mr. BOUCHER. Back to your uplink facility?

Mr. DODGE. Right, back to our uplink facility.

Mr. BOUCHER. Well, doesn't that already exist because the purpose of that local receive facility is for you to receive the signal in that market of the local broadcaster and then take that over your already in-place infrastructure back to your uplink.

Mr. DODGE. Correct and we use either we backhaul via satellite or via fiber and the question would be you would need additional fiber or a satellite capacity to uplink it to bring it back to the uplink facility.

Mr. BOUCHER. So you are saying that the existing infrastructure by which you are taking the signals of the broadcaster in that adjacent market back to you uplink would not be sufficient in and of themselves to enable you to carry the signals from broadcasters in the unserved market next door.



Mr. DODGE. I believe so.

Mr. BOUCHER. OK. Let us check this. Let me ask both of you if you would go back and examine this and maybe talk to some of the engineers.

Mr. DODGE. Sure.

Mr. BOUCHER. We occasionally do accept testimony from engineers here, it is not always lawyers, and give us an answer as to whether or not, A. we are right in saying that providing that signal to the receive facility nearby is a possible means of lowering that backhaul cost and if it is, would the infrastructures that typically are already in place to take the signal from that receive facility back to your uplink, be satisfactory for this purpose?

Let me on the same issue, slightly different aspect of it, ask Mr. Karpowicz and Mr. Padden a question. I have heard it estimated that the cost of backhaul for all 210 unserved markets, the new capacity by whatever means would have to be added, would be about \$30 million collectively and the broadcasters have a tremendous interest in getting all 210 markets served. It is their signal that would then be disseminated to a broader group of viewers in a way the viewers would like to have that signal, and among the suggestions made by DIRECTV and DISH in their offering to you in terms of how they would be willing to serve these 210 markets, was a suggestion that on some terms broadcasters be willing to help share in that cost, given the benefits that inure to you if those markets are served. So, Mr. Karpowicz and Mr. Padden, your companies own some television stations, what is your answer to that? Is there a possibility that you would be willing to help them in some measure share in that cost?

Mr. KARPOWICZ. I think what we have heard are a lot of different numbers relative to what that cost might be and at the NAB we have established a subcommittee that consists of technical people, real engineers and members of our board that are from small markets that would have a very real stake in this, you know, in this type of a decision. So we would stand very ready to work with the committee and work with the satellite operators to continue discussions about exactly how that would work, whether it be fiber, additional satellite, whatever but I think there is still not enough information relative to what the real costs might be for us to make a determination as to what our level of participation might be.

Mr. BOUCHER. The broadcast industry has had this proposal from the two satellite carriers now for more than a week and I know you have a committee that is looking at it. Do you have a timeframe within which you intend to have a response?

Mr. KARPOWICZ. We actually have had one committee meeting already and it would be my hope that we could get back to you very shortly. I don't have the specific days in my mind yet but it would be our intent to get back with you very quickly.

Mr. BOUCHER. OK. I am going to pursue one other question and the chair will be lenient with other members in taking time to ask their questions. These are important matters.

The current law contains a curious legal consequence that with the digital television transition and the termination of analog television broadcasts by the full-power television stations, virtually every viewer in America today is classified as being in a white area

and therefore being eligible to receive distant network signals. Now of course, that was never the intent of the law and the old law, well the current law says that the standard for eligibility is determined over whether or not the viewer can receive by means of an outdoor antenna an analog signal of Grade B intensity and of course then when the analog signals were turned off nobody was getting analog signals and so no one could get analog signals of Grade B intensity. Therefore, under current law you have got this curious consequence that technically everyone is eligible to get a distant network signal.

Realizing that problem, last year I asked the satellite carriers to refrain from offering distant network signals until we had an opportunity in this reauthorization to address that problem and correct it, and commendably all of the carriers responded favorably and sent letters indicating their restraint, and so far no one has taken advantage of this existing loophole in the law. But I just want to ask Mr. Dodge, Mr. Chang and Mr. Mountford for your statement of continued adherence to that pledge not to utilize that loophole in the law. There was some discussion last week about whether that might change and given that little bit of confusion I thought it appropriate to get on the record a statement from all three of you that you would not seek to utilize that loophole while we are in the process of changing the law to say that it is digital signals that are in question here not analog signals. Mr. Mountford, can we get that pledge from you?

Mr. MOUNTFORD. We currently are using the existing analog model because the digital model which we have ordered is not ready yet so as soon as that becomes available we will be using that. In the interim, we are telling customers who get rejected by the analog model that we will rerun them once we get a digital model and we will continue to use that digital model, and we will be testing those consumers. As I said in my testimony, there is an easy way to test consumers so we will be testing consumers who get rejected under the digital model and depending upon those tests we will go forward.

Mr. BOUCHER. OK. I think that means yes, you are going to continue to restrain and not utilize the law.

Mr. MOUNTFORD. That means yes unless we are disenfranchising a bunch of consumers and then we may come talk to you.

Mr. BOUCHER. Well, Mr. Mountford, we are rewriting the law in such a way just as to contain a clarification of this issue and use the word digital instead of analog, and I would assume until that happens you would continue to abide by the terms of the letter that you sent last year and not seek to utilize that loophole in order to serve those customers, is that correct?

Mr. MOUNTFORD. We will never seek to use that loophole.

Mr. BOUCHER. Thank you, Mr. Mountford. Mr. Chang, I would like to hear from you as briefly as possible. This could be just one word, a yes would do but if you want to elaborate, that is fine.

Mr. CHANG. Yes, we will.

Mr. BOUCHER. Thank you. Mr. Dodge, I know you are not delivering distant network signals but if something happens that should enable you under some circumstances to do that would you agree to this pledge?

Mr. DODGE. We would.

Mr. BOUCHER. Thank you, Mr. Dodge. That was a good answer. That was right to the point. Thank you.

My time has expired. The gentleman from Florida is recognized for five minutes.

Mr. STEARNS. Thank you, Mr. Chairman, and I think we on this committee should feel blessed because you serve on judiciary and I know judiciary has had a hearing and they will have a referral on this. I don't think the Senate had a hearing yet but when they go into the right to carry signal and the copyright protection you will be right there protecting us and perhaps the nuance of this bill will be protected. But my feeling is just overall that the bill has to move forward and I am not sure many of us on this side or either side want to hold this bill up to solve this problem which seems a little bit complicated. Just as a observation, Mr. Padden mentioned how cable is solving the problem so I would ask Mr. Mountford, the solution to which cable is doing this problem is that something that could be as a paradigm or something that we could work off in this bill?

Mr. MOUNTFORD. I am not sure if I understand the question.

Mr. STEARNS. The missing affiliates problem that Mr. Padden mentioned so basically he is saying that the local broadcasters have been solved through the cable and he described how they did it. I don't know. Do you remember what he said?

Mr. PADDEN. I think you are referring to my reference to the fact that some cable operators are carrying local news and other local programming.

Mr. STEARNS. Right.

Mr. PADDEN. From an adjacent market station today.

Mr. STEARNS. Right.

Mr. PADDEN. And there is no reason that we are aware of why a satellite distributor couldn't make the same?

Mr. STEARNS. Right, that is my question and I will let each, Mr. Dodge and Mr. Chang, yes.

Mr. MOUNTFORD. That would be something we would have to look into, something that I haven't even considered or we haven't even thought about yet but it sounds interesting.

Mr. STEARNS. OK. Mr. Chang.

Mr. CHANG. Can you hear me OK?

Mr. STEARNS. Yes, sure.

Mr. CHANG. From DIRECTV's perspective, we do blackouts as Mr. Padden suggested but they are difficult to implement and we do them on an irregular basis, mostly for sports product which is kind of mandated by various sports leagues and teams and such and to be quite honest with you, it is a very difficult process to implement from an operational perspective for us. We do it because we are forced to. Our customers do not like it. To do what Mr. Padden has suggested would in essence be the reverse of that which is really, literally to blackout probably 90 percent of a channel from an adjacent market to just then show the local news that they are allowed to pass through to the adjacent market and I think to do that, you know, across the country itself would be difficult. It would compound incredibly our operational issues. I think also from a customer perspective, to sit there and have to see a black screen for kind of 90 percent of the time in order to see local

news doesn't make a lot of sense. It is not a customer-friendly proposition.

Mr. STEARNS. Mr. Dodge?

