

**REAUTHORIZATION OF THE
SATELLITE HOME VIEWER EXTENSION
AND REAUTHORIZATION ACT OF 2004**

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS,
TECHNOLOGY, AND THE INTERNET

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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OCTOBER 7, 2009
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ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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WEDNESDAY, OCTOBER 7, 2009

U.S. SENATE,
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND
THE INTERNET,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m. in room SR-253, Russell Senate Office Building, Hon. John F. Kerry, Chairman of the Subcommittee, presiding.

**OPENING STATEMENT OF HON. JOHN F. KERRY,
U.S. SENATOR FROM MASSACHUSETTS**

The CHAIRMAN. The hearing will come to order. Thank you all. I apologize for being a few moments late.

The Satellite Home Viewer Extension Reauthorization Act has one of those fancy Washington acronyms, SHVERA, and it is definitely not the best-known piece of communications legislation. It is also probably not the most appreciated or understood. But, in living rooms all across our country, there is no question that consumers benefit from the basics of this law every single time that they turn on a television set.

And to understand that, or put it in its proper context, you got to go back about, you know, 15 years or so. At that time, a consumer seeking a premium pay television service had only one place to go; he went to the cable company. Today, that same consumer has options, and that's because SHVERA and its legal predecessors ushered in a world where consumers could choose between the cable company, satellite providers, like DIRECTV and the DISH Network. And as everybody—you know, we hear it all the time around here; people talk about, you know, choice being competition and the importance of competition, but the fact is, this is living proof of that. It also means more programming innovation, it means more viewing packages to choose from, and it means greater incentives for companies to be able to develop new digital technology for program viewing.

I might add an important personal note, obviously, in terms of competition, pricing, innovation, and viewing, we in Red Sox Nation really appreciate it.

[Laughter.]

The CHAIRMAN. To keep these benefits going, in this hearing we are now talking about the reauthorization of SHVERA. And our focus is fairly simple, it's pretty straightforward. We want to look at what aspects of the law need updating, what needs tweaking, adjustment, to ensure that consumers across the country benefit fully from the viewing choices that it makes possible.

I think, in some respects, this task is fairly simple. The law needs to be updated to reflect the transition in digital television. I suspect all of our witnesses today would agree that the Digital Revolution requires some updating. But, in other aspects, the task is also—got its complexities. Today, there are more than 20 Nielsen markets across the country, where satellite does not provide local broadcast channels. Instead of hearing information about local news, weather, sports, consumers get information from places that are far from home and, frankly, far from directly relevant to the lives that they lead. This situation, I believe, does demand our attention. Although in past Congresses, we have not required satellite services to offer local channels to every market in the country, I do think we need to talk about how to remedy this situation.

I believe, too, that public television plays a very, very special role in our media landscape. So, our SHVERA work ought to ensure that public broadcasters get fair treatment from our satellite providers when it comes to the carriage of public television programming. The Association of Public Television Stations does not believe that that is currently the case, all the time at least.

And finally, I believe that we are perhaps midcourse, and maybe somebody would peg it somewhere else in the transition, but we're somewhere around midcourse in a very dramatic change in consumer viewing habits. There's a migration underway from television to computer screen to mobile phones and so forth, and consumers are time-shifting and place-shifting their viewing. Similarly, broadcasters are, appropriately, exploring new mediums through which to deliver their content.

This is not the place to tackle all of these changes, but I think it's very important for us as we make the—you know, as we think about what adjustments to make in current law, we do have to keep in mind the impact of the technology changing and that impact on our viewing behavior. And, clearly, in time our laws will need to adjust to, and reflect, these new realities. And I say that with some experience, because when we did the 1996 Telecom Act here, we spent all our time on telephony, when, within months, the entire ballgame was data information transferral. And frankly, the bill was almost out of date, you know, at signing.

So, with that said, we want to look ahead a little bit, and I want to thank our witnesses for being here. I look forward to your testimony and appreciate your thoughts about the reauthorization of this important program.

So, without further ado, let me call on each of you. We're delighted to welcome Robert Gabrielli, the Senior Vice President for Programming and Distribution, DIRECTV, from El Segundo, California; Mr. Stanton Dodge, Executive Vice President, Secretary, and General Counsel, DISH Network, from Colorado; Mr. Paul Karpowicz, the President at Meredith Corporation, from Rocky Hill, Connecticut; and Lonna Thompson, who is standing in for

our—for Bill Acker, who’s not able to be here—and she’s Acting COO and General Counsel from the Association of Public Television Stations.

So, thank you, each of you, for being here. I don’t know if there’s—why don’t you go first, Mr. Gabrielli, and we’ll just run down the line. Thanks.

**STATEMENT OF ROBERT M. GABRIELLI,
SENIOR VICE PRESIDENT FOR PROGRAMMING
AND DISTRIBUTION, DIRECTV, INC.**

Mr. GABRIELLI. OK. Thank you.

Chairman Kerry, thank you for inviting DIRECTV to discuss the reauthorization of SHVERA.

I sit before you today on behalf of more than 18 million of your constituents who subscribe to DIRECTV. Many live in rural areas that broadcasters and cable operators do not reach. They are some of our best customers. Since the day we opened our doors, we have offered rural Americans the same national programming we provide to our subscribers in big cities. These rural customers had virtually no TV options before us; now they can get the best television experience in America.

But, the innovative technology that allows us to deliver all of our national programming to rural Americans cannot easily deliver thousands of duplicate local broadcasts stations throughout the country. We have spent billions of dollars to address this issue. We now offer local channels to 95 percent of Americans and are adding new markets every year.

Recognizing these challenges, Congress has always sought to balance the goals of localism and access to network programming. We respectfully offer the following three consumer-friendly principles, which we believe will help the Committee strike this balance:

The first principle: Consumers should always be able to get programming from at least the Big Four networks by satellite. Most consumers prefer local service, and the law reflects this. But, just like cable operators, satellite does not yet deliver local channels to every American. Where our subscribers cannot receive local service, the law should allow distant signals instead. Broadcasters will tell you that those ineligible for distance signals can always get local signals over the air; we all know this is not true. In fact, our review of the broadcasters’ own DTV transition website shows that as many as 45 percent of those predicted by SHVERA to get local signals over the air, actually cannot.

Why is this? SHVERA’s predictive model assumes many things that are almost never true. It assumes consumers have a giant rotating antenna, two stories in the air; it assumes the antenna is pointing directly at the specific broadcasting tower in question; and it assumes the world contains few trees and buildings. In contrast, NAB’s own Website apparently assumes things that are true: actual antennas people really use, for example. Congress should fix this.

Second principle: Congress should not take away consumers’ programming. Congress has changed the requirements for distance signals before, and will do so again here, because of the digital transition. In the past, it has always grandfathered in subscribers

so they would not lose their programming. It should do so again here.

Preserving the status quo is especially important with respect to multicast programming. Every broadcaster has one primary video stream, and in so-called “short markets” lacking national networks, some broadcasters have begun to offer one or more missing affiliates as a second, third, or even fourth digital multicast stream. But, these multicast streams are not really new local channels. Rather, a station will buy the rights to out-of-town network and syndicated programming, and, at most, repeat the local news already carried on their primary video stream. We have reviewed the listings of network-affiliated multicast streams throughout the country and could not find one that offers any new local content.

Existing law treats multicast streams very differently than primary video streams. Multicast streams have no must-carry rights, and they do not count for purposes of determining eligibility for distance signals under the Copyright Act. We think this is the right policy.

From DIRECTV’s perspective, multicast streams simply are not new local channels and shouldn’t be treated as such. More importantly, we frequently lack room in our crowded spot-beam satellites to carry them.

The specific issues raised in this reauthorization is that the National Association of Broadcasters (NAB) wants subscribers on January 1st, the renewal, to be ineligible for distance signals if they are predicted to get multicast signals over the air. If this happens, tens of thousands who lawfully receive signals—distance signals today, would immediately lose them. And in the future, we’d be forced to shut off distance signals whenever a new multicast channel appeared. We respectfully ask the Committee to protect these consumers as Congress has always done in the past.

And the third principle: Satellite customers should not be ineligible to receive broadcast stations offered by cable. Cable operators have long been permitted to offer neighboring significantly viewed stations. In an attempt to level the playing field with cable, Congress gave satellite carriers similar rights in 2004. In doing so, however, Congress required satellite operators, unlike cable operators, to 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 ask the Senate Commerce Committee to address this issue so that we can offer the same stations as our cable competitors.

I would respectfully ask the Committee to keep these three principles in mind as it crafts SHVERA reauthorization.

Thank you, and I’ll look forward to your questions.

[The prepared statement of Mr. Gabrielli follows:]

PREPARED STATEMENT OF ROBERT M. GABRIELLI, SENIOR VICE PRESIDENT,
PROGRAM OPERATIONS, DIRECTV, INC.

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 who subscribe to DIRECTV. Many live in rural areas that broadcasters and cable operators do not reach. These are some of our best customers, and they have no better friend than DIRECTV. Since the day we opened our doors, we have offered rural Americans the same national programming we provide our subscribers in big cities. Those who for years had no television options at all, can now get the best television experience in America.

But the innovative technology that allows us to deliver all our *national* programming to rural Americans cannot easily deliver thousands of *local* broadcast stations—containing largely duplicative programming—throughout the country. We have spent billions of dollars to address this issue. We now offer local channels to 95 percent of Americans and are adding new markets every year. In doing so, we try to balance our desire to carry local broadcasters wherever possible with the need to protect our subscribers where local carriage is not yet possible.

Congress seeks to achieve this same balance with each SHVERA reauthorization. We respectfully offer the following four consumer-oriented principles to guide the Committee in this endeavor.

First, customers should always be able to get programming from at least the “big four” networks by satellite. Consumers prefer local service and the law rightly reflects this. But we cannot yet deliver all of the thousands of local broadcast stations in every market. Where our subscribers cannot receive local service, the law should let us give them distant signals instead. What the law should *not* do is require subscribers to rely on expensive rotating rooftop antennas to get intermittent over-the-air reception. Broadcasters will tell you that subscribers ineligible for distant signals can always get local signals over the air, but we all know this is not true. In fact, the broadcasters’ own website designed to help consumers choose “the proper outdoor antenna to receive [their] local television broadcast channels” shows that as many as 45 percent of those now ineligible for distant signals cannot really get local signals over the air.¹

Second, Congress should not take away customers’ programming. Congress from time to time has changed the eligibility criteria for distant signals, and will do so again here in light of the digital transition. In the past, however, it has always “grandfathered” then-existing subscribers so that they would not lose their programming.

Third, satellite customers should not be ineligible to receive broadcast stations offered by cable. The law should no longer allow incumbent cable operators to offer more local and significantly viewed channels than their satellite competitors.

Fourth, prices for broadcast programming should be reasonable. We pay broadcasters and content providers fair compensation for their programming, and hope they, in turn, recognize the value of our distribution network. But neither market power nor government fiat should give those entities the ability to raise prices excessively, particularly in economic times like these.

These four principles inform DIRECTV’s perspective on all SHVERA-related issues. In the balance of my testimony, I’d like to discuss four important issues before the Committee: changes to the “significantly viewed” rules, questions concerning multicast signals, proposals to mandate carriage in all 210 markets; and a “market trigger” proposal championed by copyright holders.

I. Fixing the “Significantly Viewed” Rules Will Rescue Congress’s Good Idea From the FCC’s Implementation Mistakes

First, we ask the Committee to fix the rules governing carriage of neighboring “significantly viewed” stations. Cable operators have long been permitted to offer such 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 a provision to protect local broadcasters 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 signifi-

¹For more details, please see Appendix I.

cantly 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.

The House Commerce Committee has addressed this issue, and we ask the Senate Commerce Committee to do the same.

II. Preserving the *Status Quo* With Respect to Multicast Signals Will Ensure That All Subscribers Receive Network Service

Second, we ask the Committee to preserve the *status quo* with respect to “multicast” broadcast video streams. Every broadcaster has one “primary” video stream. Digital television allows some broadcasters to also offer second, third, or fourth multicast streams. In so-called “short” markets lacking one or more of the big national networks, some broadcasters have begun to offer the “missing affiliate(s)” as multicast streams.

But these multicast streams are not really “new” local channels. Rather a station will buy the rights to out-of-town network and syndicated programming, and (at most) repeat the local news already carried on its primary video stream. We have reviewed the programming of network-affiliated multicast streams throughout the country, and could not find a single one anywhere that offers any new local content.

The FCC has twice decided that multicast streams do not have “must carry” rights, in part because of the obvious constitutional problems this would raise. Moreover, multicast channels do not now “count” for purposes of determining eligibility for distant signals under the Copyright Act. On both questions, existing law treats multicast streams differently than primary video streams.

The law gets both questions exactly right. From DIRECTV’s perspective, one problem with treating multicast streams like primary streams is that they simply aren’t new local channels. Another, more important problem is that we frequently lack room on our crowded spot beam satellites to carry them. When we have room, we typically carry network-affiliated multicast streams. But where we lack room, we simply cannot accommodate them.

The broadcasters want all multicast signals everywhere to “count” for purposes of distant signal eligibility, starting on the date of enactment. If this proposal were to become law, thousands of our subscribers who have lawfully received distant signals for years would lose them. Moreover, we would have to immediately shut off distant signals whenever a new network-affiliated multicast stream appeared. And if we lacked room to carry the multicast stream, many subscribers would get *no* network programming from us—even if they have had it via legal distant signals for years. We know this will be unacceptable to our customers. It should be to the Committee as well.

III. Unfunded Carriage Mandates Would Unfairly Burden Satellite Subscribers

Third, we ask the Committee *not* to adopt huge unfunded carriage mandates. SHVERA ultimately represents a compromise among satellite carriers, copyright holders, and broadcasters. DIRECTV is concerned, however, that some might seek to alter the very essence of this compromise with a mandate to immediately serve every local market. Such a mandate would be technically infeasible, hugely expensive, unfair to satellite subscribers, and unconstitutional.

DIRECTV today offers local television stations by satellite in 152 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 133 markets, serving more than 91 percent of American households. By the FCC’s calculations, over 80 percent of DIRECTV’s satellite capacity is now devoted to local service—nearly triple the amount cable operators can be required by law to carry.² We have devoted several billions of dollars to this effort. And we are working every day to serve more markets.

Some, however, would require satellite carriers to serve all remaining local markets by satellite—perhaps as soon as within a year. Very respectfully, while expanding the reach of broadcast service might be a worthy goal, this the wrong approach.

Such an approach would upset the delicate balance that has guided Congressional policy in this area for decades. In enacting SHVIA’s statutory copyright license for

² *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, ¶11 n.48 (2008) (“*Satellite HD Carriage Order*”) (using hypothetical local and national programming carriage figures to estimate that a satellite operator would dedicate 91 percent of its capacity to local programming). With DIRECTV’s actual figures, this number is closer to 80 percent.

local broadcast signal carriage, Congress specifically recognized that the capacity limitations faced by satellite operators were greater than those faced by cable operators.³ In light of those limitations, Congress adopted a “carry-one, carry-all” regime in which satellite operators can choose whether to enter a market, and only then must carry the primary video of qualifying stations in that market.⁴ This regime was carefully crafted to balance the interests of broadcasters and satellite carriers alike. 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.⁵ (We have attached as Appendix B to this testimony a White Paper by Joshua Rosenkranz, a noted constitutional law expert, discussing the grave constitutional difficulties with such a mandate.)

By imposing heavy burdens on us and our subscribers, an unfunded carriage mandate would unintentionally create real inequality. Broadcasters already make their signals available in every market over the air, for free. More people could surely receive those signals if offered over satellite. But more people could also receive those signals if broadcasters themselves invested in the infrastructure to increase their own footprint so everyone in the market could receive a free over the air signal. We suggest that it is inequitable, especially in this economy, to place the financial burden of expanding broadcast coverage on satellite subscribers alone.

IV. Imposing a “Market Trigger” for Elimination of the Statutory Licenses Would Lead to Higher Prices and an Inferior Product

Fourth, we ask the Committee to examine any “market trigger” proposal in the context of the Communications Act’s carriage rules. By combining a “private market” copyright approach with the more regulatory approach found in the Communications Act, this proposal would lead to marketplace confusion and, ultimately, higher prices and an inferior product for our subscribers.

Some of the largest copyright holders contend that the statutory licenses upon which millions of satellite and cable subscribers now depend are things of the past. They argue that there could be other ways for multichannel video programming distributors to provide broadcast programming to their customers—hypothesizing “market mechanisms,” “voluntary licensing arrangements,” “sublicensing” and the like. Nobody really thinks such alternatives will actually work, particularly for distant signals. But copyright holders now suggest that, *if* a private copyright licensing mechanism could be developed, the statutory licenses should then sunset.

Whatever the merits of this suggestion under the Copyright Act, it completely ignores the must-carry and retransmission consent rules found in the Communications Act. Disney, for example, has argued that its ABC broadcast programming should be sold just like its ESPN cable programming. But the “market trigger” proposal wouldn’t do that at all. The government doesn’t force us to carry ESPN Classic but, under the market trigger proposal, it would still force us to carry even the lowest-rated broadcast stations. By the same token, the government doesn’t require us to obtain non-copyright “consent” to carry ESPN but, under the market trigger proposal, we would have to separately acquire both copyright and retransmission consent from broadcast stations.

From where we sit, copyright holders don’t really propose a “free market” for broadcast programming. Rather, they propose *those parts* of the “free market” that benefit them as copyright holders, while preserving those aspects of the existing regulatory structure that benefit their broadcast subsidiaries. The natural result would be marketplace chaos. The government would force us to negotiate twice, not once, for broadcast programming that our subscribers want. And it would force us to carry programming that our subscribers don’t want. Our subscribers would pay higher prices and receive lower quality programming in exchange. This strikes us as patently unfair.

³ 145 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”).

⁴ 47 U.S.C. § 338(a)(1).

⁵ 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 (4th 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”).

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

APPENDIX I
OVER-THE-AIR CARRIAGE METHODOLOGY

DIRECTV is in the process of moving the local channels in several markets from a “wing” satellite located at 72.5° W.L. to one of its more centrally located satellites. Subscribers in those markets will no longer require a second satellite dish to receive local signals. The spot beams on our central satellite, however, cover slightly different areas than do those on the wing satellite. Accordingly, several thousand subscribers who had been able to receive local channels from the wing satellite will not be able to do so from the central satellite.

Naturally, we are looking for alternative ways to provide network programming to those subscribers. To determine what options these customers might have, we contracted with TitanTV to evaluate each address.

TitanTV evaluated each address in two ways. It first evaluated each address for SHVERA distant signal eligibility using its standard digital predictive model. It next evaluated those same addresses using a different model—that used by the antennaweb.org mapping program, which describes itself as being “provided by the Consumer Electronics Association (CEA) and the National Association of Broadcasters (NAB),” and designed to “locate [] the proper outdoor antenna to receive your local television broadcast channels.”

When we received the results, we noticed that fully 45 percent of the addresses predicted to get an off-air signal by the SHVERA model were predicted *not* to get an off-air signal by the antennaweb.com model. Surprised by these results, we then took a wider set of addresses and manually entered each of them into both models. We obtained similar results.

In other words, according to NAB itself, nearly half of subscribers who cannot get a viewable signal over the air are nonetheless ineligible for distant signals under the existing SHVERA methodology.

APPENDIX II
CONSTITUTIONAL ANALYSIS

Memorandum

To DIRECTV and DISH Network
From E. Joshua Rosenkranz
Date July 23, 2009
RE Analysis of the Constitutionality of H.R. 927

H.R. 927’s Must-carry Obligations Are Unconstitutional

H.R. 927 would require satellite TV providers, like DIRECTV and DISH, to carry every single full power local broadcast station in all 210 Designated Market Areas (“DMAs”). A burden of this magnitude is unwise, unjustified—and unconstitutional.

Because the Must-Carry Rule Infringes on Satellite TV Providers’ First Amendment Freedoms, It Must Satisfy Rigorous Judicial Review

A statute triggers First Amendment concerns any time it directs a speaker what to say and what not to say—or otherwise burdens the speaker’s editorial decisions. Likewise, a law triggers First Amendment concerns any time it dictates to a broadcaster what programs to carry, and any time it burdens the broadcaster’s programming choices.

That is what H.R. 927 would do to satellite TV providers—in the most extreme possible way. For starters, H.R. 927 would force satellite TV providers to carry *hundreds* of local broadcast stations against their will, many of which have virtually no local audience. Because satellite TV service has limited channel capacity, that would mean that DISH and DIRECTV would have to drop programming that subscribers want to watch in order to broadcast channels that no one watches.

True, not every infringement on First Amendment freedoms or programming discretion is unconstitutional. More specifically, not every must-carry rule necessarily violates the First Amendment. The Supreme Court upheld the must-carry obligations that Congress imposed on cable, for example—but only by a razor-thin margin, after two trips to the Court, and after concluding that the rule would not prevent cable from carrying the programs it wanted to carry. *See Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“*Turner I*”); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224–25 (“*Turner II*”). And the Fourth Circuit has upheld the so-called

“carry-one, carry-all” rule that Congress imposed on satellite TV providers—a voluntary rule that is far less onerous than the crushing must-carry requirement embodied in H.R. 927. See *Satellite Broad. & Commc’ns Ass’n v. FCC*, 275 F.3d 337 (4th Cir. 2001) (“SBCA”).

The important lesson to draw from those cases is that the courts will strike H.R. 927’s must-carry obligation unless the government persuades them, based on solid evidence, that the justifications outweigh the burdens and that the infringement is sufficiently tailored to minimize the burdens on speech. This legal standard is called “heightened scrutiny.”

Exactly how intense the heightened scrutiny will be is a matter of debate. There is a strong argument that the courts should apply the very highest level of scrutiny, called “strict scrutiny”—a standard that is almost always fatal to any law that raises First Amendment concerns. But at a bare minimum, the courts would have to apply “intermediate scrutiny” (as the Supreme Court did in the cable must-carry context). See *Turner I*, 512 U.S. at 641. That would require the government to bear two burdens. First, the government will have to justify the infringement on First Amendment freedom by demonstrating that the infringement is necessary to advance an “important” governmental interest. *United States v. O’Brien*, 391 U.S. 367, 377 (1968). This is no easy feat. The government may not just posit a reason for imposing the requirement; “it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 664. It must also demonstrate that Congress “has drawn reasonable inferences based on substantial evidence,” in concluding that the regulation will in fact alleviate the harms in a direct and material way. *Id.* at 666. Beyond that, the government would have to demonstrate that any “incidental restrictions on alleged First Amendment freedoms” are “no greater than is essential to the furtherance of that interest.” *Id.* at 662. (emphasis added).

