S. HRG. 111–193

# ENSURING TELEVISION CARRIAGE IN THE DIGITAL AGE

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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# ENSURING TELEVISION CARRIAGE IN THE DIGITAL AGE

**WEDNESDAY, FEBRUARY 25, 2009**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feingold, Cardin, Wyden, Klobuchar, Kaufman, Specter, and Hatch.

## OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. It is good to see everybody here. We seem to have some interest in this hearing. I thank you all for coming.

Last week, in Vermont, our broadcast television stations turned off their analog signals and began broadcasting only in digital. By June 13th, of course, all the television stations across the country will have completed this transition. And with the digital era upon us, consumers are, of course, getting their video content in ways that were unimaginable just a couple decades ago. Network programs are available online, and consumers are increasingly viewing broadcast television stations through cable and satellite systems rather than using an antenna.

Congress has facilitated the growth of the cable and satellite industries by providing a statutory license to retransmit broadcast television to consumers. And we all know, I think, by the interest in this, that parts of that license expire this year, important parts.

Congress first passed the Satellite Home Viewer Act in 1988, and with each reauthorization we have sought to improve it in a manner that protects content owners but also improves the ability of consumers to access local television stations. In 1999, I introduced legislation with Senator Kohl and Senator Hatch and others that led to the creation of a license for satellite companies to provide local broadcast stations in local markets for the first time.

This provision has been tremendously successful. Both DISH Network and DirecTV use this license to provide local service in Vermont, and I thank them for making that service available. I live in a rural area in Vermont. The nearest neighbor is half a mile away, and I have what is sometimes referred to as the "State flower" in Vermont—the satellite dish on my roof.



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The local television plays a key role in cities and towns across the country. Local television, of course, provides relevant news, weather, and sports. It is the place where people hear first of emergencies in the area. It helps create a sense of community.

Now, I appreciate that Bob Hartwell is here from Vermont to testify today. As a State Senator from Bennington County, which is in the southwest corner of our State, he can talk about the importance of receiving home State television stations. Bennington County is one of two counties in southern Vermont that is not considered part of the Burlington television market, the area where our three major television stations, now a fourth, are located. Residents in Bennington were unable to receive the local Vermont broadcast stations by satellite for many years. During the 2004 reauthorization, I included a provision that made it possible for the southern Vermont counties to receive Vermont stations by satellite. Senator Hartwell knows firsthand that for a Bennington County resident, seeing news of a fire in Clifton Park, New York, is not the same as seeing that news for Rutland, Vermont, or Bennington, Vermont.

So the provision that I put in helped to keep Vermonters in all corners of the State connected. I appreciate that DirecTV took advantage of it to serve southern Vermonters, but there is still more to do. For instance, DISH is currently not allowed to provide this service, and I understand that other States have similar issues in which residents are unable to access stations from their home States.

Now, a healthy satellite industry promotes competition between video providers and benefits consumers across the country. And it is particularly important in rural areas that may be out of the reach of broadcast television and even cable access. They are, of course, in these rural areas. I could not receive our Vermont stations with an antenna, and I am very typical of many, many Vermonters, and cable would not be available because of the lack of density in the area I live in. So we have satellite that fills that role. We are not flat in Vermont, and the topography blocks other signals. But a healthy satellite and a healthy cable industry take on a renewed importance because of the digital television transition, which has left many consumers unable to access stations over the air.

So we are going to need to refocus on modernizing and simplifying the licenses for the digital age. The United States Copyright Office released a report last summer that made recommendations for updating these licenses. One of their recommendations is to harmonize the satellite and cable licenses, which currently operate very differently, and I am interested in hearing the views on how that is going to affect competition.

I look forward to working with the Senators on this Committee, and a number of other Committees that have jurisdiction, to bring out legislation that is going to improve service to consumers, but that is also going to allow cable and satellite providers and broadcast television stations and content creators to thrive in the digital age, because if they all do well, then the consumers do well.

Senator Specter.

## STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

This is a very important hearing to ensure television coverage in the digital age, and we find that people are relying more and more upon satellite and cable. This Committee has delved very deeply into a number of collateral issues relating to the controversies between the National Football League and the cable companies. And I have been concerned about arrangements where fans in the local areas of the Eagles and the Steelers, the two pro teams in my State, have been denied access because of complexities. And I do not know that this legislation will provide any opportunity to deal with those subjects, but, candidly, I have been looking for a vehicle which would address those matters, disconcerted with the high intensity of interest in the really premier teams, like the Steelers and the Eagles, that they are denied coverage.

But we are dealing with some very, very technical subjects here. While cable and satellite providers may enter into private agreements with broadcasters for retransmission, in the absence of agreements it is governing by the Copyright Act. And these license are very important to enable cable and satellite providers to retransmit over-the-air broadcast without obtaining the broadcaster's permission with the compensation provided by the statute.

Our inner workings of the Congress make it complicated because there is jurisdiction both by this Committee and the Commerce Committee, which means you have to go to four hearings—two in the House and two in the Senate. But at least you are covered by C–SPAN so what you say here will be carried far and wide.

Senator Leahy and I have a special spot reserved on C–SPAN that put us on at 3 a.m., so he and I have a tremendous following among America's insomniacs.

[Laughter.]

Senator SPECTER. We will be watching this very closely. I regret that I am going to have to excuse myself early to join the Environment and Public Works Committee, where we are pushing ahead to try to find a legislative answer to global warming at an early stage. But I am leaving behind Ryan Triplette, in company with some very high-powered lawyers on the Hill, who knows more about this subject than anybody else.

I want to give a special word of greeting to David Cohen, who is Executive Vice President of Comcast and a longstanding friend, a real activist in community affairs and commercial affairs.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much. And, unfortunately, as Senator Specter was referring to, everybody has about five different committees going on at once, but Senator Specter and I have always worked together in putting up the agenda for this Committee. So I appreciate your being here.

Senator Kohl, did you want to say——

## STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Yes, just a word or two. Thank you, Mr. Chairman, for holding this hearing as we revisit the Satellite Home

Viewer Act. The simple goal of this law at the time we passed it was to level the playing field between satellite and cable companies in order to give consumers greater choice and better value. Now that satellite has established itself in many markets as a competitor to cable, it is essential that we reauthorize parts of the law that are set to expire at the end of this year.

Where necessary, we should take stock of the changes that have occurred over the past 5 years to see whether adjustments are necessary to enhance and expand competition between cable and satellite. I look forward to continue working with you, Mr. Chairman, as we have each of the last two times this bill was considered, as we reauthorize and improve the Satellite Home Viewer Act.

I want to thank the witnesses for being here. I also have to leave because I am chairing a hearing in the Aging Committee, but it is a delight to see you, and I have enjoyed working with you over the years. Thank you so much.

Chairman LEAHY. Be careful on those of us who are aging, Senator Kohl. I do appreciate that.

Senator SPECTER. Both of us, Senator Kohl.

The first witness is going to be Charles Ergen. He is the founder, Chairman, and CEO of DISH Network, and what I am going to do is ask each one—I will introduce each one of you separately, and then if you will testify, and then we will all ask questions afterwards.

He is the founder, Chairman, and CEO of DISH Network, one of the Nation's largest satellite television companies. He founded the original company EchoStar in 1980, as I recall, then launched DISH Network in 1996. He is the co-founder of the Satellite Broadcasting Communications Association. He was named one of the world's Best CEOs by Barron's Magazine in 2007, named to Forbes Magazine's top-ten CEO list. He received his bachelor's degree from the University of Tennessee, holds an MBA from the Babcock Graduate School of Management at Wake Forest University.

Mr. Ergen, please go ahead, sir.

**STATEMENT OF CHARLES ERGEN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, DISH NETWORK, L.L.C., ENGLEWOOD, COLORADO**

Mr. ERGEN. Thank you. Chairman Leahy, Ranking Member Specter, and members of the Committee, I appreciate the opportunity to testify today. My name is Charlie Ergen. I am the Chairman and CEO of DISH Network, the nation's third largest pay-TV provider.

The Copyright Office has provided this Committee with a road map for updating the cable and satellite compulsory copyright licenses to reflect the changing video landscape. We agree with the Copyright Office that the digital age has arrived and the laws need to catch up. I would like to highlight three issues from the 2008 Copyright Office Report.

First, the separate cable and satellite copyright regimes no longer make sense. We compete for the same customers, and we should have the same rules.

Second, many consumers cannot get local news and sports from their home state because of the way local markets are defined.

And, third, many rural communities are missing one or more of the four major networks.

In addition, Congress should also address the interrelated issues of retransmission consent and must-carry when updating the compulsory copyright licenses this year.

With respect to the first issue, the Copyright Office recommended folding the existing licenses into a unitary digital copyright license to reflect the changes in technology and place all providers on the same level playing field. We support that approach. Specifically, a unitary license for all pay-TV providers would ensure that all consumers get the services they need in a digital world, in a manner that is fair to the copyright holders, broadcasters, cable, satellite, and new entrants such as the telcos.

Absent a unified license, we agree with the Copyright Office that there should at least be parity going forward between cable, satellite, and telco regimes. Consumers should have the benefit of the same bundle of rights under the law regardless of the pay-TV provider they select. It should not be harder or more expensive for one pay-TV provider to carry a local, significantly viewed, or nearby broadcaster than a rival platform because of distinctions in copyright law.

With respect to the second issue, the Copyright Office also recognizes the need for DMA reform and enhanced competition between video providers. Citizens living in DMAs that straddle state borders are often denied access to news, weather, and election coverage from their home state. State Senator Hartwell, here today, represents one such community in Vermont, where DMA lines force constituents to watch local news from a neighboring State. Overall, this is an issue in 45 states. As you can see from the map of Iowa, which is over here, depending on where a customer lives, they may get local news from Iowa, Minnesota, Nebraska, South Dakota, or Missouri. This is just one example.

Now, Senators have been receiving complaints from their constituents about this concern for many years. Mr. Chairman, you took the lead on this issue 5 years ago for two DMAs in Vermont and championed a similar effort in additional states. Importantly, these fixes helped consumers and did not cause any actual harm to broadcasters. Building off that forward-looking policy, we recommend a more global DMA fix. Specifically, a broadcast station from a neighboring DMA should be treated as "local" for purposes of the copyright laws, particularly if it furthers the concept of "state unity." With this change, citizens living in DMAs that straddle state borders would no longer be prevented from receiving their local news from their home state.

Third, we agree with the Copyright Office that all consumers should have access to NBC, CBS, ABC, and FOX programming. Today, DISH Network provides local service in 178 markets, out of the 210 total, reaching 97 percent of households. This translates into 1,400 local broadcast stations, which is far more than any other pay-TV provider. In most of the remaining markets, one or more of the big four networks is missing, and so it has not been economical to provide the service for them. If a local community is missing a broadcast station, providers should be able to treat a

nearby affiliate as the "local" affiliate under copyright and communications law.

And, finally, Congress should use this opportunity to examine retransmission consent and must-carry, given that those issues have been tied to our compulsory license. Technology and competition have come a long way in the last 5 years, but today there are multiple pay-TV providers in every DMA. Broadcast stations electing retransmission consent hold DISH customers hostage, as they play their local monopoly off multiple providers to extract huge license fees. In 2008 alone, consumers lost programming in approximately 15 percent of our markets because of retransmission consent fee disputes. Yet the same broadcasters provide their content for free on the Internet and to those lucky enough to live within the shrinking areas of digital over-the-air coverage.

Because the broadcasters received billions of dollars of spectrum for free, we think the retransmission consent should be free as well. Failing that, we support the creation of a national retransmission consent rate. Satellite providers already pay a fixed, per-subscriber copyright royalty rate, and we see no reason why a similar concept would not work for retransmission consent.

With respect to must-carry, we are forced to carry hundreds of must-carry stations that have little or no local content. This increases our costs and raises our prices to consumers at a time when consumers need all the disposable income they can get. Must-carry stations should be required to earn carriage by airing at least 20 hours of local programming each week. This would be beneficial to consumers and would have no harmful effect on broadcasters that invest in their local markets.

We are in the middle of a digital age that is changing the way people watch TV. It is pretty simple: People want to watch TV anywhere, anytime. The Committee put down a marker 5 years ago to give consumers the flexibility to get truly local content.

Again, thank you for inviting me to testify this morning.

[The prepared statement of Mr. Ergen appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much, Mr. Ergen. I appreciate your being here.

James Yager is the Chair of the Television Board for the National Association of Broadcasters. He is also the CEO of the Barrington Broadcasting Group, which he founded to manage small- and mid-sized-market TV stations. Mr. Yager began his broadcasting career in 1960 with WIS-TV in Columbia, South Carolina, and he has held numerous managerial positions at multiple broadcast companies since.

But in addition to his role with the NAB and Barrington Broadcasting, Mr. Yager serves on the boards of Broadcast Music Incorporated, Television Operators Caucus, the Maximum Service for Television. He is a graduate of Colgate University.

Mr. Yager, we are delighted to have you here. Please go ahead, sir.

**STATEMENT OF K. JAMES YAGER, CHIEF EXECUTIVE OFFICER, BARRINGTON BROADCASTING GROUP, L.L.C., HOFFMAN ESTATES, ILLINOIS, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

Mr. YAGER. Well, Mr. Chairman, thank you for that introduction, and members of the Committee, I am delighted to be here today. The Chairman has given you my background, so let me just begin by saying ever since Congress crafted the original Satellite Home Viewer Act of 1988, it has worked to further two objectives: first, that free, over-the-air television will remain widely available to American households; and, second, that satellite retransmissions will not jeopardize the local television service in any market. Those two goals remain paramount today.

Our Barrington stations keep our communities informed and connected. We work every day to embody the spirit of localism which Congress has affirmed time and time again as a vital public policy goal. We do not charge our viewers to watch our programming. We rely on payments from advertisers to deliver a free service to your constituents. Without free, over-the-air television, cable and satellite companies would essentially be unrestrained in their ability to charge subscribers even higher rates.

Broadcast television stations remain the primary source of the most diverse and popular entertainment, news, weather, and sports programming in the country. In fact, according to data from Nielsen Media Research, in the 2007–08 television season, 488 of the top 500 prime-time television programs were broadcast on over-the-air television. While these stations represent a relatively small number of channels of those on cable and satellite systems, broadcast stations offer a unique and valuable service to their local markets that could be diminished by unnecessary changes to the law.

As Congress considers updates to SHVERA, it is vital that you uphold and strengthen the tradition of localism. Any changes should not impair the enforcement of program market agreements that are essential to local broadcast service. Furthermore, this Committee should strengthen localism by phasing out satellite licenses for distant signals. The license should be placed with a requirement for local-into-local carriage in all television markets. This would enhance localism, program diversity, price competition, and increased choices for the viewer.

Congress should mandate local-into-local service in every market in the country. There are 31 of the 210 television markets in small and rural areas that satellite companies have chosen not to serve. They have said this is a capacity issue. I believe it is purely and simply a business decision on their part. I am certain that if Congress does not step in, the satellite companies will never provide local service to every market in this country.

Broadcasters have invested $1 billion, and more, in making the transition to digital television. So far there has been little economic return on that investment for broadcasters. Nevertheless, those investments, in my opinion, were in the public interest. The satellite industry's investment in providing local-into-local service to all Americans would also be in the public interest.

Localism is at the forefront of the broadcasters' operations. In emergency situations, it is the broadcaster, not the cable or sat-

ellite companies, who is on the scene providing the public with emergency, life-saving, and timely information it needs. Localism is not in the DNA or business models of either cable or the satellite companies. Some Members of Congress have expressed frustration that their constituents do not have access to in-State but out-of-market television stations. Current law allows cable and satellite systems to offer non-duplicating, out-of-market programming to their subscribers. But many cable and satellite systems choose not to do so. However, Congress should not change current law to allow cable and satellite companies to offer network and syndicated programming that is identical to programs already offered by the local broadcaster who has negotiated to have those rights in their markets. Doing so would be inconsistent with the longstanding principle of localism and the carefully balanced system of retransmission consent that is established by Congress to further this principle.

If we import a distant, in-State duplicating signal, it could undercut the retransmission consent rights of an in-market station and seriously erode the local broadcaster's service to the public.

Thank you for giving me the opportunity to testify, and I look forward to answering any questions you might have.

[The prepared statement of Mr. Yager appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our next witness is Martin Franks, the Executive Vice President for Policy, Planning, and Government Relations with the CBS Corporation. He is responsible for overseeing the corporation's activities in Washington as well as with State and local government. He also oversees CBS' corporate philanthropy. He joined CBS in 1988 following extensive experience in Washington, including service on the staffs of President Jimmy Carter, Congressman Tony Coelho, as well as having to serve a sentence as my chief of staff for a period of time. He also serves as Vice Chair of the Board for Advertising Council and Maximum Service Television and is a graduate of Princeton University.

Mr. Franks, please go ahead.

**STATEMENT OF MARTIN D. FRANKS, EXECUTIVE VICE PRESIDENT, POLICY, PLANNING AND GOVERNMENT RELATIONS, CBS CORPORATION, NEW YORK, NEW YORK**

Mr. FRANKS. Mr. Chairman, it is a very real pleasure to be working with you once again on an issue of crucial importance to Vermonters. The industry appreciates your leadership and your efforts to preserve the broadcast network-affiliate relationship while promoting competition in today's video marketplace. And CBS will always be grateful to you and Senator Specter for your courage and leadership on S. 852, the FAIR Act, in the 109th Congress.

Mr. Chairman, Senator Kaufman, I want to thank the Committee for the opportunity to appear and to express CBS' view that the legislative issue on the table today is really a very narrow one: whether to extend satellite's compulsory distant-signal license once again. In contrast, the local-into-local license is permanent and not part of this debate. Yet during the course of congressional deliberation over the distant-signal license, you will hear from parties seek-

ing to exploit this legislation as a vehicle for a wish list of unrelated items, such as changes to retransmission consent or DMA modification.