Mr. DODGE. I guess I would just reiterate what Mr. Chang said. I mean we really look at it as a three-fold issue which is at the top of the list we agree with you, Ranking Member Stearns, that this is all about the consumers and quite frankly to reiterate what Mr. Chang said they don't want their screen black 90 percent of the day, let alone paying for that privilege. And additionally, while the screen is black, they will miss important emergency weather alerts because they won't see the crawls that would be coming through on the programming from that broadcaster. Additionally, there are substantial technical difference between satellite and cable where they have people generally in all their local areas monitoring. They can monitor these signals 24/7. We have a single staff who is, as I said earlier, is monitoring about 1,400 different channels which is basically impossible for us to monitor in blackout programming at all. And finally, from legal perspective we are not quite sure that the broadcasters have all the necessary rights to do what they are saying. For example, they have the rights to the copyrights to send through the national programming clips that they include in their broadcast and advertising. And similarly while the cable folks are able to splice in alternate programming, we don't have the similar provision in our statutory license that would allow us to do it, so we couldn't do it even if it was technically feasible.

Mr. STEARNS. So you are saying right now it is not technically feasible in your mind?

Mr. DODGE. It is not.

Mr. STEARNS. And that is what you are saying, Mr. Chang, that it is not technically feasible to do this, and forget the idea that you're blacking out. I mean that could be worked through but you are saying it is not even technically feasible?

Mr. CHANG. I don't know if strictly it is technically infeasible. It would be very difficult to implement. I know that.

Mr. STEARNS. Thank you. Mr. Padden.

Mr. PADDEN. I think Mr. Dodge said he wasn't sure it was lawful under his statutory license but we are talking about is simply an arms length marketplace negotiated license where the local station says as the two Little Rock stations have said in their letters that are in the record to both DIRECTV and to DISH we, the local station, would like to license you in a normal contractual license arrangement, our local news to carry to these in-state viewers and I believe that all of the satellite operators are required to dedicate a certain percentage of their channels for public service programming. And maybe one thing you might think about is rather than worry about a blackout, simply license the local news and carry it on one of those public service channels that you are obligated to transmit anyway. I think it would be a tremendous service to your customers and it might help attract customers.

Mr. STEARNS. Anyone else on this question? Do you have anything?

Mr. KARPOWICZ. I guess my only thought would be the beauty of our six o'clock news and our eleven o'clock news, it runs at six o'clock every night and eleven o'clock every night.

Mr. STEARNS. Right.

Mr. KARPOWICZ. So compared to trying to schedule around a blackout of a sports event which is a live, fluid event that there is no timeframe, our six o'clock news runs 30 minutes every night and I would think that with server technology available as it is today that it would not be that difficult to set up a system like that.

Mr. STEARNS. OK.

Mr. PADDEN. All the networks I am told and certainly our network has given their affiliates the necessary clearance for the national news that is included in these local newscasts so there is no legal impediment in that regard.

Mr. STEARNS. I am just going to ask one more question, Mr. Chairman. The bill as such is we are trying to get the FCC to update the predictive model and the on-location test for digital broadcasting. Mr. Chang, what would be your advice to the FCC and then I will ask Mr. Padden. What would be your advice to the FCC?

Mr. CHANG. I think we said we are willing to adhere to the FCC's digital predictive model.

Mr. STEARNS. So the predictive model that they have now, you could adhere to?

Mr. CHANG. We would adhere to, yes.

Mr. STEARNS. OK. Yes?

Mr. KARPOWICZ. Again, I am not an expert relative to what that would entail but my sense would be that we continue to look at it but I don't think we have any major objections.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Stearns.

The gentlelady from California, Ms. Eshoo, is recognized for five minutes.

Ms. ESHOO. Good morning, Mr. Chairman, and thank you for holding this hearing. To all of the witnesses, thank you for being here and providing your testimony.

I have two questions. The first of Mr. Dodge, as a longtime supporter of public television, I am concerned with the disparate treatment that DISH is affording our nation's local public television stations. As you probably know, I have reintroduced in this Congress the Satellite Consumers' Access to Public Television Digital Programming Act to address DISH's refusal to negotiate meaningfully on the carriage of local multi-cast public broadcast programming. It has been brought to my attention that DISH is carrying the HD signal of the big four stations in 85 markets and yet to date, you haven't carried the HD signal of public television stations anywhere except in Alaska and Hawaii where you are legally obligated to do so.

In my district, for example, DISH is carrying the big four networks and KRON in HD but not in my local public television station, KQED. It seems to me that DISH is engaging in a pattern of discriminatory behavior against public television stations. Stations which are funded get some funding from Congress annually because of the quality of their noncommercial, educational programming that they deliver to the American public. I think that this behavior is reminiscent of past discriminatory actions including the

practice of placing public television stations and Spanish language stations on a second satellite receiver.

So my question to you is why is DISH almost alone in refusing to negotiate a carriage agreement with public TV that provides for nondiscriminatory carriage in HD and at least some multi-casting. I think if there is a market failure here, Congress should address it and I will continue to pursue that. Now, what is really deeply disturbing to me is that it has been reported that DISH has targeted the Hispanic caucus members and telling them that if my bill were to pass, DISH would be forced to stop carrying Spanish language channels. You know and I know and many of us know that this is really completely false. My bill does not prevent satellite carriers from carrying any program. It merely mandates the carriage of all digital PBS programming, and I know that I have heard the argument before that you don't have enough room, enough space and that you would have to drop some. And I would suggest that you drop some of your pay-per-view channels that carry soft porn. I would take PBS any day over soft porn so would you address yourself to the question as to why you refuse to negotiate a carriage agreement with public TV that provides for nondiscriminatory carriage in HD?

Mr. DODGE. I would be happy to.

Ms. ESHOO. I don't know about happy but if you can explain it, yes. I really can't, I mean I ask this every time we have a hearing on this subject matter and others have negotiated an agreement, you haven't. What is the sticking point here?

Mr. DODGE. Well, I guess first and foremost I believe we have for years engaged in good faith negotiations with the public broadcasters and during that process the FCC actually had a proceeding to determine how best to implement HD must-carry, that the public broadcasters fully participated in that hearing.

Ms. ESHOO. What was the most recent discussion you have had with the FCC?

Mr. DODGE. On that issue.

Ms. ESHOO. I mean with public broadcasting people. What is the most recent meeting you have had with them?

Mr. DODGE. I do not know the answer to that question.

Ms. ESHOO. Well you can get that back to us.

Mr. DODGE. I definitely can.

Ms. ESHOO. I really think that there shouldn't have to be legislation for you to get to do this and it seems to me that you have stayed in a place where I don't really think distinguishes you and you should look for ways to distinguish yourself. I mean you do other things that are good but this is you are cheating I think or holding back on the consumer because PBS is important in the life of the American people and I think what they do has already been set down and is a gold standard and this business of not having room and can't, you have got these pay-per-view things. You can make some room there. So I would like you to get that information back to me.

To Mr. Karpowicz, I know that Mr. Ross, a member of this subcommittee, is raising a very important interstate issue. I think I have an important intrastate issue. I have constituents in the southern portion of my congressional district that would prefer to

view the local news of San Francisco or San Jose but they are in the Monterey-Salinas DMA. Now, I mean there is a lot to be said obviously about localism and it is best served when the consumer has the choice to receive the broadcast signals of the community that they identify with. I don't know if you can appreciate the geography of the district but the identification is in the very southern part and not with San Francisco that it might as well be 500 miles away. That is not what they identify with and I know that these issues are politically sensitive but for many consumers in my district, these distinctions defy logic. How do you think localism and consumer choice are balanced correctly in the new digital age?

Mr. KARPOWICZ. I think.

Ms. ESHOO. It seems to me that we have got some kind of blurred old line dictating this.

Mr. KARPOWICZ. Well, I don't know if the lines are old to the extent that the DMA lines are changed every year and are up to variability and every year.

Ms. ESHOO. How about old looking?

Mr. KARPOWICZ. But to answer your question relative to your constituents in Salinas-Monterey, if in fact the cable systems down there wanted to make a deal with the broadcast stations in San Francisco to get those newscasts that can happen today. There is no reason to change the law. Where the broadcasters have said we have a problem with what Congressman Ross was proposing was the ability for the viewers in Salinas-Monterey to get two Wheels of Fortune, to get two Desperate Housewives. We don't think that is necessary but if in fact there is interest in the community to get local news out of San Francisco that can happen now without any change in the law.

Ms. ESHOO. All right. Well, we may follow up with you on that but I appreciate your answer and, Mr. Dodge, I would like you to get back to us and I wish that we didn't have to use the hammer of legislation to get these negotiations done and done well and out of the way. I just would really urge you—I mean you said that you have negotiated in good faith. I don't know when that was. I don't know if it was 5 years ago, 2 years ago so I am asking the date but I would use this hearing to once again urge you to come to the table and really take care of this. For you to be leaving out public broadcasting and carrying some of this other stuff, it just square off with consumers so thank you.

Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you, Ms. Eshoo.

Mr. DODGE. If I could address one of the issues you brought out.

Mr. BOUCHER. Very briefly, Mr. Dodge.

Mr. DODGE. Thank you. First, we are working with Congresswoman DeGette's office referring to the last hearing to set up another round of discussions with PBS.