For purposes of the discussion that follows, we make the conservative assumption that the courts will apply the very demanding intermediate scrutiny, rather than the almost insurmountable strict scrutiny standard. So, at a minimum, the courts will study the specific terms of H.R. 927 and will conduct a full examination of the television market—and satellite TV’s role within that market. If anything is clear from past precedent, it is that no court would accept the facile conclusion that just because a cable must-carry rule survived, and just because a far less onerous carry-one, carry-all rule has been upheld, the imposition of a very different must-carry obligation—on a very different market player with an entirely different technology—would also survive.

In sum, an assessment of whether H.R. 927 is likely to survive judicial scrutiny must start with an understanding of why the Supreme Court upheld cable’s must-carry rules, and proceed with a point-by-point comparison of the justification, burdens, and tailoring of the cable must-carry rule as compared to H.R. 927. Each point is addressed, in turn, below.

The Justification for the Satellite Must-Carry Requirement Is Constitutionally Inadequate

The Compelling And Well Documented Justification For The Cable Must-Carry Rule

The cable must-carry rule that the Court upheld in the *Turner* cases basically required cable providers to set aside a maximum of one-third of their channel capacity to carry local commercial television stations, and to carry local public broadcast television stations. Superficially, that requirement sounds similar to the satellite must-carry rule embodied in H.R. 927. But the justification for imposing such a requirement on satellite TV pales in comparison to the justification that the Court narrowly upheld in *Turner II*.

The Court observed that “Congress’ overriding objective in enacting the [cable] must carry rules was . . . to preserve access to free television programming for the 40 percent of Americans without cable.” *Id.* at 646. The Court found that there was a real prospect that broadcast stations—particularly less popular independent stations—would die, in the absence of must-carry rules. The point of the law was to ensure that viewers who *do not subscribe* to cable, would still have a menu of programming options to watch when they put up their rabbit-ear antennas. Specifically, the fear was that if cable did not carry local broadcast stations, the local stations would lose their audiences, causing their advertising revenues to evaporate. *Id.* This, in turn, would mean broadcast stations would go out of business, and viewers who opt not to pay for cable would have fewer channels to watch. *Id.*

The Court considered this objective important. But it did not uphold the justification on the first trip to the Supreme Court. It sent the case back to put the government through its paces of actually proving, with concrete evidence, that the fears that motivated Congress were real. *Turner I*, 512 U.S. at 667 (“Without a more sub-

stantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants.”) Three years later, when the case came back to the Court with a much more extensive factual record, a bare majority of the Court was satisfied that the evidence did support Congress’s conclusion that the structure of the cable industry gives cable operators “an incentive to drop local broadcasters and to favor affiliated programmers.” *Turner II*, 520 U.S. at 198–200. The reason is simple: Cable companies compete with local broadcasters for audience and advertising dollars—giving them strong incentive to drop local broadcast stations in favor of their own affiliates. This incentive gave rise to an enormous problem that was national in scope: a threat to the survival of a diverse network of free, over-the-air broadcast stations. Specifically, the Court found the evidence compelling on the following points:

Cable Had the Market Power To Harm Local Broadcasters:

- “Cable operators possess a local monopoly over cable households. Only 1 percent of communities are served by more than one cable system.” *Id.* at 197.
- That meant that if they could eliminate broadcast competition, their monopoly would be complete—and they did not need to fear that some other competitor would gain market share by picking up local broadcasts. *Id.*
- Cable served “at least 60 percent of American households in 1992.” *Id.*

Cable Had The Ability To Deprive Local Broadcasters of their Local Audiences:

- Cable operators exercised “control over most (if not all) of the television programming that is channeled into the subscriber’s home” and “can thus silence the voice of competing speakers with a mere flick of the switch.” *Id.*

Evidence Demonstrated Cable Was Harming Local Broadcasters:

- “A television station’s audience size directly translates into revenue.” *Id.* at 208.
- Some broadcast stations have “fallen into bankruptcy, curtailed their business operations, and suffered serious reductions in operating revenues” after cable systems stopped carrying the stations. *Id.* at 209.
- Stations without cable carriage “encountered severe difficulties obtaining financing for operations.” *Id.*

In sum, the Court, by a very narrow margin, found that there was an important justification for the cable must-carry rule: cable’s abuse of its market power posed a real threat to the survival of local broadcast stations.

The Weak And Unprovable Justification For A Satellite Must-Carry Rule

Nowhere in the text of H.R. 927 is there any statement of congressional purposes or explanation of what evils this must-carry provision is aimed at curing. Nor does the bill offer any factual findings to justify the infringement on speech. We can surmise that the government will try to justify the satellite must-carry rule on the same basis on which it defended the cable version. But the government will not be able to carry its burden of proving that satellite TV could kill local broadcasting.

First, satellite TV providers advertise nationally. They simply do not compete with local broadcasters for local advertising dollars. So satellite TV providers do not have the incentive cable companies have to drop local broadcast stations.

Second, for that reason, satellite TV providers already carry local stations in an overwhelming majority of markets. The objection here is to the burden of having to carry *all* of them, regardless of whether the cost of doing so is at all justified by the demand of viewers.

Third, satellite TV providers are nowhere near the dominant force that cable was when the Court decided *Turner II*:

- In contrast to cable operators, which “possessed a local monopoly over cable households,” each satellite TV provider—DISH and DIRECTV—competes vehemently against the other, *and* faces competition from cable and telephone companies now offering TV service. *Id.* at 197.
- In contrast to cable, which served “at least 60 percent of American households in 1992,” *id.*, in 2007 DISH and DIRECTV combined served only about 26 percent of American households. Motion Picture Association of America, Inc., *Entertainment Industry Market Statistics* (2007), at pp. 19–20, <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf>.

Fourth, unlike cable companies, satellite TV providers do not exercise “control over most . . . of the television programming that is channeled into the subscriber’s home” and cannot “silence the voice of competing speakers with a mere flick of the switch.” *Id.* In the few markets where satellite TV providers are unable to provide local service, satellite TV subscribers can seamlessly receive both over the air broadcast signals and satellite programming with the consumer set top box used to receive satellite signals and an antenna that integrates into satellite programming with the flick of switch. The difference is that the customer has control over the switch. Indeed, in enacting the 1999 carry-one,carry-all rules, Congress recognized that “subscribers who receive no broadcast signals at all from their satellite service may install antennas or subscribe to cable service in addition to satellite service . . .” (Appellate Brief for Respondents, the Federal Communications Commission and the United States of America in *Satellite Broadcasting and Communications Ass’n v. FCC*, 275 F.3d 337 (4th Cir. 2001), 2001 WL 34386914 (C.A.4) (citing H.R. Conf. Rep. No. 106–464, at 102.).

In short, satellite TV providers have no incentive to block local broadcasters from their local audiences, do not do so as a practical matter, and would not threaten the survival of local broadcasters, even if they did. So local broadcasters simply do not need a satellite must-carry rule to stay alive. Thus, any infringement on satellite TV providers’ First Amendment rights is unjustifiable.

The Burdens of the Satellite Must-Carry Requirement Are Unconstitutionally Heavy

Perhaps the most important distinction between the cable must-carry rule and H.R. 927 is that cable’s carriage obligation for commercial broadcast stations is capped at one-third of channel capacity. H.R. 927 imposes an unlimited carriage obligation on satellite TV providers. This greatly alters the relative burdens of the two rules.

The Very Light Burden Of The Cable Must-Carry Rule

Critical to the Supreme Court’s decision to uphold cable’s must-carry requirement was the conclusion that the “actual effects” of the must carry rule were “modest.” *Turner II*, 520 U.S. at 214. “[S]ignificant evidence indicates that *the vast majority of cable operators have not been affected in a significant manner by must-carry.*” *Id.* (emphasis added).

- Compliance with must-carry obligations did not force cable operators to drop a significant amount of programming. “Cable operators ha[d] been able to satisfy their must carry obligations 87 percent of the time using previously unused channel capacity.” *Id.* This minor burden, the Court accurately predicted, would diminish as cable channel capacity expanded. *Id.*
- “94.5 percent of the 11,628 cable systems nationwide have not had to drop any programming in order to fulfill their must carry obligations,” and “the remaining 5.5 percent had to drop an average of only 1.22 services from their programming.” *Id.*
- Nationwide, cable operators “carry 99.8 percent of the programming they carried before enactment of must carry.” *Id.*
- “Only 1.18 percent of the approximately 500,000 cable channels nationwide is devoted to channels added because of must carry” obligations. *Id.*

The Onerous Burden Of H.R. 927

In contrast to the “modest” burdens on cable, there is no way the government will ever be able to prove satellite carriers will not have “been affected in a significant manner by must-carry” obligations. *Id.* Congress opted to enact the less restrictive carry-one, carry all rules in 1999 in recognition of the capacity constraints faced by cable. *See SBCA*, 275 F.3d at 350 (summarizing testimony to Congress regarding the capacity limits faced by satellite and explaining that carry-one, carry-all rules reflected “the technological dissimilarities between cable and satellite.”). Despite innovations in satellite technology, there are only so many channels that can be carried on a satellite spot-beam, and satellite spectrum is limited. Even where spectrum is available, developing, constructing and launching additional satellites is not only expensive, it takes many years of planning and preparation. *Satellite HD Carriage Order*, FCC 08–86, CS Docket 00–96, ¶ 11 (recognizing that “satellite construction and launch is a lengthy process, generally taking approximately 4 years.”). As the FCC recognized in 2008, “satellite carriers face unique capacity, uplink, and ground facility construction issues” in connection with offering local service. *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules and Implementation of the Satellite Home Viewer Improvement Act of*

1999: *Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking Order, FCC 08–86, CS Docket 00–96, ¶7 (March 27, 2008) (“Satellite HD Carriage Order”). As the FCC concluded, Cable just does not face the same capacity constraints. *Id.*, ¶9.

Satellite carriers’ must carry obligations are also far broader than the ones the Court previously upheld. Unlike the cable rule which capped the must-carry requirement for commercial stations at one-third of a cable company’s channels, H.R. 927 has *no limit* on the number of channels satellite TV providers must devote to carrying local broadcast stations. Indeed, satellite providers already devote much more than one-third of their channel capacity to local broadcast stations under the existing carry-one, carry-all rules. This is due in part to the national scope of satellite providers business. Because cable companies serve a limited geographic area, they can easily satisfy their limited obligation to carry the local broadcast stations in that area—typically five to ten stations. On that same platform, cable companies offer hundreds of national channels and provide data and voice services. Satellite providers in contrast operate a single, national system on which they already carry over 1,000 local broadcast stations. In other words, satellite providers already devote more channel capacity to local broadcast stations than cable does under its must-carry rules. See *Satellite HD Carriage Order*, FCC 08–86, CS Docket 00–96, ¶11.

Even without the onerous requirements of H.R. 927, satellite TV providers’ carriage obligations will continue to grow because the current carry-one, carry-all rules require satellite providers to carry all high-definition signals of broadcast stations electing must carry by 2013 in markets where they provide high definition signals (“HD”). HD requires much more channel capacity, and in some markets, satellite carriers’ technology requires them to carry both standard and high-definition channels, thus doubling the carriage requirements for each station. As the FCC explained, “satellite carriers realize a net loss in the total number of program streams they may carry in a given bandwidth as they transition from standard definition to high definition signals.” *Satellite HD Carriage Order*, FCC 08–86, CS Docket 00–96, ¶8. H.R. 927 saddles satellite providers with added burden of carrying every local broadcast station in the country at the same time the industry struggles to comply with the phased-in HD must-carry rules.

Simply put, to satisfy H.R. 927’s requirements, satellite carriers would likely have to drop programming altogether and forego adding additional non-broadcast programming, such as international and foreign-language programming that is a critical source of news and information for many communities. See *Satellite HD Carriage Order*, FCC 08–86, CS Docket 00–96, ¶8 (adopting four-year phase in for HD carriage rules due to “serious technical difficulties” faced by satellite and finding that immediate implementation would harm subscribers if satellite carriers were forced to drop other programming to free capacity). Moreover, compliance would cost satellite providers hundreds of millions of dollars to connect local broadcast stations across the country to regional satellite uplink facilities, and to develop, build and launch additional satellites to increase channel capacity.

The Fourth Circuit’s Decision Upholding The More Limited Carry-One, Carry-All Obligations Does Not Support H.R. 927

In *SBCA*, the Fourth Circuit applied the principles of the *Turner* cases to satellite TV’s carry-one, carry-all rule, which was enacted as part of the 1999 Satellite Home Viewer Improvement Act (“SHVIA”). The carry-one, carry-all rule provides that satellite carriers that use their statutory copyright license to retransmit a single broadcast station within a DMA must carry only those qualifying full-power local broadcast stations that are in that DMA. 47 U.S.C. §338(a)(1). The rule does not apply if the satellite carrier does not use the statutory copyright license to secure the right to retransmit the broadcast station, but instead negotiates a license directly with the station.

The Fourth Circuit upheld this far more modest rule. We disagree with aspects of that ruling, which is not, in any event, binding outside the Fourth Circuit. But for present purposes suffice it to say that an opinion upholding the much more limited carry-one, carry-all requirement does not come close to supporting a sweeping extension of the principle to every local station in every DMA. In this regard, one aspect of the Fourth Circuit’s logic is especially relevant. One critical reason that the Fourth Circuit upheld the rule was that the rule did not impose an excessive burden on satellite carriers. The court held that the carry-one, carry-all rule “leaves them with the choice of when and where they will become subject to the carry one, carry all rule.” 275 F.3d at 365. The same cannot be said of H.R. 927, which imposes what might be called a “carry-one, carry-the-universe requirement.” Obviously, there is a big difference between a rule prohibiting discrimination among local

broadcasters, and a rule that for all intents and purposes requires a satellite TV provider to carry every single local broadcast station in the country.

Conclusion

Under controlling Supreme Court precedent, H.R. 927 is unconstitutional. It should not become law. But if it does, the courts are sure to strike it. The cable must-carry rule's "modest" burdens came within a hair's breadth of being struck. See *Turner II*, 520 U.S. at 214. In the intervening years, the Court has grown even more protective of First Amendment rights in the business context and less tolerant of burdensome regulations. Given these realities, H.R. 927 will be practically dead on arrival.

The CHAIRMAN. Thank you.

**STATEMENT OF R. STANTON DODGE, EXECUTIVE VICE
PRESIDENT AND GENERAL COUNSEL, DISH NETWORK L.L.C.**

Mr. DODGE. Chairman Kerry, Ranking Member Ensign, and Members of the Subcommittee, I appreciate the opportunity to testify. My name is Stanton Dodge and I'm the Executive Vice President and General Counsel of DISH Network, the Nation's third largest pay-TV provider.

Providing consumers with local, over-the-air broadcast stations by satellite in all 210 markets has been a longtime goal of the Senate Commerce Committee. This year's review of the Satellite Home Viewer Act provides an opportunity to reach that goal.

Today, DISH provides local-into-local service in 181 markets, covering approximately 98 percent of households nationwide. This considerable achievement over the last decade would not have been possible without the forward-looking actions of Congress. The job, however, is not complete until all consumers have the opportunity to view their local channels.

Today, I will review—I will detail some of the key hurdles to serving the remaining 29 markets and discuss what this—step this Subcommittee could take to make service in all 210 markets a reality.

The up-front and recurring costs of providing local-into-local service in every market are daunting. In each market where we provide local service, DISH must establish a physical presence. Our ability to recoup this substantial investment is constrained by the small size of the remaining markets. For example, there are fewer than 4,000 households in the Glendive, Montana, local market. This means there are only a few subscribers to help defray those costs. The costs to provide local-into-local service are largely fixed, so the economics of launching Houston are easy, while the economics of launching Presque Isle, Maine, and similar smaller markets, are not.

DISH has finite satellite spectrum available to provide a national service that competes with cable and telephone companies. Let me explain. The decision to provide a local NBC affiliate to a few thousand subscribers precludes DISH from offering 13 million subscribers a new national service, a high-definition channel, or an international or Spanish-language offering. This has clear competitive implications. Our investment in cutting-edge spot-beam technology and satellites, each an approximately \$350-million investment, offers a more efficient means to provide local channels. Nonetheless, the decision to include a local dedicated spot-beam instead of a national beam on our next satellite has real consequences for

a long-term competitive viability. Launching 29 additional markets would require us to find or create capacity for approximately 100 additional channels on a system that is near full capacity today.

The last key hurdle is one of consumer expectations. If any customer subscribes to a locals package, they expect to receive at least NBC, CBS, ABC, and FOX. However, in 26 of the 29 markets we have yet to launch, one or more of those networks is not available as the primary video feed. In some instances, only a single national network affiliate is present in these markets. Without action by Congress, we will be unable to provide a commercially viable offering by filling in these, quote, "short markets."

Today, we're not seeking a subsidy for the launch of these markets or the resources to construct more satellites, but we do want to give this Subcommittee an appreciation for the challenges faced by any provider seeking to launch all 210 markets. There are concrete steps the Subcommittee can take to improve the economics of serving these smaller markets.

To that end, the bill voted out of the Senate Judiciary Committee 2 weeks ago is a good first step, but it could have unintended consequences. Other pay-TV providers pay either a retransmission fee or a copyright royalty payment. Any requirement to pay double compensation to carry the same station as the Judiciary bill requires would create an unintended financial disincentive to provide those additional signals. Simply put, layering on additional costs to serve these economically challenging markets would undercut the goal of serving every market. Indeed, to ensure that incentives are properly aligned and that all consumers in the U.S. receive comparable services, DISH would need to be on an equal footing with its competitors.

In addition, the bill, as written, would allow broadcasters to withhold retransmission consent, perhaps stopping the launch of new markets.

Finally, I want to comment on the Judiciary Committee's provision to study phasing out the Compulsory License Regime. We welcome such a study, but believe it needs to be coupled with an FCC study, as well. That study should examine the current compensation regime and whether it's truly market-based and serves consumers.

In sum, we are hopeful that the reauthorization process this year will modernize an outdated statute, as well as provide the incentive to achieve a national policy goal, making local TV service available to consumers in all 210 markets. We look forward to working with members and staff to accomplish both of those goals.

Thank you for the opportunity to testify, and I look forward to answering any of your questions.

[The prepared statement of Mr. Dodge follows:]

PREPARED STATEMENT OF R. STANTON DODGE, EXECUTIVE VICE PRESIDENT AND
GENERAL COUNSEL, DISH NETWORK L.L.C.

Chairman Kerry, Ranking Member Ensign, and Members of the Subcommittee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the Executive Vice President and General Counsel of DISH Network L.L.C. ("DISH Network"), the Nation's third largest pay-TV provider.

Providing consumers with local over-the-air broadcast stations by satellite in all 210 designated market areas has been a goal of the Senate Commerce Committee

for some time. This year's review of the Satellite Home Viewer regime provides an opportunity to improve upon the existing regulatory and legal structure to incentivize the launch of the remaining unserved markets.

DISH has launched local-into-local service in 182 markets, including Puerto Rico, covering approximately 98 percent of households nationwide in less than a decade's time. This is a considerable achievement that would not have been possible absent the regulatory and legal structure Congress created to encourage and foster such investment.

The job, however, is not complete until all consumers have the opportunity to view their local channels. Today, we would like to detail some of the key technical and financial hurdles to serving the remaining 29 markets to help frame the debate on what steps this Subcommittee could take to make service in all 210 markets a reality.

First, the upfront and recurring costs of providing local-into-local service in every market are daunting. In each market in which we provide local service, DISH must establish a physical presence. This local receive facility is needed to collect the local broadcast signals and send them back to our satellite uplink centers. To do so, we need to acquire adequate fiber facilities to bring the content back to our uplink centers as well as establish a secure location to acquire broadcast signals in each of these markets. The upfront costs alone to establish this infrastructure would be approximately \$35 million for the remaining unlaunched markets. Importantly, substantial annual recurring costs are also necessary to maintain local-into-local service. The recurring cost for the remaining local facilities would be approximately \$15 million annually including the costs of associated terrestrial infrastructure and staffing. These figures do not, however, include the expense associated with retransmission consent fees and other programming-related costs.

Our ability to recoup this substantial investment is constrained by the small size of many of the remaining markets. For instance, there are fewer than four thousand households in the Glendive, Montana designated market area. This provides very few potential households to subscribe to our service to help defray those costs, yet the costs to provide a local-into-local service are largely fixed. The economics of launching Houston are easy. Presque Isle, Maine and similar smaller markets are not.

The opportunity costs of earmarking capacity for local service are also very real. DISH has finite satellite spectrum available to provide a national service that competes with bandwidth-rich cable and telephone companies. At a very basic level, the decision to provide a local NBC affiliate to a few thousand subscribers precludes DISH from providing a new national service, a high definition channel, or an international or Spanish-language offering to 13 million subscribers. This has clear competitive implications. It is certainly true that our investment in cutting edge spot-beam technology and satellites—each a \$350 million investment—has provided a more efficient means to provide local channels today. Nonetheless, the decision to include a local-dedicated spot beam on our next satellite or a national beam has real consequences to our long-term competitive viability. Launching 29 additional markets would require us to find or create capacity for approximately 100 additional channels on a system that is effectively at, or near, full capacity today.

The last key hurdle is one of consumer expectations. If any customer subscribes to a locals package, they expect to receive at least NBC, CBS, ABC, and FOX content. Yet, in 26 of the 29 markets we have yet to launch, one or more of those networks is not available as the primary video feed of a local broadcast station. In some instances, only a single national network affiliate is present in these markets. Without action by Congress as part of the reauthorization process, we will be unable to provide a commercially viable offering by filling in these so-called "short markets" with the missing national content pursuant to our local-into-local compulsory license.

We do not ask today for \$100 million to subsidize the launch of these markets or the resources to construct more satellites, but we did want to give this Subcommittee an appreciation for the challenges faced by any provider seeking to launch all 210 markets. There are, however, concrete steps this Subcommittee can take to improve the economics of serving these small markets.

To that end, the Satellite Television Modernization Act of 2009—which was voted out of the Senate Judiciary Committee 2 weeks ago—is a good first step. This bill would provide for the first time the legal authority to retransmit quasi-local signals to consumers under the local compulsory license. Among those rights would be the ability to fill in short markets with adjacent broadcasters, the ability to bring in those stations that are deemed significantly viewed in the local market, and low-power stations that may offer valuable content within the local market. Each of these proposed changes increases the likelihood that consumers in the remaining 29

unlaunched markets would receive service that is more comparable to their urban counterparts.

But restructuring of the compulsory copyright regime as currently proposed could create a hurdle that has a significant policy consequence. Other pay TV providers pay either a retransmission fee to the local broadcast station or a copyright royalty payment for carriage. Any requirement to pay double compensation—that is, both a retransmission consent fee and a royalty payment—to carry the same station would create an unintended financial disincentive to provide these signals. Layering on additional costs to the already precarious business model to serve these economically challenging markets would undercut our mutual goal to serve every market. Indeed, to ensure that the incentives are properly aligned and that all consumers in the U.S. receive comparable services, DISH would need to be on equal footing with its competitors. For example, this would include the ability to import signals during emergencies and to serve recreational vehicles and commercial trucks, as well as households outside of our local spot beams.