Besides complicating the legislative process, the issues of retransmission consent and DMA modification are not broken and do not need fixing. Each year CBS and other television broadcasters conclude hundreds of retransmission consent agreements with cable, satellite, and telephone operators. In an overwhelming majority of such instances, agreements are reached quietly, amicably, and in a mutually beneficial manner. Legislating to deal with a very few disputes against a pattern where there are literally hundreds of instances where willing sellers and willing buyers successfully reach agreement would be a solution in search of a problem. In the end, the retransmission consent regime works and in the manner Congress intended.

DMAs are not a governmental creation. Rather, Nielsen groups counties by viewing patterns and the laws of physics and signal propagation rather than geographic boundaries. DMAs are the center of a broadcaster's economic universe, and any tinkering with the system, even in good economic times, could be financially seismic, not only for smaller local broadcasters, but also for local merchants who buy time on their local stations in order to reach potential customers in their markets, never anticipating that competing and confusing ads could be coming into the market from a station a hundred or even a thousand miles away.

If the desired outcome is for viewers to access news from their out-of-market but in-State television stations, right now—right now, without the need to change any law or redefine any DMA—MVPDs may already import any station's newscast into any other market simply by securing the imported station's permission to do so. Stations control the copyright of their news programming and face absolutely no restriction in making them available to multichannel providers in nearby markets looking to augment news programming.

While we are prepared to work on any problem areas where there may be issues with regard to local and in-State news, please do not fall for the masquerade of those who are using DMA reform as a proxy for their real objective: a means for MVPDs to obtain bargaining leverage in a retransmission consent regime that is now in nearly perfect balance.

Television broadcasters have the right, through the Copyright and Communications Acts and private contracts, to control the distribution of the national and local programming they transmit. The CBS Television Network alone invests billions of dollars each year in order to be able to deliver the highest-quality news, sports, and entertainment programming.

Three weeks from tomorrow, the national phenomenon known as "March Madness" will tip off. Each year CBS spends hundreds of millions of dollars just for the rights to the 3 weeks of March Madness alone. It is a hefty investment but one that, in partnership with the NCAA and our affiliates, gives us the right to determine how the content can be distributed in a way that produces a return on that investment and a benefit to American viewers. That expensive investment in high-quality programming pays off. Superior

programming generates viewing that helps not only the CBS network and the stations we own, but also our affiliated stations nationwide.

High-quality network programming benefits local stations because they sell advertising within that network programming. That allows them to make significant financial investments in local news, sports, weather, and other programming, including syndicated shows like "Wheel of Fortune," "Jeopardy," and "Oprah," some of your constituents' favorite programs.

This mutually beneficial network-affiliate national and local arrangement, of course, is not unique to CBS. It is also enjoyed by the other networks and their affiliated stations across the country. In the end, however, it is local viewers who benefit most from this system.

Mr. Chairman, again I would like to thank you and the Committee for helping to foster today's robust video delivery marketplace, where, thanks to vigorous competition, broadcast television is still an integral player deeply valued by American viewers.

Thank you.

[The prepared statement of Mr. Franks appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our next witness is David Cohen, Executive Vice President for the Philadelphia-based Comcast Corporation, senior counsel to the CEO, well-known to this Committee. Prior to joining Comcast, Mr. Cohen was a partner and Chairman of Ballard Spahr Andrews & Ingersoll, one of the largest law firms in the country. He serves on several distinguished boards and committees, including the Greater Philadelphia Chamber of Commerce, where he serves as Chairman. He serves on Penn Medicine, the Trustees of the University of Pennsylvania. He has a bachelor's degree from Swarthmore and his law degree from the University of Pennsylvania Law School.

Mr. Cohen, it is nice to see you again. Please go ahead, sir.

## STATEMENT OF DAVID L. COHEN, EXECUTIVE VICE PRESIDENT, COMCAST CORPORATION, PHILADELPHIA, PENNSYLVANIA

Mr. COHEN. Thank you, Mr. Chairman, and thank you for the opportunity to testify. While acknowledging the slight alteration from Senate protocol, I want to take a small piece of personal witness privilege and say what a pleasure it is to testify before your newest member, whom I have had the opportunity to work with on a wide variety of matters for over 20 years, and what a pleasure it is to say "Senator Kaufman." So a real pleasure to be here and to see you, Senator.

Chairman LEAHY. And I will certainly give you extra time for this. I must say also, Mr. Cohen, how delighted I am that Senator Kaufman is here, and he has been joined by Senator Klobuchar, two new members of this Committee. It makes my life a lot easier.

Please go ahead, sir.

Mr. COHEN. Thank you. I would like to focus my oral comments today on two basic points relating to the Section 111 compulsory copyright license:

First, cable's compulsory license works—for the consumers, for the copyright holders, and for cable. It is still necessary, and it should not be repealed or substantially altered.

And, second, in light of a recent Copyright Office ruling, cable's compulsory license should be clarified to ensure that royalties are not paid on so-called phantom signals, which I will describe a little later.

The compulsory license is critical to the cable industry and to our customers and your constituents. Without this license, it would be all but impossible as a practical matter for cable operators to secure the necessary clearances for each copyrighted program included in their cable line-ups—an estimated 500 million separate copyrighted programs every year. With the license, we get these rights, our customers get the programming they expect and value, and the underlying copyright owners get appropriate compensation. In fact, since 1976, the inception of the compulsory license, the cable industry has paid almost $4 billion in royalties, including well over $150 million last year alone.

In a report to Congress last year, the Copyright Office suggested that the compulsory copyright license could be repealed and that some replacement mechanism would likely emerge. I think that is wishful thinking. No better model has emerged anywhere in the world. And as strongly as I believe in free markets, the cable compulsory license is meeting the needs of consumers, copyright owners, and cable operators. And so I think we are confronted with a clear case of "If it ain't broke, don't fix it."

Another idea that some have raised is whether Congress should consider harmonizing cable's compulsory license with the satellite industry's statutory license. The cable and satellite licenses are different largely because the FCC rules that determine how they can offer broadcast programming are very different.

For example, cable operators are required to put all broadcast signals on the basic tier and make every subscriber buy that tier. That requirement does not apply to satellite companies, and there are additional important differences as well. Parity or harmonization of the cable and satellite licenses could not be achieved without major modifications to the cable and satellite regulatory and legislative schemes, and all of these changes will likely result in the disruptive loss of some broadcast signal retransmissions to your constituents. We strongly recommend against any such plan.

There is one discrete area, however, where legislative action would be important: to deal with the so-called phantom signal issue I mentioned earlier. Let me use a simple example to explain the problem.

Assume we have two communities, A and B, served by two separate Comcast cable systems. Community A has 5,000 subscribers and has historically paid a distant signal charge on WZZZ only for the 5,000 subscribers in Community A—the customers who actually receive the signal. Community B has 100,000 subscribers and does not receive WZZZ.

But if Comcast were to connect the two cable systems with a fiber link to permit the more efficient delivery of advanced services, even though it made no changes to the channel line-ups in either Community A or Community B, the Copyright Office now says that

Comcast should pay royalties on WZZZ as if it were delivered not just to the 5,000 customers in Community A which actually receive the signal, but also to all 100,000 subscribers in Community B who are not receiving the signal. In essence, Comcast would suddenly be paying 20 times more just to deliver the signal to the same 5,000 people. This phenomenon is called "phantom signals," and I respectfully suggest it is an absurd result.

The Copyright Office itself acknowledges that the result is illogical and probably not intended by the statute, but it insists that the existing statutory language gives them no choice and that this is a problem for Congress to fix.

So we request that Congress consider a modest change to Section 111 to clarify that royalty fees need only be calculated on distant broadcast signals that are actually available to subscribers, and not on phantom broadcast signals.

Thank you again for inviting me to testify, and I look forward to your questions.

[The prepared statement of Mr. Cohen appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our last witness, Senator Bob Hartwell, is the Vermont State Senator for the District of Bennington. That includes Bennington County and Wilmington, Vermont, as I mentioned before, in the southwest corner of our State—a part where for some time television was mostly out of Albany, New York, and Vermont news was left out. Prior to beginning his service in the Vermont State Senate in 2007, Senator Hartwell was active in his community, served on the Bennington County Regional Planning Commission from 1997 to 2007; the Town of Dorset's Select Board from 2001 to 2004. He continues to serve on the New England Association of Regional Councils, and formerly in private law practice.

Senator Hartwell, good to have you here. Please go ahead, sir.

**STATEMENT OF HON. ROBERT M. HARTWELL, VERMONT STATE SENATOR, BENNINGTON DISTRICT, MANCHESTER CENTER, VERMONT**

Mr. HARTWELL. Thank you, Senator, and thank you, members of the Committee, for allowing me the time to testify today. As Senator Leahy has said, I am in the Vermont State Senate. I serve on the Senate Committee on Natural Resources and Energy and on the Senate Committee on Finance, and I reside in the town of Dorset. There are 17 towns in Bennington County that I represent, and the one town, Wilmington, in the county of Windham immediately to its east.

I am testifying as to the importance of providing local television access to residents in rural areas in rural States like Vermont. These areas are exemplified by Bennington and Windham counties, and I am requesting that the Committee assure that Vermont commercial and public television will be available in Bennington and Windham counties.

Many of the towns in my district are exemplified as rural villages and residences clustered across the rural landscape, some of it farms, much of it working forests. These residences are separated in many instances by great distances. Nine of my towns have

populations of less than a thousand people each, and for many of these people, satellite is their only access to television news, weather, and advertising. Most of these towns are located in mountainous areas accessible by one State secondary highway and a maze of local roads, many of them dirt roads.

My constituents remind me that they are unable to receive cable television due to the prohibitive cost of bringing cable to rural homes given the distance, and even in cases in which cable is available in the area, the cost of bringing it to a few isolated residences is prohibitive. These same people, again, have access to television only through satellite, but many have no access to Vermont television programming whatsoever because Windham County has been assigned to the Boston DMA and Bennington County has been assigned to the Albany, New York, DMA.

My own home is an example of this. Even as a State Senator, I do not see Vermont news on my television.

Thanks to the Leahy provision added in the 2004 reauthorization, DirecTV subscribers in Bennington and Windham counties do have access to Vermont television stations. But many of our subscribers are DISH Network subscribers, as I am, and do not have access to Vermont television or Vermont programming of any kind.

I have constituents in this situation who are relegated to leaving home in search of a newspaper, which is likely to be a more prompt source of news for them. A good example of this is that during an election, they have access to television, but to the national results. But when it comes to local and State results, they do not have access at all and do not learn about it until 1 or 2 or even 3 days later, some of these areas being served only by weekly newspapers, which usually come out on a Friday. This search is frustrated somewhat further by the absence of what would be called a statewide newspaper.

To put all of this in perspective, many of my constituents have served on their town select boards and school boards and other commissions and agencies, many of which are elective offices, as I have. Many of the proceedings of these boards and commissions are now available through local cable access, and those who have cable can see them. But many of my constituents who have served on these commissions never see them. They cannot get access to cable, and there is nothing for them whatsoever on satellite if they are DISH Network subscribers. This is frustrating for them, and they seem to feel or seem to express some sense of discrimination since they simply do not have access. Many of these people are retired. My constituents in Bennington County tend to be older than the rest of the State, and they have misgivings about going out at night to proceedings of this nature, and they usually occur at night.

The placement of Windham County in the Boston DMA and the placement of Bennington County in the Albany DMA precludes the receipt of any Vermont news, weather, and advertising. A specific example of this would be that when we watch the Weather Channel at my house and houses similarly situated, we see the national weather. We know what is going on. But there is no current status and no forecasts for the immediate area, which you would find if you had access to cable. You would have a local status and forecast for Bennington area, and you would have one for the Brattleboro

area in Windham County. We cannot see that status from our televisions at this time.

I believe that all residents, including those in rural areas, have a reasonable expectancy of access to news, weather, and other programming relative to their home State and, therefore, of interest to them. I urge the Committee to work to assure that residents of rural areas such as the area I represent receive satellite television at reasonable cost with programming relevant to the State of Vermont, the State in which they live.

Again, I want to thank you, Mr. Chairman and members of the Committee, for allowing me to testify about this important issue of public policy, and certainly a very important issue to my constituency in Vermont.

[The prepared statement of Mr. Hartwell appears as a submission for the record.]

Chairman LEAHY. Thank you, Senator.

Of course, you have the situation where Vermont is having a major debate in the legislature right now, as many other States are, on what to do in this economy with the changes in the State budget, the changes that are going to affect your constituents certainly in southern Vermont, as well as in all other parts of Vermont. And without this kind of coverage, your constituents are more apt to hear what is happening in Albany with the New York Legislature than they are about what is happening in Vermont. Is that correct?

Mr. HARTWELL. Yes, Senator, that is correct. I think certainly they will receive a lot more information about what is going on in Albany than they will of what is going on Montpelier. But they want to know what is going on in Montpelier.

Chairman LEAHY. Congress created the local license for satellite television, as has been talked about today, in 1999. Let me ask each of you: How has authorizing satellite companies to provide subscribers with local stations affected competition among video service providers from your view? And if you could keep it fairly brief, and certainly I will give everybody time to expand their testimony for the record.

Mr. Ergen.

Mr. ERGEN. Thank you, Senator. It has been great, I think, for consumers. They were asking for it when we started back in 1994 in this business, in the direct-to-home business, and it took us 5 years to get a law. And it has been one of the great success stories of this Committee to provide competition. The FCC has shown that where local channels are provided, customers have benefited from increased competition in lower rates for their TV programming and more choice.

Chairman LEAHY. Mr. Yager.

Mr. YAGER. Well, I believe in competition, and I think the satellite and cable industries have proven to all of us that good competition offers choice as long as we have local-into-local service do not differentiate against our local stations.

Chairman LEAHY. Mr. Franks.

Mr. FRANKS. It has been nothing but a boon to the video marketplace but, more important, to consumers. I would just stress, though, on Senator Hartwell's point, there is nothing in the law or

regulation today that prevents a cable or satellite operator from bringing Burlington news into the southern Vermont counties.

Chairman LEAHY. Mr. Cohen.

Mr. COHEN. Mr. Chairman, I agree with everyone on the panel. I think this has been a boon to competition, and I think it has made the cable industry a better competitor. And I think price is one thing, but I think if you look at the quality and the variety of services that are now being delivered by cable, by satellite, and now by the telcos as they go into that space, I think all of that was stimulated by bringing local television onto satellite.

Chairman LEAHY. Senator Hartwell.

Mr. HARTWELL. I would just re-emphasize, Senator, that for us it is an availability issue right now. Certainly satellite has been very important. Without the satellite, we would have no communication where I live.

Chairman LEAHY. The Copyright Office in their report has recommended that Congress either unify or harmonize the cable and satellite licenses. I have received a lot of mail from your industry on this, and each of you has a different perspective on the licenses. So let me ask you your views.

Are there aspects of the satellite licenses that do not work in the cable world? How would the broadcasters and content owners view such a change? Let us start with you, Mr. Ergen.

Mr. ERGEN. As Mr. Cohen pointed out, there are some differences between what cable does and satellite, primarily because satellite has the ability to do a national signal and cable is only capable of doing a local signal.

Having said that, I do believe that it is something that we should do, and we should be able to get to a unitary license. Mr. Cohen thought it was too complicated to do that. That is typically because they have several advantages over us in terms of how much they pay for copyright. On a percentage basis, we have paid much more than—in the satellite industry, we have paid a much greater percentage of our revenue to license fees. So we think that it needs to level the playing field.

In addition, things like phantom subscribers are things that should be fixed, and there are some things that work for cable and some things that work for satellite. But I believe that with enough effort it would be relatively easy to get to a unified license.

Chairman LEAHY. Mr. Yager.

Mr. YAGER. Mr. Chairman, they are obviously very different technologies. The satellite technology and the cable technology are not the same. I would be concerned that trying to harmonize them might have unintended consequences, but the NAB really does not have a position on this issue.

Chairman LEAHY. Thank you.

Mr. Franks.

Mr. FRANKS. I promised our general counsel I would not practice law without a license again, Senator. I am far from a copyright expert. I would just say, though, the current system works pretty well. And to Jim's point, Mr. Yager's point about unintended consequences, when we try and change things to make them better, sometimes we do not make them better. And my temptation would

be, as I testified, to do simply a straight reauthorization of the satellite license.

Chairman LEAHY. Mr. Cohen.

Mr. COHEN. Mr. Chairman, just to be clear, I think I heard two questions in your question, which are the two possible recommendations from the Copyright Office:

One, to eliminate the license, and I do not think there is any appetite by anyone on this panel to eliminate the license. I addressed it somewhat in my oral testimony, more in my written testimony, but I think that calls for the likelihood of chaos, massive disruption to customers, and is definitely not a recommendation that should be pursued.

The second half of the question is, OK, if we are going to keep the license, should the cable versus satellite provisions be harmonized? And it is our position that they should not be. Again, the current structure basically works. There are differences, but those differences, I would suggest, are rooted in technology and different regulatory treatments; and that if you are trying to level the competitive playing field, you cannot just look at the compulsory copyright license. You have to look at the entire playing field, which is a considerably more complicated endeavor that involves a wide variety of regulatory restrictions, some of which are imposed on us, some of which are imposed on satellite.

I would also note that it is not at all clear that, in fact, in the aggregate cable "pays more" and satellite "pays less." And, again, the potential disruptions that could come from these changes I think are something this Committee has to be concerned about.

I would close with one——

Chairman LEAHY. You would not agree with the Copyright Office that Congress should either unify or harmonize the cable——

Mr. COHEN. We disagree with both those recommendations. But I want to make clear, this is actually not a cable-versus-satellite issue. It happens to be an issue on which Mr. Ergen and I disagree. But I want to quote to you from some interesting testimony that was given on the other side of the Capitol, which I think is still in the same jurisdiction, if not in the same Committee, yesterday. That testimony, I will just read a very brief portion of it:

"Harmonization is better in theory than in practice. Imposing cable rules on satellite is problematic. Imposing satellite rules on cable cannot be any better. In the real world, harmonization would almost certainly result in consumer disruption."