Ms. ESHOO. I am sorry. I didn't hear you.

Mr. DODGE. I said we are working with Congresswoman DeGette's office to set up another round of discussions with the folks from PBS as we said we would at the last hearing.

Ms. ESHOO. Well, I would like to be included in those if I might. I think that I can bring something to that. You may not think so but I think I can.

Mr. DODGE. I have no reason to believe you wouldn't.

Mr. BOUCHER. OK. Thanks very much, Ms. Eshoo.

Mr. MOUNTFORD. Mr. Chairman.

Mr. BOUCHER. Mr. Mountford, we are going to move on to the next member now who is going to be asking questions.

The gentleman from Georgia, Mr. Deal, is recognized for five minutes.

Mr. DEAL. Thank you, Mr. Chairman.

I have this mental picture that we are all standing on the loading dock of a train station. Some of us are holding the hands of some people that we call orphans. Some of them are wiping their eyes and they are sniffing and people are sitting in those railcars that are saying come on over, we would like to adopt you. And we are being told as we hold their hands and saying, well, Congress has said you don't belong to them, we have let you be adopted by somebody else. And the only answer that I have heard today is to say to those orphans, well, we will let you go to their house and you can watch the local news but as soon as the news goes off, we are going to turn that television off and you got to come home because you belong to us. Congress has let us adopt you and by the way, you got to pay us because we have adopted you. Now, that just doesn't make a whole lot of sense to me and the question I guess that comes up is why is that fair, and if we are not going to deal with it today what other piece of legislation and what time-frame is going to be appropriate to deal with that issue? And I will just let you all talk.

Mr. DODGE. Well, I would say it is fair and there is more than that, there is a precedent for it. As Mr. Chang and I both said in our testimony, this issue was recognized in 2004 and was fixed for four communities to great success for the consumers and as far as I can tell, to no harm to the broadcasters. And the reason I say that is because if there was some harm I think we would be hearing about it for the last four years and I haven't heard a peep so I think it is unfair.

Mr. CHANG. I would reiterate what Mr. Dodge has said, I think that we feel there is a solution and it has been proposed and we want to support it. I think that what is difficult for us is what these folks have suggested in terms of and what you reiterated which is having it only be able to watch the news and then getting sent home and that is difficult for us to implement.

Mr. MOUNTFORD. I agree and it is not only just the orphan next door. It is the orphan anywhere else in the country. My wife has a sister who lives in a different city and her sister calls her up when she is watching a different program and sees a commercial that she wants my wife to see. That wouldn't happen if we were only showing the news. So and it doesn't happen obviously but there is one other quick point I would like to make about the predicted model. This sheet tells you got in my written testimony, it shows the mathematical formula on a predicted model and how much outage is predicted and I also have a disc for you, a DVD that shows you a 30-second outage, 7½ second outage and other outages which we can supply to you now or later. Thank you.

Mr. PADDEN. Mr. Deal, the rationale that has been articulated to us for Mr. Ross' adjacent market proposal is to get in-state news



and other in-state local programming to viewers and we are just here to explain that that can happen today. It does happen today as I said in my testimony. We own a TV station in Philadelphia. Our cable operator is in Harrisburg who believe their customers have an interest in seeing our Philadelphia newscast and they provide it to their customers today. And we got the two leading local news stations in Little Rock to send letters to DISH and to DIRECTV saying we are ready to sit down with you and make arrangements for you to carry out Little Rock news into these Arkansas counties in the Shreveport market. To date, I don't believe the local stations have even gotten a response from DISH or DIRECTV.

Mr. DEAL. Is your answer that they have to turn it off after the news goes off and go home?

Mr. PADDEN. No, my answer is that in our free market society, it is wrong for the Congress to abrogate free market negotiated exclusive licenses just so people can watch Desperate Housewives on two channels at the same time. That is wrong.

Mr. DEAL. I understand your concern for your affiliates but I don't understand why you would take your programming and put it on ABC.com and totally bypass your affiliates if that is your concern.

Mr. PADDEN. Well, actually we don't totally bypass our affiliates. We have included our affiliates in that operation. We use a geo-location service. There are four commercial positions in each program on ABC.com and the local affiliate gets to sell the ad in one of the four, very similar to the shared advertising arrangement we have on our network. We are also concerned about local advertisers who the local station says would you like your ad to run in Desperate Housewives, well yes I would and I am going to pay you a lot of money to run it in Desperate Housewives but if you bring in a second Desperate Housewives at the same time, some portion of the audience that that local advertiser expected to reach is not going to see his ad because they are watching the out-of-market signal. We are completely sympathetic.

Mr. DEAL. Even if that advertiser has to try to attract that audience from across State lines which doesn't make a whole lot of sense to me, quite frankly. Yes, sir.

Mr. KARPOWICZ. I guess I would say that given the example that I gave in my testimony about our station in Greenville, we would be challenged to continue to produce six hours of live, local news everyday if in fact our advertisers were being whittled away by other signals coming into our market. I mean if Mr. Mountford's sister-in-law was watching a commercial coming in from Indianapolis versus the commercial that I ran in Greenville, that is a viewer that I have lost.

Mr. DEAL. Well and you say you got four percent in North Georgia and I use to be in that four percent area and had to buy television in Greenville to reach four percent of your market. Got a lot of votes in South Carolina by running political ads in Greenville, but they realistically could not vote for me. Those four percent in that northeast Georgia area that are having to be tied into your Greenville station, I think in many instances would prefer to be tied into the State of Georgia where they live and I just I do not see why we allow these artificial negotiated arrangements to inter-

fere with that and or why there can't be some realistic accommodation to it other than going dark or going blank or having to duplicate.

Mr. BOUCHER. Thank you very much.

Mr. DEAL. Who in the world would like to have two versions of Desperate Housewives is beyond me.

Mr. BOUCHER. Thank you very much, Mr. Deal.

The gentleman from North Carolina, Mr. Butterfield, is recognized for five minutes.

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman, for convening this hearing today and I particularly want to thank the five witnesses who have come forward. I am sorry I missed your testimonies. I have a written copy of your testimony in my binder and when I get a chance I will try to scan most of those.

Mr. Chairman, as you know, I am relatively new to this committee and so this subject matter is new and so I am trying as best I can to learn it and get up to speed on it. When I first got appointed to this committee, the broadcasters in my State came to my office and very painfully and carefully worked with me in trying to understand SHVERA and I am still struggling to get the detail and so this hearing today is certainly very helpful. I am going to ask unanimous consent, Mr. Chairman, that my opening statement that I was not able to give be included in the record.

Mr. BOUCHER. Without objection.

Mr. BUTTERFIELD. I had two questions that I brought to the committee and, Mr. Chairman, you asked one of those two questions and so I only have one that I would like to very briefly ask if I can find it but it has escaped me. Here it is. It deals with the terrestrial loophole and I want to address this again to Mr. Chang and to Mr. Dodge and the terrestrial loophole permits vertically integrated cable operators to deny programming to certain multi-channel video programming distributors when such programming is not transmitted by way of satellite. What can you tell me about the terrestrial loophole and any harm to customers who might not be able to get this programming?

Mr. DODGE. I think I would let Mr. Chang take that because of the programming expert.

Mr. CHANG. We do believe we are at a disadvantage to the cable operators on account of the terrestrial loophole in the areas that this exists particularly in the Philadelphia market. We do see penetration rates in terms of our subscribers take lower than in other areas and I mean it is due to the lack of local sports programming. I think that simply put it is we are at a disadvantage because we don't have that program to share with our customers.

Mr. BUTTERFIELD. Do you concur with that, Mr. Dodge?

Mr. DODGE. We do and I don't see why the method of distribution is relevant to whether or not we have access to the programming.

Mr. BUTTERFIELD. All right. Thank you and I yield back, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Butterfield.

The gentleman from Illinois, Mr. Shimkus, is recognized for five minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman.

My first question will be to Mr. Karpowicz. I know there has been talk on the regional aspects and crossing State lines. In my opening statement I mentioned that I had five DMAs that cover my congressional district so depending upon the intensity of the campaign you make choices and you eventually buy. You guys like it. We have to buy all even though the broadcast sector of who we are going to hit could be very, very limited. If the Ross bill, how would the Ross bill affect smaller broadcasters? If in my five DMAs, if they all had to compete with St. Louis how would they affect, you know, the other four or really the other four probably would be competing with maybe Indianapolis and maybe Memphis and so maybe you would have a sector there that would be challenged. What is your response to how they affect the smaller broadcasters?