The Satellite Television Modernization Act of 2009 also includes provisions for a study by the U.S. Copyright Office of the proper means to implement a phase-out of the copyright compulsory license regime with respect to the Copyright Act. We welcome such a study to provide a roadmap toward a market-based solution to replace a heavily regulated system that has too often failed consumers. So much of the current rules sit atop a complicated and outdated regulatory structure that treats competing pay TV platforms differently and deprives consumers of desired content.

As we move toward that market-based approach, we believe that a companion report from the Federal Communications Commission is warranted to address corresponding issues and challenges raised by provisions within the Communications Act. Among the topics that merit expert study are: an economic analysis of the current compensation regime, the appropriateness of subsidizing over-the-air viewers in a market-based world, and whether a new framework would provide a more workable path to providing all consumers with in-state news, weather and sports. The current system fails households in 45 states on that account. Such a report could provide this Subcommittee with an invaluable roadmap as work begins on a true market-based carriage mechanism.

In sum, we are hopeful that the reauthorization process this year will modernize an outdated statute as well as provide the incentive to achieve a national policy goal: making local TV service available to consumers in all 210 markets. We look forward to working with members and staff to accomplish both objectives.

Thank you for the opportunity to testify today, and I'd be happy to answer any questions.

The CHAIRMAN. We look forward to that. Thank you, Mr. Dodge. Mr. Karpowicz?

STATEMENT OF PAUL A. KARPOWICZ, PRESIDENT, MEREDITH BROADCASTING GROUP ON BEHALF OF THE TELEVISION BOARD OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. KARPOWICZ. Thank you. Chairman Kerry, Ranking Member Ensign, and Members of the Subcommittee, thank you all very much for having me here today.

My name is Paul Karpowicz, and I'm President of the Meredith Broadcast Group, which operates 11 television stations in small, medium, and large markets throughout the United States. I'm also Chairman of the Television Board of the National Association of Broadcasters.

As you reconsider reauthorization of SHVERA, two longstanding congressional policies are paramount: localism and private-party contractual agreements.

Localism has been the bedrock principle of national communication's policy. Congress fosters broadcast localism by allowing stations to enforce program contracts that provide stations with the exclusive right to televise their programming in their markets. If a cable or satellite system serving one community is permitted to

import the same programming from distant out-of-market stations, the viewing audience of the local station will be fragmented, advertising rates will plummet, and the ability of local television stations to provide costly local news, weather, emergency information, and local public affairs programming will clearly be diminished. Local viewers will inevitably have less access to local television stations' news, weather, and emergency and public affairs programming. Allowing cable and satellite companies to enter into exclusive program distribution contracts with their program suppliers, but depriving local stations of the same ability, will result in sports leagues and national program providers migrating their marquee programming to less restricted pay television services. Then, only those consumers who can afford to pay for this programming would have access to it.

The benefits of digital television will be undermined if satellite carriers are allowed to exploit the digital transition by retaining, or grandfathering, distance-signal subscribers they have recently signed up, when those subscribers can easily receive the same programming from a local station. Local stations can now provide three or four separate channels of free over-the-air television programming, and they're using this new technology in creative and exciting ways. In short markets, those without a full complement of existing networks, multicast channels are being used to provide the programming of missing networks, for free, that previously was only available to those who could afford cable or satellite. We're doing precisely that with a multicast channel of our Flint, Michigan station that is now broadcasting a new network that previously was unavailable, and I might add, local news is being provided on that station. And contrary to DIRECTV's testimony, we and other stations are providing local news, weather, sports, and local emergency information and local public service programming on these multicast channels.

These new multicast channels are also creating new opportunities for network programming aimed at minorities and other specialized audiences. The survival of these new and emerging networks is as dependent, perhaps more so, on local program exclusivity as existing networks. The Senate Judiciary Committee bill, introduced by Chairman Leahy and Ranking Member Sessions, wisely protects the program exclusivity of digital multicast signals, a result we strongly endorse.

Some Members of Congress have inquired about market modification legislation. We recognize congressional concern for providing viewers with in-State but out-of-market broadcast programming, a concern that can be addressed without a change in the law. Cable and satellite systems can now retransmit locally produced programming from in-State distant stations. In fact, our own station in Atlanta has signed an agreement with a cable operator in northwest Georgia to allow it to carry nonduplicating locally originated programming to Georgia residents in the Chattanooga, Tennessee DMA. Similarly, in-State carriage arrangements with local television stations exists around the country. Now, regrettably, satellite carriers have refused to participate in these carriage arrangements.

NAB strongly supports the extension of local-into-local service to all 210 markets. Residents of Jonesboro, Arkansas are better served in times of emergency by satellite carriage of Jonesboro stations' weather and emergency information than by nonlocal programming from distant out-of-market stations. Various proposals are under consideration to facilitate extension of local-into-local service to all markets, including the solution contained in the Senate Judiciary Committee's bill, which we endorse.

Thank you for the opportunity to testify. We look forward to working cooperatively with you as the reauthorization bill moves forward.

[The prepared statement of Mr. Karpowicz follows:]

PREPARED STATEMENT OF PAUL A. KARPOWICZ, PRESIDENT, MEREDITH BROADCASTING GROUP ON BEHALF OF THE TELEVISION BOARD OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Good morning, Chairman Kerry, Ranking Member Ensign 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.

I 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 Policy Objectives

Two public policy objectives should guide Congress's actions in reauthorizing SHVERA—preserving the important local broadcast service local stations provide, *i.e.*, “localism,” and respecting the 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 national policies 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 since they were adopted 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 “local” 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 Congressional policy objective is that the government should respect contracts freely entered into by private parties for distribution of television programming, especially since Congress and the FCC have found that honoring those contracts fosters localism, diversity, competition, and high quality service to the public. 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.”¹ The Act and the FCC's rules respect and enforce contracts, freely negotiated among the parties, that encourage the creation and distribution of a diverse mix of broadcast television pro-

¹FCC, 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).

gramming that serve the needs and interests of local viewers throughout the country.

II. Market Modification Proposals

The first specific issue I wish to address is our concern about market modification proposals that have been a major topic of debate in connection with SHVERA. These market modification proposals would allow satellite and cable companies to import *duplicating* content from distant in-state stations into counties located in the same state as the distant stations. 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 WHNS, a station Meredith operates in Greenville, South Carolina. Thirty-four percent of the households in its Designated Market Area (DMA) are located in North Carolina and 4 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 close weather, topography, economic, and cultural ties with Greenville, South Carolina. Accordingly, 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.

Proponents of market modification suggest their proposals are necessary to enable viewers to watch local news, weather, and local programming originated by stations located in their home states. We respectfully disagree. Cable and satellite carriers may import, with the consent of the originating stations, the locally originated in-state news, weather, sports, and public affairs programming from distant, in-state stations without any change in the law, and quite a number of cable systems do so today. Cable systems in Virginia, South Carolina, Georgia, Colorado, Tennessee, Wisconsin, and various other states import the *local* programming of in-state, out-of-market stations.

In fact, Meredith's CBS affiliate in Atlanta, Georgia recently signed agreements with Comcast to begin retransmitting non-duplicating programming to Georgia residents in the Chattanooga, Tennessee DMA. This service, offered for no additional charge to Comcast customers, highlights the actuality of these private sector agreements being completed in the marketplace. Satellite carriers may also retransmit the local programming of in-state, distant station—but, regrettably, they have refused to do so.

Market modification proposals would have a very different effect. They would:

- allow the importation of duplicative, national programming into local markets where local stations have bargained for the exclusive right to show that programming in their home markets. That result would harm 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. This would be the antithesis of localism;
- 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; and
- override and strike down the contractual provisions between local broadcasters and their programming providers (*e.g.*, between local affiliates and their networks, syndicators, and sports leagues)—thereby eroding the ability of content providers to negotiate fair compensation for their programs and the ability of local broadcasters to provide the highest quality programming to their local service areas.²

²The FCC has found that these contractual arrangements serve the public interest. In 1988, it reinstated rules it had earlier repealed that allow local stations to enforce their syndicated program exclusivity 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

I am sure you are aware of the most recent struggles, caused by harsh economic conditions, of local television stations to maintain their local news. The market modification proposals would severely damage the economic ability to provide local broadcast news—and local sports, weather, emergency alerts and public affairs programming.

To deny local television stations the ability to enforce exclusive program contracts with their program suppliers—yet allow satellite and cable companies to enforce exclusive program contracts with their program suppliers would create an unfair and highly discriminatory regulatory scheme and would drive quality programming from free over-the-air television to pay services.

III. Grandfathering

The so-called “grandfathering” issues relate to subscribers that, for various reasons, historically were unable to receive the signal of one or more of their local network stations and who have legally been receiving distant signals, but who now can receive good reception from the local network station signals over the air. The questions, which are many and complicated, relate to which of those subscribers should be allowed to keep their distant signals even though they can receive the very same network programming *free*, from a local station.

While each SHVA renewal has raised a unique set of grandfathering questions, the issues this time around are particularly complicated because of the digital transition. Because there is no current definition of an “unserved” household with respect to digital signals, as a technical matter beginning last year, much of the country has been eligible to receive distant digital signals. While the DBS industry has committed not to exploit this unintended situation, Congress should codify the promise.

It would be contrary to the core Congressional policies underlying the satellite act and harmful to local television broadcast service to allow satellite carriers to exploit the digital transition by expanding, through grandfathering, the scope of their government-granted compulsory copyright license.

In the spirit of compromise, we will not oppose satellite carriers retaining their existing lawful distant signal subscribers who were unable to receive a Grade B analog signal from a local network station—even though those subscribers may now (post digital transition) receive a perfectly good digital network signal from that same local network station. We also would not oppose allowing satellite carriers to deliver a distant network signal to subscribers in non-local into local markets who would qualify under the new digital service standard, but who previously did not qualify to receive a distant analog signal under the Grade B analog standard. In short, in this respect, the satellite carriers will receive the best of both worlds.

We do not believe, however, it is fair or reasonable to also allow satellite carriers to retain subscribers that have been receiving a network signal from a local network stand-alone digital station (*i.e.*, one that never had a companion analog signal) or from a digital multicast channel affiliated with a network. If that subset of distant signal households can, on the date of enactment, receive that same network from a local digital station (regardless of whether the channel is labeled a multicast or primary channel), such households should not be permitted to continue to receive a duplicating distant network station. That was never the intent of the Act—and to permit it now would be to allow the satellite carriers to exploit the digital transition for private gain.

New digital multicast broadcast networks are now being formed (ethnic, minority, and other specialized and general audience networks) for digital multicast channels and the existing major networks are affiliating with these multicast channels in smaller markets that previously did not have a full complement of network affiliates. For example, the Hearst television stations located in Albuquerque, West Palm Beach, Orlando, and Tampa have entered into network affiliation agreements on digital multicast channels with a new Hispanic program network. Other TV stations have done the same. This new network and its specialized Hispanic programming will not survive if Congress allows satellite carriers to retransmit the very same programming into these local markets. The result will be that viewers who otherwise would have access to those networks for free from these local stations will have to pay to get them. Congress should not be a party to facilitating that result.

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 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.

Finally, as I mentioned earlier, every household in America, except those households that can receive a Grade B analog signal from a local low power or translator station, can now legally receive a duplicating network signal by satellite from a distant network station. We urge that this legislation prevent that unintended result by enforcing the oral promise made by satellite carriers to Congress not to exploit this aspect of the digital transition. As noted earlier, Congress should codify that promise.

Cable is not permitted to import duplicating digital multicast network signals. The FCC applies its cable network and syndex non-duplication rules to digital multicast signals the same as it does to all other digital and analog signals. There is no reason why satellite carriers should be given a competitive advantage over cable in this respect.

Moreover, a prohibition against grandfathering would prevent the importation of distant duplicating national programming and, in turn, create an economic incentive for DIRECTV and DISH to extend their local-into-local satellite service to all 210 markets.

IV. Protecting Exclusivity for Programming Carried on Multicast Signals

The importance of local market program exclusivity to localism and the network affiliate relationship cannot be overstated. By that I mean the ability of local stations to secure and enforce the right to be the exclusive provider of a network or syndicated program in their local market. Local stations, particularly those in small markets, can survive only if they can generate advertising revenue based upon local viewership. If satellite carriers can override the copyright interests of local stations by offering the same programs on stations imported from other markets, the viability of local stations, and their ability to serve their communities with the highest quality programming, is put at risk.

Local market program exclusivity is no less important to stations' multicast signals than it is to their primary signals. One of the major advantages of the digital conversion is that it provides stations with the ability to provide *multiple* signals, each with separate, and additional, programming. Stations are using this technological advance in many new and exciting ways. In "short markets"—those without a full complement of existing major networks—stations are using multicast to provide locally the programming of some networks that previously were available only from distant signals, or not at all. As stated earlier, many stations are using multicast to start new programming services aimed at minority and other specialized audiences.

The survival of these new and emerging networks is just as dependent, and perhaps more so, on local program exclusivity as existing major networks. That is why it is imperative that the satellite rules protecting program exclusivity with respect to a station's primary signal apply with equal force to its multicast signals.

The Senate Judiciary Committee's approach to this issue is to provide protection to multicast signals immediately. NAB commends Senators Leahy, Sessions, and the other members of that Committee for recognizing the importance of providing this protection for multicast signals immediately. In this regard, I would note that cable has always provided program exclusivity protection to multicast signals. Cable, in this respect, should not be competitively disadvantaged by a different standard for satellite carriers.

V. Local-into-Local

NAB strongly supports the extension of local-into-local service in all 210 markets. Localism is a beacon of Congressional communications policy. The satellite legislation of 1999 made it possible for satellite carriers to compete effectively with cable operators by providing the compulsory copyright privileges 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 all of the American public.

The House version of SHVERA renewal provides a mechanism whereby DISH's right to again provide distant signals to unserved households would be restored in exchange for its commitment to provide local into local service in all 210 markets. NAB does not oppose this provision. While the Senate Judiciary bill does not contain these provisions, it does have a mechanism to facilitate providing local into local in short markets by allowing carriers to import a missing affiliate from an adjacent market and treating it as local signals for purposes of the compulsory copyright license. With the advent of digital, the number of "short markets" 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 (typically accompanied by local news and informational programming). Thus, KBAK-TV, the CBS affiliate in Bakersfield, California, now carries Fox network programming on a multicast channel and presents separately originated local news and other localized program services on that channel as well. With the switch to digital last June, this trend will continue and the number of short markets should be substantially and rapidly reduced.

VI. Other Issues

There are other major issues affecting the reauthorization. Specifically, we would urge Congress to:

1. amend the current statute to make clear that "unserved households" are to be determined in terms of *digital* service, not only analog service, and incorporate into the statute a "noise limited service" standard which is the FCC's definition of a good quality digital signal;
2. adopt the digital signal predictive methodology, recommended to Congress by the FCC at the direction of Congress, for determining whether households are unserved;
3. reject proposals to reduce the area of protected program exclusivity from the interference-free service area to the *lesser* of that area or the DMA in which the station is located except, perhaps, to facilitate carriage of a missing major affiliate in short markets. To do otherwise would reduce and marginalize the exclusive program service area of local stations; serve no useful public policy objective; and be harmful to viewers who depend upon free local broadcast service; and
4. assure satellite carriers do not import HD and multicast signals into "significantly viewed" areas in a local market from an adjacent market without also carrying the HD and multicast signals of the in-market stations.

Finally, the SHVERA reauthorization process should not be used as a vehicle for reopening a range of well-established retransmission consent issues. The various 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.

There is no need to change the present retransmission consent process, which works as Congress intended.³ Congress should continue to reject the efforts of the satellite and cable industries to persuade the government to intervene in free-market 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 responding to any questions Members of the Subcommittee may have.

The CHAIRMAN. Thank you very much, Mr. Karpowicz.
Ms. Thompson?

STATEMENT OF LONNA THOMPSON, ACTING COO, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, ASSOCIATION OF PUBLIC TELEVISION STATIONS

Ms. THOMPSON. Thank you.

³FCC 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").

Chairman Kerry, Ranking Member Ensign, and Members of the Subcommittee, thank you for inviting us to testify here today. I'm Lonna Thompson, Acting COO and General Counsel of the Association of Public Television Stations. We appreciate your allowing me to testify in lieu of our witness, who was not able to arrive today from the station.

The reauthorization of SHVERA is of great importance to the 364 public television stations across this country. There are three principal areas to which we would like to call this Committee's attention as you consider the reauthorization of SHVERA: first, carriage of our local stations' HD signals; second, carriage of our local multicast offerings; and third, our Statewide broadcasters' inability to serve all DBS subscribers in their States.

Public television proudly highlights the private carriage agreements that we've been able to negotiate with almost all major multichannel video programming distributors. Rather than relying Congress to work out these carriage agreements, we pioneered our own private agreements with cable, Verizon, and DIRECTV that address the carriage of our local HD signals and the full array of our digital programming, including our unique multicast offerings. We're also working very closely with DISH Network to come to a similar agreement on the carriage of our digital content from multicast programming to HD because we believe that DISH Network's nearly 14 million subscribers deserve access to their local public television stations. Both sides have worked diligently in recent months, and we commend the work that Mr. Dodge and his team have put into these negotiations.

Ultimately, we believe that a private carriage agreement is in the best interest of all the parties, including Congress, and we remain hopeful that an agreement may be signed before this Committee finishes its work on SHVERA. However, we must stress that any national carriage agreement must contain an accelerated deployment of our local stations' HD, accessibility to our local multicast programming, and, ultimately, the preservation of localism.

As for HD carriage, while the FCC has created a time schedule for HD rollout in all satellite markets through 2013, we've sought to reach private agreements with the DBS providers to accelerate this rollout. This accelerated schedule was a principal portion of our 2007 agreement with DIRECTV and is something that we're actively pursuing with DISH. To date, DISH is only carrying the HD signals of local public television stations in Alaska and Hawaii. The fact is that, until now, DISH has chosen to leave local public television stations in an SD world, that offers demonstrably inferior viewing experience. This is not sustainable. We certainly hope that such discriminatory treatment of our stations will be rectified by an agreement; but, if not, we will have to ask the Committee to do so legislatively.

Turning to multicasting, public television stations were early adopters of digital technology and have been at the forefront of developing content and maximizing digital capacity to serve our core missions of localism, education, and diversity. Our stations offer multicast streams that allow for complete local coverage of the State legislatures, educational, health, public service, kids, and

unique sports programming. Again, this is an issue that's been addressed by our carriage agreement with DIRECTV, and we hope to resolve it through our negotiations with DISH. However, absent an agreement, this is an issue that should be given serious consideration by this committee as you look to reauthorize SHVERA.

Finally, I'd like to address the fact that at least 16 Statewide public broadcast networks are not able to fully serve viewers in their—all their States. Because the SHVERA carriage regime is based on the DMA system, many of these networks cannot be carried by DBS providers in parts of their States, simply because they do have a full-power transmitter in each DMA. West Virginia is a glaring example. The State network covers the entire State with three full-power transmitters in three of the nine DMA's. However, because they don't have transmitters in all nine DMA's, nearly 35 percent of the State's population is ineligible to receive their Statewide service over satellite. West Virginia's not alone in this issue. We thank the Judiciary Committees in the House and Senate for addressing this issue in their SHVERA bills, and we ask that this Committee support those provisions as the bill is confereed.

Again, thank you for inviting me to participate in today's hearing. The reauthorization of SHVERA is critical to all public television stations. We look forward to continuing to work with you as you examine SHVERA reauthorization and other issues of importance to public broadcasters.

[The prepared statement of Ms. Thompson follows:]

PREPARED STATEMENT OF LONNA THOMPSON, ACTING COO, SENIOR VICE PRESIDENT
AND GENERAL COUNSEL, ASSOCIATION OF PUBLIC TELEVISION STATIONS

Chairman Kerry, Ranking Member Ensign, and Members of the Subcommittee thank you for inviting me to testify before you today on behalf of the Association of Public Television Stations (APTS). The reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA), which governs the transmission of local public television signals to millions of direct broadcast satellite (DBS) viewers, is of great importance to the 364 public television stations across the country. It also will bear directly on the future of public broadcasting in the digital era.

There are three principal areas to which we would like to call this Committee's attention as you consider the reauthorization of SHVERA: (1) carriage of our stations' local HD signals (2) carriage of public television's multicast offerings, and (3) our statewide broadcasters' inability to serve all DBS subscribers in our states. Although this latter issue is being addressed by the House and Senate Judiciary Committees, we wanted to keep the Committee informed on this, and we will seek your endorsement of the solution in the final confereed bill.

Public Television's Private Carriage Agreements

As Congress looks to reauthorize SHVERA, public television proudly highlights the private carriage agreements that we have been able to negotiate with almost all major Multichannel Video Programming Distributors (MVPDs). Rather than rely on Congress to work out these carriage agreements, which are admittedly challenging, we pioneered our own private agreements with cable, Verizon and DIRECTV that address the carriage of High Definition (HD) signals and the full array of our digital programming and services, including our unique multicast offerings.

In 2005 APTS, PBS, and the National Cable and Telecommunications Association (NCTA) reached a landmark agreement which ensured that the Nation's largest cable providers would carry up to four digital streams, including HD and multicast, of each public television station entitled to carriage on a given system. This was the first carriage agreement of its kind and has ensured that cable consumers have access to the complete line-up of their local public television station's digital offerings. In 2006, APTS and PBS reached a similar national agreement with Verizon for carriage of the full digital offerings, including local HD and multicast, of local public

television stations on Verizon's fiber-based telecommunications platform, FiOS. Then in 2007, APTS and PBS reached a digital carriage agreement with the American Cable Association (ACA), which represents 900 smaller cable systems that serve more than seven million subscribers in all 50 states. This deal was similar to the earlier deal with NCTA.

Also in 2007, APTS, PBS and DIRECTV reached a landmark agreement which allows DIRECTV's nearly 17 million subscribers to access a broad array of public television's digital services. We realized that our agreements with cable and Verizon were unique to those providers and we worked with DIRECTV on creative solutions that recognized their capacity limitations, ultimately ensuring that subscribers have access to the myriad of content and services provided by the local stations while accommodating their capacity concerns. The agreement stipulates that in each market in which DIRECTV provides high-definition (HD) local channels, they will carry either an HD signal or two standard-definition (SD) streams from each station, at the station's option. In addition, DIRECTV will carry two national SD feeds featuring educational programming that is differentiated from the station's primary streams, with local stations' identification included on the Electronic Programming Guide. In the future, DIRECTV will provide public television stations the ability to offer additional localized programming through dedicated on-demand services to its new MPEG4 receivers, which are equipped with broadband connections. Finally, in markets where DIRECTV is not yet offering local broadcast signals, DIRECTV will provide stations with marketing materials regarding an offer for an antenna and ATSC tuner so many customers can gain seamless access to local signals over-the-air.