The source of that testimony was DirecTV testifying against harmonization of the cable and satellite licenses.

Chairman LEAHY. Thank you. My time is up, and I will yield to Senator Hatch—unless you wanted to add something to that, Senator Hartwell.

Mr. HARTWELL. Thank you, Senator. For me, it is——

Chairman LEAHY. You just want to get the service.

Mr. HARTWELL. The signal is coming from the satellite, Senator. Yes, that is what I want.

Chairman LEAHY. Thank you.

Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Now, Section 109 of SHVERA, the Satellite Home Viewer Extension and Reauthorization Act, required the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Copyright Act and recommend any necessary legislative changes no later than June 30th of 2008.

Now, I know some of you referenced the report in your remarks, but I would like to just ask this question, for anybody who cares to answer it: Did the Copyright Office get it right or didn't it? Mr. Ergen.

Mr. ERGEN. I will start with that. I think in general they got it right. We all have our different constituencies. Some of us are public companies. We all have our own self-interest here. The Copyright Office really is an independent party, really does not get into shareholders and different constituencies. And so I think in general they got it right, and most of the panel here, other than myself, have said, "We do not want to change anything." And that is usually indicative of a marketplace where somebody is pretty comfortable. They do not want to change anything because they do not want additional competition and so forth. And I think in general the Copyright Office is a good place for this Committee to start, as it is written by a third-party, objective observer.

Senator HATCH. Anybody else care to comment?

Mr. COHEN. I think, Senator, as I said, the Copyright Office got some things right. I think they got some things wrong. And one of the reasons for that is that I think when you look at the purposes of the compulsory copyright license, there were a number of stakeholder interests that needed to be examined: copyright owners, distributors, and the consumer interest. And I think where the Copyright Office fell down is that they did not properly value the consumer interests and the risks of disruption to our customers and your constituents to some of the changes that they proposed. And I think that is the underlying reason why they reached contrary conclusions, or conclusions that I do not think are supported by the overall public policy objectives that this Committee has in front of it.

Senator HATCH. OK. The 2008 Copyright Office Report states that the cable and satellite industries are no longer dependent upon distant signals, as they were at the outset of the licenses, so repealing the distant-signal licenses will not have the dramatic effect that it would have had years ago.

I would just like to know what your thoughts are on this finding. And what is your response to the argument made by the Copyright Office that current distant licenses have impeded the development of the sub-licensing system? And how would repealing the distant-signal licenses affect viewers? Yes, Mr. Yager.

Mr. YAGER. Repealing the distant-signal license is just part, I think, of the progress we have made in technology in terms of the satellite industry, as well as the cable industry. The NAB supports repeal of the distant-signal license. We support the local-into-local in all small markets, and they are all small markets that do not have local-into-local today. So we would support local-into-local, but we think basically the Copyright Office got it pretty right the first time.

Senator HATCH. Mr. Yager, the Internet has opened up a whole new world of how television networks offer news, sports, entertainment, and other types of programming. Now, online video aggregators, like iTunes and Hulu, allow us to download or share their content over the Internet. Now, slingbox technology allows one to redirect local network streams remotely. Of course, not to be forgotten are digital recorders which allow viewers to watch programs at their leisure.

Now, with everything available to the consumer today, why are you opposed, if you are, to importing TV stations' signals from adjacent DMAs, especially in areas where those DMAs cross State lines? Let me give you an example. If my fellow Utahans are receiving their local channel either through their cable or satellite providers, but want to pay an additional fee to receive a Las Vegas, Nevada, channel or a Denver, Colorado, channel, why would you oppose that option? And do you agree that in light of the emerging technologies, a new approach will be necessary to address how consumers are accessing TV programming?

Mr. YAGER. I think the issues of DMAs and in-market/out-of-market stations are much more complex. Let me just give you an example of a station we own in Amarillo, Texas. It serves three counties in Oklahoma, up in the Oklahoma Panhandle. We are in the Texas Panhandle. The closest in-State station to those three Oklahoma counties is 334 miles away, and an omnibus change to the definition of "DMAs" could gigantically impact the service we provide to those three small counties in the Panhandle of Oklahoma. We are the ones who put emergency information on the air for them. We are the ones who report their school closings. We are the ones who cover their high school football games. And we are the ones that cover their local political institutions.

It is hard for me to believe that a station that is 335 miles away would do the same for those three counties that we would do. That is the essence of the DMA structure we have had in this country for now about 45 years.

I would strongly believe that—there are exceptions, certainly, to DMA, and there are four exceptions currently to the in-State/out-of-market regime. But if we are going to get into DMAs, we have got to look at each one as an individual kind of situation.

Let me just give you one other: North Carolina. For years, I managed a station in Spartanburg, South Carolina, that served the northwestern part of the State of North Carolina. We had 40 translators up in the North Carolina area. If we could not serve that area, that market would have lost its viability in terms of its North Carolina audience, and the Asheville station would then be competing, if they brought in in-market stations, against much larger stations from Charlotte, North Carolina.

So I really think when we get into the DMA situation, it is a much more complex situation than just saying let's bring in out-of-State stations to in-market stations—markets.

Senator HATCH. Mr. Franks.

Mr. FRANKS. Senator Hatch, let me address two points, I believe. As one of the networks that is providing content over the Internet, let me point out that we do not do that until a considerable period of time after it has aired live on the network. So that is one issue.

Another is we do not put on our full complement of programming, either because we do not have the rights or for another business reason. But if as we enter into the Internet distribution of our programming, it is done as a private contractual agreement either with our affiliates or with—we supply video on demand to Comcast, or we are about to start supplying video on demand to Mr. Ergen. Those are private contractual arrangements that, frankly, work just fine and I do not think need congressional intervention.

On the out-of-market question, I think the biggest—as I say, out-of-market news can be provided today. Once you get beyond news into either the entertainment programs or the sports programming, you enter a whole new web of copyrights, and of rights holders, and it is a very complicated world. But even more important than that, if Las Vegas starts coming into southern Utah, you are going to ultimately undermine not only the economics of the stations in Salt Lake or St. George or other parts of the State, but you are also going to hurt the local businesses that advertise on that station. A car dealer in St. George is buying an ad to reach that region. If a Las Vegas car dealer ad is coming in, I do not think too many people from St. George are going to Las Vegas to buy their car. And you are going to undermine that local economy, not just the station.

Senator HATCH. You never know.

Mr. ERGEN. Senator, if I may, I would like to give an opposing view, perhaps, that our customers tell us about. You have heard that it was too complicated, these DMAs are too complicated and so forth. If we listen, with all due respect, to the broadcasters here, we would still have the horse and buggy.

As you correctly point out, technology has changed. You can watch any of these channels on the Internet. Why can't you watch them on your satellite or cable system?

And consumers, you cannot just put the news on and turn it on and off. It would be disruptive to consumers. And as Senator Hartwell said, people in Vermont in March Madness that is coming up, they want to watch the University of Vermont when they are in southwest Vermont. They do not want to watch the University of Rutgers because they are getting the Albany station. And at some point, I hope that the desires and the rights of consumers and what people want to see, they can get another technology until we bring the broadcasting world into the 21st century, into the digital age. And I think we have to keep the consumer in mind.

Chairman LEAHY. We have gone way over time, and we are going to have to—and I am supposed to be at another hearing. But, Mr. Franks, I would give you—very, very briefly.

Mr. FRANKS. What Mr. Ergen just said is not that he cannot deliver the local news. It is that he does not want to deliver the local news without also being able to deliver the prime-time programming.

Mr. ERGEN. Let me just put on the record that that is not true. I have gone to broadcasters to deliver local news, and what they say is, "Well, our local news has national content in it. So when we do the local news from NBC, we may carry a national feed of NBC during the middle of the news, and we do not have the rights to do that. So we cannot give you the rights to do that."

So it is beyond news. It is also—but it is really people in Vermont want to see Vermont, and it is as simple as that. It is not complicated. And when you start—when people on a committee up here start talking about complicated, that is code for, "We do not want competition."

Chairman LEAHY. We are going to go to Senator Feingold and then Senator Kaufman, Senator Klobuchar, and Senator Cardin, depending upon which ones are here. I am going to step out briefly and turn the gavel over to Senator Feingold.

Senator FEINGOLD [presiding.] Thank you, Mr. Chairman. Thanks for having this hearing on television and the digital age. I know that the focus of this hearing is primarily on the SHVERA reauthorization, but I did want to take a minute to focus on some concerns of my constituents. Let me start with a comment on the digital transition itself, which has been a stressful time for many of my constituents who rely on over-the-air television for information and entertainment.

I want to acknowledge the hard work of many of your companies in helping to get the word out about the transition. I know that the Wisconsin broadcasters were diligent about setting up regional call centers and also believe that other industry segments were involved as well. While clearly there were problems with the converter box coupon program that are now being resolved, I remain concerned about individuals on the edges of markets that are going to be unable to receive over-the-air digital signals and are facing the prospect of significant expense to either subscribe to a pay-TV service or invest in an antenna that may or may not fix their situation.

Similarly, the shift from analog to digital in pay-television services can also have ramifications as channels are shifted and compatibility issues arise with older television sets. These burdens can be especially daunting for low-income individuals and seniors living on a fixed income, and we have to make sure that we keep these populations in mind, particularly because many of them rely so heavily on television for entertainment.

The other main area of concern I heard about in Wisconsin regards content. I go to every one of Wisconsin's 72 counties every year for a public town hall meeting. I cannot say that television is one of the top topics, but in the northwestern part of Wisconsin, it is a consistent concern. No offense to Senator Klobuchar, who was just here, but as was just being indicated by some of you folks, my constituents want to know why they can only get news about what is happening in Minnesota's government rather than about the laws and budget of Wisconsin. And while they can understand that some football fans might want to see the Vikings—we do have a little bit of dissension in that part of the State—most of my constituents only want to watch them when they lose to the Packers.

[Laughter.]

Senator FEINGOLD. And they are extremely frustrated by what they see as an arbitrary decision on a map that prevents them from seeing their favorite team. So let me turn to my questions.

Mr. Ergen, in your testimony you mentioned the need to find a way to address this situation. Tell me a little bit more about how you would envision this working. Would consumers have to sub-

scribe to an additional in-State station and pay a fee? Would copyright holders and broadcasters be compensated?

Mr. ERGEN. Yes, I think the solution is very simple, and the Copyright Office addressed this in part. I think we need to expand the definition of "local into local." We all know that in the DMA we can broadcast the local stations. We need to expand that "local-into-local" definition to include the adjacent DMA. I believe that to do that, to protect broadcasters, as Mr. Yager had said, you must first broadcast to the local market DMA, and then you would have the right to bring in the adjacent market. You then should compensate the adjacent market through retransmission consent and private agreements. That way the copyright holder is also protected.

There will be differences in sports leagues and so forth and so on, and I think that once you expand local to local, the copyright holders will do their negotiations around that expanded local into local. I think it is a very, very simple solution.

Senator FEINGOLD. OK. Mr. Yager and Mr. Franks, Senator Hatch and Senator Leahy sort of touched on this, I think, but I noticed in your prepared testimony that you would oppose modification of DMAs to allow my constituents to watch the Packers and receive local news. Believe me, it will not go over well at my next town hall meeting during football season in northwestern Wisconsin. Do you have another solution to the issue? Or in your minds is it simply not a problem?

Mr. FRANKS. Well, first off, Senator, unlike what Mr. Ergen said a few minutes ago, the CBS Television Network is willing to sign off any rights in our news programming to allow our local affiliates to give the right to an adjacent market to carry their local news. Local news is not really an issue in this hearing, I do not believe.

The sports questions, though, are a very different question because there you are dealing with a very powerful rights hold—in this case, the National Football League—and with all due respect, I think it is a question you really need to address to them, because even if we wanted to allow that adjacent market in, we do not have the contractual right from the league to do that. And, in fact, we are regularly called upon by the league to enforce their territorial blackouts as part of our contractual obligation to them.

Senator FEINGOLD. Mr. Yager.

Mr. YAGER. Well, I agree with my colleague from CBS. They are the ones who negotiate for the national rights for major sporting events, and they negotiate with the NFL. The local station has very little it can do to carry an NFL game other than work with its network on what they offer.

I understand the problem from—I happen to be a Bears fan, so I do not totally understand the problem that anybody would want to watch both the Packers——

Senator FEINGOLD. Well, we have a problem with that in another part of the state.

[Laughter.]

Mr. YAGER. But it really is something you should be addressing with the NFL because it is a contractual——

Senator FEINGOLD. All right. My time is up. I would turn to Senator Cardin for his round and turn the gavel over to him.

Senator CARDIN [presiding.] Well, let me thank you all. I really came to this hearing to try to learn more about this issue. I represent Maryland, as you know, and we really have not seen the problems that have been expressed by those Senators who represent States that have a larger rural community. I represent rural areas in Maryland, and they do have this issue, but it has not been a dominant issue. I really wanted to try to understand more about the challenges.

I was pleased to hear the last response, and I just hope that we can clarify that, because local content news is perhaps the most single important issue that we want to make sure communities can receive. And it seemed like there was more agreement than the information that we had received before. So perhaps we have made some progress on that as a result of this hearing.

The other matter that I find challenging is that we have technology changing all the time, and with the use of the communications through the Internet, competition is not what it was when these laws were developed. And I think as we look at trying to harmonize and modernize the laws as it relates to different ways in which families receive their video communication, we have to be realistic that technology is not static and will continue to change and that what we put in law will be able to allow for fair competition and access as we move forward on these issues.

So, with that in mind, I am just going to ask a general question as to are there changes that we should be looking at because of the technology changes that are currently taking place. As it relates to the way individuals can get video communication today, it is not from the conventional television set, but it is from so many different other sources. Do you have any advice for us in that regard?

Mr. ERGEN. I think I will start with that, and I was privileged to testify yesterday on the House side Commerce Committee where a representative from Consumers Union, Ms. Sohn, talked about this particular subject, and also a representative from one of the think tanks talked about this subject. And the big thing is that geographic lines no longer mean anything. In fact, almost they do not even mean anything around the world, but they certainly do not mean much anymore with today's technology from a geography DMA line that is randomly drawn through a Nielsen rating from 50 years ago on a map. You know, we showed a map earlier from Iowa that shows just how convoluted those DMA maps are. So with the advent of the Internet, it is ludicrous that you could watch any TV on your computer, but on your TV set you have to be in some DMA line that was broadcaster to broadcaster.

So what I hope does not happen is we do not go another 5 years with restrictions that do not keep up with the technology, and I think you have to look at that. Your point is well taken.

Senator CARDIN. I appreciate that.

Mr. Yager.

Mr. YAGER. I would hate to mix technology with the DMA issue. The DMA issue is one that is voted upon by the viewers in their community. And, by the way, DMAs change every year. But your point on technology is a very valid one. It does not really impact, I think, the DMA issue, as Mr. Ergen would suggest.

Where we think technology is going, look what we can do with digital. Look what we will be able to do with digital. Today we can probably multi-cast two channels other than the major channel we have. We think this is going to solve a lot of local problems, local service problems in the communities we serve. And we agree with you. We think technology is growing very rapidly, and when we get out of MPEG2 to MPEG4, which allows us to probably multi-cast four or five channels in the local market, Mr. Ergen is going to have further problems because we are going to say we want those carried as well on satellite.

Mr. FRANKS. Senator Cardin, let me put on a slightly different hat, if I may. Instead of television network per se, let me be a program producer. For instance, we own the three "CSI" programs, three of the top-ten most popular programs in the country. A challenge for us is that technology is indeed breaking down the windows and the business models in which we air that programming. But the technology is ahead of the economic models. So while, yes, we put the "CSI" on the Internet on a delayed basis for a video-on-demand experience for consumers, our network business is a $4.5 billion business, and attracting the advertisers to that simultaneous national viewing of a Thursday night "CSI" episode is what allows us to spend millions of dollars to create just that single episode.

The revenues from the Internet are still in comparison de minimis, and it is why we are very careful in how we manage our Internet business so that it does not completely cannibalize the economic model that allows us to produce this popular programming. That is the threat we feel from technology. We will sort out our business issues with Mr. Ergen and Mr. Cohen. We are all big companies. We can protect ourselves pretty well. It is this attack on the economic model, the disruptive technology in that sense of the economic model, and it becomes a problem because if we do not figure that out, then it is going to be very hard—I mean, who is going to produce that programming? The Internet itself cannot produce the program. And how do you know that you want to go watch a program on the Internet? You know because the demand has been created by the dinosaur network.

Senator CARDIN. Is that factored into your negotiations today, that economic reality of current technology?

Mr. FRANKS. It is why we try so hard to protect our windows, it is little things like DMAs. That $4.5 billion dinosaur network business, if you will, is what fuels all of that program creation and makes it possible for people like Mr. Ergen to resell our signal.

Senator CARDIN. Senator Wyden, the gavel is yours.

Senator WYDEN [presiding.] Thank you, Mr. Chairman, and I want to apologize to all of our guests. We had a very long hearing in the Finance Committee, and I am coming in late, and I am going to try not to plow over too much that people have already pummeled.

My concern is born out of what I hear at home, and what I hear at home is tens of thousands of Oregonians get up every day to see their television broadcast—television that is important—coming from somewhere else and coming largely with news that they do not have a great interest in. It might be Washington, it might be

Idaho, but it certainly is not Oregon. And I have been pushing for a great many years—I was also on the Commerce Committee. My spouse said the other day, "Dear, what Committee are you not on?" And now that I have picked up this Judiciary Committee assignment, I come to the Satellite Home Viewer Act with a perspective from a judicial outlook.

From my vantage point, it is hard to see how just putting Band-aids on this issue, the question of reforming the Satellite Home Viewer Act, is going to really address the concern. You need to create what is, in effect, a bright-line fix that cannot involve manipulation and ensures that people can get broadcasts that they really care about, that represent the concerns and interests that they aspire to hear about on a daily kind of basis. So I think what I would like to do for a few minutes is touch on these issues.