Mr. KARPOWICZ. Effectively, what would happen in those smaller DMAs with a St. Louis or an Indianapolis station coming in over the top not only with local news but with additional NBC programming or CBS programming or Fox programming and additional syndicated product, I think it would put a tremendous challenge on those broadcasters in the smaller DMAs to have the same resources available to them to continue to provide the services that they provide today because their audience would be splintered, quite frankly, so that instead of having all of the audience for 60 minutes, you may have, you know, audience coming in from KMOV in St. Louis would be coming in over the top. That is the risk that we run that the small broadcasters and this is a very difficult time for small broadcasters. I have a station in Flint, Michigan that is going through an incredibly difficult time right now and to put this burden on those broadcasters whereby they would have additional signals coming in over the top, I think it would really hinder their ability to serve their local communities.

Mr. SHIMKUS. So it is not just the news aspect. I mean I think that is where a lot of members come. It would be, you know, if it was broadcasting in but there is the basic programming would in essence compete with the local broadcasters paired programming.

Mr. KARPOWICZ. I think we have tried to be—we are sensitive to the fact that, you know, these out-of-state stations or I guess in-state stations out of DMA stations that may want to come in and that constituents in those areas, those counties may want to see their news from the capital, for example. We understand that but we think that if that is limited to local news that that should be adequate to serve their needs but we don't see any need for duplicative programming to come in over the top of those smaller broadcasters.

Mr. SHIMKUS. What about the issue of emergency service broadcasting for the elements that may be occurring?

Mr. KARPOWICZ. Well as I indicated in my testimony, in most cases as we have looked at these, in most cases the severe weather would be closer to their DMA base so in the case of Greenville that I had given in my testimony, if Greenville is only 25 miles away, they are certainly going to be responding to severe weather that is happening up in North Carolina more quickly than Charlotte would be which is 95 miles away. And beyond that, I think every broadcaster understands it is their responsibility to make sure that they cover everyone in their DMA with emergency services, weath-

er updates and so forth. So whether it is at the far northern end of your DMA or the far southern end, it is our responsibility to cover that.

Mr. SHIMKUS. Yes, I would tell you in just about a month ago, maybe 5 weeks ago we had what was called an inland hurricane in southern Illinois which in essence wouldn't have been covered by St. Louis just on the periphery. It would be covered by Carbondale. It would have been covered by Marion. It would have been covered by maybe Paducah, maybe Cape Girardeau but it was a major, major event that the public really had to be concerned about.

Mr. PADDEN, if you could wave the magic wand and eliminate all statutory and FCC video regulations so that Disney could negotiate directly with any entity that wants to distribute Disney programming to anyone that wants to watch it, would you?

Mr. PADDEN. Absolutely. We negotiate with every program distributor today for all of our networks and programs except ABC because ABC is covered by the compulsory license. If the compulsory license and the related regulations went away, we would be working 24 hours a day to see that ABC was in front of every set of eyeballs in America because that is how we make our money, and the more rules that the government layers on top of this compulsory license, the more mixed-up the market gets.

Mr. SHIMKUS. Do you think that approach would lower cost?

Mr. PADDEN. Yes.

Mr. SHIMKUS. Thank you, Mr. Chairman. I yield back.

Mr. BOUCHER. Thank you very much, Mr. Shimkus.

The gentlelady from the Virgin Islands, Ms. Christensen, is recognized for five minutes.

Ms. CHRISTENSEN. Thank you. I am similarly situated to my colleague here from North Carolina being new and new to some of the issues so some of my questions may be very basic but one question to Mr. Padden. On the issue of securing so-called orphan counties with in-state local programming, you testified that the satellite carriers can today cut deals with local stations to retransmit those signals. Do your affiliation agreements prevent your affiliates from granting retransmission consent to send the signal outside of that station's DMA?

Mr. PADDEN. There is nothing in our affiliation agreement that prevents our local affiliate from making an arrangement for their local news and other local programming to be distributed by anyone they want.

Ms. CHRISTENSEN. On the issue of the DMAs from listening to Mr. Karpowicz and looking at your testimony you think that it is fine the way it was. We don't need to change it because that has come up in several hearings and I would like to just know what all of the panelists feel if we can work within the DMAs as they exist today or do we need to change them?

Mr. KARPOWICZ. I believe we can.

Ms. CHRISTENSEN. Because it would seem to me that—I mean I come from a small community so I can't even use mine—but if say the southern part of North Carolina was in with South Carolina and might be much more similar to the northern part of North Carolina, so DMAs should work. Does everybody agree or do we need to change how the DMAs are configured.

Mr. KARPOWICZ. The DMA is determined by the Nielsen Rating Company and it is a measure of to which city is most of the viewing from this county directed, so it is a living definition that changes every year based on to which television market the people in that county are directing most of their viewing. So by definition it reflects consumer preferences.

Ms. CHRISTENSEN. And we can address all of the emergency—the situation that Mr. Shimkus talked about is kind of scary if they can't get the information because they are based out of St. Louis.

Mr. KARPOWICZ. Right, I think as a practical matter what we have found is that the information coming from the DMA that those so-called orphan counties are in is certainly more relevant and closer to those counties than the information that would be coming from a distant DMA.

Mr. MOUNTFORD. Congresswoman Christensen, thanks for the question.

The DMA system works and people do want their local station however, how do I respond—and I have to respond to this about five times a day now—to a consumer who says how come I can't get your channel from San Francisco or from New York and my only response is because that is the law. People know that that channel is up there and that it is on their DISH Network system and they want to receive it. Why can't they.

Ms. CHRISTENSEN. Mr. Chang?

Mr. CHANG. From DIRECTV, we believe that the current DMA system is not perfect. It is also probably not wildly broken. I think we highlighted earlier in my earlier testimony some of the simple fixes we would probably make to the extent that this became part of a broader discussion including dealing with the orphan counties, the significantly viewed issue, the Grade B, and all that sort of stuff.

Mr. DODGE. I think it is not surprising we do favor DMA reform because I guess in the broadest sense we think as technology evolves and the current market in which we live where contents are free on the Internet, a consumer should be able to decide what is local for them, and for every case where there might be an example where you are in an out-of-state DMA and that is actually closer to your home, there is probably a case where it is not true. For example, in Wyoming there are many people in the Denver DMA where Denver is actually about 300 miles from their house. And similarly, although there is a parade of horrors that gets rolled out every time the concept is floated, we do have examples today of the four markets where this was approved in 2004. And if you look at Vermont, I don't think you hear the Albany broadcasters or the Boston broadcasters complaining that the folks in southern Vermont have access to Burlington signals.

Ms. CHRISTENSEN. OK. The committee staff had mentioned in the briefing that satellite carriers and I guess I would direct this at Mr. Chang and Mr. Dodge, had problems with the interpretation of Section 340 of equivalent bandwidth as being too restrictive and therefore limiting the practical utility of it for satellite carriers. Could you explain what concerns you might have with that or are there no concerns with the interpretation of equivalent bandwidth as being too restrictive?

Mr. CHANG. I think in the prior bill and I believe it is being or in the current draft it has been changed to the language that we think is fine in terms of the equivalent bandwidth?

Ms. CHRISTENSEN. OK.

Mr. DODGE. We agree.

Ms. CHRISTENSEN. Thank you. Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Ms. Christensen.

The gentleman from Oregon, Mr. Walden, is recognized for five minutes.

Mr. WALDEN. Thank you very much, Mr. Chairman. I appreciate the panel and the testimony today and I wanted to thank DISH Network, Mr. Dodge, thank you for your opening statement announcing you are going to be in the Bend market, local-into-local by July 9. We appreciate that in the Bend market. I was down at another hearing that is going on in the O and I Committee so I wasn't here for the openings. I am a big fan of local-into-local and I would certainly encourage you to continue on down the rankings until all communities that have television have that ability and the viewers have that ability to see their local stations on their satellite system.

I want to talk a little bit about this notion of the evils of blacking out the rest of the duplicative programming and the effect that has on viewers. I have before me a channel changing device and it seems to be that during the course of any day, people pick and choose programs on different channels whether it is over-the-air broadcast, or cable, or satellite. And it seems to me that if I want to watch an out-of-market local program, I have the ability to push this button. I won't because God only knows what I will do to this monitor but I will never get it back. But I would have that ability wouldn't I? I mean this happens on your systems, right? People change channels.

Mr. DODGE. You certainly would.

Mr. WALDEN. They do that with pay-per-view, right? The pay program ends, they are done. It goes blue screen to the next pay program until they buy, right?

Mr. DODGE. That is true for pay-per-view. I mean I think the general concept is as you are scrolling through people don't want to see a black screen 90 percent of the day.

Mr. WALDEN. But they might see a blue screen with a pay-per-view sales pitch, right? So I mean you do that.

Mr. DODGE. Well but, you know, quite frankly if you are watching the news and you don't want to change the channel, you want to just roll on to the next program.

Mr. WALDEN. Can you get that mike a little closer, too.

Mr. DODGE. If you are watching the news and it is rolling into your next favorite program, you know, why should you have to change the channel when you could otherwise?