With the tremendous investments that public broadcasting—and by extension the American public—has made in digital programming, it was absolutely necessary to undertake these carriage agreements to ensure that satellite and cable consumers have access to the full array of educational and public service programming that their local stations are providing.

We are also working very closely with Dish Network to come to a similar agreement on the carriage of public television's digital content from multicast programming to HD, because we believe that Dish Network's nearly 14 million subscribers deserve access to their local public television stations. Both sides have worked diligently in recent months to try to come to an agreement and we commend the work that Mr. Dodge and his team have put into these recent negotiations. Ultimately we believe that a private carriage agreement is in the best interest of all parties, including Congress.

We remain hopeful that an agreement with Dish Network will be signed before this Committee finishes its work on SHVERA. We must stress, however, that such a national carriage agreement must respect localism. Public television stations are some of the last locally owned and locally controlled media outlets in this country. We cannot accept any deal with Dish Network that undermines our local ability to serve our viewers. Local broadcasters' rights to serve their local communities with programming and content designed to address local needs go directly to the core of SHVERA itself, and to the work of this committee over the years. We remain committed to a deal with Dish Network that serves our communities with the full complement of local programming and services in which the American public has invested, and as such, we cannot and will not accept anything that undermines our fundamentally local initiatives.

Between Dish and DIRECTV, more than 32 million consumers depend on satellite providers to receive their television signals. We recognize that there are challenging technical and economic factors involved in trying to reach an agreement, but the core principles of localism and access through our HD and multicast services must be addressed. These are issues we have been able to address with every other major MVPD, including DIRECTV. We cannot afford to overlook the importance of ensuring that consumers have nondiscriminatory access to HD programming, regardless of the platform or service provider. If we are unable to come to a private agreement with Dish Network, it will be incumbent upon this committee and Congress to address these critical carriage shortfalls.

DBS Carriage of HD Signals

While the FCC has created a time schedule for HD roll-out in all satellite markets through 2013, public television has sought to reach private agreements with the DBS providers that accelerate the roll-out and greatly enhance the educational offerings available to consumers nationwide. This accelerated schedule was a principal portion of our 2007 agreement with DIRECTV and is something we are actively pursuing with Dish Network. There are currently 150 markets where Dish Network is offering HD local service. However, to date, Dish is only carrying the HD signals of local public television stations in Alaska and Hawaii where they are legally obli-

gated to do so. We remain hopeful that this issue can be resolved through a private negotiation so that all consumers will have access to highest-quality programming being created at local public television stations. However, if such private negotiations should fail, it is imperative that this committee address the inadequacies of HD carriage of public television stations as part of the reauthorization of SHVERA.

DBS Carriage of Multicast Services

Public television stations nationwide were early adopters of digital technology and have been at the forefront of developing content and maximizing the new digital capacity to serve our core missions of localism, education and diversity. Local public television stations are utilizing their multicasting capabilities to provide dedicated channels for public affairs programming and programming designed to reach underserved audiences. In a time of declining news coverage, the importance of these services cannot be underestimated.

For example, West Virginia Public Broadcasting (WV PBS) utilizes all three multicast channels to provide a full complement of local educational and public service programming. On their main SD channel and HD channel, they provide the only daily coverage of the State legislative session, available in West Virginia, including the live broadcast of the State of the State address. Moreover, WV PBS produces and broadcasts weekly programs providing viewers with medical advice, legal advice, and daily science and mathematics help for local students. The historical documentaries produced by WV PBS and local independent producers are legendary and award-winning. Their second SD channel is focused on educational programming and secondary sports. Ultimately they have plans to differentiate their HD and main SD channel. Once that happens, contingent on funding and public support, they are considering dedicating one of the SD channels purely to education and the other to public service and sports programming.

WV PBS is not alone in their innovative embrace of multicast programming. WFSU in Tallahassee partners with the Florida State Legislature to offer the Florida Channel, a public affairs network that is carried by several public television stations in the state. The Florida Channel features live, gavel-to-gavel coverage of the state Senate and House of Representatives, as well as other local electoral and public affairs coverage.

In Arkansas, the Arkansas Educational Television Network (AETN) is broadcasting four multicast channels. In addition to its primary channel, AETN's Scholar Channel, done in partnership with the Arkansas Department of Education, provides 24-hour programming that assists in teacher professional development and enhances the classroom experience. AETN splits another of its multicasting channels between children's programming and programming focused on creative lifestyles. AETN utilizes its last multicast channel to provide a reading service for the blind in partnership with the Arkansas Department of Health and Human Services.

However, SHVERA does not address DBS carriage of local broadcast stations' multicast offerings. Without carriage on all multichannel video platforms, this content is lost to millions of taxpayers who have invested their hard-earned dollars in public broadcasting. The Federal Government, which helped fund the conversion of public stations to digital, also has a strong interest in making this content available to the American public. Again, this is an issue that has been addressed by our carriage agreement with DIRECTV. Recognizing satellite providers' legitimate capacity concerns, the deal utilizes creative solutions to ensure that all DIRECTV subscribers have access to local station's multicast content. Multicast carriage is also a central issue being discussed in our negotiations with Dish Network and one that we believe all sides should be able to agree upon. Any agreement with Dish Network would also recognize its capacity limitations, but would ensure its consumers have access to their local stations' multicast programming. Again, we strongly prefer a privately negotiated solution to this issue. However, absent an agreement, this is an issue that should be given serious consideration by this committee as you look to reauthorize SHVERA.

Statewide Networks' Ability to Reach DBS Subscribers Throughout State

A central issue I would like to address is the fact that at least 16 statewide public broadcast networks throughout the country are not able to fully serve all viewers in their states. As you know, SHVERA establishes a copyright license that enables DBS providers to retransmit, within a Designated Market Area (DMA), the local stations located in that DMA. In several states, state governments or community foundations operate statewide or regional networks made up of several public television stations. These state or regional public television networks are charged by their state legislatures to provide statewide services including news and information, public affairs, K-12 services to schools, higher education, workforce services

and emergency response information. Statewide public television networks typically receive funding from their states to provide these unique programming services in return for its pledge to serve all citizens of the state. Public television's statewide networks take this mandate very seriously. However, because the SHVERA carriage regime is based on the DMA system, many of these networks cannot be carried by DBS providers in certain portions of their states because they do not have a full-power transmitter in each DMA reaching into the state. This is not acceptable.

For example, West Virginia is divided among 9 DMAs including Charleston-Huntington, Beckley-Bluefield-Oak Hill, and Clarksburg-Weston where WV PBS has three primary full-power transmitters. In addition, West Virginia DMAs include Wheeling-Steubenville and Parkersburg DMAs, both of which contain WV PBS translators. Six more translators are distributed throughout the state to include 2 counties assigned to the Pittsburgh DMA, 7 counties assigned to the Washington, DMA, one county in the Harrisonburg DMA, and finally one county in the Roanoke-Lynchburg DMA.

As a matter of note, West Virginia also includes a major portion of the National Radio Quiet Zone (NRQZ). The NRQZ is 13,000 square miles and affects, more or less, 19 counties in the state. This limits their ability to broadcast into some of the most rural counties in the state and underscores the importance of satellite carriage. Because over the air broadcasts are limited in these areas, satellite carriage is the only way many of these rural communities can receive WV PBS programming.

Because DBS providers lack a statutory copyright license to retransmit West Virginia Public Television in the other 6 DMAs, nearly 35 percent of West Virginia residents live in places that are not eligible to receive their station. The rest of the state receives either out-of-state public television stations or—in several of the DMAs—no local public television signals at all.

West Virginia is not alone in this issue. This problem affects state or regional public television networks in at least 15 states, from Louisiana to Nebraska and from Arkansas to Oregon, and implicates counties encompassing more than a million households. In Wyoming, the issue is so bad that over 75 percent of the population resides in DMAs that are ineligible to receive Wyoming Public Television. In many situations, these are rural areas with difficult terrain where DBS is the best option for viewers to receive their local television stations. Additionally, because of the challenges of digital conversion, many small cable systems have since closed down, leaving towns in these areas without cable service. This further highlights the necessity of ensuring that homes in these areas can receive the signal of their local statewide public broadcaster through satellite service.

Again, we recognize that the changes needed in the Copyright Act to address this issue are the jurisdiction of the Judiciary Committees and we are pleased that this non-controversial issue has been addressed in both the House and Senate Judiciary Committee bills. However, we raise this issue today because we are hopeful that this Committee will support the Judiciary Committees work to solve this issue for our statewide networks when all four committees come together to conference the final bill.

Thank you for inviting me to participate in today's hearing. The reauthorization of SHVERA is critical to all public television stations. We look forward to continuing to work with you as you examine SHVERA reauthorization, and other issues of importance to public broadcasters in the exciting new and challenging media world unfolding before us.

The CHAIRMAN. Well, thank you very much, Ms. Thompson. Let me, sort of, go right to the, sort of, first challenge here, Mr. Dodge. Ms. Thompson described a situation that is unsustainable, and I'd like you to address the question with respect to the DISH carriage issue.

Mr. DODGE. Sure. And I'd, you know, first like to say, I think there's a bit of a misconception about our dedication to, and appreciation of, the value of public broadcasting. Certainly, as a company, we recognize that, and personally, growing up in Boston, watching WGBH as a child and a young adult, I appreciate it. And, in fact, today we are the largest distributor of PBS programming in the United States, by virtue of the fact that we're in 182 local markets today, and we hope that, through the—at the end of this

process, we'll have an incentive that will take us to 210 markets. We'll make PBS available to every subscriber in the United States.

So, with respect to the specific issue of HD programming, we are in good-faith negotiations with the folks at APTS to accelerate the FCC schedule, and I've personally been involved in that, and working on it for the last 2 months nearly everyday, and I am optimistic we will reach a private commercial agreement.

The CHAIRMAN. What's the hang-up?

Mr. DODGE. At this point, there are several outstanding issues still.

The CHAIRMAN. Do you want to speak to them, Ms. Thompson? I mean, is there—do you sense the same optimism, that you'll get to the completion happily?

Ms. THOMPSON. We are also optimistic, Mr. Chairman. We do have a number of key issues that we're still discussing, around the local HD accelerated schedule, in particular, but we are—

The CHAIRMAN. So, you feel there's a way through the private negotiating process to be able to arrive—to resolve this question of coverage. Is that correct?

Ms. THOMPSON. That's our sincere hope and desire.

The CHAIRMAN. So, you do not see this as something the Committee, per se, in the reauthorization, needs to specify or dictate, or something?

Ms. THOMPSON. Not at this time. We're hopeful we can resolve it by private negotiations.

The CHAIRMAN. So are we, obviously. We'd rather have you do it that way.

I think it was you, Mr. Gabrielli, you mentioned the issue—you were talking about the predictability with respect to the distant-signal piece.

Mr. GABRIELLI. Yes, the SHVERA says that we're the—supposed to use a model that is fairly old and does not include some, I'd say, recent enhancements in technology that could be taken advantage of. Part of it is—again, is trees. And if you're from an Oregon country, you know, trees are a big issue. And we get that with our customers, that, you know, "We can't see a services 'cause of trees." So, it's just interesting that the SHVERA model, which is what we have to use to figure if you're eligible, has a big discrepancy with the model that the NAB uses when you would sign up to say, "What antenna should I use?" And you go to that model, and it says, "There is no antenna to suit you." We just need to close that gap between the two, so that—

The CHAIRMAN. How do you do that? How do—do we do that?

Mr. GABRIELLI. I think the FCC should look at the models they use, and ask the NAB what models they use, and just bring those two together.

The CHAIRMAN. Yes, Mr. Karpowicz?

Mr. KARPOWICZ. Thank you, Mr. Chairman.

I would like to say, I think we're comparing apples and oranges here. The model that was created by the FCC was the model that is being used for SHVERA. What is on the CES and NAB website is simply to help people pick out which antenna to use. In certain situations, you're going to need a larger antenna than other situations. But, it's never to say, "You can't get the signal, there is no

antenna, you are without hope.” It is simply to say, “You may need a larger antenna in this situation, versus other situations, where you may be able to accomplish the same goal with a smaller antenna.” So, we’re—I think we’re talking about——

The CHAIRMAN. And your complaint——

Mr. KARPOWICZ.—two very different standards.

The CHAIRMAN.—and your complaint is that it’s really a problem of simply not being able to get the signal, either way? I’m not——

Mr. KARPOWICZ. No, no, no, I’m actually very comfortable with the work that——

The CHAIRMAN. With the antenna choice?

Mr. KARPOWICZ. Yes, and the work that the FCC did in creating the SHVERA model.

The CHAIRMAN. I see. All right.

Mr. KARPOWICZ. So, we’re comfortable with that.

The CHAIRMAN. Yes, Mr. Gabrielli?

Mr. GABRIELLI. I guess we’d have a difference of opinion, because we actually took our customers who, when we ran through the SHVERA models, said, “You get a grade-B signal.” We took the same address, went to the antenna website, and it didn’t come up with an answer; there was no antenna that it said, “Here’s what you should go down and buy.” So, we just need to close that gap, and we’re happy to share the—our analysis with——

The CHAIRMAN. Well, we’ll work with—yes, we should try to close that gap, obviously. Let me come to, sort of, the larger question, which is: DIRECTV offers local to—you know, local-into-local service in about 152 of the 210 DMA’s?

Mr. GABRIELLI. That’s about right, yes.

The CHAIRMAN. And DISH, I gather, about 181?

Mr. DODGE. Yes, sir.

The CHAIRMAN. So, the question that a lot of people are asking themselves is, Are you dedicated to the goal of getting the 210?

Mr. GABRIELLI. I guess I’ll take that first, is—you know, DIRECTV wants to provide local channels in as many markets as possible, and the “as possible” is a strong word.

The CHAIRMAN. Is there a long-term plan to do so?

Mr. GABRIELLI. There’s a plan to continue to add markets every year. You know, we’ve spent billions of dollars, we’re in 95 percent now. We have proposed to the Congress a couple of proposals to eliminate some of the barriers. An example would be——

The CHAIRMAN. Are the barriers what are preventing you from doing it now, or is it an investment decision? Is it cost? I mean, what’s the——

Mr. GABRIELLI. One of the barriers is the cost. It—as he—Mr. Dodge says, it’s very expensive. It’s 2-and-a-half-million dollars to go to a new market and to rent out——

The CHAIRMAN. How much does it cost to, say, move into a—you know, a local-local service in a new territory? Pick a territory.

Mr. GABRIELLI. Glendive, Montana. It cost about \$2 million, because you have to establish a local facility, you have to put the infrastructure in there. And what we’re finding in a lot of the more rural markets is, there’s no way of getting the signals back to a facility, so we actually have to put the fiber in the ground to get the stuff back.

The CHAIRMAN. And is it just a simple business equation, bottom-line spreadsheet, that says, "You don't have enough people there," in terms of the advertising revenue for that market—

Mr. GABRIELLI. Well, they—

The CHAIRMAN.—to be able to support it, or what?

Mr. GABRIELLI.—they certainly—this certainly would not be not be—it'd be a loss, I mean, in this model. And part of what we—our proposals was a cost-sharing, because on top of us spending this cost to bring the local channels, the local station also wants to be paid, on top of that, for their programming rights. And so, one of our proposals is a cost—sharing of this cost.

The CHAIRMAN. And you're telling us there's no way for existing infrastructure to be able to be used in order to broaden the scope of coverage to the 210. You have to use—are you saying to us that you necessarily require significant new infrastructure investment to make that happen? There's no new—there's no current technology that could simplify it, facilitate it?

Mr. GABRIELLI. I guess—the current technology is, you actually need to go to a market and somehow gather all the television signals in a market, either by over-the-air or by fiber, locally. Then we have to transport those back to one of our uplink facilities. So, you have to go to market, find a place, rent it, put up antennas on the roof, or bring in fiber. And then, I said is—you have to now fiber that all the way back to an uplink. That infrastructure, you have to build on a market-by-market basis.

The CHAIRMAN. Senator Ensign?

**STATEMENT OF HON. JOHN ENSIGN,
U.S. SENATOR FROM NEVADA**

Senator ENSIGN. Thank you, Mr. Chairman.

If I may, before I ask a few questions, just make a few comments.

The CHAIRMAN. Yes, sure.

Senator ENSIGN. When Congress first passed the Satellite Home Viewer Act back in 1988, I think few people could have imagined what the satellite industry would look like today. Far more people today subscribe to satellite television than watch television exclusively via over-the-air antennas. In addition to the rapid growth of the satellite industry, the last two decades have seen tremendous innovation in the video marketplace.

And never before have consumers been able to get access to television content in so many different ways. Consumers can watch TV broadcasts over the air for free; they can purchase pay-television service from cable companies, satellite companies, and even phone companies; they can rent or buy entire seasons of TV programs on DVD; and they can stream or download TV content over the Internet, either to their computer or to the television in their living room.

The 1988 Act was intended to foster exactly this sort of competition and innovation. Indeed, it was never meant to be a permanent immutable regulatory framework, however. Believing that the satellite carriers would eventually be able to negotiate in the open market for copyright licenses, Congress intended for a limited interim compulsory license created by the 1988 bill to be temporary.

This temporary license has been extended three times, bringing us here to 2009, to consider extending it for a fourth time. I urge my colleagues to really think about whether we need to continue extending this license and whether our many other satellite and cable regulations fit today's marketplace.

A 2008 Copyright Office report states that, "The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system," and recommends eliminating the compulsory licenses. The satellite and cable industries are more than capable today of negotiating agreements with television networks and broadcasters, and the Copyright Office agrees.

We need to take a holistic look at both our copyright and retransmission rules, to see if we can move them toward a free market system, where consumer interests, rather than the government regulations, drive competition.

I know that some of this discussion, particularly the compulsory copyright license, falls outside the jurisdiction of this Committee. I also recognize that we simply do not have the time this year to fully debate this issue in earnest. Even so, the time must come to revisit our pay-television regulatory framework, and I hope that my colleagues will work with me, over the next few years, to address this issues in a serious way.

On the issue of local-in-local service, I think everyone here agrees that consumers benefit when they can receive their local network stations from their satellite company. DISH Network and DIRECTV have done a good job of expanding their local-in-local offerings over the years, but many communities still cannot watch their local stations on these satellite systems.

As the Committee debates how best to bring local content to every market in the country, I urge my colleagues to find a solution that does not rely on prescriptive government mandates. I am concerned that a government requirement for satellite companies to provide local-into-local service to all 210 markets could be unnecessarily burdensome for the satellite providers, would be subject to years of litigation, and might lead to a number of unintended consequences. Indeed, we should consider proposals that incentivize the satellite companies to reach all 210 markets without government requirement.

Such a proposal has been advanced by the House Judiciary Committee in their reauthorization bill. I think their idea has many merits, and most industry stakeholders seem to be comfortable with their approach. Whatever direction this Committee takes, I hope it will be one that puts consumers first, while also avoiding unnecessary and onerous government mandates.

Mr. Chairman, just a couple of quick questions.

Mr. Karpowicz, DIRECTV has testified that NAB's own Website shows that as many as 45 percent of those now considered unserved by SHVERA, and thus ineligible for distant signals, cannot, in fact, receive local signals over the air. If this is true, it would appear that many households that should be able to receive distant signals from satellite operators are blocked from receiving such service. Why does the NAB antenna website differ so greatly

from the digital perspective model that you want Congress to rely on?

Mr. KARPOWICZ. As I indicated, I think we're actually comparing two very different systems, here. The purpose of the NAB CES website was simply to help people select the type of antenna that they need in their particular circumstance. Now, some people, based on their location and their proximity to the tower and the location to the station, may not require a very sophisticated antenna. There may be other people on the fringes of the coverage area that may require a more substantial antenna and one with a greater height off of the ground. That's very different—that comparison and that website and what they're trying to do there—is very different from the model that's been developed by the FCC in their SHVERA calculations.

Senator ENSIGN. Mr. Gabrielli, in your testimony you say that, "The law should no longer allow incumbent cable operators to offer more local and significantly viewed channels than their satellite competitors." Please elaborate on this. And specifically, what rules need to be changed in order to achieve parity in this situation?

Mr. GABRIELLI. There are two rules that were incumbent on the satellite subscribers that now are on cable. The first one is this equivalent bandwidth, where if we bring in a significantly viewed station in from an outside market, we have to give it the same bandwidth—or we have to give the local station exactly the same bandwidth as we give the significantly viewed. The problem was, they did it—that on, literally, a second-by-second basis, and there's no way for us, if the local station goes from an HD signal to an SD, to be able to shut off the outside station. You know, it—so, it was matter of the way the wording was done. It's—the capacity required for both had to be literally equivalent at every moment in time.

The second issue is that, even though we have the rights from—to bring the significantly viewed in, we have to negotiate with the outside station, and we have to renegotiate with the inside station. So, it really kind of complicates the retransmission, where the inside station can say, "Well, yes, where you bring in the outside station, there's a different deal going on here."

So, we're just asking the parity with the cable, which—neither of those two requirements are on them.

Senator ENSIGN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Ensign.
Senator Klobuchar?

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I'm sorry, I've been losing my voice over the last two nights of Minnesota sports. If you—

The CHAIRMAN. Now, don't—

Senator KLOBUCHAR. I don't know if you noticed—

[Laughter.]

Senator KLOBUCHAR. Maybe.

The CHAIRMAN. We don't have any Michigan Senators.

[Laughter.]

Senator KLOBUCHAR. Or Wisconsin ones.

Actually, speaking—

The CHAIRMAN. Or Wisconsin, right.

Senator KLOBUCHAR. I'm a member of both this Committee, as well as Judiciary, so these are the two committees that are considering SHVERA. And, as you know, we did pass a bill out of our Committee. I was glad we did that. But, in the context of the debate we had in the Judiciary Committee, we actually had one amendment that we discussed, and that amendment was an amendment by the Wisconsin Senators to provide service to Wisconsin counties located in the Minneapolis DMA to retransmit the local programming of a Wisconsin station. And, despite the obvious Packers/Vikings pull on this issue, and my sympathy to these Wisconsin viewers, I ultimately voiced my concern that we would harm local broadcasters by splitting the Minneapolis DMA's viewer and advertising base. And we have 14 Minnesota counties that are considered orphan counties, as well.

So, I truly have sympathy for this, but I was concerned that we would go down a slippery slope, where we would try to make similar modification in other DMA's, with the end result being confusion for our broadcasters, our advertisers, and our viewers.

So, in the end, our Judiciary Committee marked up a clean bill that had the agreement of all parties. I acknowledge, we didn't tinker with the media markets, and we didn't create winners and losers. I hope that we will be doing the same thing here in the Commerce Committee so we can get this very important legislation reauthorized.