Mr. Ergen, you have had strong views on these topics for a lot of years, and let me start by getting your view with respect to the importance of these kinds of concerns—in-State news, weather, emergency notices. You have been in this business a long time. What is your sense about how people look at this?

Mr. ERGEN. I am 100 percent confident how they look at it. They look at it in the State of Oregon that they want to see the news, weather, and sports of Oregon. And these randomly drawn lines on a map 50 or 60 or 70 years ago by a Nielsen company who does not even want to take ownership for these lines today in today's digital world do not make sense.

Mr. Yager earlier said that the consumer voted on these lines. I know of not one consumer who has ever voted in Oregon to watch Washington when it could watch Oregon. The technology exists, both through cable and satellite, for the people of Oregon to be able to watch channels in Oregon.

Senator WYDEN. And so your argument is that these rules are simply outdated. I mean, talk about health reform, something you and I have talked about, there you are dealing with the 1940s, a day when people stayed somewhere at the workplace 20, 25 years until you gave them a gold watch and a big steak dinner. And we are talking about reforming the health system to modernize these health rules. And you are talking about, I think, much the same thing as it relates to the Satellite Home Viewer Act.

Mr. ERGEN. Again, I do not want to live in the horse-and-buggy age. I think that the Internet and satellite technology, along with digital cable, these are fantastic technologies that are able to now deliver consumers what they want to watch, where they wanted to watch it, and only the incumbent generations of people who do not want competition, you missed—you know, earlier in the panel everybody said things are too complicated, we do not want to change anything. Well, nobody wants to change anything when they make good money and do not have competition. Of course, you do not want to change.

But as you know, the consumer is saying you should change because the technology does allow us. We can watch it on our phone. We can watch it on our computer. Why can't we watch it on our TV?

Senator WYDEN. Now, how would an adjacent DMA fix, which is largely the concept that is being discussed here, that allows all sat-

ellite providers to offer State-specific stations to their customers solve these problems? What are the implications of an adjacent DMA fix? I guess that would be the way to characterize it.

Mr. ERGEN. Well, it is a very simple fix for consumers. It just allows you to bring in the adjacent DMA along with the local DMA. I think you should be required to do the local DMA. I do think—and we do not have a representative from sports leagues here or other copyright holders, and I do not want to speak for them. I think that they would have to renegotiate their contracts around what I call "expanded local," which is to expand the definition of local to include your current local DMA and an adjacent DMA. That would solve the in-State problem where the 45 States import signals—I mean, from different States than their own State. That would solve that problem and give customers a choice. We can protect the local broadcaster by requiring the local broadcasts to be broadcast as well.

Mr. FRANKS. Senator Wyden, may I jump in?

Senator WYDEN. Yes. Go ahead, Mr. Franks, and we are going to have some questions for you, too.

Mr. FRANKS. I look forward to them, as always.

With regard to the local news problem, there is nothing in today's law or regulation that prevents a cable operator or a satellite operator in the State of Oregon from providing that local news. The local station controls that copyright, and so there is no reason right now that your constituents could not be delivered the in-State local news product that you want. There is no impediment in the law or regulation to doing that now.

Senator WYDEN. Mr. Ergen.

Mr. ERGEN. I do not believe that is true. I have tried—I have met with Gannett Broadcasting, and I have tried to bring in the local news. I even talked about doing regional concepts. Ultimately what they said was—and this is an NBC affiliate so I do not want to speak for Mr. Franks, who is CBS. They said, well, we own the copyright to our local news, but we do not own the copyright to the national news, and our local news feeds are interlaced with national stories. So when President Obama was talking last night, that is a national story that national NBC owns the copyright. The local broadcaster did not have the right to give that news to me.

Second, the consumer is interested in more than just news. He is interested in sports. So March Madness comes up, in Oregon they may want to watch the University of Oregon. They may not want to watch Gonzaga, which is what may be shown by the CBS affiliate that comes from Yakima or Spokane into Oregon.

So it is a broader issue than that, and, look, it is a question of do we want to be on the side of consumers or do we want to be on the side of special interests that I represent and other people at this panel represent? And that is a choice that this Congress has to make.

Senator WYDEN. Mr. Franks I think is champing at the bit to say some more.

Mr. FRANKS. I just do not quite understand how I am representing the special interests here. If there is a problem in Oregon that involves the CBS Television Network and a local CBS affiliate in providing local news product to your constituents, I would be

happy to start working on it this afternoon, because it is not a problem.

Senator WYDEN. That may be what it comes to—under Chairman Leahy's auspices sending you all out to do some negotiating so that we get this resolved, because this has gone on for too long.

As I look at this question, adjacent DMA, nobody is talking about doing this everywhere on the planet, only where there is not otherwise available State-specific affiliate broadcasting. So we may have to send good people like Mr. Franks and Mr. Ergen out to have their own kind of negotiation and put this together, because it is time to get this done.

Mr. FRANKS. Well, I doubt that your constituents really care where they get their "CSI." Part of what Mr. Ergen is also trying to do is to be able to import "CSI" into that market, and then we do begin to have a problem because then you are undermining the local station. But to the extent that this is about news, it is not a problem—it is a problem, I understand, but the solution to the problem exists right now.

Senator WYDEN. Do you want to bat this around some more, Mr. Ergen?

Mr. ERGEN. Well, I am pleased to hear Mr. Franks say CBS would give us the rights to the—would give their national rights to their affiliates——

Mr. FRANKS. I did not say I would give them to you, but I would give them to our local affiliates.

[Laughter.]

Mr. ERGEN. That is right, local affiliates in—I think Mr. Yager wanted to jump in here because I did not want to——

Senator WYDEN. We are teeing you up, Mr. Yager.

Mr. YAGER. Okay. Number one, our company would be happy—we have never been asked to give the rights to any of our newscasts, special programming to—by any satellite or cable company. I can say without question here I would be more than willing to work with our NBC, FOX, and ABC affiliates to get the rights to carry their news. Mr. Franks said we could always do that, so our CBS affiliates are available to Mr. Ergen to State lines at any time he wants as of this hearing.

That is what is in the law, and we want to abide by the law. I was not aware that other affiliates might be using the network news angle and saying we do not have the copyrights. I think that is a simple problem to work out.

Senator WYDEN. That is promising.

Mr. ERGEN. I think that is great. I think that is great, and I am glad to hear that CBS will take the lead, and hopefully they can convince some of their other constituents or the other networks to do something similar. And I think Mr. Yager made a kind offer as well, and I think that would be an important step.

Senator WYDEN. That is real progress. You can take the rest of the day off.

[Laughter.]

Senator WYDEN. Listen, can I ask you one——

Mr. FRANKS. But I do think it is significant, Senator, that no one has ever asked him. How long have you been in the business, Jim?

Mr. YAGER. You do not want to know. I should be at Senator Kohl's hearing——

Senator WYDEN. I guess I just did, so——

Mr. FRANKS. No, but I mean that no satellite or cable operator has ever asked. So, I mean, if there is this pressing need and this urgent desire to meet the needs of customers and constituents, in some ways we are hearing about it relatively late in the game.

Senator WYDEN. I am going to quit while I am ahead. I think we are on our way to making some progress.

Just one other question for you, Mr. Yager. When our country switches over to digital on the 12th of June, obviously broadcast and TV changes dramatically. Folks in rural areas like rural Oregon who used to make do with a weak signal and a little snow on their TV screens are going to end up sometimes with no picture, no sound at all, unless the local broadcaster takes step to improve signal strength and coverage.

What is being done on this point to make the necessary investments so that these communities get the kind of quality service they deserve?

Mr. YAGER. Well, I think most responsible local broadcasters are taking steps to, if they have had a side-mounted digital antenna—and I think that is what you are referring to, where the digital signal might not be totally at this point in time replicating the analog signal in a given market, that can well be because of the power kind of being deficient to what they are going to have on analog or because they have got a side-mounted antenna.

I can only speak for my company. We intend to fully replicate the analog signal, and the beauty of that is that when you replicate the analog signal, it is not a snowy picture. It will be a picture that that viewer can see without distortion.

Senator WYDEN. And for you, Mr. Cohen and Mr. Hartwell, we have largely spared you the grilling here today. Would you all like to add anything? In fact, what is really timely about this, and the comments of Mr. Franks, Mr. Yager, and Mr. Ergen, is that I think it is fair to say that the administration, the Obama administration, with all they have had on their plate, has not exactly laid out all of their goals for Satellite Home Viewer reauthorization, and I think it is helpful to have been able to have the three of you respond to some questions because I think it suggests that there may be more of a consensus here than people thought. And I want to give Mr. Cohen and Mr. Hartwell a chance, in effect, to make any comments they want, and we will wrap this up.

Mr. Cohen, anything you want to add?

Mr. COHEN. Senator, I think all I would say is that although I will plead guilty to being one of the folks on the panel who said that the adjacent DMA issue was complicated, what I also said was I think that there is dialog that can occur. We have found some fixes around this problem, for example, in—we, Comcast, and so I have some familiarity with it—in southern Vermont, and it does not help Senator Hartwell's constituents who are living in the most rural areas of southern Vermont where cable just cannot economically extend.

We do currently carry WCAX, which is the CBS affiliate in Burlington. We bring that in as a distant signal under the compulsory

copyright license. It happens to be the network affiliate, I am told, that has the most local news and the most local coverage. And it has been a way for us to satisfy or at least largely satisfy our customers in southern Vermont who were complaining to us, as well as to Senator Hartwell and Senator Leahy, about the absence of local news and local news content in southern Vermont.

So we are prepared, we as an industry are prepared to sit at the table, to be at the table, to look whether there are business solutions or legal solutions to these issues, and we are happy to be a partner in trying to help resolve those.

Senator WYDEN. Mr. Hartwell, anything you want to add?

Mr. HARTWELL. Yes, thank you, Senator Wyden. I appreciate your introductory remarks. They go right to the point that the issue that is bothering many Oregonians is the same issue that is bothering many Vermonters. I look forward to what would be a novelty in my case, to turn on the television set in my home in Dorset, Vermont, and see the Burlington, Vermont, television. And we do not do that. We do not see that. But that is what we want.

Senator WYDEN. Well, I appreciate the panel. The fact of the matter is if you have these States—and Vermont and Oregon are particularly concerned. We have got large swaths of our State that simply are not able to watch news and information that we feel strongly about because their "market area" is somewhere else. And I think we have been able to make some progress today in terms of our witnesses looking at some ways to bridge the differences. So this has been constructive.

Again, I apologize to our panel for coming in late and having to try to pick up on some of the earlier comments. But I like the tone of the outcome and where we are headed, and we will look forward to following up under the leadership of Chairman Leahy and Senator Specter.

With that, we are adjourned.

[Whereupon, at 11:40 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

Senate Judiciary Committee questions arising from the February 25, 2009 hearing Entitled "Ensuring Television Carriage in the Digital Age" -- the Response of David L. Cohen.

**Senator Specter: What would the impact be on the cable industry if the structure of Section 111 were moved to be more similar to Sections 119 and 122?**

Unfortunately, the primary impact of such a revision to Section 111 would be a significant disruption in the availability of distant signals currently carried by cable systems across the country. The Section 111 royalty fee structure is based on federal communications policies which favor or disfavor the carriage of certain signals based on community-specific factors. For example, under the Section 111 license, Comcast pays substantially more for a distant independent station than we do for a distant network station. Under Section 119, these rates are the same. Additionally, under Section 111, the number of "permitted" distant broadcast stations (allowed to be carried at a lower rate) is established based on community-specific FCC carriage regulations. And small systems pay less than larger systems. These significant carriage distinctions would be wiped away by application of a Section 119 national per signal rate.

Imposing a uniform national per signal fee, as contained in Section 119, would dramatically alter the community-based royalty fee schedule established under Section 111. For many cable communities, this would require dropping distant signals traditionally carried in order to avoid a significant increase in a cost of providing cable service. This consequence was expressly acknowledged in the testimony of DirecTV before the House Committee on Energy and Commerce Subcommittee on Communications, Technology and the Internet (February 24, 2009). DirecTV testified: "Changing the rules now would disturb the settled expectations of viewers throughout the country and would cause compliance problems on all sides. Inevitably, both cable and satellite viewers would lose stations they now rely upon." We agree the primary impact of any attempt to harmonize the cable and satellite licenses would be significant disruption of current viewing patterns and consumer expectations.

**Senator Specter: If the Congress were to harmonize the cable license with the satellite licenses, what additional changes would need to be made to the cable license to ensure parity?**

Any attempt to "harmonize" the cable license with the satellite license would require significant adjustments to the underlying regulatory structures of both the cable industry and the satellite industry. Such adjustments would likely create significant signal carriage disruptions without necessarily achieving parity and without any discernable consumer benefit. The differences between the satellite and cable licenses necessarily reflect differences in the regulations governing the way each industry offers broadcast programming. For example, the so-called "must buy" requirement -- imposed *only* on



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cable operators -- requires operators to put all broadcast signals on the basic tier and make every subscriber buy that tier. There are additional significant differences related to must carry, network non-duplication, retransmission consent, and the carriage of unaffiliated commercial and non commercial programming, just to name a few. For example, DBS's copyright license enables it to import a distant network affiliate into an "unserved" area without securing retransmission consent from the owner of the distant station. Cable has no similar exemption from retransmission consent.

There are numerous other differences in the regulatory landscapes that affect cable and DBS, and which impact their compulsory licensing schemes; any attempt to harmonize the copyright licenses alone, without addressing parity in these areas as well, would be harmonization in name only. We generally believe that the regulatory burdens fall far more heavily on cable -- we are, for instance, subject to franchise fees and other franchise related obligations, local rate regulation, equipment capability requirements, PEG channel access, ownership caps, and a variety of restrictions on programming and exclusivity -- which DBS is not. As DirecTV acknowledged in testimony before the House Committee on Energy and Commerce Subcommittee on Communications Technology and the Internet (February 24, 2009), any attempt to harmonize would "take an extraordinary amount of work to achieve results that, in a perfect world, would largely replicate the system already in place today." DirecTV further testified that such an effort of harmonization "would also ignore important differences between cable and satellite technologies and businesses." We agree that the regulatory and business changes necessary to ensure parity in harmonizing the licenses would be both substantial and disruptive.

**Senator Specter: As I understand it from your testimony, the Copyright Office has issued an interpretation of Section 111 that would require cable operators to pay distant signal royalties for customers who live in communities where the distant signal is not even available to them. Can this be correct?**

Unfortunately, yes. This Copyright Office interpretation has created royalty obligations for distant signals that are not even available in a community, so called "phantom signals." This occurs because the Copyright Office has interpreted the definition of a "cable system" in Section 111 as precluding cable operators from calculating royalties based solely on the particular communities in which a distant signal is actually available. As a result, when two commonly owned cable systems happen to be adjacent to each other, or are technically connected to the same headend, the Copyright Office would have us calculate royalty payments as if the customers in *every* system community carried each and every distant signal carried in any one of the other system communities. Under the interpretation, as soon as a distant signal is offered in one community that the Copyright Office deems part of a single "cable system," every community that is deemed part of that "cable system" is "contaminated." A signal might only be offered to a very small subscriber community -- let's say a single community that has only a thousand customers -- but the Copyright Office would have us pay as if the signal were available to everyone in all adjacent system communities (with, for example, 20,000 customers). In essence,



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Comcast suddenly would be paying twenty times more for the exact same signal delivery, and the entire increase would be attributed to customers who could not receive the distant signal. Because each individual system community often maintains its own unique complement of distant signals, the Copyright Office's interpretation leads to an illogical and inequitable royalty obligation.

Even the Copyright Office knows this is wrong – they refer to it as a "phantom signal" problem that could be resolved by payment of royalties "based on subscriber groups that actually receive the signal." No one, including the Copyright Office, believes that the Copyright Office's interpretation makes sense, because it doesn't. But since the Copyright Office claims it has no latitude under the statute to adopt a sensible subscriber group methodology, we are asking for a minor clarifying amendment, consistent with the original intent of Section 111, to fix this problem.

**Senator Feingold: What is causing the increases in the price of pay-television services? Are the increases justified? Is there anything that can be done to make television service more affordable for Americans during these difficult economic times?**

We think that today, cable provides a better value to consumers than ever. In fact, whether measured on a per-channel basis or on a per-viewing-hour basis, cable's prices have actually *declined*. As Bernstein Research analyst Craig Moffett recently noted, "The most meaningful measure of perceived value is usage level . . . . Taking into account the increased amount of time US households spend watching television, and the fact that cable's share of total television viewing has increased, the real price of an hour of cable TV actually declined by an inflation-adjusted 26% over the last 10 years."

We offer a wide variety of programming packages, or "tiers," so our customers have the freedom to select the program options and price points that meet their needs and budgets. Our broadcast basic packages generally start at less than $15 per month and, above that, we have many additional options, including premium channels and specialty tiers. Subscribers to our Digital Starter package have access to thousands of hours of our video-on-demand ("VOD") programming, the vast majority of which is free. We now offer over 10,000 VOD choices each month, and our customers are taking full advantage of this service. On a monthly average, our customers use Comcast's On Demand service more than 300 million times and watch 149 million hours of VOD programs. In fact, earlier this year, we announced that Comcast VOD service has surpassed 11 billion views. We think the services we offer are a great value, especially when compared with other entertainment options. We are sensitive to the fact that as a result of the digital broadcast transition some households may now be considering multichannel service for the first time, and have created special low-cost offers that will allow them to do so.

According to the FCC's latest data, cable customers on average get over 70 channels for less than $50 and over 40 additional digital channels for about $15 more per month. When purchased as a bundle with Comcast High-Speed Internet service or Comcast's



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Digital Voice service, consumers receive even more value and greater savings. We have not raised prices, or raised them only nominally, on these other services (even though we have doubled our customers' Internet speeds again and again). The intense competition today among cable operators, DBS operators (DirecTV and DISH), AT&T and Verizon to sell bundles of video, telephone and data service ensures that consumers have the ability to select a provider who is best able to meet their price/value expectations.