Mr. WALDEN. Well, yes but I think viewer habits are such that people do watch the local news and I know this will be sacrilegious to those in the networks but they may choose a different network newscast then the one that—I mean they change, right? They make those choices. Let me—so it seems to me that you have a legal way to do non-duplicative programming a customer wants to see by it

can be offered to cable and satellite customers without a change in the law, correct, if you negotiate it for their local content?

Mr. DODGE. We are actually not. I am not certain of that. Mr. Padden said that ABC has granted the right to all of its affiliates to broadcast.

Mr. WALDEN. Well, you would have to negotiate it. It is their local programming but you would have under the current law you are allowed to do that?

Mr. DODGE. Included in their local programming are advertisements for which they may not own the copyright and therefore have the rights to allow us to broadcast it because it is out of their DMA.

Mr. WALDEN. Well, correct.

Mr. DODGE. And their national content as well although Mr. Padden says.

Mr. WALDEN. Right but they would have to order. That would be their responsibility.

Mr. DODGE. It would.

Mr. WALDEN. To make sure they are offering you something they are legally allowed to offer, right?

Mr. DODGE. It would, correct.

Mr. WALDEN. And that doesn't require a change in the law?

Mr. DODGE. If they have those rights, it would not.

Mr. WALDEN. Right, that is all I am talking about. I am not talking about selling you the Brooklyn Bridge, you know. If they have the rights to sell it they should be able to sell it. Mr. Padden, isn't that correct?

Mr. PADDEN. That is absolutely correct and it is being done today by cable operators.

Mr. WALDEN. Mr. Karpowicz.

Mr. KARPOWICZ. And in addition to ABC, we also know for a fact that CBS and NBC have agreed that any content of theirs that would end up in our local newscast, we would have the right to move that forward to a provider.

Mr. WALDEN. And I serve in a district of 70,000 square miles with all kinds of media markets surrounding. I am not unsympathetic to my constituents certainly who would like to see Oregon news. If you are out on the Idaho border and 360 or 400 miles from Portland, I still have people out there who say I would like to see the Oregon news but what I am hearing in this hearing is there is a way to do that within the law to get that product because they don't say I want to see, pick your show. They are really talking about how they get that local news and that seems to me it can be done now. And I know that you raised a technical issue of how you would go in and out of that local programming that would come up to your satellite systems. Now, I confess I spent almost 22 years in the radio business and actually have been on the cool end of a soldering iron a number of times wiring in those satellite receiver systems to pick up different programming, and they are pretty sophisticated yet simple if I was able to make it work, systems of switching, and couldn't the local stations as you do your uplink simply have a coded digital switching, Mr. Karpowicz? Isn't that the way it works?

Mr. KARPOWICZ. Yes, you would build in a tone and the tone would trigger a switch at their head end which would then trigger the programming.

Mr. WALDEN. I mean this happens all the time so I think that is important for the committee to know. It is not—this is sort of normal backroom stuff and the engineers do all the time. And I guess my final question would be to Mr. Mountford because you said how many interruptions should be allowed per hour in terms of this digital programming I think you meant. Don't you face that problem with satellite distribution, you know, especially during the sort of sun cycles in the spring and the fall? Don't you have interruptions, as well, and storms?

Mr. MOUNTFORD. Absolutely.

Mr. WALDEN. And I am not picking on satellite.

Mr. MOUNTFORD. No, no, no.

Mr. WALDEN. You get your share of digital interruptions, so does cable and so does broadcast now.

Mr. MOUNTFORD. There is rain fade and there is sun interruptions but in the predictive model what you are saying to a rural consumer is that if you are saying it is 90 percent viewability, you are saying that 10 percent of the time we are going to allow your signal to be totally unviewable. Now, mathematically that would work out to as I said before, 12 30-second interruptions which is totally unacceptable or even six 1-minute interruptions in an hour program. I truly believe that the FCC has to tighten that standard because it is digital, because an analog interruption is twice as bad.

Mr. WALDEN. Is much different. Much different, I agree. Mr. Padden, Mr. Karpowicz, do you have any?

Mr. PADDEN. We favor the Congress adopting the noise-limited signal intensity standard in Section 72.622(e)(1) of the FCC's rules.

Mr. WALDEN. And you were just reading that again this morning, I bet, that whole rule.

Mr. PADDEN. It is fascinating. You know, if I could make one point. I have just met Mr. Mountford. He is a wonderful man, a great advocate. He is in the business of selling ABC to people. Now, how does that happen? We have no contract with him. We spent billions of dollars a year creating this programming. He is selling it to people by satellite. He neither owns the network nor a satellite system. This is entirely a creation of the Congress and it helped get the satellite industry launched but the existence of 500 other networks that we manage to get out to satellite customers without government intervention strongly suggests as the copyright office found, that we ought to be looking at how to phase out of what we have got here because I just think the existence of someone who is selling something that is not theirs through transmission facilities that are not theirs, suggests that there is something wrong here.

Mr. MOUNTFORD. We pay for that programming. It is called the copyright fee and so we do pay for it. We also pay for all of our transmission facilities, our backhauls through a lease agreement. Thank you.

Mr. PADDEN. My point only is you are paying a price set by the government rather than through a negotiation with the people whose programming you are distributing.



Mr. MOUNTFORD. And the government has chosen to set that price as a fair price.

Mr. BOUCHER. Thank you very much. Thank you, Mr. Walden and gentlemen.

The gentleman from New York, Mr. Weiner, is recognized for five minutes.

Mr. WEINER. Do you guys want us to leave while you keep doing this?

Mr. Chang, does DIRECTV produce content in the classic sense? Does it produce programming?

Mr. CHANG. We do produce a limited amount of programming.

Mr. WEINER. I mean I don't mean like what is on TV at eight o'clock, nine o'clock and ten o'clock but that is not your primary model here, is it?

Mr. CHANG. No, our primary model is the distribution of programming content.

Mr. WEINER. I just think it is worth us taking a step back here as a group and recognizing that consumers do have, in your term, an interest in wanting to choose from moment to moment what is on their screen but there is also a higher imperative that Congress has always endeavored to protect to make sure that content in the general sense was incentivized by the marketplace and that we figure out how we get people a rich amount of content distributed in a way that they want to get it.

Now, that latter part, how they want to get it, is changing every single day but one of the things that we try to do and I think that Mr. Boucher's draft does, is it protects the idea that yes you naturally want to be able to go out and distribute Mr. Padden's content any which way you want but we need to figure out a way to incentivize Mr. Padden's company to produce it and that is ultimately in the long term interest of our constituents, as well. If you—you know, you are not going to have Desperate Housewives getting produced at all if we don't have a model that allows Disney or ABC to produce the content, negotiate for how it is distributed in the marketplace. So I think we have to be careful not to say yes, why shouldn't someone be able to get five or six or eight Desperate Housewives because that is a model that would have guaranteed them in a very short time of being able to get none.

That also—now I don't know in Mr. Deal's metaphor which I frankly lost track of—I don't know who is holding the hand and whose hand was being held or who was on the train or who was driving the train or what the next stop was but I do know that if we look at the interests of consumers, we can't only look at the near term decision that they may want to make to see content. We also have to figure out a model that works that incentivizes creation. Now, sometimes the industry is going to have to work that out and they did it woefully badly in the music business but sometimes government is going to have to help by saying that we are going to be much tougher and making sure people can't copy or pirate information. So we strike that balance here and I think that Mr. Boucher's bill does that fairly well. If there seem to be kind of shotgun relationships between your companies, it is because we are trying to find the way to ensure that we incentivize content being produced.

It is not in Mr. Chang's job description to be all that concerned about it. You are trying to figure out a way to get consumers as much choice as you can, zapping it all over the place and I can tell you as someone who represents New York City, I probably would benefit. My, you know, when Mr. Shimkus says probably the opposite for me. I probably could run statewide just advertising in New York on New York City because the guys in Albany wouldn't have a chance to compete against the resources of a New York market. So I just think we have to remind ourselves that the interest of the consumer is not a near term thing, it is also a larger framework that we invoke going back to the Cable Act in the '80s, we have tried to balance. Maybe we don't get it exactly right. Mr. Chang, do you want to respond to that?

Mr. CHANG. Sure. I don't disagree with you. I think that it is in the interest of the consumers long term to deliver as much content as possible that they want to see. I think that where you talk about incentives for the content producers to make sure that they can invest in their content, similarly I think we need to talk about not having disincentives for folks like us on the distribution side who provide a very valuable service to customers, not having to invest in unnecessary technologies or capital investments such as potentially duplicating signals and thereby wasting valuable bandwidth in terms of having to black out for instance, programming that is not the local news. When, in fact, we think the impact of what we are talking about here is limited in nature and I think in the limited areas where it has been done in the past, we don't believe that there has been a significant impact. So I don't think there is a huge disincentive from a content producer's standpoint and for folks like Disney, who also own multiple other content sources, I think it is up to them to decide how they want to divvy up their own internal resources and whether they put it on ABC.