My question, first, is just a more general one. As we look at the fact that we are reauthorizing SHVERA, what changes have taken place since 2004—technological changes that you think should make a difference in how we consider this bill?

Maybe you want to start, Mr. Gabrielli.

Mr. GABRIELLI. Well, I think the first one's been talked to about today, is—there's—you know, the old SHVERA used the analog world and the models of an analog. And the SHVERA needs to take into consideration there is very little analog TV; there are some, still, low power and stations like that, that still do it, but most of the full powers are now fully digital. So, whether it's in the way the waivers are granted for just the networks or the way the actual—the SHVERA looks at distant signals—I mean, the local channels for the grade B—they both just need to be tweaked, if the word—

Senator KLOBUCHAR. And, you know, it's my understanding that the definition of the "unserved viewers" is based on whether or not a viewer can receive analog signal. Is that correct?

Mr. GABRIELLI. That is correct. So, technically, as it's well known, is—everyone today is virtually in a white area, because these customers no longer receive a analog grade-B signal. DIRECTV's obviously chosen not to use that. We consider the digital signal the same type, and—

Senator KLOBUCHAR. Right. So, do you think we need to update that definition of "unserved customer"?

Mr. GABRIELLI. It does need to be updated. I think this just—at this—one of those things that everybody just kind of knows should happen, but it definitely needs to be in the law.

Senator KLOBUCHAR. Yes.

Mr. Dodge?

Mr. DODGE. So, I would reiterate everything that Mr. Gabrielli says. I think the most important thing is that you end up with a signal quality test at the end of the day that really works for consumers and predicts whether or not they get an acceptable over-the-air signal in the digital world.

Senator KLOBUCHAR. Mr. Karpowicz?

Mr. KARPOWICZ. I think the single biggest thing has been the digital transition, which clearly has been transformational across the country. And it has helped stations deal with this short-market issue, where stations are now being able to fill in those blanks with secondary networks.

And again, contrary to the research that Mr. Gabrielli's people did, I can tell you that those multicast stations are doing local news, they are doing local sports. So, I think it's very important that the Committee considers that these multicast stations have to have the same rights as the primary stations.

So, I think that's been the primary big change that has happened, has been the digital transition and what that has enabled stations to provide to markets.

Senator KLOBUCHAR. So, do you think we need to update the definition of the "unserved customer," then, when it's based on analog?

Mr. KARPOWICZ. Absolutely.

Senator KLOBUCHAR. Could you talk about—I mentioned the issue of dividing up the broadcast area—some of the struggles that local broadcasters are having now in this difficult economy, and how this would be affected if we made major changes to this bill?

Mr. KARPOWICZ. The concept of market modification, where we would redefine what the DMA is, would be very, very difficult for us. As you know, the broadcast industry has had a very difficult year. I don't want to go as far as to say that we've experienced the same troubles as the newspapers, but it is not dissimilar. Our primary revenue source is advertising-based, and when advertising fell off dramatically, we were really in a tough situation.

I think you described it perfectly, that if we started to fragment these local markets and brought in other stations, it would clearly diminish our ability to continue to provide the service that we provide. We staff, you know, large newsrooms, we employ a lot of people, and if, in fact, there was a service that was duplicative, came right in over the top of us, it would really diminish our ability to continue to serve our market the way we have in the past.

Senator KLOBUCHAR. OK.

And then, last, Ms. Thompson, you mentioned in your remarks, or at least the prior written testimony, that it's better for public broadcasting to negotiate carriage agreements with satellite and cable companies privately, in that a private carriage agreement is in the best interest of all parties. In short, it seems like you're saying that Congress should stay out of this. And I would agree with that. Can you tell us more about why you think it's in the best interest of all parties to negotiate a private carriage agreement?

Ms. THOMPSON. Yes, thank you.

We have found in the past, although it's time consuming and a lot of resources, when we—we, APTS, the public television representative—has gotten to know the industry, we've taken into account the capacity constraints and other issues, technological issues, we've gotten to know each other, we've been able to work through—after years of negotiation, been able to work through agreements. As I said in my earlier testimony, we were able to do this with cable, with Verizon FiOS, and with DIRECTV; we're very hopeful that we will continue our negotiations and—with DISH Network—and it will end in the same way. We don't seek legislative assistance unless it's absolutely necessary, unless we absolutely feel that our industry efforts and our private negotiations have reached a standstill.

Senator KLOBUCHAR. Thank you very much.

Thank you, to all of you.

The CHAIRMAN. Thank you, Senator Klobuchar. And I want you to know that everybody in Massachusetts is pulling for the Twins for the next week or so.

[Laughter.]

Senator KLOBUCHAR. I just—I could have guessed that. I don't know why.

The CHAIRMAN. There you go.

Senator Pryor?

**STATEMENT OF HON. MARK PRYOR,
U.S. SENATOR FROM ARKANSAS**

Senator PRYOR. Thank you, Mr. Chairman.

Let me, if I may, ask the—our two satellite providers here, and that is something Ms. Thompson mentioned briefly there a minute ago, about capacity. I'm curious about your capacity now as compared to, say, 5 or 10 years down the road. Is that a problem for you all, in terms of your capacity and providing the programming?

I'll start with you, Mr. Dodge.

Mr. DODGE. It is, in fact. And it's—the interesting things about satellites is, it takes about 3 to 4 years to build one, and every satellite we order, the day that it's delivered, we build it totally differently because the technology advances rather quickly. But, at the end of the day, it makes it impossible for it to have additional—requirements put on our capacity today, we need to plan very—several years in advance. And so, even though today there have been great technological advances, our system is effectively full. And just to meet the FCC milestones, for example, for HD must-carry, we're building two—or actually, three additional new satellites today that will be required to make that a reality.

Senator PRYOR. Are you in a similar situation?

Mr. GABRIELLI. Very similar.

The most constraining value, I guess, or thing, on satellites is frequencies. You know, we have to use the frequencies that were allocated, or get, as licensed from the FCC, so to throw on additional burdens when we have no more frequencies to use means it's a zero-sum game; something has to come off.

So, that's one of the things that frequently doesn't get discussed, is that, you know, there is a limited amount of frequencies that we

have licenses for. You know, we don't—there are no additional ones coming up to be used; they're all spoken for. So, we have to judiciously use that capacity; and part of it is to build satellites that are smarter to do spot beams and all that. But, that frequency is an overriding constraint.

Senator PRYOR. So, how many channels do you offer right now?

Mr. GABRIELLI. Locally, we carry over 2,500 local channels, and between all of the satellites, including the international and HD and SD, there are about 500.

Senator PRYOR. OK.

Mr. GABRIELLI. So, 500 national and 2,500 local.

Senator PRYOR. And how much of that would be Pay-Per-View-type channels?

Mr. GABRIELLI. There's about 30 SD Pay-Per-View channels, and there are about 30 HD Pay-Per-View channels, but we also use those for sports; they're kind of like dual purpose. So, like on Sundays there are very few HD Pay-Per-View, because we carry a little football.

Senator PRYOR. OK. I understand.

Ms. Thompson, let me ask you a question. I know that the West Virginia person couldn't be here today, but you mentioned in your opening statement about, sort of, a West Virginia problem. And I'm assuming, if I understood you correctly, what you mean is that there are people in West Virginia that, on satellite, don't get West Virginia public television. Is that what—

Ms. THOMPSON. Yes.

Senator PRYOR.—you mean? And how common is that around the country, where you have a—sort of a State-oriented public TV system, but, on satellite, not everyone in the State has access to that system? How common is that?

Ms. THOMPSON. It's actually, unfortunately, fairly common, Mr. Pryor. We have 16 State networks that range in percentages of their in-State citizens that cannot receive the State network that their communities have invested in, that their States have invested in, and their local businesses. They range in amounts from the highest, Wyoming, where 75 percent of the in-State citizens that are satellite viewers cannot see Wyoming public television programming. Arkansas has over 17 percent. Alabama, 7 percent. It goes down to Wisconsin, over a 100,000 viewers, down to—the lowest percent is still 1 and a half percent in Idaho, 22,000 viewers that are satellite viewers that cannot see their local State networks.

Senator PRYOR. And if you could do this, what would your fix be on that? How do you fix that?

Ms. THOMPSON. We have put in place permissive language; it's not mandatory, but it's permissive. It's a—would be accomplished through a copyright fix, and so, is in the bills in front of the Judiciary Committees. But, the fix would allow the satellite providers to show the in-State public television station in DMA's where the State network does not have a transmitter, but which is unserved by public television.

So, it's permissive. We're hopeful the satellite carriers would take advantage of it. We believe the citizens, their consumers and viewers, really want to see their State networks. And we're hopeful that

this can be accomplished and that this Committee would support that when the bill is conferenced.

Senator PRYOR. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Pryor.

Senator Begich?

Senator BEGICH. Mr. Chairman, I'm actually going to pass for now.

The CHAIRMAN. Senator Udall?

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you, Mr. Chairman.

Most of the State of New Mexico is in a single TV market centered in Albuquerque; however, about 13.5 percent of the State's TV households receive out-of-State television. Unfortunately, this means that some New Mexicans are cutoff from important State news and information that directly affects them. In fact, the second largest city in New Mexico receives its television from another State. This problem is compounded by the fact that major newspapers from New Mexico no longer deliver to these areas that don't have New Mexico TV channels.

And I've received numerous complaints from residents calling for changes to SHVERA to allow satellite TV customers to receive these in-State TV channels. A satellite TV customer told me he pays for dozens of channels, but he cannot get a single New Mexico channel to keep up with events. A mayor of one of the cities in these communities told me, "Our citizens are very disturbed by the unavailability of New Mexican television in our area. As New Mexican residents, our communities should have access to New Mexico State news and events."

Several county commissioners wrote me that, "New Mexico is our State, and we're entitled to information as it pertains to our citizens' safety and well-being."

Our State legislature has weighed in on numerous occasions with a resolution urging Congress to require satellite television providers to provide New Mexico television to all parts of the State.

So, Mr. Karpowicz, I'd like to ask you, from the broadcasters' perspective, and then also the satellite TV representatives here, your testimony extols the virtues of localism in broadcasting; however, the current TV market uses Nielsen company designated market areas to impose on TV viewers what their local area should be. Why should my constituents be prevented from receiving the New Mexico television they wish to watch?

Mr. KARPOWICZ. I don't think they should. I think they should be able to get their local news from a New Mexico station. In fact, I have before me a letter from KOAT, where they are granting consent, without charge, to all the cable systems and DIRECTV and DISH Networks to retransmit the station's locally originated news, weather, and public affairs programming to each of the carrier subscribers located within the State of Mexico. This is not dissimilar from what we have done in moving our newscast from Atlanta up into the northwest corner of Georgia, which is actually in the Chattanooga DMA.

So, the TV stations and the broadcasters in Albuquerque are prepared and willing to give the right to move their newscasts, the content they control, to the satellite operators and the cable systems. That would necessarily include network programming, which we don't have the rights to, or sports programming, which we don't have the right to, but certainly New Mexico news would be available to your constituents throughout the State under that scenario.

Senator UDALL. Well, the problem here is that one of my constituents asked a broadcasting company, just like you talked about, and said they wanted to get the New Mexico media, and they were told, "Your town, while in New Mexico, is not part of the Albuquerque/Santa Fe market. Because of that, DISH Network and DIRECTV cannot offer our signals where you live. Cable may be able to, but it's optional for them."

So, why will broadcasters not voluntarily agree to allow satellite TV companies to provide a New Mexico channel to State residents who want to watch it?

Mr. KARPOWICZ. I think the distinction—I think that—

Senator UDALL. I mean, I think there's a real problem here.

Mr. KARPOWICZ. Well, I think the distinction is, we can only grant consent for the programming that we control, which is local news. And if it is local news that is the issue, we control the rights to local news that we produce. I think moving another—moving the station in its entirety, which would include network programming and sports franchises and so forth, we can't control that. But, local news, we can make that happen. And, as I say, the station in Albuquerque has effectively, today, said they're granting the rights to these guys. If they would like to take the local news programming from Albuquerque and move it across the State, they're happy to do that.

Senator UDALL. And so, all somebody has to do in one of these areas is make a request and it will happen is what you're telling me.

Mr. KARPOWICZ. Well, first these guys have to agree to do it.

Senator UDALL. Who has to agree?

Mr. KARPOWICZ. The satellite—

Senator UDALL. Yes.

Mr. KARPOWICZ.—carriers.

Senator UDALL. Well, that's the next question I'm asking—

Mr. KARPOWICZ. OK.

Senator UDALL.—them. But, the broadcasters have apparently—broadcasters have apparently opposed this effort—

Mr. KARPOWICZ. I—

Senator UDALL.—at the local level.

Mr. KARPOWICZ. I think it's—I think the distinction is, the broadcasters have opposed moving another—a station in its entirety—

Senator UDALL. Right, right. I understand that. I understand—

Mr. KARPOWICZ. OK.

Senator UDALL.—that. Could I—

Mr. Chairman, I don't know if I've run over, here, so are we going to have a second round?

The CHAIRMAN. It's OK, take a moment.

Senator UDALL. Just—

The CHAIRMAN. Yes, we'll have a second round.

Let me let the other Senators get their—
 Senator UDALL. Yes. I want to make sure—you bet.
 The CHAIRMAN. Senator McCaskill?
 And then Senator Thune—

**STATEMENT OF HON. CLAIRE McCASKILL,
 U.S. SENATOR FROM MISSOURI**

Senator McCASKILL. I'll ask it—
 The CHAIRMAN.—and then Senator LeMieux.
 Senator McCASKILL. I'll ask it for Senator Udall.

Here's the bottom line. The bottom line is, we have orphan counties. We've got orphan communities in Missouri. And they're big cities—I mean, they're not big cities by Kansas City/St. Louis standards, but Hannibal, Kirksville, St. Joe—just like his situation. Is this about you not wanting to run the news that they're willing to give you, because you don't want to give up the space for it, or is this about you not wanting to pay for the entirety of the channel, because you don't want to have pay for the network programming too, because you can get it cheaper somewhere else? DISH, DIRECT?

Mr. DODGE. I—well—I'd like to start off by saying we absolutely support giving consumers the right to decide what programming is local to them, and providing that programming to them. I also agree with Mr. Karpowicz, that they can only give us the rights that they have.

Senator McCASKILL. Correct.

Mr. DODGE. And our answer to that is, hence the need for compulsory licenses, which no one agrees are ideal, but that's the purpose of them, to clear rights. And even—there are multiple problems with this, but when Mr. Karpowicz says, "We'll give you the rights for a newscast," the broadcasters have admitted, or put in writing to Congress early this year, that they might not actually have all those rights, because they incorporate national bits and pieces, even to their local newscast, that they might not have the rights to grant the copyrights for—

Senator McCASKILL. Well, let's just assume, for this purposes, that they can.

Mr. DODGE. OK, so assuming that—

Senator McCASKILL. Why aren't you doing—why can't you offer Kirksville news to the folks in Kirksville, and why can't you offer St. Joe news to the folks in St. Joe, and why can't you offer, in Senator Udall's State—why can't—since they're offering up their news—why can't you do that, right now?

Mr. DODGE. The issue is, one, consumers don't—if we did that, their screen would be blank about 90 percent of the day, and consumers don't want that. You know, two—

Senator McCASKILL. Well, wait a minute, wait a minute. So, you're saying that you—the consumers don't want to get the news, because they'd have to change the channel to look at the national broadcasting on another channel that you might put in there?

Mr. DODGE. I'm not saying that. I'm saying—

Senator McCASKILL. Well, when—

Mr. DODGE.—you actually—

Senator MCCASKILL.—it went blank after the news, wouldn't they switch to whatever NBC programming you have on your lineup—

Mr. DODGE. They may—

Senator MCCASKILL.—that's not in their DMA, that's not in their community?

Mr. DODGE. They may or may not. But, we've actually reached out to our customers, and they don't want a screen that's blank 90 percent of the day. But—in putting that aside—

Senator MCCASKILL. How did you reach out to your customers? I'm curious about that. Because I—you know, I would have to believe the folks in Hannibal and Kirksville, if you called them and said, "Hey, we're going to include, in your lineup, local news,"—and I'll guarantee you people in Missouri are smart enough to switch the channel when it goes blank.

Mr. DODGE. I agree.

[Laughter.]

Senator MCCASKILL. Yes. So, I'm curious as to how you reached out to your consumers, because I'm not aware of you reaching out to the folks in Missouri that are in orphan communities. Have you done that in Missouri? Have you reached out to the consumers in those area and asked if they'd like to cover—to carry the local news?

Mr. DODGE. I don't know specifically if we spoke to folks in Missouri.

Mr. GABRIELLI. So, this is—it's complex. So, the people in New Mexico that are not in the New Mexico market, there would be an extra channel in their guide, it would show KOAT, and would have all the listings for all the programming that they normally carry. And you'd tune to it, and you would get a message, "This programming not available in the area." So, they have to be recognized that, when local news shows up, that it's going to be opened up to them, and when local news is gone, it's going to be closed to them.

One of the things that this fails to do, which is really most important, is emergencies. Nobody knows when emergencies are. All of a sudden there's a breaking news story and they break into it. These customers would still be blacked out of that unless we could figure some super-technological way that they would inform us, "Hey, emergency's coming, open it up. OK, emergency's over, shut it down." So, it doesn't fix the emergency messaging part of the—of what it—it really is very important to local news.

Senator MCCASKILL. I guess this is an economic decision, correct? I mean, there's nothing wrong with that. I'm not—you don't—you can admit—

Mr. GABRIELLI. I don't think—I mean—

Senator MCCASKILL.—that it's an economic decision.

Mr. GABRIELLI. Assuming we use the same capacity that we use for KOAT in New Mexico and it actually reaches this other part—because one of the parts that both of us, years ago—10-plus years ago—we designed satellites to reach the DMA's, because that's what we told the market was. And when you do a spot-beam satellite, you have to make sure this beam is just big enough so that you can put one next to it and one next to it and next to it. They're not huge beams that overreach stuff, because they wouldn't all fit.

So, assuming we can reach this upper part of New Mexico, it would be different—a channel in the guide that would be blank—it would be—listings would be there; most of the time, you wouldn't get it. It could open up for local channels; and then, again, it would shut down. Consumers would probably call us a little bit, saying, "Well, what about this show? Well, how come I can't see that?" So, there is a complexity and a part of it that's—you know, we'd all have to wrestle with.

But, the emergency broadcast—you know, we couldn't open it up and shut it down quick enough to get the breaking news—

Senator MCCASKILL. But, what about—couldn't you just send them a note in their bill? Couldn't you just give them notification? I mean, I—yes, no, I would think that if the people, you know, were told, "You can get local news, but you won't get anything else on that channel but local news," I think people would pay attention to that and appreciate it, and especially—you could include in that note in the bill—you communicate with your customers every month. Trust me, I get a big whoopin' bill from one of you every month. So, every month the bill comes, you could communicate in that bill, "In your area, you can now get local news. It will not be available to you any other time. And, by the way, you will not get emergency break-ins on this channel; you should be aware of that." I mean, that—it seems to me that would be a simple way—you have a way to communicate to your customers.

Mr. GABRIELLI. OK, and then I'd also say there are probably four major news—four major stations in the New Mexico market. What happens if only three of them agree to do this and the fourth doesn't? Then my customer's going, "Well, I really like the NBC person. Can't I get the NBC." So, it is a very complex issue that—you know, that we'd have to work out with the broadcasters very closely. And part of it is, you know, an—overall, reaching agreement that if we can do one, we can do all.

Senator MCCASKILL. Right.

Mr. GABRIELLI. Because is it a must-carry situation; if we carry one, we have to carry all? Do we have to renegotiate? Three of them will give it to us for free, but the fourth says, "You know, that's worth an extra, you know, coin in my pocket."

Senator MCCASKILL. I think we want to work with you. I think you—I think you're getting the sense that you guys are being victimized by your success. I mean, you now have spread into enough of the markets in this country, and people are getting so spoiled with the variety of channels they get. We are getting constant pressure from people who can't get their local stations, as to why that can't get fixed. And I realize there are problems, and it's complex. But, I think the quicker we all get together and figure out how to fix it, the better it's going to be, in terms of your competition and the happiness of your customers.

So, thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you. Good line of questioning, and that's exactly what we're going to do with this reauthorization; and in pretty short order, I hope.

Senator Thune?

**STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman, and I want to thank our panelists for shedding some light on this subject. It is an important one, and one that Congress does have to deal with this year. And so, we appreciate your insights and—as we go through the, kind of, complex process of reauthorizing SHVERA.

I'd like to direct this to Mr. Gabrielli and Mr. Dodge. And the question has to do with incentives. And, aside from an outright mandate, what incentives can or should this committee provide to the satellite TV providers to encourage local broadcast coverage for all 210 media markets?

Mr. GABRIELLI. I guess I'll start.

So, we didn't do a proposal to the Congress for "removing the barriers," as we like to call them. One of them is some kind of a cost-sharing. It is—gotten very expensive to go to these markets, and, as Mr. Dodge pointed out, some of these markets have so few customers, it's—it will be a loss to the company. We'll never make—even break even on it. So, we're hoping to share with the—you know, the broadcasters, some of this cost. It'd be no different than them putting up a—an additional tower to do repeating. It's—you know, it's a cost of getting their broadcast out.

As I was asked, "You know, how many local channels do we carry?" We carry 2,500 local channels, compared to 500 national channels. And, you know, that's more than the one-third capacity maximum that cable has to carry.

So, some kind of a help, in that, you know, we don't have to carry channels that are pretty redundant in the programming. There are a number of local channels who virtually repeat a national channel, but, because they're being broadcasted also locally, we carry both versions. You know, something to look at maybe the—reducing that constraint on us.

We think a lot of the things that are already being discussed—the grade-B bleeds and stuff like that will help—so that when we go to a market that's missing some affiliates, we don't have to try to negotiate with the three or four people that kind of bleed into it, each one wanting to be the station of choice; or, worse yet, dividing it up so, you know, half the market gets an NBC from outside left and half from outside right.

So, there are a number of proposals which we're, you know, happy to reiterate, that would help remove these barriers.

Senator THUNE. And you think there ought to be any of those incentives that differ for DISH Network and for DIRECTV?

Mr. DODGE. I would say, today we're hamstrung in that—in the 29 markets that we're not—where we haven't launched local service today, we don't have the ability to bring in a distant-network signal. And they're all short markets, so we can't offer a full complement of network programming. So, we can't make a competitive offering vis-à-vis DIRECTV or the cable folks. So, in the simplest sense, that's an additional incentive we would need to take that step.

Senator THUNE. In light of the economic downturn, what we hear from—I hear, I know, from a lot of small broadcasters—and that is that they're struggling with declining advertising revenue. So, if

the reauthorization of SHVERA includes market modification proposals that would allow for more out-of-market signals, how would that type of proposal impact broadcasters in predominately rural markets like the ones that I represent?