The single biggest cause of the increases in prices for pay-television services is the continuing rise in the cost of programming. Our programming costs are steadily increasing, and our prices reflect that (as do the prices of all our competitors). Earlier this year, the FCC found that programming expenses in 2005, 2006, and 2007 increased by 6.9%, 8.3%, and 9.5%, respectively. We continue to work extremely hard with our programmers in an effort to limit escalating programming costs.

**Senator Hatch: Do you think the program access provisions written by the Congress in the early 1990s have kept pace with today's technology and market structure?**

Frankly, no. The program access provisions outlived their usefulness many years ago. As Congress envisioned when it enacted the program access provisions in 1992 and scheduled them to sunset ten years later, the marketplace has become highly competitive. The program access provisions are no longer needed and should be eliminated now. In 1992, DBS service was in its infancy and cable operators were the dominant MVPDs. In addition, cable operators owned more than 50% of all national programming networks in existence at that time. Today, DirecTV and DISH Network are the second and third largest MVPDs in the United States, and control over 30% of the subscribers in the multichannel marketplace. Meanwhile, cable's ownership of programming has declined dramatically. Fewer than 10% of the 565 national programming networks in existence today are owned by cable operators. In this environment, cable operators have neither the incentive nor the ability to impede competitors by denying them access to programming. And it is particularly anomalous to have rules that require cable-affiliated programming to be sold to DBS operators, while DirecTV enjoys exclusive access to the NFL Sunday Ticket and pays enormous sums to the NFL to prevent cable operators from making this programming available to consumers who want it.

**Senator Feingold: I understand that many cable and satellite television providers are making special offers for individuals switching from over-the-air broadcasting as part of the digital transition. Are your companies making such offers? If so, do these special plans and rates last only a limited amount of time? After they expire, what kind of price increases do you anticipate?**

Yes, across the country, Comcast is making available two special offers for TV viewers who are being affected by the digital broadcast transition.



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(1) A customer can obtain our entry level video service, which includes their local off-air TV stations, at no charge for a year if they also sign up for Comcast high speed data or voice service.
(2) Customers interested only in receiving low cost video service can obtain our entry level service for $10 for twelve months.

In both cases, after the twelve month period, our standard charges for entry level basic video would apply. Those charges vary by community, but generally are less than $20 per month.

**Senator Feingold: I am concerned that public, educational and government channels, or PEG channels may be hurt as pay-television systems shift to digital. These changes could include shifting the stations to radically different channels numbers, treating them differently than other channels like AT&T's U-verse, or other changes that may force viewers with older television sets to rent a converter box. What has Comcast, and the cable industry in general, done to eliminate or reduce the disruption and cost for viewers to continue to receive PEG channels?**

First, I should note that Comcast has long supported PEG programming. Both in the provision of PEG channel capacity and in the funding of PEG, Comcast has worked cooperatively with thousands of local governments and PEG programming providers to address the needs and interest of PEG providers, local franchising authorities, and our customers. Comcast will continue that cooperative relationship as we address the compelling need to transition our systems to digital technology. The transition of Comcast cable services, including PEG channels, from analog to digital is occurring in a highly competitive marketplace. Because all of our largest competitors -- DirecTV, Dish, Verizon FiOS, and AT&T U-verse -- already offer all digital platforms, it is imperative that Comcast make this digital transition as rapidly as possible in order to bring to customers the services they now expect and demand.

Comcast has taken reasonable steps, which we will continue to improve and refine, to minimize any disruption caused by the transition of PEG channels from analog to digital. Where PEG channels are converted from analog to digital carriage, they typically remain on the basic service tier with the lowest service rate. Further, Comcast provides all appropriate notices prior to any such digital transition and typically provides hundreds of PSAs announcing the coming digital carriage of the PEG channels and providing the specific channel locations for such digital carriage. Because over 70% of Comcast subscribers already receive digital service, the digital carriage of PEG channels has no impact on their ability to receive such channels. Some of the remaining customers have their own digital reception equipment (e.g., digital televisions, TiVo recorders, etc.) and likewise require no additional equipment to view digital PEG channels. For the remaining subset of customers, Comcast typically offers a free digital converter for at least one year.

We believe that maintaining PEG channels on basic service, providing all appropriate notifications, providing hundreds of free PSAs, and offering free digital converters for at



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least a year helps to ensure that any disruption associated with the digital carriage of PEG channels is minimized. Further, as more and more of our customers switch to digital service, fewer and fewer customers will suffer any disruption as a result of the carriage of PEG channels in digital format.

Finally, I would note that Comcast's carriage of PEG programming on linear digital channels presents none of the accessibility, technical quality, and functionality problems that have been ascribed to AT&T's U-verse PEG product.

**Senator Feingold: The transition to digital television seems likely to cause the production of a significant volume of e-waste. This waste could be produced indirectly through viewers deciding to upgrade to digital television instead of getting a converter box or more directly through the replacement of analog with digital cable or satellite tuners, for example. What are your companies' policies regarding e-waste? Do you collect obsolete equipment from customers or when customers cancel service? If so, could your provide details on the fate of this equipment including the portion that is recycled? If applicable, please provide the name and location of facilities that conduct the recycling.**

Comcast understands the importance of protecting our environment, which is why we have not only implemented programs to recycle our obsolete equipment but are encouraging the public to do so as well. Comcast utilizes recycling vendors to assist with the recycling and disposal of converter boxes and other materials. We have a national agreement with Global Investment Recovery, Inc. (GIR).

More broadly, the company also has created a community outreach program known as Comcast E-Waste Eco-Rally. This is a program where Comcast partners with the community, local businesses, and e-waste recycling vendors to educate the public on the subject of e-waste and encourages people to return their old televisions and other unwanted electronics to a designated location where we have arranged for recycling. The pilot program, launched last year in partnership with the City of Denver, Planet Green, and others, resulted in 922 screens and more than 70,000 pounds of e-waste being collected at one event. The waste was disposed of by Guaranteed Recycling Xperts (GRX) and Waste Management Recycle America. We are planning to expand the program to other markets.



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**Senator Specter Questions**

1. **My constituents in the western portion of the state are not able to watch in-state news, because they are part of the Youngstown, Ohio television marketing area. I understand the problem for those residents and others in specific Pennsylvania counties—and on how offering them Pennsylvania TV signals would address those issues. Is it your position that the local-into-local compulsory copyright license should be amended to include the ability for satellite providers to offer a Pennsylvania signal to the entire Youngstown DMA, which included Ohio counties, or just the affected counties in Pennsylvania?**

   Unlike cable systems, which are typically county-based, DBS systems are designed to serve entire DMAs. To account for this difference in technology, we believe the local-into-local copyright license should be amended to allow a satellite provider to provide signals from neighboring DMAs. Today many broadcasters distribute their content via the Internet nationwide, and that distribution is not limited by county or DMA boundaries. Provided that broadcasters and content owners are fairly compensated, consumers should be able to decide what they want to watch.

2. **If local into local is available but the spot beam does not hit a subscriber who qualifies as unserved, should a distant signal be allowed?**

   Unserved households that fall outside spot beams are already permitted to receive distant signals under 47 U.S.C. § 339(a)(2)(D)(iv). Unserved subscribers outside the spot beam should continue to be able to watch network stations, but they should be from neighboring areas to the extent possible.

3. **Mr. Ergen, you state that DISH Network is unable to provide distant network signals under the 119 license in southern Vermont and other places because of the court ordered injunction. Why is the only solution to this for DISH to provide distant signals themselves when you already have an arrangement with NPS to provide distant signals to residents in other markets?**

   NPS is a customer that leases wholesale satellite capacity from DISH Network. NPS independently offers a service that is based on the historic "distant" analog signal approach where signals are imported often from thousands of miles away to provide analog service to unserved households.

4. **Mr. Ergen, if you were able to carry adjacent, in-state DMAs, in what specific markets would you begin to carry stations from adjacent DMAs? Would you carry all affiliates from neighboring DMAs? How many total adjacent market stations would you import? Would current technology allow entire counties to be served? Generally, could you please explain how the technology works to make this available?**



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Based on our own subscriber requests and constituent calls to Members of Congress, there is a clear demand for a broader local service offering that includes neighboring market broadcast stations. From a technical perspective, we can 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. However, if the neighboring market is not being delivered using the same spot beam as the "home" market, then we can only offer the neighboring market broadcast signals to our subscribers if there is sufficient capacity available on the "home" market spot beam to add the channels from the neighboring market.

From a practical perspective, however, it is not possible at this time to provide a clear roadmap as to how such service would be rolled out absent a clear understanding of the critical regulatory components of such neighboring market service. For example, it would be prohibitive to offer the service if blocking out individual programming on a station-by-station, zip code-by-zip code basis were required.

It is our hope to offer neighboring market service wherever our satellite infrastructure permits and wherever our subscribers desire the enhanced service. Just as we have grown from zero local-into-local markets ten years ago to 178 markets today, this will inevitably be a market-driven organic process. We look forward to working with you this year to ensure that our collective efforts maximize the availability of neighboring market service for the benefit of your constituents and our subscribers.



53927.008

**Senator Feingold Questions**

1. **I understand that many cable and satellite television providers are making special offers for individuals switching from over-the-air broadcasting as part of the digital transition. Are your companies making such offers? If so, do these special plans and rates last only a limited amount of time? After they expire, what kind of price increases do you anticipate?**

   DISH Network offers the lowest-cost, all digital, pay TV service in America. DISH Network provides nationwide pricing to all of America, including rural areas where consumers tend to be more cost-sensitive and in many cases, where cable TV service is not available.

   In light of the impending digital transition, DISH Network has put forward very attractive special offers to assist consumers who may want to subscribe to pay TV. First and foremost, we offered analog to digital converter boxes, including the TR-40 CRA, which had an MSRP of $39.99. Therefore, consumers with a $40 federal coupon paid nothing for the converter box. In addition, DISH Network is running one of the most aggressive promotional offers in its history that offers a low introductory price of $9.99 for six months for over 100 channels. The pricing on that promotion will increase by $20.00 following the promotional period. DISH Network is also offering customers a locals only package for a regular price of $9.99 a month. The locals only package gives customers their local news, weather and sports programming. In addition, DISH Network offers DishFAMILY for a regular price of $19.99 per month. DishFAMILY offers customers over 40 channels of low-priced, family-friendly programming.

2. **I frequently hear concerns about the consistent increase in the cost of pay-television service no matter the provider. We do not have a consumer advocate on this panel, but I'd like to ask you what you think is causing these increases, whether they are justified, and whether there is anything that can be done to make television service more affordable for Americans during these difficult economic times?**

   DISH Network is the lowest-cost, all digital, pay TV service in America. We offer nationwide pricing. We, too, are concerned about the rising costs to consumers.

   The largest cost driver for our business is programming fees, and a focus on keeping those costs in check is the key to maintaining control of consumer prices.

   Broadcast station ownership groups have begun demanding retransmission consent fees that are 200-300% greater than their previous rates. The market is broken. When the Cable Act was passed in 1992, the market consisted of one cable operator negotiating against one broadcaster, so there was equal bargaining power. Today, multiple pay TV providers negotiate against one monopoly broadcaster. Indeed, broadcasters have increasingly initiated on-air marketing campaigns (e.g., TV and radio advertisements, on-screen crawls, and website information) during retransmission consent negotiations



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threatening pay TV subscribers with lost programming unless they switch to a cable provider, rival satellite provider, or new telco provider. Pay TV providers cannot do the same: they are forced today to negotiate only with the local network affiliate that has monopoly rights to network content. Such an imbalance of market power translates directly into a higher cost of goods, and therefore higher costs to consumers.

Congress has an opportunity to ensure that television service remains affordable during tough economic times. During the reauthorization of SHVERA, there are a number of changes within the retransmission consent regime that could benefit consumers. First, Congress should consider the creation of a national retransmission consent rate, which would apply to all broadcasters and all pay TV providers. Such a uniform rate finds support in the fixed, per-subscriber copyright royalty rate that applies to satellite-delivered distant network signals. A similar compensation mechanism should be considered for retransmission consent. Second, another means to control the cost of television service would be to bring the market back into balance by eliminating the current monopoly power of the local broadcaster in any market. If retransmission consent negotiations break down and the local broadcaster threatens to drop their programming, pay TV providers should be able to import the signal of a nearby affiliate of the same network to fill the gap. Finally, Congress should review the successful third-party arbitration structure established by the Federal Communications Commission within its merger review process. Specifically, the FCC's third-party baseball-style arbitration approach would provide two clear consumer benefits. The inclusion of a standstill provision would ensure that consumers do not lose access to any programming during a retransmission consent negotiation impasse. Further, an impartial arbitrator guarantees a fair and equitable market-based rate based on a comparison of other relevant carriage deals.

3. **The transition to digital television seems likely to cause the production of a significant volume of e-waste. This waste could be produced indirectly through viewers deciding to upgrade to digital television instead of getting a converter box or more directly through the replacement of analog with cable or satellite tuners, for example. What are your companies' policies regarding e-waste? Do you collect obsolete equipment from customers when customers cancel service? If so, could you provide details on the fate of this equipment including the portion that is recycled? If applicable, please provide the name and location of facilities that conduct recycling?**

DISH Network leases satellite TV equipment to the majority of its more than 13.5 million customers. This model makes for a powerful reclaim-reuse-recycle operation that emphasizes environmentally friendly behavior. Over 40% of DISH Network's 20+ million active set-top receivers have been refurbished and recycled through this lease program. When a customer disconnects service or no longer needs leased equipment, DISH Network makes every effort to recover the equipment and return it to one of its three return warehouses in Spartanburg, South Carolina, El Paso, Texas or Denver,



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Colorado (including sending pre-paid shipping cartons to the customer so that they can conveniently return their equipment to DISH Network without additional charge). DISH does not attempt to recover equipment it does not own.

All returned equipment that is identified as obsolete or unserviceable is disassembled into clean recyclable material. DISH's policy is to recycle 100% of the e-waste that is generated through this process.

All non-environmentally volatile material (ferrous and non-ferrous metal, plastic, wire, coax cable) is processed through environmentally sound recyclers located near each of the return warehouses. The two materials that are considered environmentally volatile are printed circuit boards and batteries. These materials are processed according to federal, state and local regulations. Printed circuit boards are processed by Xstrata of Switzerland and batteries are processed by Battery Solutions Inc. of Michigan.



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**Senator Hatch Question**

1. **Do you think the program access provisions written by the Congress in the early 1990s have kept pace with today's technology and market structure?**

No, the original program access provisions have not kept pace with today's technology and market structure. Specifically, the statute defines a cable operator as an entity that delivers programming via satellite to its head-end. This is the so-called "terrestrial loophole" that allows large cable operators with contiguous systems to circumvent the program access rules by simply delivering their programming terrestrially to their local head-ends instead of via satellite. The effects are devastating to competition. One need only look at the San Diego market, where Cox not only owns the cable system, but also its own television network-Channel 4 San Diego, to see what happens to the pay TV market under such circumstances. Cox does not deliver Channel 4 San Diego to its local head-ends via satellite, but rather terrestrially, and as a result is not compelled to offer that programming to its DBS and telephone-video competitors. Not coincidentally, the penetration rate for DBS in San Diego is lower than the average national DBS penetration rate. In fact, AT&T recently filed a program access complaint against Cox highlighting the anti-competitive result of withholding Channel 4 San Diego from competing pay TV providers. Despite compelling evidence of anti-competitive conduct, the FCC rejected the AT&T's complaint given the lack of clear statutory authority to address these situations.

Procedurally, the FCC made a number of improvements to the program access rules in 2007 to update and refine the initial implementing rules. Building off those reforms, Congress should consider further procedural improvements to better reflect current market conditions. Specifically, the program access rules should: (1) provide for a standstill provision to ensure that no consumer loses access to programming during the pendency of a program access complaint; (2) include a fixed shot clock for FCC action on program access complaints to mirror more closely commercial negotiations; and (3) incorporate a third-party arbitration structure to resolve disputes quickly in an equitable manner.



53927.012

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EXECUTIVE VICE PRESIDENT
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March 23, 2009

The Honorable Orrin G. Hatch
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Hatch:

I write to respond to your written question following from the Senate Judiciary Committee's February 25, 2009 hearing "Ensuring Television Carriage in the Digital Age" at which I testified. In your written inquiry, you ask if I believe the program access provisions written by the Congress in the early 1990s have kept pace with today's technology and market structure.

As part of the Cable Act of 1992, Congress enacted the so-called program access requirements to which you refer. Those requirements, promulgated by the Federal Communications Commission, were designed to ensure that cable could not hamper the growth of its competitors --particularly DBS-- by denying them satellite-delivered program networks in which cable operators had an ownership interest.

The rules by their very nature apply only to vertically integrated programmers --those owned in whole or in part by a cable operator. CBS is not vertically integrated and, therefore, is not covered by the program access rules. Thus, we respectfully note that we have not formulated a position as to whether the rules have kept up with technology.

Please do not hesitate to contact me for additional information if more is needed, or if I can be of assistance in any other way.

Sincerely,

Martin D. Franks

cc: The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary



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March 23, 2009

The Honorable Arlen Specter
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Ranking Member Specter:

I write to respond to your written question following from the Senate Judiciary Committee's February 25, 2009 hearing "Ensuring Television Carriage in the Digital Age" at which I testified. In your written inquiry, you note that you are concerned that following the digital transition many households which used to receive an analog signal over the air will not be able to receive a digital signal, and you ask whether CBS has plans for dealing with this situation by investing in more towers and equipment so that families do not lose local signals when analog signals are cut off.

CBS engineers have undertaken numerous studies over the last few years to compare analog and digital coverage areas –both pre- and post-transition. To accurately and fully respond to concerns about signal coverage differences, we conducted a brand new engineering study just a couple of months ago.