Mr. WEINER. But it is also under their control to decide when they are making contractual arrangements of how and when their product is going to be distributed in local markets to not have the specter of you guys hanging over and say we will just drop in someone else here. I think that is the problem. The problem is they have a right to some control over their content and I think you agree with that and you say that well in some selective cases they should lose that control and I think that is where you and I part company. I mean I think that if we both agree, you know, Mr. Padden says that his solution and Mr. Karpowicz says their solution for getting local content, they say it is a relatively small thing. You say your solution is a relatively small thing. The problem is your relatively small thing would have a rather dramatic structural problem in those communities that you are seeking to serve, meaning essentially Mr. Padden would lose the right to make exclusive arrangements, essentially.

Mr. CHANG. Right but I would ask a question. I mean how big or what percentage of the population are you talking about and how would that really impact the programming cost.

Mr. PADDEN. I just come back to you want to abrogate our contracts for the purpose of the customer being able to watch the same show on two channels. I just don't see the public benefit.

Mr. CHANG. No, we are trying to respond to Congressman Ross and his desire to have his constituents as well as several of the other congressmen, have their constituents be able to watch relevant programming and try to do it in a fashion that is not a huge burden to any one of us from an economic standpoint.

Mr. WEINER. Well, can I interrupt this conversation and ask this question, Mr. Chang. Do you agree that you shouldn't be in a position to offer Desperate Housewives on two different stations in the same market?

Mr. CHANG. What I would agree with is that we are trying to deliver relevant programming to customers.

Mr. WEINER. Understood. But would you answer, take a stab at my question. Do you agree that you shouldn't have it in your rights to distribute two Desperate Housewives not the housewives but the show, two Desperate Housewives?

Mr. CHANG. That I would agree with.

Mr. WEINER. To the same customers?

Mr. CHANG. Listen, I think that when you take into account the law and the various contracts, it is what it is in terms of what we are allowed to do. All we are asking for is to try to be responsive to various members and their requests that their customers can see, their constituents can see relevant programming.

Mr. WEINER. Well, I have already gone well over my time and I thank you, Mr. Boucher, but I think that if we can reach one conclusion that the answer is no, they shouldn't be able to because that severely undermines Mr. Padden's ability to negotiate a contract and therefore by extension, to produce the content. And I think we are at a foundation where Mr. Boucher starts us which is let us try to solve the other problem and I think then I think you will find broad agreement here and I think we want to solve Mr. Ross' problems but I don't think that what your solution is, is a real structural undermining, at least in those communities there is structural undermining of the thing that makes Desperate Housewives available once, let alone twice but I thank you, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Weiner.

The gentleman from Arizona, Mr. Shadegg, is recognized for five minutes.

Mr. SHADEGG. Thank you, Mr. Chairman.

As I sit here and listen to this debate and review the issue, I have got to tell you that it drives into my mind the issue of our inability to discern reasonable requests from unreasonable requests. Mr. Chang, you just struggled mightily to try to answer Mr. Weiner's question about whether or not people should be able to see Desperate Housewives two times. I guess you would have the same problem with people demanding to see it 20 times on the same TV station in one town. And the problem with that is that Mr. Padden's constituents, the people he represents, have to have the capital to make attractive programming and if you are allowed to sell that programming in one particular area two times, five times, eight times, each time it gets sold or made available in the same area and you say they are demanding this, I don't particularly see that demand. I don't see—I am not sure I know why anybody watches Desperate Housewives but I don't know why you

have to be able to watch it twice at once. And I guess it seems to me that with regard to local news or with regard to sports, I can understand some issue but how do you deal with the fact that Mr. Padden has right now a certain level of exclusivity that lets him market that product in a way that creates enough economic value that he can produce something that is worth watching. And how is Mr. Ross' problem not solved by what is currently available?

Mr. CHANG. Again, I don't know specifically how many people we are talking about and what sort of overlap we are talking about whereby people would get duplicative programming such as Desperate Housewives and what that would do to his advertising.

Mr. SHADEGG. Well, let me stop you right there. If we don't know how big a problem this is, why are we struggling here in this hearing so mightily to overcome it?

Mr. CHANG. Well, we don't think it is a large problem. I don't know the specific number I guess is a better characterization. And I guess the question that I would have back to these folks, is if we end up having to duplicate signals and thereby investing a lot more in terms of our satellite infrastructure and our maintenance infrastructure, is that our burden to bear alone to solve this problem or are they going to pay for that?

Mr. SHADEGG. Well, why don't you ask the customers to pay for it? If the customers really want that local thing, why don't you make that pay-per-view? Mr. Padden, let me ask you, have I accurately expressed your concern with regard to having the same show made available multiple times in one market or otherwise destroying the economic value of what you produce?

Mr. PADDEN. Yes, you have captured it precisely and let me give Derek an example. Under Mr. Ross' proposal, the satellite operators would be able to bring the Richmond stations to every household in northern Virginia in the Washington, D.C. television market. They represent about a third of the market. You would be duplicating the exclusive network programming in a third of the market. It would have a devastating impact on the Washington station. On the other hand, if what we are trying to do is get Richmond news to folks in northern Virginia, there is absolutely no bar under current law for you to negotiate a deal with the Richmond station to carry their news to your northern Virginia customers and we would encourage you to do that.

Mr. SHADEGG. Mr. Mountford, you said that the only thing that stops this from happening right now is the law. I guess I would say to you that is right. It is the law of copyrights. Mr. Padden has a property right to the program he produces. If you diminish that property right, you can destroy the value of the program he produces and we will have nothing worth watching. It seems to me that nobody here is looking at the choices people make. If somebody chooses to live in some backwater town in Idaho or Montana or Wyoming and they say but I want to be able to watch the Miami local news station in Miami because my sister lives in Miami and I want to look at the news she is watching, maybe you should make that available to her for a price and let her pay in Wyoming to watch the news programming in Miami, Florida but I don't see how you should do it in a way that costs Mr. Padden his business.

Mr. MOUNTFORD. That is exactly what we want to do, is offer it to the person in Wyoming at a price.

Mr. SHADEGG. So she can buy the second right to watch Desperate Housewives.

Mr. MOUNTFORD. Well, it wouldn't be Desperate Housewives.

Mr. SHADEEG. You would compensate Mr. Padden for the diminution in the value of Desperate Housewives in that marketplace?

Mr. MOUNTFORD. We would pay what, you know, either a negotiated agreement or a set copyright fee to the providers. That is what we do today, for people in Wyoming, for example and a lot of the rural customers, it wouldn't be a duplicative program because they don't get it. They don't get their station. That is why I am advocating the 99 percent viewability standard because at 90 percent it is going to say you get your station but 10 percent of the time it is not there but Congress says you get it, so that is the law. That is not right.

Mr. SHADEGG. I think he is now saying, Mr. Padden, he is willing to pay you but I don't see that in the legislation before us.

Mr. PADDEN. No, if the government wasn't involved we would have every economic incentive to meet with and license our content to anybody that can get us additional eyeballs because that is in our self-interest.

Mr. SHADEGG. That is the copyright you are selling. Thank you.

Mr. BOUCHER. Mr. Shadegg, thank you very much.

All of the members present have been recognized for questions. We want to thank our witnesses very much for your testimony here today. This subject is always interesting. Every five years we address it again and it seems to get even more interesting over time, so thanks to all of you for excellent testimony today.

And with that this hearing is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Statement of  
Representative John D. Dingell  
Committee on Energy and Commerce  
Subcommittee on Communications, Technology, and the Internet  
Hearing on a "Discussion Draft to Reauthorize the Satellite Home Viewer Act"

June 16, 2009

Thank you, Mr. Chairman. At issue today is the reauthorization of the Satellite Home Viewer Act (SHVA), whose provisions are set to expire at the end of this year. As I stated during the Committee's February 24, 2009, hearing on this matter, I support your goal of a clean reauthorization of the Act. SHVA was authored with the intention of fostering competition among Multichannel Video Programming Distributors, while at the same time preserving the viability of free broadcast television. The Act helped to balance these at times conflicting objectives, and I fear that consideration of issues not immediately related to SHVA's reauthorization indeed may threaten to defeat the Act's original purpose and, more importantly, may cause imprudent delay, especially in light of its looming sunset.

I do, however, recognize that developments in the marketplace for satellite and cable services have necessitated changes to the regulatory framework that govern them. This in mind, I commend you, Mr. Chairman, for the targeted and thoughtful manner in which your bill addresses the matters of so-called "short markets" and significantly viewed signals.

It is my hope that today's proceedings will be marked by collegiality and ultimately lead to consensus-driven, common-sense legislation that serves the best interests of American consumers. Thank you for your courtesy, Mr. Chairman, and I yield back the balance of my time.