And I'd direct that to—maybe—that's a question, maybe, for Mr. Karpowicz.

Mr. KARPOWICZ. It would be devastating, Senator. It would be very, very difficult, because the fragmentation of our local market-place is—particularly in small markets—you know, in a larger market, a top-ten market, they might be able to sustain that; but in a smaller market, to have a competing duplicative signal come in over the top and basically split the audience and to fragment that audience would be very, very difficult. And it would really hamper that station's economic health, and then their ability to continue to provide the service and the news and everything else they do. So, it would be devastating.

Senator THUNE. Thank you, Mr. Chairman.

The CHAIRMAN. Senator LeMieux?

**STATEMENT OF HON. GEORGE S. LEMIEUX,
U.S. SENATOR FROM FLORIDA**

Senator LEMIEUX. Thank you, Mr. Chairman.

First of all, thanks, to the panelists, for being here today. It's a—obviously a complex issue. But, I wanted to just go on record for the people of Florida. We have three counties in the great north-west part of Florida—Escambia, Okaloosa, and Santa Rosa; this is all the way on the Panhandle, all the way to the west—that receive their broadcasting from Alabama. And although this area of Florida is affectionately called "L.A.," meaning Lower Alabama, I know that those folks would like to get more local programming.

So, I think a lot of the questions that have been asked on this topic—and the Chairman has said that we're going to work together to try to find some solutions. But, I wanted to make sure you were aware of the challenges that we're having in that part of Florida, that they're not receiving as much local programming as they would like. And then just get you to comment, if you have anything additional to add whether, you know, the—we should be in a mandate situation or a market-based incentive situation, as Senator Thune just spoke to.

Mr. Gabrielli, if you want to start.

Mr. GABRIELLI. I mean, this is a problem that started 50 years ago, when there was only over-the-air broadcasters and these territories were established. And it is one of the few pieces of telecommunication that still has limitations on its area, that broadcasters still have these rights.

You know, we're willing to work with them on modifications and all that, but the way it's been written and revised in each of these is, you know, these definite market areas we have to follow. So, it is a—it's a complex problem, because I do agree that changing it would change the boundaries of a television station, which, you know, affects—would affect some stations not being in business, and the others would grow.

But, it is—you have to recognize, it's, you know, something that started 50 years ago, when that was—that territory became de-

fined, because that's the only stations they got. And maybe we just need to recognize that's just not the way the world is now, that you can get newspapers from outside, you can get Internet from the world, you know, and it's just the television market that's still sticking with this, "This is my territory, and I have exclusive rights." And it's—it is complex, because they have to negotiate and, you know, make sure they don't override each other.

Senator LEMIEUX. Mr. Dodge, did you have anything to add?

Mr. DODGE. I would just—there are—with respect to just importing local news, there are also technical limitations we face, in that if you're going to just broadcast the news at 6 o'clock in the evening, you actually have to set aside all the bandwidth for that channel all day long. So, if you do just that, other folks will suffer, and we'll be able to launch less channels on a particular spot beam.

Additionally, there's a difference between us and cable, in that they generally have a local presence, and it's easier for them to blackout, on a moment's notice, as things change during the day, whereas we have a single team of folks in Cheyenne, Wyoming, who are responsible for managing our local stations across the entire network. So, it's very, very unwieldy.

But, we do support, as I said earlier, the concept of letting subscribers and consumers decide what, for them, is local, and trying to provide that to them.

Senator LEMIEUX. Mr. Karpowicz?

Mr. KARPOWICZ. Well, I guess, as it relates to the emergency broadcast concern that have—concerns that have been addressed here, I think we have to remember that, in those households, they are still going to be getting their local television station from their primary DMA. So, even if they had the news from New Mexico or the news from Atlanta, they would still have their primary newscast available to them from their DMA, which, quite frankly, is probably closer to them, in terms of geographic proximity, than getting the news from somewhere else.

Senator LEMIEUX. Yes, but when it's from a different State—

Mr. KARPOWICZ. Right. But, it's—

Senator LEMIEUX. There's a lot of—whole host of different issues that they may be interested in. Maybe—they may want to know what's going on in State government, for example, down the street, and they're getting Alabama State government news.

Mr. KARPOWICZ. Absolutely, and that's why I think, for regularly scheduled newscasts, that would certainly address those issues. What I was talking about was emergency coverage, which would be tornados and things of that nature. The proximity of the DMA station is such—they're closer to that household than probably, you know, the secondary station that is being brought in. So, as it relates to the concern about bringing in emergency notices, I'm not as—I just don't think that is as big a concern.

Senator LEMIEUX. Ms. Thompson?

Ms. THOMPSON. Our focus has primarily been, as I mentioned before, on our—on the State network issue. We have really—our real concern about in-State service has been with our 16 State networks that have been unable to reach all of the viewers who are satellite viewers within their States.

I had mentioned earlier that it ranges from 70 percent of all the citizens down to 1 and a half percent, but, even with 1 and a half percent, we're looking at over 20,000 viewers. So, we are hopeful that we can work with the satellite companies on a permissive understanding that they will indeed serve all of their viewers with the in-State network. And we're hopeful that the resolution that's put into the bills in the Judiciary Committee will pass and will have the support of this Committee.

Senator LEMIEUX. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. I appreciate it.

Senator Begich, you passed, at first. Do you want to do a—

**STATEMENT OF HON. MARK BEGICH,
U.S. SENATOR FROM ALASKA**

Senator BEGICH. Mr. Chairman, just some quick, if I can?

The CHAIRMAN. Sure.

Senator BEGICH. Thank you very much.

The CHAIRMAN. And then Senator Udall.

Senator BEGICH. Mr. Dodge, you had made a comment, and I just wanted to kind of follow up so I can get a better understanding. I mean, we—Alaska's somewhat unique. We don't have this issue on noncovered areas. So, I'm listening to my colleagues and recognizing their struggles in ensuring that they get full coverage from their local broadcasters. We don't have that problem, as rural and as unique as our State is. You mentioned the 29 markets you cannot get into. Can you just help me understand that a little bit more? And your ability to be in those markets may require incentives to do that—can you help me understand that?

Mr. DODGE. Sure. As it stands today, the—I believe it's the—in every remaining market we're not in, which are the 29 markets, are "short markets," meaning they're missing—

Senator BEGICH. Right.

Mr. DODGE.—a local affiliate. And we don't have—we no longer have our distant license so that we can actually import a signal. And therefore, from a competitive standpoint, you know, say, in Glendive, Montana, where I believe there's one local affiliate—doesn't really make sense for us to launch it, from a competitive standpoint, because DIRECTV can bring it a full complement of network stations; the local cable folks can do the same. So, from a competitive standpoint, putting aside economics and all that, it just doesn't make sense for us to go into the remaining markets, because we don't have a viable product to sell to people.

Senator BEGICH. Gotcha.

Mr. DODGE. Everybody would go to DIRECTV or the cable folks.

Senator BEGICH. Gotcha.

Mr. DODGE. So, from an incentive standpoint, to go into those remaining markets, at a minimum we need that. And we think this is a great opportunity as well, after the digital transition, to put all players back on the same level playing field with respect to the 119 distant license so the consumers have choice amongst the providers, it's equal, and we can compete on customer service and service offerings alone. So, we'd ask for that, as well.

Senator BEGICH. Very good.

Mr. Gabrielli, you had started to list a few incentives, I think it was to Mr. Thune's—Senator Thune's question.

Mr. GABRIELLI. Yes.

Senator BEGICH. Would you be willing—and I don't want you to elaborate more on that right now—but could you give me kind of the shopping list, at some point, in written form—

Mr. GABRIELLI. Certainly, I—

Senator BEGICH.—what those—and then I'm going to ask you—and I'll—and I know there are folks—knowing how this place operates, I'm sure there are folks from the Broadcast Association sitting out in this audience—your one idea on cost sharing, I'd be interest in more elaboration for that.

And even though the broadcasters are probably in the audience, I'd asked them to send me the same thing on their view on this. It's my way of getting the question to them through you, as they're in the audience.

Because I'd be interested in how you see that, and also the broadcasters see that. But, if you could give me that shopping list, I'd greatly appreciate that.

And, for both of you, I was listening to Senator McCaskill's line of questioning, and I just want to make sure—I'm going to use a different word; instead of "It's not profitable," "It doesn't fit into the business model," some of these situations. And I think the example you just gave, Mr. Dodge, was that; it doesn't fit into the business model, because you're—the competitive nature doesn't exist for you, or the opportunity to be competitive and grab clients or share. Is that a—

Mr. DODGE. Well, with respect to just bringing in local news to, say, southern Colorado or to—

Senator BEGICH. Right.

Mr. DODGE.—the Albuquerque DMA, there are—I guess, in the simplest form, there are practical concerns that we have, but also licensing concerns.

Senator BEGICH. OK.

Is that same thing on your end?

Mr. GABRIELLI. Same thing. And I was going to say that, you know, we might have a chance to learn from history, because the last reauthorization allowed a limited amount of this market modifications. I mean, you know, New Hampshire and Vermont, two cases. And I think there was one in Alabama. But, we could look, you know, where we have actually done this in a limited amount, what the effect was. So, maybe we can learn from empirical data rather than just hypothesis of what it will cost.

Senator BEGICH. Good comment, there.

Ms. Thompson—and I caught your last comment—or, your comments throughout the testimony today about—that last resort is Congress in regards to trying to figure out how to inject good programming, PBS and so forth. How do you know when you reach that point? Because—you know, I know negotiations can go on for a long period of time, but how do you measure that so you can determine—in other words the way, again, this place moves, it's very slow. So, when you might get to conclusion, it may take years for this body to move. Is there a better approach of simultaneously having that consideration?

Do you follow what I'm saying or—

Ms. THOMPSON. Yes.

Senator BEGICH. Because you're negotiating, and you may finish and say, "Guess we can't get there." But, the way this—it may be years before we come around and assist you in that effort. So, can you elaborate?

Ms. THOMPSON. We have—both APTS and DISH—if I may speak for a moment for DISH—have both set an expedited time-frame on resolving our negotiations. The hope was that we would actually have them resolved prior to this hearing today, but we have hit some stumbling blocks that we're continuing to work through as early as today, throughout the week.

Our goal is, most clearly, getting our local stations carried in HD in local markets where DISH is providing HD coverage. Thankfully, because of the last SHVERA reauthorization that takes place in Alaska and Hawaii, the local public TV's HD stations are being seen by the citizens there.

Senator BEGICH. Absolutely.

Ms. THOMPSON. That's not the case in 150 markets where DISH is now. So, we want to expedite these negotiations, because we—it's really—you know, viewers are not seeing public television as, you know, we've taken the time to go through this. So, we're really hopeful that we come to a conclusion quickly, and the viewers will benefit from that.

Senator BEGICH. Thank you very much.

Thank you, Mr. Chairman.

And you'll keep us informed on the status?

Ms. THOMPSON. Yes, sir. We will.

Senator BEGICH. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Begich.

And I would certainly urge the parties to do that. As I said earlier, it's preferable to get it resolved on the private side, but, you know, if we have to tackle it, we will.

Senator Udall?

Senator UDALL. Thank you, Mr. Chairman.

The—you made a—Mr. Karpowicz, a statement about KOAT. Was that in a letter form? Or was that—

Mr. KARPOWICZ. Yes, sir.

Senator UDALL. That they—you have that with you?

Mr. KARPOWICZ. Yes, I do.

Senator UDALL. Could we make that part of the record?

Mr. KARPOWICZ. Absolutely.

[The information referred to follows:]

KOAT-TV
Albuquerque, NM, October 6, 2009

To Whom It May Concern:

This letter confirms that Station KOAT-TV, the ABC affiliate in Albuquerque, New Mexico, hereby gives consent, without charge, to each cable system and to DIRECTV and the DISH Network to retransmit the Station's locally originated news, weather, and public affairs programming to all of each carrier's subscribers located within the State of New Mexico, that are located outside the Albuquerque DMA, and where the station is significantly viewed.

KOAT is already providing this service to Comcast Cable in Dona Ana County, so that viewers in Las Cruces, New Mexico, which is part of the El Paso, Texas

DMA, can be informed. This is further evidence that local news, weather and public affairs programming can be made available throughout the state.

Sincerely,

MARY LYNN ROPER,
President and General Manager.

Senator UDALL. Is the—is what they're saying that—basically, that they're willing to put it out without any—could you just read us—

Mr. KARPOWICZ. Yes, sir.

Senator UDALL.—the crucial part of the letter there?

Mr. KARPOWICZ. Yes, sir.

“To whom it may concern, This letter confirms that Station KOAT, the ABC affiliate in Albuquerque, New Mexico, hereby gives consent, without charge, to each cable system and to DIRECTV and DISH Network to retransmit the station's locally originated news, weather, and public affairs programming to all of each carrier's subscribers located within the State of New Mexico. KOAT is already providing this service to Comcast cable in Donna Anna County so that viewers in Las Cruces, New Mexico, which is part of the El Paso, Texas DMA, can be informed. This is further evidence that local news, weather, and public affairs programming can be made available throughout the State.”

And it was signed by Mary Lynn Roper, the president and general manager of KOAT.

Senator UDALL. Thank you very much. And that's a very positive development, I think.

My question to the two gentlemen to your right, there, would be, Are you willing to run it now?

Mr. GABRIELLI. I think the answer is, we'll certainly look at it. It's a—complex whether that signal actually reaches the entire part of the rest of New Mexico that needs to be reached. So—because, again, our spot beams were designed, 10 year ago, to reach a certain area, and hopefully this is within it. That's a very big constraint.

We have to make sure that we allow just these people, I am assuming, that are in New Mexico and not across the State border, where we're actually in the other DMA, to see it. So, we have to define a blackout that's very specific to this.

And then, one of the hardest ones is keeping track, with the stations, of what is it they've—giving us the rights to? Because if their local programming goes long or if it runs—what happens if a baseball game is on, but it runs long, and they're going to delay the local programming. All of a sudden we open it up—because it—this will be automated, there won't be people standing there. Now the game's on. You know, are we going to get in trouble?

So, when you talk about, you know—and I'm sure Congress knows—the devil in the details, this is going to be one of those.

Senator UDALL. Mr. Dodge?

Mr. DODGE. I guess I'll just reiterate what I've said earlier, which is, we have reservations about whether they actually have all the necessary rights to grant us the copyright to rebroadcast just their local news, weather, et cetera, be it with their local advertising or national news clips inserted into their local news. And—huge practical limitations, in that it's nearly impossible for

us to blackout programming around the country, and you have to set aside bandwidth for a few hours a day, an entire channel, on a spot beam. So, from a practical perspective, it's very difficult to implement the way that the broadcasters have outlined.

Senator UDALL. Thank you.

Mr. Karpowicz, in your written testimony you said, in talking about this issue of modifying TV markets, quote, "It would not advance localism goals, but would, in fact, undermine sound public policy and harm consumers," end quote. The last time SHVERA was reauthorized, a handful of exemptions were made by States with the same problem as New Mexico. Were consumers harmed by these limited exemptions that allowed satellite companies to provide secondary transmissions of in-State TV signals?

Mr. KARPOWICZ. I think our economic reality has changed dramatically since the first authorization of SHVERA, and the fact that those exceptions took place in isolated pockets. And, quite frankly, I don't have the historical perspective on what impact those have.

I can say, though, with—I believe, with certainty—that today, in today's environment, if we were to implement a full duplication of signal—if another signal came in, in its entirety, including network programming, syndicated programming—came in over the top of a local station, it would inhibit his ability to perform, and certainly have a great economic impact, and have an impact on his ability to subsidize his news and all the other services that he provides in his market.

Senator UDALL. Thank you.

Chairman Kerry, thank you very much for your courtesies in allowing this second round.

The CHAIRMAN. Oh, absolutely. Important questions. I appreciate the participation of so many Senators. And I think it's been very helpful in creating the record for this.

Obviously, you all can sense, from every question, there's a pretty focused area of concern here, and we're going to need to address it. You know, this question of why there—Mr. Dodge, there are 150, you know, areas where public can't be carried in HD. It can be carried elsewhere. It's just—you know, it's pretty fundamental. And we want to maximize the ability of citizens to get local and to get the kind of quality that they deserve.

So, we're going to work to do that. We will get this done in the Committee as soon as we can.

I will leave the record open for a week because there are additional questions that I don't have time to submit right now, to question you on, because I have an 11:30. But—and other Senators may have additional questions we want to submit in writing.

So, I'd ask you to try to respond to those as rapidly as possible, and the Committee will continue its work behind the scenes and get ready to do a markup and get this done.

Thank you all very, very much for being here today. We appreciate it.

Hearing is adjourned.

[Whereupon, at 11:31 a.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. JOHN D. ROCKEFELLER IV,
U.S. SENATOR FROM WEST VIRGINIA

Over the past 15 years, satellite television has grown into a strong competitor to cable by offering consumers in rural as well as urban markets a choice in pay television providers. Where residents once were limited to a single cable operator, satellite providers now offer most consumers an alternative. This has led to price and service competition, which is good for subscribers. Congress supported such competition through the passage of the Satellite Home Viewer Act and its progeny, including the Satellite Home Viewer Extension and Reauthorization Act or SHVERA.

Now we are faced once more with the reauthorization of SHVERA. This entails the extension of certain communications and copyright provisions, but it also provides us with the opportunity to examine whether consumers across the country are adequately served by existing law.

A decade ago, Congress, recognizing that consumers want access to local news, weather, and community-oriented programming, established a mechanism by which satellite providers could offer local broadcast stations to residents in the local market. This means that when a satellite subscriber in Huntington, West Virginia tunes-in to CBS, PBS, ABC, FOX or NBC, they hear about events in the state capital and see the successes and trials of their neighbors—not the weather in Manhattan.

Recognizing the limits of satellite providers at the time, Congress did not require the companies to offer local channels to every market in the country. Over time, this has created a division between haves and have-nots in which satellite companies are not providing local channels to residents in the smallest markets.

In West Virginia, DIRECTV recently began providing local service to the Beckley area, which I applaud, but that still leaves the Parkersburg and Wheeling markets without local channels. In reauthorizing SHVERA, I believe that we should examine how all consumers in even the most rural regions can gain access to local news, sports, and community programming.

As some broadcast television has become coarser and less informative, the importance of the mission and programming provided by public television has grown. Unfortunately, getting carriage of public television programming to satellite subscribers has not always been easy.

For example, existing copyright law makes it difficult for state-wide public television networks, like that in West Virginia and 14 other states, to reach every resident of the states they serve. I am pleased that the Senate and House Judiciary committees have addressed this issue in their reauthorization legislation. I also understand that public television and the satellite providers have been discussing other carriage issues and look forward to hearing about the progress of those talks.

The reauthorization of SHVERA provides us with the opportunity to encourage greater competition and access to quality programming to consumers throughout the Nation. I thank the witnesses for coming today and welcome their thoughts on these issues.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN D. ROCKEFELLER IV
TO ROBERT M. GABRIELLI

Question. Satellite television has spawned greater competition among pay television providers, especially in rural areas. This benefited consumers by giving them more choices and in some areas lowering prices. A key component to making satellite television attractive to consumers is the carriage of local channels. Unfortunately, in approximately 23 markets, neither DIRECTV nor DISH Network offers local broadcast channels. Two of those markets are in West Virginia, Parkersburg and Wheeling. Consumers in those communities want access to their local news, sports, and regional programming.

What can be done to make sure that people throughout the country can get access to local broadcast stations? If there is no obligation or incentive to serve all 210 markets would DIRECTV or DISH Network do so and by what date? What steps can broadcasters take to encourage or incentivize the extension of local service to unserved markets?

Answer. Perhaps the most important step Congress could take to incentivize the extension of local service is *not* to adopt the broadcasters' proposal with respect to multicast signals.

As we discussed in our testimony, while satellite is the perfect technology for delivering national programming to even the most rural customers, it is much less efficient at delivering local channels. Accordingly, we have spent billions to offer local service to more than 95 percent of Americans.

Yet the economics of serving the very smallest markets are daunting. Our costs to serve Parkersburg—in terms of satellite capacity, local receive facilities, and backhaul—are comparable to those to serve Cleveland. Parkersburg, however, has only a fraction of Cleveland's population—making it much harder to recoup our costs.

It would be even more difficult to recoup our costs if we could not even deliver the full complement of network programming that our cable rivals offer. This is a very real problem in "short" markets like Parkersburg, which are missing one or more network affiliates.

The broadcasters propose to make this problem even worse. Today, we cannot deliver distant signals to subscribers who can receive a local network station's analog, or "primary," signal over the air. Broadcasters now want to extend that prohibition to subscribers who can also receive network programming over-the-air on a station's secondary digital "multicast" feed. They argue that, if we want to carry the "missing" network programming in short markets, we should carry the multicast feed rather than a distant signal.

Where we have room to carry multicast feeds, we generally do so (for example, in Bluefield-Beckley). But, because we designed our satellite spot beams to maximize the number of markets served, we often lack room on individual beams to carry multicast signals. In such situations, we must rely on distant signals to fill out our local service offering.

The broadcasters' proposal would guarantee that we could not offer all four networks in many of the smallest markets. We can think of no greater disincentive to providing local service in these markets.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO
ROBERT M. GABRIELLI

Question 1. What are DIRECTV's publicly announced plans for launching new satellites in the upcoming years? What is the purpose of each of these satellites (*i.e.*, add capacity, replacement, etc.)?

Answer. We plan to launch a new, state-of-the-art satellite, DIRECTV 12, later this year or early next year. D12 will replace spot-beam capacity used for local service on an older satellite, and will add capacity to be used for additional high definition national channels.

Question 2. Has DIRECTV switched over to using the MPEG-4 format exclusively? Has the use of the MPEG-4 format helped you to better manage the (bandwidth) capacity of your satellites?

Answer. DIRECTV uses MPEG-4 exclusively on all of its *new* satellites. But we use MPEG-2 on our older satellites. We will continue to do so for the foreseeable future, as many millions of our customers still use older receivers and antennas incapable of processing MPEG-4 compression. MPEG-4 allows us to deliver programming—especially data-intensive high-definition programming—far more efficiently without sacrificing picture quality. This allows DIRECTV to, for lack of a better term, "fit" more channels into a fixed amount of transponder capacity.

Question 3. Does the DIRECTV currently offer service to consumers in the five so-called "orphan counties" in southwest Washington State that are in the Portland DMA? Is the spot beam servicing these communities the same one that covers the Portland DMA? How does DIRECTV ensure that there is no overlap between the spot beams that serve the Seattle DMA and the Portland DMA? As a result, are there locations between the two DMAs where there is no spot beam coverage?