I am happy to report that these studies found that based on the current licensed facilities or granted and pending applications, almost all of the 29 full-power CBS Television Stations, as evaluated pursuant to the Longley-Rice model, are calculated to have digital coverage areas that will replicate their current analog areas. Because the engineering model is predictive, it is difficult at this time to determine what the actual, real-world comparisons will yield. In certain markets, for example, there are mountainous areas or pockets of extremely tall buildings we believe may interfere with reception of our signal, and we are committed to conducting field measurements after the transition to determine where actual losses are occurring.

We are pleased that almost all of the stations replicating their analog service areas actually will serve far more people in the digital world than they are in the analog world. For example, WPSG in Philadelphia, when its facility is maximized, will serve some 132% of the population now served by its analog contour. That means 2.1 *million* viewers who could not receive our analog signal will be able to watch our digital station in Philadelphia free, over the air. In the Sacramento-Stockton market, KMAX, once its



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facility is maximized, will serve 165% of the population it now serves in analog --or an additional 2.2 *million* viewers.

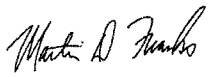
For the few of our television stations whose digital signals may not reach households that used to receive analog signals, we assure you that because the viewers in these homes are very important to us, we are taking numerous measures to ensure that they continue to be able to access CBS Television Network entertainment, news and sports programming over the air for free. First, we will be notifying these households via 30-second PSAs at least on a daily basis, including in prime time, of their potential loss of the specific station's digital signal and how they can access another CBS-affiliated station's digital signal. We will also announce this information periodically as part of our local newscasts and in a half-hour program we will be airing on the digital transition. In addition, we will include this information on our stations' websites. Our stations are actively participating in state and local broadcasting educational efforts, including call and walk-in centers, and these outlets serve as invaluable sources of information to our viewers.

Next, once the transition is complete and we can look at the real world (versus the currently predicted) reach of our stations' digital signals, our engineers will study the population service of these stations and assess plans for enhancing that reach –be it by distributed transmission system (DTS) or translators-- in order that our stations may once again serve in the digital era those homes we served in the analog era. Constructing DTS and translators, as you know, means that we would be building additional towers and transmitters to extend stations' signals.

Please remember that the current analog/NTSC coverage areas are the product of 60 years of signal maximization and fine tuning. As soon as the dust has settled from June 12, we and other broadcasters will embark on a similar effort to perfect our digital signals much as we have since the dawn of modern television broadcasting in the United States.

Rest assured that we are committed to serving our viewers, and I hope the above is helpful. Please do not hesitate to contact me for additional information if more is needed.

Sincerely,



Martin D. Franks

cc: The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary

**Robert M. Hartwell**
**Vermont State Senator**
**P.O. Box 1105**
**Manchester Center, VT 05255**

April 24, 2009

Honorable Orrin G. Hatch
United State Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator Hatch:

As a member of the Panel testifying on February 25th with regard to the Satellite Reauthorization legislation, I am responding to your question directed to the panel:

"Do you think the program access provisions written by the congress in the early 1990s have kept pace with today's technology and market structure?"

First, please let me state that I am not an expert in satellite and other communications technologies nor do I have any particular familiarity with the legislative history with respect to satellite communications. My testimony relates to my experience and that of many of my constituents who rely on satellite providers as their only source of communication for the receipt of television programming. I am not now nor have I been an employee of the any provider or any network, private or public provider of programming.

However, without, in any way, claiming technical expertise, my impression is that, in the early nineties, Congress attempted to begin to address the rapid expansion of cable television and the progress of satellite communications about the end of the time of satellite dishes more than ten feet in diameter such as the one used at my rural Vermont home until about the year 2002.

Again, while I do not possess the engagement with this industry and the experience of the other panel members, I believe the provisions from the early 1990's, as best I understand them, have not kept pace with today's market conditions in that telecommunications are reaching deep into rural America to an extent not envisioned less than twenty years ago. (The Vermont farm house visited often as a boy during the fifties and sixties had no electricity and no telephone until about 1965.)

While much has been accomplished since the early 90's including the Leahy Amendment during the last satellite reauthorization, substantial areas of rural America are relegated



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Honorable Orrin G. Hatch
United States Senate judiciary Committee
Washington, D.C. 20510
April 24, 2009
Page two

to the effects of Designated Market Areas including Dish Network subscribers in eighteen towns in my Senate District. These areas receive no Vermont news of any kind. During the hearing, Senator Wyden took note that many Oregonians receive their news and weather from television stations in Washington State only, a similar impact.

The current situation for rural America was not addressed previously in my view because the technology was inefficient, bulky, expensive and simply foreign to people in rural America whose predecessors, were living without power and who came to own televisions, for the most part, after the nineteen sixties.

Thus, many of us in rural southern Vermont have only one choice for television reception, Dish Network; we receive no Vermont programming and are relegated to an arbitrary assignment to a Designated Market Area which is urban, large and possessive of little, if any, reason to provide relevant service to our market.

I hope this limitation on access to relevant television programming can be resolved during the current reauthorization process.

Thank you very much for allowing me to testify and for your efforts on this important communications issue.

Sincerely yours,

Robert M. Hartwell
State Senator
Bennington Senatorial District
Vermont



53927.017

**Jim Yager Post Hearing Questions**
**Hearing on "Ensuring Television Carriage in a Digital Age"**
**United States Senate Committee on the Judiciary**
**February 25, 2009**

**Senator Specter Question #1**

If local into local is available but the spot beam does not hit a subscriber who qualifies as unserved, should a distant signal be allowed?

**Answer:**

A very limited distant signal compulsory license may continue to be required for those very rare instances where a subscriber is both located outside any of the spot beams of a DBS operator and is unserved by any local network station. Great caution must be exercised to assure that a DBS operator cannot manipulate its spot beam to exploit any such narrow exemption. One possibility would be to severely limit the number or percentage of subscribers that would be eligible for the "out of spot beam" license.

**Senator Specter Question #2**

Should satellite providers be permitted to import signals from adjacent DMAs and, if so, under what circumstances?

**Answer:**

Existing law allows satellite carriers to deliver "distant" network stations to subscribers that cannot receive a good signal from a local affiliate of the same network and to deliver adjacent market signals to subscribers in communities where these adjacent market signals are "significantly viewed."

There are two other situations where the issue of importation of signals from adjacent markets has been discussed. The first is the so-called "short market" situation where a market lacks a full complement of local stations affiliated with the four major networks. The second situation is where DMAs cross state lines. It has been suggested that importation of a "distant" affiliate from an in-state adjacent market be permitted to provide in-state news, sports, weather, and public affairs programming.

With respect to the short market situation, there are, in fact, few of them. Even in markets where four full-power network affiliated stations are not assigned to the market, the networks increasingly have begun to offer "missing" network affiliations to local low-power stations and to multicast digital broadcast channels



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of local full-power stations. Examples of this are Palm Springs, California, El Centro/Yuma, California, Bluefield/Beckley, West Virginia, Quincy, Illinois, Bakersfield, California, and Bend, Oregon. Satellite carriers are currently offering local-to-local satellite service in some of these markets (Bakersfield, Palm Springs, and Quincy for example) but not in other markets (for example, El Centro/Yuma and Bluefield/Beckley). Whatever reason satellite carriers may have for not providing local-to-local service to all these markets, it plainly cannot be attributed to a lack of four local network affiliated stations. The advance of digital multicast television and the rate at which the networks are affiliating with new digital multicast channels suggests a rapid reduction in the number of short markets.

Moreover, even in existing short markets, satellite carriers could offer a full complement of network signals by pairing the existing "local" network affiliates with adjacent market signals that are "significantly viewed" in the local market.

To the extent there are remaining "short markets" without four local major network affiliates, continuation of the distant signal license to allow access to the four major network services would be appropriate. However, as the number of short markets declines, coupled with a mandate from Congress requiring satellite carriers to extend local-to-local satellite service to all 210 markets, the scope and duration of the distant signal license should be limited. NAB looks forward to working with Congress and the satellite industry to develop an appropriate distant signal satellite compulsory license for this limited purpose.

With respect to the importation of distant in-state stations from adjacent markets into local markets crossing state boundaries, as I stated in my written testimony (pp. 24-31), it is unnecessary and could greatly harm localism and local stations.

It is unnecessary to allow the importation of duplicating national programming, if the goal is to provide in-state news, weather and public affairs programming to all in-state residents. Cable and satellite operators can do that now under current law by obtaining the consent of in-state stations originating such programs, which consent I am confident will be freely given. Cable companies have, in fact, provided this very service in some markets.

To the extent there is local interest in regional football, basketball, and other athletic events that are broadcast by an in-state station, those universities and sports leagues (collegiate and professional) could authorize the broadcast of those games on *local*, in-state television stations. With multicast capability now a reality, this enables all local stations to broadcast multiple games. Having these in-state games broadcast over the air on a "free" basis would enable *all* in-state viewers (not just those who can pay for cable or satellite) to see them. This is the most appropriate and consumer and constituent-friendly solution to this specific issue.



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In sum, there is no public need for amending the copyright law to allow the importation of *duplicating* programming already available to local viewers. Duplicative programming would destroy contractual rights that local stations have bargained and paid for in the marketplace with networks and other program suppliers. Moreover, non-duplicated programming from other markets can be imported now without a change of law.

As discussed in my testimony, the importation of distant in-state stations into adjacent markets that includes programming *duplicating* that available in local markets would contradict the public interest in access to local news and information. Importing duplicating programming necessarily would undermine local stations' advertising revenues and their ability to provide advertiser-supported local programming. It would also have a disruptive effect on marketplace negotiations for consent to retransmit local stations' signals.

**Senator Specter Question #3:**

Mr. Yager, both Mr. Ergen and Mr. Cohen testified that the current retransmission consent construct is flawed and inhibits the delivery of programming to consumers. Could you respond in a bit more detail to their concerns?

**Answer:**

As Congress has recognized consistently for decades, broadcast television stations licensed to local communities serve the public by providing valuable programming and services, including local news, weather and sports, other entertainment programming and vital emergency information. To ensure that consumers could continue to access valuable local programming carried on cable and that broadcasters remained able to provide such programming, Congress in 1992 adopted retransmission consent to provide broadcasters the opportunity to negotiate in the marketplace for compensation from multichannel video programming distributors (MVPDs) retransmitting their signals. As shown by the history and operation of retransmission consent, the process has fulfilled Congress' purposes for enacting it and has benefited broadcasters, MVPDs and consumers alike.

Prior to the Cable Television Consumer Protection and Competition Act of 1992, cable operators were not required to seek the permission of a broadcaster before carrying its signal and were not required to compensate the broadcaster for the value of its signal. Examining this problem in the early 1990s, Congress concluded that the failure to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace." S. Rep. No. 92, 102d Cong., 1st Sess. at 35 (1991) (*Senate Report*). Using the revenues they obtained from carrying broadcast signals, cable systems had supported the creation of cable programming and services and were able to sell national and local advertising on



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these cable channels in direct competition with broadcasters. Congress concluded that public policy should not support "a system under which broadcasters in effect subsidize the establishment of their chief competitors." *Id.* Noting the continued popularity of broadcast programming, Congress also found that a very substantial portion of the fees that consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. *Id.* This situation was not only unfair to local broadcast stations, it was anticompetitive. To remedy this "distortion," Congress in the 1992 Cable Act gave broadcasters control over the use of their own signals and permitted broadcasters to seek compensation from MVPDs for carriage of their signals. *See* 47 U.S.C. § 325.

In establishing retransmission consent, Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals." *Senate Report* at 36. Congress stressed that it did not intend "to dictate the outcome of the ensuring marketplace negotiations" between broadcasters and MVPDs. *Id.* Congress correctly foresaw that some broadcasters might determine that the benefits of carriage were sufficient compensation for the use of their signals by cable systems. *Id.* at 35. Some broadcasters would likely seek monetary compensation, while others, Congress explained, would "negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system." *Id.* at 36. In fact, for years cable operators consistently refused to pay cash so many retransmission agreements have involved various types of in-kind compensation.

After some years' experience with retransmission consent, Congress asked the Federal Communications Commission (FCC) to evaluate the relative success or failure of the retransmission marketplace. This evaluation showed that MPVDs' complaints about retransmission consent disadvantaging them in the marketplace or somehow harming competition are groundless. In its September 2005 report to Congress, the FCC concluded that the retransmission consent rules did not disadvantage MVPDs and have in fact fulfilled Congress' purposes for enacting them. The FCC accordingly recommended no revisions to either statutory or regulatory provisions relating to retransmission consent. *See Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005) (*FCC Report*).

In its report, the FCC concluded that local television broadcasters and MVPDs conduct retransmission consent negotiations on a "level playing field." *Id.* at ¶ 44. The FCC observed that the retransmission consent process provides incentives for both broadcasters and MVPDs to reach mutually beneficial arrangements and that both parties in fact benefit when carriage is arranged. *Id.* Most importantly, according to the FCC, consumers benefit by having access to the broadcasters' programming carried via MVPDs. *Id.* Overall, retransmission consent has, as Congress intended, resulted in broadcasters being compensated for the



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retransmission of their stations' signals by MVPDs and MVPDs obtaining the right to carry broadcast signals. *Id.* These conclusions remain valid today.

The repetitive complaints made by cable and satellite operators against the retransmission consent process continue to ring hollow. Disruptions in service due to retransmission disputes have been extremely rare and are typically brief. Between January 2006 and December 2008, Broadcasting & Cable magazine reported a total of eight instances in which retransmission consent disputes led to carriage interruptions. These were out of the thousands upon thousands of retransmission consent negotiations that took place during that period. In the history of retransmission consent, a broadcaster has never been found by the FCC to have violated its statutory obligation to negotiate in good faith.

Some MVPDs apparently object to retransmission consent simply because they believe broadcasters should give away their signals to MVPDs without compensation. For example, DISH removed from its system in December 2008 the stations of Young Broadcasting rather than pay "a penny per day per subscriber." Linda Moss, Multichannel News (Dec. 12, 2008). But there is no reason that broadcasters – unique among programming suppliers – should be singled out not to receive compensation for the programming provided to MVPDs. In fact, MVPDs routinely pay *more* for cable/satellite programming channels that are *less* popular than broadcast programming.

Contrary to the claims of MVPDs, it is clear that retransmission consent does not inhibit the delivery of programming to consumers. As discussed above, the FCC found that consumers benefit from retransmission by having access to broadcasters' programming carried via MVPDs. Retransmission consent has also specifically benefited viewers by increasing their access to local news channels. *See FCC Report* at ¶¶ 35, 44. For example, Allbritton Communications' NewsChannel 8 in the Washington, DC area is a cable news network providing local news, weather and public affairs programming, which has expanded as a result of retransmission consent negotiations over the carriage of Allbritton's broadcast television station WJLA-TV. Belo similarly used retransmission consent to obtain carriage of its regional news channel NorthWest Cable News on cable systems serving millions of households in several states. Broadcasters such as LIN Television have also used retransmission consent to provide local weather information on separate channels carried by cable systems.

Not only has retransmission consent encouraged broadcasters to create and launch local news and weather programming services for carriage on cable systems, it promotes localism in other ways. In particular, allowing local broadcasters to negotiate in the marketplace for compensation for the fair value of their signals helps local stations remain competitive in the face of competition from dozens, or even hundreds, of non-local cable and satellite channels in their markets. It also potentially provides revenues to help stations better fulfill their



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obligations to serve their local communities with costly programming, including local news and information.

In sum, there is no basis for altering the current market-based retransmission consent process that benefits consumers, broadcasters and MVPDs alike, and turn back the clock to an era when MVPDs took local stations' signals without permission. Doing so would harm competition in the video marketplace and ultimately restrict viewers' programming choices.



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**Jim Yager Post Hearing Questions**
**Hearing on "Ensuring Television Carriage in a Digital Age"**
**United States Senate Committee on the Judiciary**
**February 25, 2009**

**Senator Hatch Question #1**

Do you think the program access provisions written by the Congress in the early 1990s have kept pace with today's technology and market structure?

**Answer:**

NAB does not have a position on the program access rules. These rules were designed to assure competitive access to cable and satellite programming owned by vertically integrated cable and satellite operators, and do not apply to broadcasters.



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# SUBMISSIONS FOR THE RECORD

**Testimony of the Association of Public Television Stations (APTS)**
**Before the Senate Committee on the Judiciary**
**February 25, 2009**

Mr. Chairman and Ranking Member Specter, the Association of Public Television Stations (APTS) greatly appreciates the opportunity to submit testimony for the record on this issue. The reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA), which, among other things, 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.

As Congress looks to reauthorize SHVERA, there are three issues that are of particular interest to public television stations. Our primary concern is that currently a large portion of DBS customers have no access to public television stations' extensive and valuable multicasting services. Another pressing issue for public broadcasters is the fact that DBS viewers in more than 50 smaller and often rural markets cannot receive even the primary offerings of their local public television stations. Finally, we would like to call the Committee's attention to an issue that is unique to public television and which hinders our statewide broadcasters' ability to serve all DBS subscribers in their states, thereby undermining our local mission.

## DBS CARRIAGE OF MULTICAST SERVICES

As you are aware, SHVERA does not address DBS carriage of local broadcast stations' multicast offerings. 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. Public television stations are utilizing their multicasting



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capabilities to provide dedicated channels for public affairs programming, for educational services and for programming designed to reach underserved audiences.

For example, 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. Georgia Public Broadcasting, which operates nine full-power stations throughout the state, airs GPB Knowledge, a digital channel featuring quality educational content for teachers and students, as well as documentaries, public affairs and lifestyle programming.

However, 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. Almost exactly one year ago, 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. Public television is cognizant of the DBS providers' concerns about capacity limitations and worked with DIRECTV on creative solutions to ensure that subscribers have access to the myriad content and services provided by the local stations. The agreement provides that in each market in which it provides high-definition (HD) local channels, DIRECTV 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 with local stations' identification 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. For example, KBDI will be able to offer on-demand access to all our

weekly local public affairs program and political campaign coverage on DIRECTV. Finally, in markets where DIRECTV is not yet offering local broadcast signals, it will provide stations with marketing materials regarding an offer for an antenna and ATSC tuner so many customers can gain access to local signals over-the-air.