**Rep. G.K. Butterfield**  
**Opening Statement**

“Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act”

Today marks a significant step in considering a must pass piece of legislation this year that would reauthorize the Satellite Home Viewing provisions of the Communications Act. SHVERA, as it has become known through the most recent reauthorization in 2004, is yet the latest version of legislation which has become significantly complex over the years, as telecommunications technology has changed and advanced, and consumer viewing habits have matured to a changing market with a variety of options.

As a new Member of this subcommittee, I’ve tried to understand this issue as best as I can, but perhaps the most important means of doing this has been by listening to the opinions of those I’ve been elected to represent. I must say that the more discussions I have on this issue, the greater concern I have for the local broadcast industry in my district and the possibility of consumers to lose out on free over-the-air programming with a local perspective.

**Rep. G.K. Butterfield**  
**Opening Statement**

“Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act”

I understand there are various proposals that would address some of the pressing issues of competitiveness across the satellite, cable and broadcast markets – I think competition is a good thing, however, it is important that we not lose sight of this issue from the consumer standpoint and that we be cautious and deliberate about adopting measures that could have widespread ramifications throughout the television viewing market.

Mr. Chairman, I look forward to this hearing as I believe the testimony and subsequent questions will provide additional context for examining the underlying legislation – particularly in the context of a new all digital broadcast market – and will help us make more informed choices as we move towards a markup.



**Statement of Congresswoman Anna G. Eshoo**

Hearing on Reauthorization of the *Satellite Home Viewer Extension and Reauthorization Act*  
Subcommittee on Communications, Technology and the Internet  
June 16, 2009

Thank you Mr. Chairman and welcome to the witnesses.

During our last hearing on the *Satellite Home Viewer Act* I expressed my serious concern that access to local public television stations' digital programming is denied to almost half of all Direct Broadcast Satellite (DBS) households – that's nearly 12 million households – because one major DBS provider, Dish Network, has failed to negotiate an agreement with public television.

In response to this concern, I reintroduced the *Satellite Consumers' Access to Public Television Digital Programming Act* (H.R. 1155) to require DBS carriage of all public television stations' multicast digital signals. It is simply unacceptable for any household to be denied access to public television's digital programming, and I'm very pleased that DirecTV, the Association for Public Television Stations (APTS) and PBS reached an agreement whereby DirecTV would carry public television stations' digital signals.

This legislation would not be necessary but for the recalcitrance of Dish Network and their unwillingness to even discuss this issue with representatives from public television. Public television does more than other local broadcasters to serve their communities and provide programming that is relevant, educational, and targeted to the viewers it serves. Arguments that there is not room for public television on Dish's channel line-up, which apparently has ample room for out-of-market sports stations and pay-per-view adult movies, seem dubious.

I intend to pursue H.R. 1155 as an amendment to this legislation when it comes before the Committee, but I urge Mr. Dodge and his colleagues to re-engage with public TV to seek an agreement that would render my legislation moot.

Thank you Mr. Chairman and I look forward to the witnesses' testimony.



FOX TELEVISION AFFILIATES ASSOCIATION

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June 15, 2009

The Honorable Rick Boucher  
Chairman  
Subcommittee on Communications, Technology, and the Internet  
United States House of Representatives  
Washington, DC 20515

Re: Legislative Hearing on "The Satellite Home Viewer Act"

Dear Chairman Boucher:

Tomorrow the Subcommittee will hold a hearing to consider reauthorization of the Satellite Home Viewer Act. As Chairman of the FBC Television Affiliates Association (the "Association"), I would like to describe some of the unintended effects of the Satellite Home Viewer Improvement Act in 1999 ("SHVIA") and the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA") in 2004. The Association represents 170 television stations throughout the United States that are affiliated with the Fox Television Network. Our members represent stations in every size of market, from major urban centers to smaller cities which rely on service to rural areas to sustain their operations. We hope that the Subcommittee will take steps to correct the market imbalances created by the unintended effects of SHVIA and SHVERA.

The Subcommittee has done a great service through its efforts to enact SHVIA and SHVERA. These Acts have been by far the most important forces behind a tripling of the number of DBS subscribers in the past decade by providing viewers with a subscription television alternative. The Acts' facilitation of local into local service propelled the nascent DBS business to unparalleled success and allowed local broadcasters to reach more viewers. These Acts have allowed many Americans beyond the reach of cable systems, and even those beyond the reach of over-the-air signals, to receive local broadcast signals as well as complete packages of pay network programming. Undoubtedly, some over-the-air viewers who may have lost access to one or more broadcast signals as a result of last week's digital transition will be able to obtain those signals from a DBS provider.

It is fair to count SHVIA and SHVERA among the greatest communications policy successes of the past decade. Just fifteen years ago almost no American had a choice of multichannel video program distributors ("MVPD"), and millions of Americans had no

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access to MVPD service at all. Today almost all Americans can choose from two or three MVPD providers and many can choose from four or more providers. This competition has led to hundreds of millions of dollars in infrastructure investment and has greatly improved many aspects of MVPD service. MVPDs offer digital service, digital video recorders, video on demand, high definition channels, and many other services that did not emerge when cable systems were monopoly providers.

For all of their successes, though, SHVIA and SHVERA have had some unintended and unfortunate consequences. Intense competition among MVPDs in the past decade has shifted monopoly pricing power from MVPD distributors to pay television programmers. These programmers impose excessive price increases on MVPDs. Further, they require MVPDs to carry very expensive networks on the basic tiers so that essentially all subscribers must purchase a bundle of networks whether they watch them or not. MVPDs accept the rates and terms demanded by leading cable programmers, because loss of some cable networks may cause subscribers to switch to a competing provider.

Consumers ultimately pay the costs of these practices. Programming that used to be free to viewers is steadily migrating to pay television, and the price of pay television is rising every year. In the last decade consumer payments for cable and DBS programming have almost tripled, from \$8 billion in 1999 to \$22 billion in 2009. As program fees have grown, free over-the-air viewers have lost Monday Night Football, the Bowl Championship Series, many MLB and NBA games, scripted dramas and other programming. For free, over-the-air viewers, the loss of these programs is not a series of isolated events. It is a growing trend. This program migration is not preferred by viewers, as evidenced by the fifty percent reduction in the ratings for Monday Night Football since its move to ESPN. NBC has cancelled five hours of prime time program production and replaced it with a low cost talk show. Simultaneously, NBC Universal is increasing its original programming on its cable channels. Oprah Winfrey, whose syndicated talk show has been a staple of broadcast television programming for years, said she hopes to end broadcast syndication and move the Oprah Winfrey Show to her new cable network. "Oprah Winfrey and Discovery to Create New Cable Network," *New York Times*, January 16, 2008. When the MVPD market dynamic supports almost unfettered price increases, content owners, including the television broadcast networks, have little incentive to continue making their programs available to free over-the-air viewers.

John Malone of Liberty Media explained the leverage enjoyed by high-priced pay networks in a May 27, 2009 interview with *Barrons*:

"ESPN is far and away is the most expensive service the cable operators are required to carry. If you make it optional, cable industry would love you. Leverage is with the guy who has the key content. Distributors do not want to risk losing ESPN. Guys without leverage don't charge you much; guys who do won't let you buy channels a la carte."

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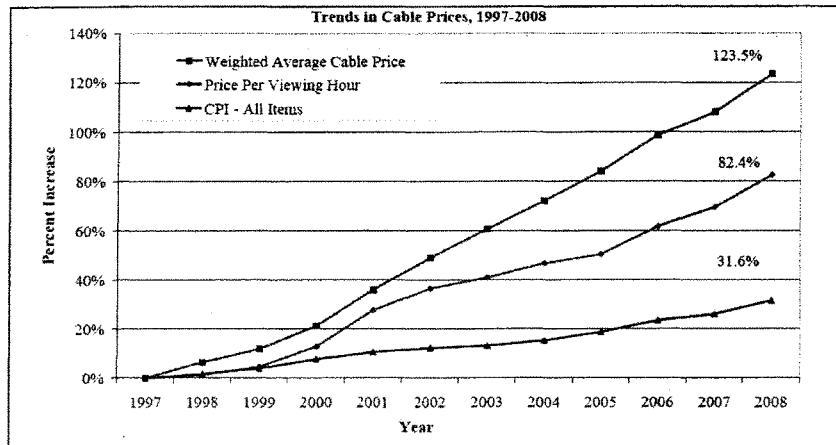
Just last week Time Warner Inc. chief financial officer John Martin reportedly told an audience at an industry conference that, despite the sluggish advertising market, cable network growth is expected to soar over the next several years, driven by strong affiliate deals and the shift of available advertising dollars away from broadcast outlets. Mr. Martin went on to say, "In general, our view is that as money moves from broadcast to cable, as audiences have moved from broadcast to cable...." Mr. Martin also stated "TNT also has a strong slate of original programs - 13 original shows this year compared to none in 2005." See "Time Warner CFO Martin: Cable The Place To Be Despite Economy, Cable Nets Should Grow" Mike Farrell, *Multichannel News* (June 11, 2009).