Answer. Yes. Please note, however, that the satellite spot beam with which we provide service in the Portland local market does not cover all of Klickitat County. (It does completely cover the other four counties.) Yes, we use the same spot beam to offer service in these "orphan counties" and service in the Portland DMA. The

two beams operate over different frequencies. In fact, they are on different satellites. Thus, while they do overlap geographically, they do not interfere with each other. (This is the same principle that allows thirteen FM radio stations to operate in Washington DC without interfering with one another.)

Question 4. A number of my constituents living in those five orphan counties—Clark, Cowlitz, Klickitat, Skamania, and Wahkiakum—have told me that they would like to receive news and public interest programs from the Seattle market, which includes coverage from our state capitol Olympia. As you know, several States have counties which are part of the DMA of a neighboring state. One thought is to have the news and public interest programming from the State the orphan counties are located in be broadcast on a separate satellite channel. I understand your concern about a channel that remains dark for most of the day and then is on for a few hours to broadcast news and public interest programming. What are the technical, operational, and legal barriers for setting aside one channel in each DMA where you provide local-into-local service to serve as a PEG-like channel?

Answer. We would have to overcome many hurdles to make such an offering, but the biggest of these is our lack of capacity. Nearly all of our spot beams on which we provide local service are now full. (We needed to fill these spot beams in order to maximize the number of local markets we could serve.) So we simply could not offer news and public interest programming in the manner described above. We support an approach to “orphan counties” similar to the last reauthorization’s approach to southern Vermont, southwestern Mississippi, and northern New Hampshire. Such an approach would permit us to carry stations in neighboring, in-state markets (including orphan counties) where our technology permits.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV
TO R. STANTON DODGE

Question 1. Satellite television has spawned greater competition among pay television providers, especially in rural areas. This benefited consumers by giving them more choices and in some areas lowering prices. A key component to making satellite television attractive to consumers is the carriage of local channels. Unfortunately, in approximately 23 markets, neither DIRECTV nor DISH Network offers local broadcast channels. Two of those markets are in West Virginia, Parkersburg and Wheeling. Consumers in those communities want access to their local news, sports, and regional programming.

What can be done to make sure that people throughout the country can get access to local broadcast stations? If there is no obligation or incentive to serve all 210 markets would DIRECTV or DISH Network do so and by what date? What steps can broadcasters take to encourage or incentivize the extension of local service to unserved markets?

Answer. Satellite-delivered local-into-local service has been a great driver of consumer choice and innovation in the subscription television business. DISH Network L.L.C. (“DISH”) has been the leader in providing local-into-local service, launching service in 181 of 210 markets representing approximately 98 percent of households nationwide. There are a number of challenges—operational, legal, and economic—to add local-into-local service to the remaining 29 markets. Congress can take steps this year to help address each of these central challenges to launching additional markets, including the two unlaunched West Virginia DMAs.

Operational Challenges

The first is lack of available spot beam capacity, particularly along the East Coast. Unlike terrestrial providers that have substantial capacity to provide multiple services over their pipe, DISH has limited satellite frequencies and satellites to provide a competitive national video-only service. To launch the remaining unserved markets, DISH would need to find or create capacity to add approximately 100 additional channels (including those in the Wheeling DMA) on our system, which is effectively at capacity today.

Wheeling is one of those markets that DISH does not have adequate capacity to serve today. Additional planned satellites will provide some capacity to expand service into additional markets like Wheeling. From a commercial perspective, DISH has to make a difficult decision in planning each new satellite on how to allocate the finite number of satellite frequencies and beams between local and national services. Adding more local-into-local markets—in standard definition or high definition—makes DISH more competitive in that particular market, but it reduces the variety of services that DISH can offer nationally in all 210 markets.

To address this issue, Congress should avoid mandating any additional carriage obligations on satellite providers—e.g., accelerating the FCC’s HD must carry mandate for some or all broadcasters—or providing broadcasters with expanded exclusivity protections for multicast signals. The focus of Congress has been to intent satellite providers to launch additional markets. Adding conflicting capacity demands would only frustrate our good faith efforts to fulfill Congress’s objective and launch additional local-into-local markets.

Legal Challenges

A second key challenge is one of consumer expectations. Our subscribers that choose to receive a locals package expect to receive at least NBC, CBS, ABC, and FOX content. Yet, in 26 of the 29 markets we have yet to launch, one or more of those networks is not available as the primary video feed of a station in that market. In some instances, only a single national network affiliate is present in these markets. Parkersburg is one of these “short markets,” because there is no ABC or CBS affiliate in Parkersburg. Today, DISH does not have the legal right to “fill” this short market under its local-into-local compulsory license.

With respect to short markets, the Judiciary Committee has provided a potential framework with the Satellite Television Modernization Act of 2009 (S. 1670). The bill would give DISH the rights to provide quasi-local services under its local-into-local license to fill in short markets like Parkersburg with adjacent broadcast stations. This provision would permit DISH to import an NBC and FOX affiliate from the Clarksburg DMA to provide a viable service to Parkersburg residents. However, importantly, just like any other pay TV provider, DISH should have the flexibility to provide an in-state or other broadcast station to fill a short market if the adjacent market’s signal does not adequately cover the short market. This is a modest, but important, alteration to the Senate Judiciary Committee’s approach.

Additional key quasi-local rights included in that bill are the ability to import broadcast stations that are deemed significantly viewed in the local market and to provide in-market low-power stations. Some similarly complementary rights should also be included in the local license: the ability to import out of market signals during emergencies; the right to serve recreational vehicles and commercial trucks; and the right to provide network content to households outside of our local spot beams.

Economic Challenges

The last key challenge is economic. A national satellite provider has no existing infrastructure in an unlaunched market. Thus, DISH needs to establish new facilities and new infrastructure in each new market it elects to serve with local channels. The upfront and recurring cost to do so can be considerable, centered on the establishment of a local receive facility and associated backhaul fiber and equipment. Yet, many of the remaining markets are very small, limiting significantly our ability to recoup our upfront and recurring investment in these markets. Wheeling and Parkersburg are two such smaller markets, Nielsen market numbers 159 and 193 respectively.

The expense associated with retransmission consent fees and other programming-related costs can adversely affect the business case for launching a new market: a market that could otherwise be economically viable becomes a money loser when escalating programming costs are factored into the equation. Congress should ensure that measures intended to incent additional market launches do not have the opposite effect because of financial considerations. A case in point, the importation of adjacent broadcast stations into short markets should not require double compensation. Typically, subscription TV providers pay either a retransmission fee to the local broadcast station or a copyright royalty payment for carriage. Any requirement to pay double compensation—that is, both a retransmission consent fee and a royalty payment—to carry the same station would create an unintended financial disincentive to provide these signals. DISH should pay a royalty fee for filling in a short market just as DIRECTV does today. Similarly, broadcasters should drastically reduce—if not forego altogether—their retransmission consent fees for these unlaunched markets to ensure our joint viewers have access to their free over-the-air content.

Each of these proposed changes increases the likelihood that consumers in the remaining 29 unlaunched markets would receive service that is more comparable to their urban counterparts. Indeed, DISH is prepared to invest in the remaining 29 markets if necessary changes to copyright and communications law are made to en-

sure parity of rights going forward across competing providers. Assuming the final reauthorization statute reflects a framework that achieves parity of rights across competing providers, DISH will provide local-into-local service in all markets no later than 2 years from the date the bill is signed into law. Importantly, this commitment assumes that there are no new carriage obligations that would require DISH to redirect bandwidth to other services, and that there are no major unforeseen implementation challenges, such as a launch delay or failure, in-orbit satellite failure, or other similar mitigating event.

Question 2. Far too much of the programming offered to consumers is designed to entertain on a base level. It does not enlighten, educate, or elevate the viewer. Instead, I see a coarsening of society with media in the vanguard. Public television is one of the few resources for programming that educates and shares the best of our culture. Programming such as Ken Burns' documentary on the National Parks expose viewers to the grandeur and history of America. Such programming however is best viewed in high-definition (HD) format. I am concerned when satellite providers choose to offer "Dancing with the Stars" in HD format and not "The War."

I understand that DISH and the public television stations are in discussions over the carriage of local HD programming as well as mechanisms to provide subscribers with access to public television multicasting channels. What is the status of those negotiations? If no agreement is reached, what can Congress do to encourage consumer access to such programming?

Answer. As an independent distributor of video programming, DISH worked proactively with its programming partners to establish the DISH Family programming package that offers households an affordable and kid-safe package of channels. Nonetheless, DISH shares your concerns about the overall quality of television programming, and offers both vertically-integrated and independent programmers the opportunity to bring high-quality and family friendly programming to over 13 million households today. We welcome your leadership to ensure that the wholesale programming market provides distributors with the flexibility to offer consumers high-quality and affordable packages of programming that appeal to all different types of consumers.

With respect to public broadcasting, DISH currently carries more PBS affiliates than any other pay TV provider. Further, if the necessary changes are made to the statute and DISH serves all 210 markets, then all Americans will have access to their local PBS station—even if they are located outside the reach of a broadcast tower. For the first time, all residents of mountainous areas of West Virginia will be able to view the latest Ken Burns documentary.

We are also preparing to roll out PBS affiliates in HD consistent with the Federal Communications Commission's schedule adopted last year, starting this February. Given our current capacity constraints, it is not feasible for DISH to launch every PBS affiliate in HD before 2013.

Nonetheless, we remain willing to work with the Association of Public Television Stations ("APTS") and PBS on a deal that delivers PBS HD content to DISH subscribers on a more accelerated schedule than the FCC has mandated. To that end, we have negotiated in good faith with APTS to provide our joint viewers expanded PBS viewing options on DISH. We have offered numerous constructive proposals to address the needs articulated by APTS. Those negotiations have not yet resulted in a national carriage deal, but DISH remains committed to finding a commercial resolution.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
R. STANTON DODGE

Question 1. What are the constraints to increasing your ability to offer local-into-local programming for all television markets?

Answer. Please see the response to Question 1 from Chairman Rockefeller with respect to the legal, economic and operational challenges faced in launching additional local-into-local markets. DISH has launched 181 markets to date, and is willing to work constructively to find means to launch the remaining 29 markets in a reasonable timeframe. Congress can take important steps this year to provide DISH with the tools and the incentive to launch local service in every market as long as it does not impose conflicting capacity demands on a satellite system that is effectively at full capacity today.

Question 2. Hypothetically, should you be able to expand into all 210 television markets, How soon could you implement the agreement?

Answer. Please see the response to Question 1 from Chairman Rockefeller with respect to the necessary changes to provide DISH the legal rights and proper incen-

tives to invest in the remaining 29 markets, as well as the time frame DISH could commit to if final legislative action provides the legal and economic framework for a satellite carrier to serve every market.

Question 3. What would DISH Network's stated policy for distant signal importation be? Would priority be given to adjacent market signals?

Answer. Given the "if locals, no distant" provision in the law today, DISH would not provide a traditional distant service if it launched all 210 markets. DISH would, however, still need to import out-of-market stations to fill in short markets, provide service to out-of-beam customers, and provide significantly viewed stations to our subscribers. To the extent DISH can provide an adjacent broadcast station from the same or an overlapping spot beam, DISH's preference would be to offer consumers that more local option. DISH would, however, require some flexibility to provide a regional or national feed where the adjacent broadcast stations cannot reach all, or some, of the neighboring DMA just as other pay TV providers do today.

Question 4. There is one short market in my state in Jonesboro. How would you fill this short market?

Answer. It remains unclear what options DISH will have under the law to fill short markets like Jonesboro. Our ability to launch this market is dependent upon a path to offering a "locals package" that includes the missing CBS, NBC, and FOX content in a cost effective and straightforward manner. Technically, DISH has the ability to bring in the missing content from a national market or an adjacent market. With respect to compensation for filling a short market, DISH should pay a copyright royalty payment just as DIRECTV does today. There is no basis to layer on an additional payment (i. e., retransmission consent fee), which could have the perverse result of foreclosing DISH's ability to justify the economics of launching more short markets.

Question 5. What is the status of your negotiations with public television for High-Definition and multicasting programming?

Answer. Please see the response to Question 2 from Chairman Rockefeller above. As PBS's largest distributor, we are hopeful a long-term carriage deal can be reached that increases the amount of PBS content on DISH in a manner that is consistent with the operational realities of our system.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO
R. STANTON DODGE

Question 1. What are DISH Networks publicly announced plans for launching new satellites in the upcoming years? What is the purpose of each of these satellites (i.e., add capacity, replacement, etc.)?

Answer. The upcoming launch schedule for DISH and its sister company, EchoStar Corporation, is as follows:

- 1Q–2Q 2010: EchoStar 14 (DISH) will be launched to replace EchoStar 7 at 119° W.L. EchoStar 14 will be a hybrid national/local satellite that will provide some additional capacity and overall efficiencies, but will not materially change DISH'S overall satellite capacity.
- 3Q–4Q 2010: EchoStar 15 (EchoStar) will be launched to replace EchoStar 3 at 61.5° W.L. EchoStar 15 will be a national satellite that will provide some additional capacity and overall efficiencies that have been lost because of infirmities to EchoStar 3. Those gains, however, will not materially change DISH'S overall satellite capacity.
- 2Q–3Q 2011: Quetzsat 1 (Quetzsat) will be a replacement satellite for EchoStar 1 and EchoStar 8 at 77° W.L. This is a Mexican satellite on which EchoStar has leased capacity to provide service into both the United States and Mexico. As with the other replacement satellites, capacity gains will not be significant.
- 3Q–4Q 2012 (tentative): EchoStar 16 (EchoStar) is the intended replacement satellite for EchoStar 12 at 61.5° W.L. This satellite will be designed in part—to satisfy the February 2013 final benchmark for the FCC's HD carry-one, carry-all mandate.

The key to expanding capacity significantly is new spectrum. The challenge faced today is that DISH and EchoStar effectively use all of their allocated direct-to-home satellite spectrum, so launching new satellites does not necessarily add any substantial capacity gains. DISH and EchoStar have, however, been able in recent years to add considerable capacity thanks to commercial arrangements with Canadian and Mexican companies with satellite spectrum that was not previously available to DISH subscribers.

DISH will continue to seek out additional non-U.S. spectrum resources to expand service available to U.S. consumers. One potential source of additional spectrum domestically is 17/24 GHz BSS (“Reverse Band”). EchoStar has recently been granted five 17/24 GHz BSS authorizations for frequencies not used today for direct-to-home services. The launch milestones for those satellites are not until 2014, and there are a number of technical and international coordination issues that must be resolved before DISH can achieve any increased capacity as a result of the Reverse Band frequency grant.

Question 2. Has DISH Network switched over to using the MPEG-4 format exclusively? Has the use of the MPEG-4 format helped you to better manage the (bandwidth) capacity of your satellites?

Answer. DISH continues to invest aggressively in new satellites and new technologies, one of which is state-of-the-art MPEG-4 compression. All of our high definition programming—both national and local content—has been transitioned to MPEG-4 compression. MPEG-4 has been critical to DISH’s ability to manage its capacity and to compete with bandwidth-rich terrestrial providers. Without MPEG-4 technology, DISH would not be a leader in national HD programming—140 HD channels—and would not be able to provide some local channels in HD in over 150 markets.

There is no current plan to transition all standard definition programming from MPEG-2 to MPEG-4. Among other issues, the key challenge to an MPEG-4 transition is our legacy customer base with one or more MPEG-2 receivers in their home. Our 13 million plus subscriber base would need to be upgraded with more expensive equipment to view MPEG-4 programming. Through new customer acquisition, HD upgrades, and customer churn, the number of households with MPEG-4 equipment will grow organically in the next few years.

Question 3. Does the DISH Network currently offer service to consumers in the five so-called “orphan counties” in southwest Washington State that are in the Portland DMA? Is the spot beam servicing these communities the same one that covers the Portland DMA? How does DISH Network ensure that there is no overlap between the spot beams that serve the Seattle DMA and the Portland DMA? As a result, are there locations between the two DMAs where there is no spot beam coverage?

Answer. Yes, DISH provides customers in Wahkiakum, Cowlitz, Clark, Skamania, and Klickitat counties with local-into-local service from the Portland, Oregon DMA. These counties are “orphaned” in that they do not have the option to receive local channels from in-state Yakima or Seattle in addition to their assigned locals.

The Portland and Seattle local stations are not on the same DISH spot beam. DISH provides local-into-local service from a number of different satellites and orbital locations to minimize the out-of-beam overlap issue highlighted in the question. In this case, the Portland DMA is served from EchoStar 10 at 110° W.L., and Seattle DMA is served from EchoStar 7 at 119° W.L. There are no locations between Portland and Seattle DMAs where there is not spot beam coverage.

As a practical matter, Portland and Seattle could not share the same satellite spot beam transponder because there are too many channels in the combined markets. Spot beam transponders typically carry up to 14 standard definition channels, yet Seattle has 13 local channels on DISH and Portland has 9 local channels.

Question 4. A number of my constituents living in those five orphan counties—Clark, Cowlitz, Klickitat, Skamania, and Wahkiakum—have told me that they would like to receive news and public interest programs from the Seattle market, which includes coverage from our state capitol Olympia. As you know, several States have counties which are part of the DMA of a neighboring state. One thought is to have the news and public interest programming from the State the orphan counties are located in be broadcast on a separate satellite channel. I understand your concern about a channel that remains dark for most of the day and then is on for a few hours to broadcast news and public interest programming. What are the technical, operational, and legal barriers for setting aside one channel in each DMA where you provide local-into-local service to serve as a PEG-like channel?

Answer. Our customers in Clark, Cowlitz, Klickitat, Skamania, and Wahkiakum counties and 731 more counties across the Nation tell us the same thing—the current system based on designated market areas is broken and too often fails to deliver the local content consumers deem local to them. These orphaned counties are often too far away from their “local- out-of-state broadcasters and their in-state broadcasters for any in-depth coverage. In-state DMA reform would create a clear incentive for both in-market and in-state broadcasters to provide more robust weather and regional news to these communities.

A PEG-like Station Is Technically Infeasible for Satellite Providers. The objective of in-state DMA reform efforts is to provide consumers with service they want by capitalizing on the national scale of satellite provider operations. Solutions that may make sense for cable companies but are a poor technical and operation fit for satellite providers will not result in expanding options for consumers. Unfortunately, a PEG-like channel dedicated to adjacent local news programming—which may work for a local cable company—is not feasible for a national satellite provider.

The first challenge for a satellite carrier would be a lack of available spot beam capacity. A new PEG-like news channel is a new unique channel requiring the same space on the satellite as NBC or PBS. A spot beam typically “sees” multiple markets (e.g., San Francisco, Monterey, Sacramento), and that limited capacity is shared amongst those markets. Our spot beam configurations are designed to maximize the number of markets that can be served, and are effectively full today. For example, if DISH sought to add a Sacramento news feed station, it would need to eliminate another channel from San Francisco, Sacramento or Monterey (an impossibility under carry-one, carry-all rules).

The second core challenge is one of implementation. DISH would be responsible for splicing together real-time programming from multiple broadcasters in any number of similarly situated markets across the Nation to create an adjacent market news channel. While a single channel is far superior for consumers than blacking out content on individual adjacent market channels, it creates even greater logistical challenges for DISH. DISH is not aware of any pay TV provider effectively creating daily programming line-ups in the manner that would be contemplated here. DISH’s national service greatly complicates the logistical and operational issues with such a proposal. DISH’s engineers manage over 1,400 local broadcasters nationwide without any local points of presence to make programming adjustments and changes. In contrast, cable is inherently local, offering more flexibility and minute-by-minute control than does a satellite’s national architecture. A cable system typically covers a single local market, and the operator of that cable system only has to navigate a single set of local broadcasters (4 to 20 in total).

The third challenge is a legal one. Broadcasters have not addressed lingering questions about their ability to offer a private copyright license for their news programming that include national newsclips, and advertisements. Even if the broadcaster has legal rights to a particular newscast, that grant of rights is a very narrow private copyright limited to a few hours per day. Broadcasters offer no copyright protection or indemnification for what happens if NBC Sunday Night Football runs into the 11 PM news and is provided to DISH customers without rights or permission. Given the number of last minute programming changes and programming overruns (i.e., whenever you lose the last few minutes of a program on your DVR), DISH would have to manually monitor programming nationwide to ensure a compliant system or risk copyright and other liability, an impractical—if not impossible—logistical task.

An Alternative Approach. DISH believes that an alternative solution that capitalizes on the national scale of our satellite system would achieve your objective in a more straightforward manner. In many instances, our spot beams cover areas larger than the DMAs they serve today and could provide service today to orphaned counties. From a technical perspective, we can easily offer our subscribers broadcast signals from a neighboring market if those signals are presently being delivered using the same spot beam as the broadcast signals for the subscriber’s “home” DMA. This type of adjacent market reform would capitalize on the fact that a nearby broadcast station—already on a satellite spot beam—could be provided with a flip of a switch to a consumer seeking in-state or regional coverage more pertinent to their lives or professions. It would not require dedication of finite spot capacity and would not require daily monitoring and program alteration.

This approach could be implemented to protect the interest of the “local” broadcast stations. First, this adjacent market service could only be made available in the sliver of counties receiving out-of-state network affiliates, not the entire DMA. This would ensure that broadcasters remain the only source of network content for their in-state residents. Second, the adjacent market service would be complementary in that it would only be available to consumers subscribing to their “local” broadcasters first. This is, therefore, a very modest reform proposal that would have clear pro-consumer results and should enhance broadcasters’ statewide and local coverage of news and events. Importantly, this is similar to what Congress did for four special test cases in 2004 in SHVERA. Congress established specific provisions to address a handful of the most glaring instances of consumers receiving out-of-state non-local networks by allowing the importation of out-of market yet in-state—broadcasters in New Hampshire, Vermont, Oregon, and Mississippi. Expanding this successful con-

cept nationwide is the next logical incremental step to provide consumers with access to the programming that is local to them.

Thus, in this instance, consumers in Clark, Cowlitz, Klickitat, Skamania, and Wahkiakum counties would receive Portland locals. Those consumers would then have the option to add on a package of Seattle locals as a complement to their Portland service. To the extent out-of-state broadcasters in Portland are effectively serving these orphaned counties today or are better situated geographically to provide news and emergency coverage in those orphaned counties, consumers are unlikely to pay a premium for access to additional broadcast stations. It is important to highlight that any additional limitations that would require programming to be blacked out or substituted would create substantial technical hurdles and undercut the viability of this consumer option.

At a minimum, the Senate Commerce Committee should add study language similar to the bill that passed the House Energy and Commerce Committee last month. Specifically, H.R. 2994 included a provision requiring the FCC to study whether there was a better regulatory structure to ensuring that consumers receive in-state news, weather, and sports than the Nielsen Media designated market area system. We think this study has merit, and would welcome your support to ensure that consumers receive the local service they need and expect long-term.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
R. STANTON DODGE

Question 1. Broadcasters claim that there is no legal barrier that prevents satellite TV companies from providing “non duplicative” New Mexican TV programming to those parts of the state outside the Albuquerque-Santa Fe TV market. A cable TV provider, for example, broadcasts some of the Albuquerque ABC affiliate’s local news to New Mexican customers in the El Paso DMA. What then keeps satellite TV companies from providing such in-state television to all parts of the state?