Public television also has implemented beneficial carriage agreements with the National Cable and Telecommunications Association (NCTA), the American Cable Association (ACA), and Verizon so that households that receive their video programming through cable or fiber will have access to their local public television stations' multicast offerings. However, there remain nearly 14 million Dish Network subscribers across the country who do not have those benefits. Public television has tried for years to reach a carriage agreement with Dish Network, but to date we have been unsuccessful. As was the case with our negotiations with DIRECTV, APTS acknowledges that full multicast carriage poses a potential capacity constraint for Dish Network. However, we have urged Dish Network to consider creative solutions similar to those in the DIRECTV agreement that will provide viewers with the digital advantages of more locally produced content delivered over multicast streams while still respecting reasonable limitations on Dish Network's capacity. The DIRECTV deal proved that these goals are attainable. In the meantime, however, as we await an agreement with Dish Network, its subscribers are denied the high quality educational, cultural and public affairs multicast programming offered by their local public television stations.

To remedy this situation, during the last Congress, Representative Anna Eshoo introduced H.R. 4221, the Satellite Consumers' Access to Public Television Digital Programming Act of 2007, which would mandate DBS carriage of public television stations' complete digital signals where no private agreement between the DBS provider and the local station has previously been reached. That legislation

is being reintroduced again this Congress, and we greatly appreciate the work of Representative Eshoo to try to ensure that all DBS subscribers have access to the content and services offered by their local public television stations. We urge that this important legislation be incorporated into SHVERA reauthorization.

**DBS CARRIAGE OF LOCAL PUBLIC TELEVISION SIGNALS IN ALL MARKETS**

As you know, SHVERA does not require that DBS providers carry local broadcast signals in all of the areas they serve. As a result, viewers in more than 50 smaller and often rural markets cannot receive even the primary offerings of their local public television stations through one or both DBS providers.

In most parts of this country, local public television stations are the last truly locally owned and operated television stations. Public television is strongly and irrevocably committed to the principle of localism and to translating that commitment into practice and programming that enables residents of communities they serve to cope with local problems and engage in the civic life of their towns, cities and states. Despite their limited resources and the fact that it costs a public television station at least *20 times* as much to produce its own programming as it does to acquire it from the Public Broadcasting Service (PBS) or another supplier, public television stations are producing and airing a wide array of programs focused specifically on their local communities and the issues that affect them. Nearly all the 174 public television licensees around the country provide rich mixtures of locally-produced public affairs, educational and cultural programming. As the Government Accountability Office has noted, many public television stations are the only source in their communities of local programming unrelated to news or sports.

Testimony of the Association of Public Television Stations

As stations transition to digital-only broadcasting and production, and as they invest in greater local capacity and services, local carriage by all video providers is critical to ensure that Americans have access to the fruits of their financial commitment. Public television calls on Congress to renew its commitment to localism by ensuring that DBS customers in every market are able to view, through some mechanism, their local public television stations as soon as reasonably practicable.

**STATEWIDE NETWORKS' ABILITY TO REACH DBS SUBSCRIBERS THROUGHOUT THE STATE**

The final SHVERA issue we would like to address today is one that is, as far as we are aware, unique to public broadcasters. As you know, SHVERA establishes a copyright license that enables DBS providers to retransmit, within a Designated Market Area (DMA), local stations located in that DMA. In many states, state governments or community foundations operate statewide or regional networks made up of several public television stations. These networks are charged by statute or mission with reaching all viewers in their state or region. 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.

For example, Wyoming is divided among seven DMAs that include Wyoming and portions of six other states: Utah, Idaho, Montana, Iowa, Nebraska and Colorado. Wyoming Public Television, which is licensed by a state university, has three full-power stations, all located in the Casper-Riverton DMA, and serves the rest of the state with translator stations. Because DBS providers lack a statutory copyright license to retransmit Wyoming Public Television in the other six DMAs, the network can reach only 45 percent of its state population through DBS carriage. 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.



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Testimony of the Association of Public Television Stations

Wyoming is the most severe example, but this problem affects state or regional public television networks in at least 18 states, from Louisiana to Nebraska and from North Carolina to Oregon, and implicates counties encompassing more than a million households. 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.

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 their pledge to serve all citizens of their states. Public television's statewide networks take this mandate very seriously. When DBS carriage does not cover all state residents, citizens of the state do not receive the promised benefit of their state licensee's programming and services. That is not acceptable.

As this committee looks toward reauthorizing and refining SHVERA, it is our hope that public television can work closely with you, Mr. Chairman, and the other members of the committee to find a solution to ensure that DBS providers are able to retransmit state or regional public television networks to all viewers within their state or region.



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**FEDERAL FUNDING**

Finally, we would be remiss if we didn't stress the importance of federal funding for public broadcasters. Federal funding is essential to public broadcasters' ability to deliver quality local service to all Americans, including the millions of viewers that receive their local signal through DBS. Federal funding is more critical now than ever before as public broadcasting is rolling out new digital content and services and fulfilling its core objectives of education, localism, and diversity, while simultaneously facing the greatest economic challenge in its 42-year history. To that end, we ask for the support of members of this authorizing committee for increased federal funding to offset the dramatic declines in anticipated revenues from other sources of funding—states, individual contributions and corporate underwriting—that constitute 85 percent of public broadcasting's total operational revenue. Such increased support will be essential to realize the promise of public broadcasting as it seeks to provide its unique educational content across all platforms including over-the-air broadcasting, satellite, cable and the internet.

Thank you for allowing APTS to submit testimony for the record. We look forward to continuing to work with you as you examine SHVERA reauthorization, our funding requests and other issues of importance to public broadcasters in the exciting new media world unfolding before us and which public broadcasting can do much to help shape.

Testimony of

David L. Cohen
Executive Vice President of Comcast Corporation

On

*Ensuring Television Carriage in the Digital Age*

Before the

**United States Senate**
**Committee on the Judiciary**

**February 25, 2009**



53927.032

TESTIMONY OF DAVID L. COHEN
EXECUTIVE VICE PRESIDENT
COMCAST CORPORATION

BEFORE THE
U.S. SENATE
JUDICIARY COMMITTEE

HEARING ON
"ENSURING TELEVISION CARRIAGE IN THE DIGITAL AGE"

February 25, 2009

Mr. Chairman, Ranking Member Specter, and Members of the Committee:

Thank you for inviting me to testify today. Comcast has an obvious interest in ensuring the successful carriage of broadcast television stations by multichannel video programming distributors like cable and DBS in the digital age. I would like to focus my testimony today on the Section 111 compulsory copyright license, which enables the cable industry to deliver broadcast content to our customers.

As this Committee is aware, the Supreme Court ruled in the 1970s that cable's retransmission of broadcast signals did **not** require a copyright license or payment. The Copyright Act of 1976, however, legislatively reversed this outcome, and simultaneously created a compulsory copyright license to facilitate cable's retransmission of broadcast signals. That license is set forth in Section 111 of the '76 Act. The compulsory license is critical to the cable industry and its distribution of broadcast signals. Congress properly recognized that without this license, it would be nearly impossible as a practical matter for cable operators to secure the necessary clearances for each copyrighted program included in each broadcast station's line-up.

The compulsory copyright license set forth in Section 111 is admittedly complex. It builds on signal carriage regulations that had been established by the FCC in the 1970s and that



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subsequently have been modified many times. But despite its complexity, Section 111 has actually worked very well. For more than three decades, it has ensured that cable operators and cable customers have access to copyrighted programming on retransmitted broadcast signals, and it has ensured that the underlying copyright owners are appropriately compensated for that retransmission. Under the Section 111 compulsory license, the cable industry has paid almost $4 billion in royalties, including well over $150 million in copyright fees during the past year. Comcast alone paid almost $50 million in fees last year.

**I have four simple points to share with you today:**

1. Cable's compulsory copyright license works and is still necessary;
2. Congress should not consider major changes to cable's compulsory license;
3. In light of a recent Copyright Office ruling, cable's compulsory copyright license should be clarified to ensure that royalties are not paid on "phantom" signals, as I will explain; and
4. The existing retransmission consent regime – a quasi-copyright regime that resides in the Communications Act – is problematic and should be addressed.

**1. Cable's Compulsory Copyright License Is Still Necessary.**

Comcast carries approximately 1,100 different broadcast station signals across the country. When you look at every one of the cable systems in the United States and calculate how many broadcast signals each of them carries, you find that there are over 58,000 discrete instances of broadcast station carriage. The vast majority of this carriage involves signals that are "local"– that is, the broadcast station and the cable system are both located in the same television market, as designated by Nielsen. Most of our cable systems, however, also carry at least one "distant" broadcast signal – where the station is located in a different television market than the cable system. Generally, when we carry a distant signal, it is from a community that is



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of news or cultural interest to our subscribers. In southern Vermont, for example, we carry a "distant" Burlington CBS affiliate to provide some in-state coverage on our Vermont cable systems that happen to be located within the Albany, New York, and Boston, Massachusetts television markets. This distant retransmission subjects Comcast to an additional royalty obligation, but Section 111 provides the copyright license necessary for Comcast to lawfully retransmit the copyrighted programming to our customers -- from both local and distant broadcast signals.

Unlike cable networks (such as CNN and Discovery), broadcast stations almost never acquire the underlying copyright clearances that are necessary for the broadcaster to *directly* license cable retransmissions either inside or outside the station's television market. In Comcast's case, if we could not rely on the compulsory copyright license, we would face a conundrum of immense proportion – how to clear the retransmission of dozens of different copyrighted programs appearing every day on the 1,100 different broadcast stations we retransmit. The logistics of even attempting to privately secure the necessary copyright clearances to retransmit all of these broadcast signals to our customers are truly mind-boggling. The National Cable & Telecommunications Association ("NCTA") estimates that, absent the compulsory license, operators would have to clear the rights to 500 million separate copyrighted programs each year. We fear that eliminating the compulsory license would create chaos for millions of cable customers across the country, as they lose access to broadcast programming that they value and have come to expect.

In a report to Congress last year, the Copyright Office suggested that the compulsory copyright license could be repealed and that some replacement mechanism would **likely** emerge. This is a bit of wishful thinking that has floated around Washington for over 20 years. No better



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model than the compulsory license has emerged anywhere in the world. And no one has ever come forward with a comprehensive marketplace mechanism here in the U.S. As strongly as I believe in free markets, this is one of those circumstances where a workable system that meets the needs of consumers, copyright owners, and cable operators – and which has stood the test of time -- is best allowed to keep working. This is a clear case of "if it ain't broke, don't fix it."

**2. Congress Should Not Consider Major Changes To Cable's Compulsory Copyright License.**

Cable's existing compulsory copyright license is agnostic with regard to the format of the television signal -- it applies equally to analog and digital signals. Some policymakers have suggested that Congress should consider simplifying cable's compulsory copyright license and perhaps "harmonizing" it with the satellite industry's statutory license as it is reauthorized this year. The satellite industry's license may sound simpler. But any effort to harmonize the licenses will tie both industries in knots, with no net consumer benefit. We strongly recommend against any such plan.

Although the flat royalty fee included in the satellite license seems simple, the satellite license itself is anything but simple. A review of Sections 119 and 122 of the Copyright Act reveals a very complicated license, with a host of operating limitations and exceptions that are based on the DBS industry's unique operational and regulatory history, a history that is very different from that of the cable industry. The differences between the satellite compulsory license and the cable license necessarily reflect differences in the regulations governing the way each industry offers broadcast programming – such as the so called "must buy" requirement imposed *only* on cable operators to put all broadcast signals on the basic tier and make every subscriber buy that tier. There are additional important differences related to must carry, network nonduplication, retransmission consent, and the carriage of unaffiliated commercial and



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non-commercial programming, just to name a few. For example, DBS's copyright license enables it to import a distant network affiliate into an "unserved" area without securing retransmission consent from the owner of the distant station. Cable has no similar exemption from retransmission consent. Given the numerous business and regulatory differences between the two industries, a copyright scheme that makes sense for DBS does not necessarily make sense for cable.

Cable's selection of distant signals has been deeply influenced by the workings of the compulsory license as it has developed over the years. By way of illustration, Comcast has certain cable systems serving small populations where we are able to carry a distant broadcast signal under the current copyright law at no additional fee. We have other systems where a distant signal is assessed at just one quarter of one percent of our basic receipts. We have still other systems where a distant signal is assessed at almost four percent of our basic receipts. One may take issue with these classifications, and we sometimes do, but they are based on a detailed regulatory framework that takes account of related and complicated communications law and policy. The varying distant signal carriage among our cable systems today is based to a significant extent on these copyright differences. Any dramatic change in the compulsory copyright license and the associated royalty fees – even in the name of "harmonization" -- would inevitably be disruptive to established viewing patterns.

Moreover, the complexities of cable's compulsory copyright license are not without logic. For example, Section 111 provides favorable royalty rates for "small systems" that face business and technical challenges not confronted by larger cable systems or national DBS distributors. Subjecting these small systems to a flat fee designed for larger cable systems or



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DBS would almost certainly have an adverse impact on cable's delivery of distant broadcast signals to rural America.

Similarly, Section 111 provides favorable royalty treatment for distant signals historically offered in a cable community, thereby protecting subscriber expectations. Favorable royalty treatment is also available for distant signals that are imported with the goal of providing cable customers with a full complement of network programming, another logical policy objective.

Simplification sounds great in concept, but the inevitable result of trying to simplify things will be to risk the loss of broadcast signal retransmissions to your constituents, thereby disrupting consumer expectations. Parity is also an admirable goal, but given the numerous legal, regulatory, and factual differences between the cable and satellite industries, you cannot simply assign the same royalty structure to cable and DBS and declare "parity." Instead, you would have to declare "calamity." And in any event, bringing true parity to the cable and DBS industries would require major modifications to a variety of regulatory and legislative schemes – not just a harmonization of compulsory copyright royalties.

I would add that the cable royalty rate, which is tied to gross receipts, has one inherent advantage to the flat royalty rate included in the satellite legislation. Cable's royalty fees necessarily adjust to the changing receipts received for broadcast signals. In that sense, it is largely self-correcting in terms of inflation and subscriber demand. The existing satellite license, with its flat fee, lacks this self-correcting pricing mechanism.

**3. In Light Of A Recent Copyright Office Ruling, Cable's Compulsory Copyright License Should Be Clarified To Ensure That Royalties Are Not Paid On "Phantom" Signals.**

Although we would not support a general overhaul of Section 111, there is one discrete area where legislative action would be important. The Copyright Office issued a decision last



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year regarding the royalty that cable operators should pay for distant broadcast signals that are delivered to some, but not all, of the communities served by a cable system. The issue arises because Section 111 defines a "cable system" very broadly to include "two or more cable systems in contiguous communities under common ownership or control or operating from one headend." Based on this definition, the Copyright Office recently concluded that Section 111 requires the royalty rate for *each* distant broadcast signal to be assessed against *all* subscribers of the broadly defined "cable system" -- including those subscribers in communities previously considered to be entirely separate. Under this interpretation, cable operators would be required to pay copyright royalties for subscribers who *cannot* even receive a particular distant broadcast signal. In essence, cable operators would pay copyright royalties on "phantom" signals, because they would be paying based on far more customers than can actually view the individual signals.

A simple example illustrates the problem. Assume we have two communities, A and B, served by two separate Comcast cable systems. The system serving Community A has 5,000 subscribers and has historically carried distant signal WZZZ. The system serving Community B has 100,000 subscribers and has *never* carried distant signal WZZZ. Under existing copyright law, Comcast would sensibly pay the distant signal charge associated with WZZZ only for the 5,000 subscribers in Community A – those who actually receive the signal.

But if Comcast were to connect the two distinct cable systems with a fiber link to permit the delivery of advanced services, even though it made *no* changes to the channel line-up of either system, the royalty result would be dramatically different under the Copyright's Office's "phantom" signal interpretation. The Copyright Office would require Comcast to pay royalties on WZZZ *as if* it were delivered not just to all subscribers in community A, but also to all subscribers in community B. Suddenly, instead of paying royalties on 5,000 subscribers (who



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actually receive WZZZ), Comcast would be paying on 105,000 subscribers (even though 100,000 of those subscribers are not offered and cannot receive WZZZ). In essence, Comcast suddenly would be paying twenty times more for the exact same signal delivery, and the entire increase would be attributable to subscribers who cannot receive the distant signal.

This sort of payment for "phantom" signals is absurd. And the more system communities that are joined together, for reasons that may have nothing whatsoever to do with distant signal carriage, the more absurd the result. And remember, under the Copyright Office's interpretation, geographic contiguity is enough to compel "phantom" signal reporting. Two cable systems that are commonly owned and located in adjacent communities would be subject to this same "phantom" signal calculation *even if the systems are not physically connected in any way.*

I am sure this Committee would agree that there is no logic to requiring that royalty fees be paid on broadcast signals that are not actually available to customers. And the Copyright Office *itself* has acknowledged that this is illogical. However, the Office says that this result is the necessary consequence of the existing statutory language, and that only Congress can solve the underlying problem.

So we and the Copyright Office agree that the "phantom" signal situation is illogical. We believe this inequitable result is at odds with the existing statutory language of Section 111 and Congress' original intent. But because the Copyright Office maintains that the only way to fix this problem is to change the statute to expressly allow "subscriber group" reporting, we request that Congress consider a modest change to Section 111 to clarify that royalty fees need only be calculated on distant broadcast signals that are *actually available* to subscribers, and not on phantom broadcast signals. Significantly, this request matches that previously made by the Copyright Office itself. In last year's decision, the Copyright Office acknowledged that it had



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previously recommended to Congress a clarifying amendment that would allow royalties to "be based on subscriber groups that actually receive the signal." I am confident that the entire cable industry would be happy to work with the copyright owners to ensure that this clarification is implemented in a way that is consistent with the original intent of Section 111 and is fair to both copyright owners and cable subscribers.