Cable network programmers use windfall profits to outbid broadcasters and their networks for high quality programming, thereby building even greater leverage to impose future rate increases on consumers. Program owners place their content on cable networks because cable networks can pay far higher fees, not because they reach more viewers. The Bowl Championship Series has moved from Fox simply because ESPN outbid Fox for the rights. "Fox pulls out of bidding for next round of BCS games," ESPN.com, January 11, 2009 (available at <http://sports.espn.go.com/ncf/news/story?id=3709030>).

The unchecked ability of programmers to force ongoing rate increases on consumers is harming every television viewer in America. Consumers who rely on free television are losing access to some high-value programming altogether. Consumers who subscribe to MVPD services must pay ever-higher rates, often for programming they do not watch. For example, in New York ESPN (along with its sister networks, which are packaged with it) costs subscribers approximately \$5 per month. Yet ESPN has a weekly come of less than 25% (75% of viewers do not watch fifteen minutes of ESPN in a week) and therefore subscribers collectively are paying an average of \$20 per month for the minority of viewers that watch ESPN. Approximately 75% of viewers are unwittingly paying \$60 per year for a channel they never watch. Ft. Smith, Arkansas subscribers fare even worse – in Ft. Smith ESPN has a weekly come of only 6% and therefore the cost per viewing subscriber is a ridiculous \$80 per month. The effects extend throughout the MVPD ecosystem. Without knowing it, virtually all subscribers are paying an average of over thirty dollars per month for forty cable channels. Subscribers pay an average of \$5.31 per cable channel rating point every month, compared to just \$.29 per month for a broadcast channel rating point. Of course, broadcast television remains completely free to over-the-air viewers.

For all of their success, SHVIA and SHVERA have not abated growth in the cost of MVPD service. The FCC's most recent report on cable prices concludes that "competition from DBS does not appear to constrain expanded basic cable prices." *Report on Cable Industry Prices*, 24 FCC Rcd 255 at ¶ 4. The chart below, taken from that report, shows that after SHVIA was enacted in 1999 cable prices began to rise even faster than before.

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Although some of the cost increase can be attributed to investment in improved infrastructure, higher programming costs are the biggest factor in the skyrocketing cost of MVPD service. Growth in programming expenses accounted for 52 percent of the overall increase in the price of expanded basic service during the year ending January 1, 2006; 54 percent during the year ending January 1, 2007; and 59 percent during the year ending January 1, 2008. In 2007, the most recent year for which data is available, cable programming fees rose 9.5% -- almost *four times* the 2.4% increase in the CPI (less food and energy) in the same year. *Report on Cable Industry Prices* ¶ 37.

Broadcasters provide the only universally available free television, and they are the only television programmers with boots on the ground in every market, from New York to Glendive. Broadcasters live and work in the communities they serve. Broadcasters adhere to local community standards, stimulate the local economies, provide over \$10 billion annually in support of local charitable institutions and they are the main source of news and public safety information. Stand-alone advertiser-supported television stations that provide their programming free over-the-air cannot compete for content with programmers that can raise rates every year, bundle multiple networks for sale, and force tens of millions of consumers who do not watch those networks pay for them anyway. Cable program services do not have employees in every market in the country and therefore cannot adjust their programming to local standards or assist local communities in times of need. Although SHVIA and SHVERA can be credited with improved cable infrastructure and better DBS service, the price of MVPD service through both platforms is still growing far faster than the CPI, and program migration is fast undermining the foundation of free over-the-air television.

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In the 1992 Cable Act Congress acknowledged the public interest in keeping sports programming available on free television, and the FCC later recommended that legislative action would be appropriate if evidence of program migration arose. Pub. L. 102-385, § 26, Oct. 5, 1992, 106 Stat. 1502. In recent years the pace of program migration has grown, and this trend is the greatest long term challenge to the economic viability of free television. The broadcast television industry today is on life-support in part because of market imbalances that arose in the wake of SHVIA. In considering reauthorization of SHVERA, I encourage Congress to consider targeted adjustments to correct the market imbalances that are destroying free television broadcasting.

There appear to be five stakeholders associated with the Acts:

1. **Cable Channel Programmers.** Although not intended to be major stakeholders in the Acts, cable content providers have been the biggest winners of all. They have exploited the leverage of SHVIA and SHVERA to triple their revenues and they are well on the way of taking over all marquee programming. They are generating over \$20 billion in fees hidden in basic program tiers. Subscribers blame the cable systems for rate increases, when in fact, it is the programmers who drive the increases while avoiding any disclosure to consumers of their prices. Content providers control the market and impose hidden fees similar to those imposed by the credit card industry. They are motivated to take control of all news, sports and entertainment content. They currently have the resources to accomplish this goal.
2. **Satellite Operators.** DBS providers have benefitted greatly from the Acts, using local broadcast stations to triple the number of DBS subscribers. Ironically, the local signals upon which DBS operators have built their businesses are being bankrupted by the Acts' unintended consequences.
3. **Cable systems.** SHVIA and SHVERA challenged cable operators with new competition, but that competition drove them to make major investments, permitting them to offer voice and broadband services. These new services have more than offset the economic effects of DBS competition. Cable systems would like to see local broadcast television disappear so they can take over \$20 billion in local advertising.
4. **Broadcasters.** In spite of marginal increases in reach, broadcasters have been the second biggest net losers from the unintended consequences of the Acts. Several group broadcasters are in bankruptcy or are close to it. Local stations are generating negative or severely reduced cash flows as a result of the average broadcast network audience reduction of 35% since the passage of the Act. Loss of viewership leads to loss of broadcast revenue. According to TNS Media Intelligence/CMR data, in the first quarter of 2009 local broadcast television revenue was down 27.6%. The programs that have migrated to cable previously subsidized local news, and loss of that programming is causing massive layoffs affecting broadcast

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newsrooms across the country. Unless the trend of program migration is slowed or stopped, local stations will be forced to sell or lease their spectrum to cellular telephone or wireless internet providers and cease local programming.

5. **Consumers.** These are the biggest losers of all. As a result of SHVERA consumers who subscribe to cable or DBS services pay excessive rates and are forced to purchase expensive channels whether they watch them or not. Consumers who continue to rely on free over-the-air television have lost major sports programming, scripted dramas and syndicated programming, and local stations are being forced to cut back on local news. Without local broadcast service, consumers will not have the benefit of diversity of ownership and of news and information sources. If a few control the distribution of the content via cable program services, they control the information and our democracy. Instead of multiple competitive news rooms maintaining a strong democracy, the nation is headed for a handful of owners determining who gets elected and who gets the spoils from hidden consumer fees.

Recent history has once again demonstrated that prudent regulation of free-market activity is absolutely necessary to avoid disasters precipitated by short-term pursuit of profits. We ask the Subcommittee to consider the adoption of limited regulations similar to those provided to many other industries to protect consumers and save the essential regulated services provided to our communities by local television broadcasters.

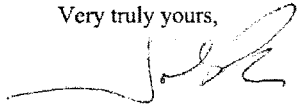
A prohibition on block booking and discriminatory pricing by cable programmers will solve the problem. This will not be disruptive in any way to consumers. MVPDs will finally be freed from the monopoly practices of programmers. The Acts have been unfair to the two losing stakeholders referenced above. A slight rebalancing will bring fairness to all and preserve our democracy. Whether or not it is too late to save the print media, it is not too late to preserve free, over-the-air broadcast television.

It is our belief that an adjustment to the Act to stem the rate of program migration will help the multi-media owners of television broadcast networks to refocus their attention and financial resources on the broadcast-affiliate platform. In addition, an adjustment will facilitate cooperation among local stations, their networks, DBS operators and the cable television systems industry. A collaborative effort will yield new and exciting services for consumers as these industries prepare for the Internet to become the main source of television distribution within the next eight to ten years. Many of the promised services from the Internet Protocol Television of the future can be offered now; if stations, networks, DBS operators and cable systems partner to employ existing off-the-shelf technology.

The Honorable Rick Boucher  
June 15, 2009  
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On behalf of the member stations of the FBC Television Affiliates Association, I appreciate your efforts to improve television service for all Americans. I encourage the Subcommittee, in tomorrow's hearing and in the coming months, to consider the vitally important issues addressed in this letter and to take appropriate steps to correct the market imbalances that are threatening the viability of free broadcast television service.

Very truly yours,

A handwritten signature in black ink, appearing to read "John B. Tupper", with a long horizontal line extending to the left.

John B. Tupper, Chairman

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