Answer. DISH agrees that all residents of New Mexico should have access to broadcasters from New Mexico. Residents of Quay county and other eastern New Mexico counties want to watch Albuquerque stations and should be afforded the opportunity to see that station in its entirety.

As detailed in response to Question 4 from Senator Cantwell, DISH is prepared to provide the Albuquerque stations to all residents of eastern New Mexico within our existing spot beams if it is granted the right to provide the Albuquerque station in its entirety to those subscribers. DISH has no such legal rights today. To date, broadcasters, however, have offered only a small portion of their content, which would be operationally infeasible as detailed above. Blacking out content is not a viable option. The FCC has concluded that blacked out stations are bad for consumers, “recogniz[ing] that if a [pay TV provider] were required to delete network programming from a station, and the network programming subject to deletion constitutes a high percentage of the station’s programming, the [pay TV provider] would likely drop the entire station from carriage.” Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals, FCC 00–388, ¶47 (2000).

Here, 70 to 90 percent of programming on the channel would be dark. Broadcasters have conceded that DISH does not have the ability to fill in blacked out programming today. Letter from CBS and NBC Network Affiliate Associations to Chairman Leahy, Rockefeller et al, April 14, 2009.

We seek your help to persuade broadcasters that the best solution for New Mexican residents is full access to their New Mexico broadcasters, just as it was for New Hampshire, Vermont, Mississippi, and Oregon residents in 2004.

Question 2. Satellite television provides an important service to rural Americans who cannot always get cable or even broadcast television. I am concerned about those TV viewers in remote areas who lost their antenna TV reception due to the digital TV conversion. Although we do not yet know how many people live in these “digital white spaces,” some TV viewers have lost their free, over-the-air television reception. Satellite TV is probably available to most of those affected, but satellite TV is not free. What are your thoughts on the role satellite TV could play in “filling in” the digital white space gaps for those who once had free analog TV but do not have digital TV reception. Is there any way to restore these TV households’ free TV?

Answer. DISH shares your concern about over-the-air households. DISH was actively involved in the digital transition. Among other things, DISH sold digital-to-analog converter boxes with a recommended sales price of \$40, the cost of the Federal Government’s coupon. Both our satellite and our converter box customers have

reported back to us that digital reception does not always reach areas covered by analog transmissions as reflected in your question.

DISH offers households adversely affected by the digital transition a lifeline service of local broadcast stations today in markets in which DISH provides local-into-local service. DISH also offers affordable options for households not accustomed to paying for their TV service, including a \$24.99 DISH Family package of programming that includes local channels where available.

While these options offer consumers affordable and flexible choices, it does not restore a “free TV” option. The cost of DISH equipment—both the actual receiving dish on the home and the set-top box receiver(s) in the home—is not inconsiderable, nor are the costs associated with the installation process. That said, DISH would be happy to work with your staff on exploring whether there is some mechanism by which formerly free over-the-air households could receive a subsidized lifeline satellite service with retransmission consent fee offsets from local broadcasters whose signals do cover their entire DMA or some other form of universal service program.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO
PAUL A. KARPOWICZ

Question. Satellite television has spawned greater competition among pay television providers, especially in rural areas. This benefited consumers by giving them more choices and in some areas lowering prices. A key component to making satellite television attractive to consumers is the carriage of local channels. Unfortunately, in approximately 23 markets, neither DIRECTV nor DISH Network offers local broadcast channels. Two of those markets are in West Virginia, Parkersburg and Wheeling. Consumers in those communities want access to their local news, sports, and regional programming.

What can be done to make sure that people throughout the country can get access to local broadcast stations? If there is no obligation or incentive to serve all 210 markets would DIRECTV or DISH Network do so and by what date? What steps can broadcasters take to encourage or incentivize the extension of local service to unserved markets?

Answer. Mr. Chairman, thank you for the question. As I stated during the hearing, local broadcasters strongly support the extension of local-into-local service in all 210 markets. Localism is a beacon of Congressional communications policy. In 1999, Congress allowed satellite companies to retransmit a local broadcast network signal back into the same local market from where it originated. This was a “win-win” for all, as local residents received imperative news, weather and sports programming they desired and DBS providers scored a windfall of new subscribers effectively leveling the playing field with larger cable systems. However, when SHVIA was adopted, the law did not require DBS companies to provide this service, creating a system where smaller communities are often disenfranchised. As you know, a number of different legislative proposals have been introduced as we undertake the reauthorization of SHVERA to remedy this problem. In the House, both the Energy and Commerce and Judiciary Committee’s included language in their bills that would facilitate local-into-local carriage in all 210 DMAs. While NAB did not oppose these efforts, numerous concerns still lie in the details of how this potential solution would work. Furthermore, the Senate Judiciary bill (S. 1670), allows satellite carriers, using their local compulsory copyright license, to import in short markets the missing network from an adjacent market. Thus, DISH, which lost its distant signal copyright license, can use this provision to deliver local-into-local service to all 210 markets. This approach facilitates, without mandating, the extension of local-into-local service into all markets. Moreover, Congressman Bart Stupak (MI) introduced legislation (H.R. 927) in the House that would mandate local-into-local service in all 210 markets.

If there was no obligation or incentive to serve all 210 DMAs with local programming, I do not believe DIRECTV or DISH Network would make that investment. DIRECTV and DISH Network have repeatedly claimed that capacity and economic constraints severely limit their ability to offer local-into-local service to more than a small number of markets. A few years back, they said unless Congress allowed the two companies to merge, “the most markets that each company would serve with local channels as a standalone provider, both for technical and economic reasons, would be about 50 to 70.” Today, the satellite carriers no longer claim, seriously, that providing local-into-local service is technically impossible. They say it is expensive. Under your leadership, local broadcasters successfully transitioned to digital broadcasting in June. During the course of this massive transition, local sta-

tions spent billions of dollars upgrading facilities and informing the general public. While there has been very little economic return on that investment, those investments were in the public interest. I believe the satellite industry's investment in providing local-into-local service to all American's would also be in the public interest.

Again, local broadcasters have long advocated for local communities to be served by their local television station. It is not lost on us that residents of the northern panhandle of West Virginia are better served by WTRF in Wheeling as opposed to distant signals from Denver or New York.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
PAUL A. KARPOWICZ

Question 1. You claim that there is no legal barrier that prevents satellite TV companies from providing "non duplicative" New Mexican TV programming to those parts of the state outside the Albuquerque-Santa Fe TV market. You also note that one Albuquerque station would potentially allow carriage of its non-duplicative programming by satellite companies to orphan counties in New Mexico. Are there any examples where satellite companies provide such in-state, non duplicative TV programming to viewers in "orphan counties?" If so, why then is this not available to TV viewers in affected areas of New Mexico? If not, how then is this option a viable way to bring in-state TV to "orphan" counties?

Answer. Senator Udall, thank you for the opportunity to answer your questions. To my knowledge, satellite companies have not been willing to provide in-state non-duplicative television programming to viewers in any so-called "orphan" counties. I respectfully submit that the mere fact that no DBS operator is offering such a service does not mean that it is not a viable option to do so. Rather, the failure of DBS to offer such a service stems from an unwillingness to devote the necessary capacity and financial resources which the carriers, in fact, have. DIRECTV and DISH are among the largest multichannel video program providers in the country.

DIRECTV has given three reasons for refusing to provide in-state, non-duplicative programming from a New Mexico station to New Mexico residents located in an out-of-state DMA. None is a valid reason for not providing their service.

First, DIRECTV claims that stations, which have already provided written consent to carry their local programming throughout the state for free, nevertheless lack the necessary copyright licenses to authorize such consent. That assertion is false. My stations, in various markets in other states and the local television stations in New Mexico, as well, have secured the necessary copyright licenses to provide satellite carriers (as well as cable companies) local news, weather, public service, and political programming on a state-wide basis. Notwithstanding DIRECTV's assertions, this is not an issue and is not an impediment to satellite delivery of this programming.

Second, DIRECTV asserts that none of its subscribers have *requested* receiving service consisting only of in-state local programming. On one level, this is not hard to understand since DIRECTV has never offered such a service. Significantly, such a service is being offered by Comcast Cable in New Mexico, which presumably would not devote its resources to doing so if New Mexico subscribers in these counties had no interest in receiving this purely local, in-state programming service.

Third, DIRECTV complains that requiring it to strip out duplicative programs would be "far more expensive" than retransmitting a station's entire signal that includes duplicative programming, and would require DIRECTV to reconfigure its set top boxes. This, it seems to me, is the essence of the question you pose. It is simply not the case that providing only the non-duplicative programming to orphan counties is not "viable" for DBS. Rather, it is a matter of money and allocation of resources and technology. In this regard, it is significant to note that on page 4 of the June 22, 2009 edition of *Communications Daily*, DISH and DIRECTV announced that each would soon have the technical capability to insert local *commercials* for advertisers in markets where they were providing local to local service. Surely, if DIRECTV and DISH can insert local commercials, they can insert local news, weather, political, public service announcements, local emergency announcements, and public service programming from in-state stations. Ironically, the satellite industry strongly *opposed* an effort by the FCC to require satellite carriers to provide *local* public safety and emergency announcements.

Moreover, satellite carriers also offer pay-per-view services offering sexually explicit and other programming requiring sophisticated addressable set top boxes. If satellite carriers can provide addressable boxes and the technology necessary to provide for sexually explicit content, why can they not provide the same technology to

enable subscribers to receive local, in-state news, public service, and local emergency programming and announcements broadcast by in-state stations?

Clearly, DBS can offer non-duplicative in-state programming from a New Mexico station to orphan counties.

Question 2. The last time SHVERA was reauthorized, a handful of exemptions were made for states with the same DMA problem as New Mexico. How were consumers harmed by these limited exemptions allowing satellite companies to provide secondary transmissions of in-state TV signals to “orphan counties”?

Answer. Senator, to answer your first question the “exemptions” made in 2004 in SHVERA ostensibly affected four states: New Hampshire, Vermont, Mississippi, and Oregon. To my knowledge the Oregon provision has not been utilized. Accordingly, there are, effectively, “exemptions” for just three states.

The 2004 Act did not deprive the stations whose signals were subject to export into an adjacent market of the right to give or withhold their retransmission consent. Nor did the Act in the three affected markets apply to cable. In short, the arrangements for satellite carriage were worked out *voluntarily* by the parties.

In addition, because the “exemptions” were enacted as part of the distant network signal license in Section 119 of the Copyright Act, DISH Network was prohibited from utilizing the “exemptions” beginning December 1, 2006, when it was permanently enjoined by a Federal court from use of the distant network signal compulsory license. Accordingly, to our knowledge only DIRECTV is utilizing the exceptions and the service is provided to only a few homes in each local market.

In two of the markets, the out-of-market network station being imported is owned by the same company that owned the in-market station affiliated with that network—thus, the company’s stations simply exchanged viewers. The result is that the 2004 act’s provisions are quite limited in scope.

If Congress should allow pay TV companies to retransmit *duplicating* national entertainment and sports programming from distant stations in other markets without obtaining the consent of the copyright holder or the stations whose signals are being retransmitted, local stations and local television broadcast service will be harmed in several ways. First, it will fragment local viewing of the same national programming—depriving stations of critical local advertising revenue. Second, it will deprive local stations of the ability to negotiate compensatory retransmission consent agreements with cable and satellite companies. Cable and satellite will not pay local stations retransmission consent fees for programs it can get without paying retrans fees at a government-subsidized copyright fee. Because the “exemptions” would *only apply to broadcast programming—not to cable and satellite network programming* such as ESPN, USA, HBO, etc.—they could result in national broadcast networks, program suppliers, and the sports leagues withdrawing their best programming from local, free, over-the-air television stations and placing them on pay services for more money on an *exclusive* basis in each local market.

Consumers and viewers would then lose quality *free*, over-the-air broadcast programming, as local stations could no longer provide viewers with local news, weather, sports, and public interest programming.

Without competition from local stations, cable and satellite companies would be able to increase and raise their pay TV rates for the same programs viewers had previously been able to see for *free* from their local stations—further harming consumers.

Question 2a. Would further exemptions that apply to small areas truly destroy the entire broadcast TV business model nationwide?

Answer. Yes, over time. Local stations buy their national entertainment and sports programming and compete in a fiercely competitive program market for their programming with cable and satellite. Why would the government want to give that same programming to cable and satellite at a government-set, highly subsidized copyright rate or deprive the creator of the programs of the right to pick its local distributor? What incentive would broadcast stations have to develop programming if the government gives it to pay cable and pay satellite at a subsidized rate to compete head-to-head with the stations that produced it?

The interest in having the local news programming of in-state television stations made available for cable and satellite distribution throughout a state is clearly understandable. We support that objective. Fortunately, legislation to achieve that objective is not necessary; it can be done now without any change in the law. In fact, it is being done now in various states and television markets—including in New Mexico—and it could be done in other parts of New Mexico and in every state if DIRECTV and DISH were only willing to do so.

Existing Federal copyright and regulatory law is *not* an impediment to the importation by satellite carriers and cable systems of *non-duplicating* local news, informa-

tion, or sports programming from stations in distant markets. Local stations own the copyright for their local news and are in a position to allow—and do allow—cable and satellite companies to export their local news, weather, sports, public safety, and informational programming into distant markets. For example, Comcast imports the local news programming of KOAT-TV, Albuquerque, New Mexico, into Las Cruces, New Mexico, which is located in the El Paso, Texas, TV market. And there are numerous other examples, including: cable systems in Virginia, North Carolina, Southern Colorado, Tennessee and Palm Springs California that provide in-state programming to communities located out-of-state DMAs.

DIRECTV and DISH, of course, could easily provide the same service. Congress should be asking cable and satellite to do more of this—not give them a *free* copyright to import duplicating *national* entertainment and sports programming already available to viewers for free—from local stations.

Cable and satellite companies are asking Congress to enlarge the geographic scope of their existing government granted statutory compulsory copyright licenses to allow them to import the very same national, *duplicating* network, syndicated, and entertainment and sports programming from distant stations that local television stations are televising in their markets and for which they have paid large sums of money, in a competitive open market, for the exclusive right to do so.

The competitive strategy of satellite and cable companies in urging Congress to enact market modification legislation is anti-competitive. Cable and satellite companies compete head to head for viewers and advertising dollars with local television stations. It is simply impossible for local stations to compete when they must provide their satellite competitors with a *government subsidized copyright license* and *free retransmission consent* to televise from a distant market station the most popular entertainment and sports programming which DBS in turn, can resell to their subscribers.

If the broadcast networks, program studios, and sports leagues are deprived by Congress of the ability to control the reasonable terms for territorial and exclusive licensing of their copyrighted works when televised for free over the air by local television stations, they will simply withdraw their entertainment and sports programming from the free, over-the-air television broadcast service and place it, on a less regulated, less restricted cable or satellite video distribution platform where they can maintain control over the territorial scope of the copyright license and the terms of program exclusivity.

Market modification legislation will, in short, relegate the *free* television broadcast service to a third- and fourth-run program service, to the detriment of local viewers and, in particular, those viewers who cannot afford a paid subscription television service.

Without the ability to contract in a competitive market for program copyright *exclusivity*, local television stations will lose local viewers and, in turn, essential advertising revenue. They will also lose the ability to negotiate meaningful arrangements with cable and satellite companies for carriage of their signals. Cable and satellite companies will be able simply to by-pass local stations if Congress allows them to offer local viewers the *same* national network, syndicated, entertainment, and sports programming from distant stations that is televised by local stations.

The FCC, under various administrations, has examined the public interest implications of broadcast program exclusivity for local, over-the-air television stations and has concluded that the loss of program exclusivity would place local, free, over-the-air television stations “at a competitive disadvantage relative to their rivals who can enforce exclusive contracts” and deny consumers the “benefits of full and fair competition and higher quality and more diverse programming.”*

No reasonable public interest justification can be made for importing, on a paid subscription basis from another distant station, the *very same duplicating* entertainment and sports programming available to local viewers free from a local, over-the-air television station. Obviously, the importation of *duplicating* programming does not contribute to program diversity. It would only serve the self-serving financial and anticompetitive interests of satellite and cable companies.

Now is not the time to financially undermine the efforts of local television stations to provide *free local* news, weather, public affairs, public service, political, and public safety information programming.

Question 3. You state in your testimony that offering duplicative TV signals in even a handful of “orphan” counties would harm consumers since broadcasters would no longer make available their most desirable TV programs to over-the-air

*Notice of Inquiry and Notice of Proposed Rule Making re Program Exclusivity FCC Rcd 2393 (1987) at ¶62.

TV viewers. However, broadcasters already provide duplicative programming to some TV viewers in these orphan counties via TV station websites and Hulu. If those with Internet access in orphan counties can already watch in-state TV programming online, why should they not be allowed to watch this same programming via satellite television?

Answer. Providing viewers in orphan counties with the opportunity to view isolated network programs (rather than the entire network schedule) on Internet websites is substantially different from making the full network schedule available from a distant network station via satellite for simultaneous viewing on conventional television sets.

First, in the case of satellite delivery, the duplication would be simultaneous or, worse, with time zone differences, could precede broadcast of the programming by local stations. The vast majority of viewing to significant prime time network programming such as “Desperate Housewives” is “live.” That is where local stations make most of their advertising revenue—or would lose it if viewing of “Desperate Housewives,” for example, on Sunday night was to a distant duplicating network station. The amount of viewing of such programming on Websites is not nearly as significant as when it is being aired over the network and unlike satellite delivered distant signals which are live. Because Internet distribution is *subsequent* to a program being aired on the local affiliate, the two types of distribution and the threat they pose to local stations simply is not comparable.

Second, the distribution of network programming via Internet venues is a function of private marketplace contractual negotiations among the networks, program suppliers and often the affiliates. Some of the TV Website distributors involve revenue sharing with local affiliates from Internet viewing. Under these arrangements, it is the private copyright holders of these program rights and their licensees who work out the distribution of the programs. In fact, some of these Internet websites instantaneously transfer the user to the local, in-market network station’s website, so the viewer is actually watching the program from the website of the network’s local affiliate—along with the local affiliated station’s own commercials. This viewing is accretive to the local station’s over-the-air viewing—not dilutive as would be the case with the importation of a distant duplicating network station.

On the other hand, program distribution by satellite of a distant signal is accomplished by means of a government statutory compulsory copyright license, depriving copyright holders of the ability to license their creative works. Under the government’s compulsory license, the program creator and its licensees only control and exploit the program to the extent they are permitted by the government to do so. If the government interferes with the copyrighted licensing of programs on broadcast television stations, copyright owners, studios, and sports leagues will simply divert their marquee programs to less regulated Pay TV services—which, in turn, will be a disservice not only to local, *free*, over-the-air TV stations, but to viewers and consumers who depend on their local broadcast stations for quality entertainment, sports, national and local news, and emergency information.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO LONNA THOMPSON

Question. Far too much of the programming offered to consumers is designed to entertain on a base level. It does not enlighten, educate, or elevate the viewer. Instead, I see a coarsening of society with media in the vanguard. Public television is one of the few resources for programming that educates and shares the best of our culture. Programming such as Ken Burns’ documentary on the National Parks expose viewers to the grandeur and history of America. Such programming however is best viewed in high-definition (HD) format. I am concerned when satellite providers choose to offer “Dancing with the Stars” in HD format and not “The War.”

I understand that DISH and the public television stations are in discussions over the carriage of local HD programming as well as mechanisms to provide subscribers with access to public television multicasting channels. What is the status of those negotiations? If no agreement is reached, what can Congress do to encourage consumer access to such programming?

Answer. Public television has worked for a number of years to reach a comprehensive carriage deal with Dish Network. In that time, APTS, on behalf of the Nation’s local public television stations, has worked consistently in good faith to reach a deal that brings the full array of local stations’ programming to Dish’s subscribers, while recognizing the capacity concerns of Dish Network. This is something that we know can be accomplished, as is evidenced by our prior carriage agreements with DIRECTV, NCTA, ACA and Verizon. Recognizing that each provider has separate

capacity and technological constraints, each of these past agreements have been individually crafted to reflect these realities, while ensuring that viewers have access to the highest quality of locally produced digital content.

Unfortunately, after years of trying to conclude a similar agreement with Dish, as of this date, no such agreement has yet been reached. Dish, by their own record is providing local HD service in over 150 markets, yet they have refused to carry any local public television stations except in Alaska and Hawaii, where they are legally obligated to do so. Absent a private carriage agreement, we call on Congress to help us end this discriminatory practice.

All efforts to finalize carriage agreements with Dish have ended with their refusal to accept a deal that does not contain a national HD feed of public broadcasting programming in exchange a specific accelerated roll-out of local-into-local HD that exceeds the FCC rules.

A national HD feed threatens the foundation of local public television stations. This type of feed in markets where there is no local HD carriage would compete against local stations' programming and would erode valuable local pledge fundraising—undercutting stations and ultimately destroying the principle of localism.

Without an agreement with Dish, we are asking Congress to ensure that all citizens are able to have access to their local public television stations' HD programming—regardless of how they receive their television signals.

During the House Energy and Commerce Committee mark-up of its version of SHVERA reauthorization legislation, Representative Eshoo offered an amendment that mandated the carriage of local public television stations' HD signals. The amendment requires Dish to carry local public television stations' HD signals in 50 percent of their local HD markets within a year and the remaining 50 percent in 2 years. Additionally, if Dish goes into new markets in local HD after the bill is enacted, they have to carry the local public television station on a prospective basis. If an agreement can be reached before the legislation is signed into law, the amendment does not take effect.

As the Senate Commerce Committee considers its version of SHVERA reauthorization, we are asking that the Committee consider adopting similar language in its bill. Given the fact that we have not been able to finalize a deal at this point, we feel we have no other option than to ask that this language be included in the bill. In the meantime, APTS will continue to try to reach a private agreement with Dish. We continue to believe that private negotiations are in the best interest of all parties, including Congress.

Dish Network's nearly 14 million subscribers deserve access to the highest quality of local programming that local public television stations are producing. Congress and the American public have invested in this programming. From major productions like *The War*, to local arts, education and public affairs programming, consumers deserve access to the full breadth of programming and services offered by their local public television stations.

Public television remains committed to doing everything we can to bring these services to the American public. We will continue to negotiate, as we have all along, in good faith with Dish Network. However, at the end of the day, absent a private agreement, we cannot miss this opportunity of SHVERA reauthorization to ask Congress for help in addressing this long standing practice of discrimination that prevents Dish subscribers from accessing the highest quality programming being offered by local public television stations nationwide.