**4. Retransmission Consent And The Compulsory License Regime Are In Conflict And Need To Be Reconciled.**

Finally, while the cable and satellite compulsory copyright licenses are not broken, the same cannot be said about the "retransmission consent" provisions of the Communications Act. These provisions were first enacted in 1992 and were amended as part of the renewal of the satellite compulsory license in both 1999 and 2004.

As described above, the Copyright Act's compulsory license provisions provide certainty with respect to the compensation cable pays to those who own the copyrights in broadcast programming -- ensuring that broadcast programming is available to subscribers without disruption and at a reasonable cost.

In contrast, the retransmission consent rules, which enable an individual broadcast station (which is generally not the copyright owner for the vast majority of the content it broadcasts) to demand compensation for the carriage of its "signal," have become a source of considerable *un*certainty. For example, even though broadcasters are required by the terms of their free, government granted licenses to meet the needs and interests of the viewers in their service areas, retransmission consent disputes produce the threat and, in some instances, the reality of signals being withheld by broadcast stations. By creating an impediment to the availability of broadcast signals to consumers, the current retransmission consent scheme is at odds with the intent of the compulsory license regime, which is to help facilitate that availability. In this respect,



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retransmission consent is deeply intertwined with copyright policy considerations that are of interest to the members of this Committee.

We respectfully suggest that a focus on the consumer, while fully respecting the rights of copyright owners, calls for reviewing these two regimes in tandem. While I have no specific proposals to share with this Committee today, we would welcome the opportunity to work with you as well as with the Commerce Committee to develop reforms that would protect the legitimate needs and interests of consumers, multichannel video programming distributors like cable and satellite, as well as broadcasters.

I would like to thank you again for inviting me to speak to you today as you take up this important legislation. I would be happy to answer any questions you may have.



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**Testimony of**

**Charles W. Ergen**
**Chairman and Chief Executive Officer of DISH Network Corporation**

**On the**

**Ensuring Television Carriage in the Digital Age**

**Before the**

**Committee on Judiciary**
**United States Senate**

**February 25, 2009**



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*Testimony of Charles W. Ergen*
*DISH Network Corporation*
*February 25, 2009*

Chairman Leahy, Ranking Member Specter, and Members of the Committee, I appreciate the opportunity to testify today. My name is Charlie Ergen, and I am the Chairman and CEO of DISH Network, the nation's third largest pay-TV provider.

* * *

The U.S. Copyright Office has provided this Committee with a roadmap for updating the cable and satellite compulsory copyright licenses to reflect the changing video landscape. We agree with the Copyright Office that the digital age has arrived and the laws need to catch up. I would like to highlight three issues from the 2008 Copyright Office Report:

First, the separate cable and satellite copyright regimes no longer make sense. We compete for the same customers and should have the same rules;

Second, many consumers cannot get local news and sports from their home state because of the way local markets are defined; and

Third, many rural communities are missing one or more of the four major networks.

In addition, Congress should also address the interrelated issues of retransmission consent and must-carry when updating the compulsory copyright licenses this year.

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*Testimony of Charles W. Ergen*
*DISH Network Corporation*
*February 25, 2009*

With respect to the first issue, the Copyright Office recommended folding the existing licenses into a unitary digital copyright license to reflect changes in technology and place all providers on a level playing field. We support that approach. Specifically, a unitary license for all pay-TV providers would ensure that all consumers get the services they need in a digital world, in a manner that is fair to the copyright holders, broadcasters, cable, satellite, and new entrants such as the telcos.

Absent a unified license, we agree with the Copyright Office that there should at least be parity going forward between cable, satellite, and telco regimes. Consumers should have the benefit of the same bundle of rights under the law regardless of the pay-TV provider they select. It should not be harder or more expensive for one pay-TV provider to carry a local, significantly viewed, or nearby broadcaster than a rival platform because of distinctions in copyright law.

With respect to the second issue, the Copyright Office also recognizes the need for DMA reform and enhanced competition between video providers. Citizens living in DMAs that straddle state borders are often denied access to news, weather, and election coverage from their home state. This is an issue in 45 states. Indeed, Senators have been receiving complaints from their constituents about this concern for many years. During the last reauthorization, the stranded-county issue was addressed in several states, including Vermont. Importantly, these fixes helped consumers and did not cause any actual harm to broadcasters. Building off the hard work started by the Judiciary Committee in 2004, we recommend a more global DMA fix. Specifically, a broadcast station from a neighboring DMA should be treated as "local" for purposes of the copyright laws, particularly if it furthers the concept of "state unity." With this change, citizens living in DMAs that straddle state borders would no longer be prevented from receiving local news from their home state.



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Third, we agree with the Copyright Office that all consumers should have access to NBC, CBS, ABC and FOX programming. Today, DISH provides local service in 178 markets, reaching 97 percent of households nationwide. This translates into over 1400 local broadcast stations, which is far more than any other pay-TV provider. In most of the remaining markets, one or more of the big four networks is missing. If a local community is missing a broadcast station, pay-TV providers should be able to treat a nearby affiliate as the "local" affiliate under copyright and communications law.

* * *

Finally, Congress should use this opportunity to examine retransmission consent and must carry, given that those issues have been tied to our compulsory license. Technology and competition have come a long way in the past five years since the last reauthorization of the Satellite Home Viewer Act. Today, there are multiple pay-TV providers in every DMA. Broadcast stations electing retransmission consent hold DISH customers hostage, as they play their local monopoly off multiple providers to extract huge license fees. In 2008 alone, consumers lost programming in approximately 15 percent of our markets because of retransmission consent fee disputes. Yet the same broadcasters provide their content for free on the Internet and to those lucky enough to live within the shrinking areas of digital over-the-air coverage.

Because the broadcasters received billions of dollars of spectrum for free, we think retransmission consent should be free. Failing that, we support the creation of a national retransmission consent rate. Satellite providers already pay a fixed, per-subscriber copyright royalty rate, and we see no reason why a similar concept would not work for retransmission consent. Alternatively, we support the creation of an actual market. If a broadcaster threatens to



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drop programming, pay-TV providers should be able to go get a nearby affiliate to fill the gap. Consumers should never have to wonder what happened to Sunday Night Football.

With respect to must carry, we are forced to carry hundreds of must carry stations that have little or no local content. This increases our costs, and raises our prices to consumers at a time when consumers need all the disposable income they can get. Must carry stations should be required to earn carriage by airing 20 hours of local programming every week. This would be beneficial to consumers and would have no harmful effect on broadcasters that invest in their local market.

* * *

We are in the middle of a digital transition that is changing the way people watch TV. It is pretty simple: people want to watch what they want, when they want, where they want. The Copyright Office recognizes that TV has changed fundamentally and concludes in its report that incremental changes to outdated rules are not good enough. We encourage you to build on the hard work of the Copyright Office and act boldly on behalf of your constituents.



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STATEMENT OF
MARTIN D. FRANKS, EXECUTIVE VICE PRESIDENT OF PLANNING, POLICY
AND GOVERNMENT RELATIONS
FOR CBS CORPORATION

BEFORE THE SENATE JUDICIARY COMMITTEE

HEARING ON ENSURING TELEVISION CARRIAGE IN THE DIGITAL AGE

FEBRUARY 25, 2009



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Good morning, Chairman Leahy and Ranking Member Specter.

Senator Leahy, a very long time ago, you taught me first-hand how you valued the importance of local broadcasters in Vermont. As you have navigated through the various iterations of the satellite home viewer legislation, and now from my CBS perspective, I want you to know how much the industry appreciates your leadership and efforts at preserving the broadcast network-affiliate relationship while promoting competition to cable through satellite.

Senator Specter, a little more than a dozen years ago, CBS Corporation enhanced its proud history as a pioneer and leader in broadcasting when it became a part of Pittsburgh-based Westinghouse and Group W Broadcasting. We remain proud that Westinghouse pioneer KDKA radio is now part of the CBS family. No station in America has a more storied history…a Pittsburgh station founded by one of its own engineers and which made the nation's first-ever commercial broadcast –on November 2, 1920. That broadcast was devoted solely to serving the public interest: On that date, the station transmitted the results of the Harding-Cox presidential election to its listeners while other Americans had to wait until the following day to read about the outcome of the race in their newspapers. We are proud that Pennsylvania is home not only to KDKA radio and eight other CBS radio stations, but to four of our 30 local television stations: KYW-TV and WPSG-TV in Philadelphia and KDKA-TV and WPCW-TV in Pittsburgh.

On behalf of CBS, I thank you for the invitation to present our views to the Committee about over-the-air broadcast television and the video programming marketplace.

Before I begin my discussion of satellite home viewer legislation and its impact on broadcasting, I would like to speak for just a moment about CBS's content. A good example is the Men's NCAA basketball tournament. Three weeks from tomorrow, on March 19, the national phenomenon known as March Madness will tip off. ***Each year***, CBS spends hundreds of millions of dollars just for the rights to the three weeks of NCAA March Madness alone. It is a hefty investment, but one that in partnership with the NCAA, gives us the right to determine how the content can be distributed in a way that produces a return on that investment and a benefit to American viewers ---whether they be at home in front of their television sets (watching games on a CBS-owned or -affiliated local broadcast television station); out of their homes with their laptops (watching games streamed on CBS Sports.com); or out and about with their mobile devices (watching clips). Last year was a banner year, when for the first time NCAA March Madness on Demand gave users –free of charge-- the ability to view all 63 games of the Division I Men's Basketball Championship, from the first round of the tournament through the Men's Final Four. From March 20, the opening day of the First Round through April 7 (the Championship game) in 2008, there were 4.76 million total unique visitors to the on-demand player, a 164% year-over-year growth.

CBS offers up the March Madness games on other platforms as a complement and addition to its core business ---broadcast television. But, as the paying rights holder to the tournament games, the decision how, when and where to provide the games is our decision to make, in consultation with the NCAA, the ultimate rights holder. CBS is firmly committed to the broadcast network-affiliate relationship and has determined that providing games online is accretive to our broadcast business. The ability to control content we pay dearly to produce, create or distribute is what makes content a true investment --- especially for the end user in the chain, the consumer.

This hearing, at bottom, is about who gets to decide how, when and where content is distributed. Almost five years ago to the day, I testified before Congress on the very matter that is the subject of today's hearing --the end-of-year expiration of satellite's compulsory license to deliver distant broadcast television signals. The legislative issue on the table now, as it was five years ago, is really a very narrow one, that is, whether to extend the distant-signal license. Yet, during the course of congressional deliberation over this issue, you are likely to witness some parties seeking to exploit any legislation relating to the license as a vehicle for a wish list of unrelated items, items such as changes to retransmission consent or DMA modification, that are likely to bog down and complicate what we believe should be a clean and streamlined reauthorization.

Besides complicating the legislative process, the issues of retransmission consent and DMA modification are not broken items that need fixing. Each year, CBS along with other television broadcasters collectively conclude hundreds of

retransmission consent agreements with MVPDs –successfully, quietly, amicably, and in a mutually beneficial manner. Yes, there are times, as in any free market negotiation in any industry when negotiations do not succeed, at least initially, and a dispute erupts and both sides threaten a disruption of service. And, in a very few instances, there may be a short-term disruption. But legislating to deal with a handful of disputes, when there are literally hundreds of instances where willing sellers and willing buyers reach agreement, would be a solution in search of a problem. In the end, the retransmission consent regime works and in the manner Congress intended.

With respect to DMA modification, it is important to note that these geographic areas were not designed by Congress, the FCC or any governmental body. That is, a DMA –a Designated Market Area-- is not a political creation; rather, it is a trademarked term of Nielsen Media Research to describe a group of counties and used to measure television viewing by people who live in those counties. Based on which over-the-air stations receive the majority of viewing, Nielsen assigns counties into a DMA. According to Nielsen, it uses DMAs "solely in measuring *who* is watching *what* within a given area." DMAs are the center of broadcasters' economic universe and any tinkering with the system, especially during this tumultuous economic time, could be financially seismic, particularly to smaller local broadcasters and to local merchants who buy time on their local stations in the expectation they are paying to reach potential customers in the locale in which they conduct business.

It is significant to note here that if the desired outcome is for viewers to access news from their in-state television stations, that arrangement is already legal and in existence. Right now, without the need to change any law or redefine any DMA, MVPDs are free to carry a local station's newscast anytime they want by simply securing the station's permission to do so. Stations control the copyright of their news shows and can, and do, make them available to cable operators in nearby markets looking to augment news programming. In fact, according to a February 24, 2008 Broadcasting & Cable Magazine story, Matt Polka, the president of the American Cable Association, which is pushing for DMA changes, concedes that cable operators already carry out-of-market newscasts. But he adds that "current network nonduplication rules and DMA boundaries prohibit greater competition for retransmission consent signals that would benefit consumers." What Mr. Polka really means is that MVPDs would benefit –at the expense of the American over-the-air television broadcasting system and their viewers. Congress should be wary of calls for DMA modification masquerading as nothing more than a means for MVPDs to obtain a bargaining advantage in a retransmission consent system that is now in perfect equipoise.

As was the case five years ago, I am perfectly content if you do nothing on satellite legislation this year. If absolutely no legislation at all emerged, meaning that the distant-signal license is not extended, CBS would find a way to live with that. But an immediate and drastic cut-off would not be our preference.

My message today is simply this: As you and your colleagues contemplate in the next several months extending the distant signal license for satellite carriers for the fourth time in 20 years, please continue to be guided, as you have in the past, by the twin pillars of (1) competition in the multichannel video programming marketplace and (2) preservation of local, free over-the-air broadcasting. At this juncture, we believe that the best means for achieving these goals is for Congress to encourage satellite carriers to provide local television stations to subscribers in more and more markets so that the need to import distant stations is eliminated. And the best means, in turn, for encouraging the carriage of local stations is to wean the satellite industry from the distant signal license, a special exemption Congress created to assure network signals to all and to foster exactly what exists today: Competition.

More on that later.

First, I wish to congratulate you for a remarkable success. Twenty-one years ago, when the sole multichannel video programming distributor was cable, Congress knew that it needed to find a way to help the nascent satellite industry become a competitor and it did so by ensuring the availability of broadcast programming comparable to that offered by cable operators. The legislation that became the Satellite Home Viewer Act (SHVA) gave satellite carriers an efficient means of providing broadcast network programming to those homes that could not receive adequate signals over the air from their local network affiliates.

Congress originally adopted SHVA to cover C-Band satellite, a big-dish service, before the existence of direct broadcast satellite, a high power, mini-dish

service. In 1994, when DBS was just entering the market, Congress amended SHVA in order to, among other things, extend for five years the sunsetting statutory license for the carriage of distant broadcast signals.

By the end of 1994, what is today DirecTV had launched the nation's first DBS satellite, had rolled out its service mostly to rural markets, and boasted one million subscribers. A little more than a year later, a second DBS service, EchoStar, was born.

Yet, cable, which was initially developed as a means for delivering broadcast television station signals to homes unable to receive them over the air, continued to dominate the pay television landscape mainly because they could provide their customers with local broadcast signals and satellite could not. As Senator Orrin Hatch noted in early 1999:

> In the last decade, satellite broadcasters have emerged as the newest competitors in the television delivery system and industry. With hundreds of channels of programming, they are pushing the envelope of consumer options and stand poised to serve as full-fledged, full-service competitors to cable in the multi-channel video delivery marketplace.
>
> The Satellite Home Viewer Act, however, is simply not designed for this sort of competition in its current form. It was enacted in 1988 only to provide lifeline access to television for those scattered households that were unable to get television in any other way, such as over-the-air or by cable.
>
> The bill we will discuss today is designed to allow satellite broadcasters to compete fully in the market. Most importantly, it authorizes satellite broadcasters to provide local subscribers with their local television signals.

Once again, and just in time, Congress's vision resulted in a needed boost to the satellite competition. In the Satellite Home Viewer Improvement Act of 1999

(SHVIA), Congress gave satellite carriers a royalty-free, statutory copyright license to transmit local programming to customers in their markets, as those markets --DMAs-- are defined by Nielsen. For the first time ever, consumers had a real choice among MVPDs: DBS operators, like cable operators, could now offer viewers a full complement of their local broadcast television stations.

As Senator Leahy described the new law:

> Today the only way you can get local service is through cable, or from an antenna if you have one. Now home satellite packages will be able to offer the same thing. This will be the first time that cable television has had real competition in most communities. I suspect that both the satellite companies and the cable companies will try to offer a lot more to consumers and at a lower price, and that will benefit both cable subscribers and home satellite viewers.

How prescient were those words. With the first-time ability to access their local television stations from satellite carriers, consumers chose DBS in droves. In mid-2005, DBS was the choice of 26.1 million American households, constituting well over one-quarter of total MVPD subscribers. In fact, DBS subscribers have increased every year since their numbers were first reported by census data in 1993, with the growth from 2004 to 2005 alone reaching 12.8%.

Today, DirecTV and EchoStar's Dish Network serve 17.6 million and 13.78 million households, respectively. The 31.38 million homes they serve collectively constitute nearly one-third of all MVPD subscribers. In their most recent financial results, The DirecTV Group, Inc. reported fourth quarter 2008 revenues of $5.31 billion, while Dish Network Corporation reported third quarter 2008 revenues of $2.94 billion. The DBS industry has come a long way,

particularly when viewed against the early financials of USSB, the original DBS operator (now DirecTV), which in July 1996 had yet to show a profit.

There are many winners emerging from Congress's 20/20 vision in the video programming marketplace, but no one more important, however, than the consumer.

Of course, competition to cable today has flourished beyond satellite and DBS and the wildest of expectations. Verizon and AT&T are no longer just telephone companies delivering voice. They now provide hundreds of channels of video programming through their FiOS and U-Verse services to three million homes. And the ubiquitous Internet is a platform that offers up more than informative websites and answers to arcane trivia questions: Today it is a destination for consumers seeking not only professionally created news, entertainment and sports programming, but millions of hours of user-generated video content.

It is important to remember that as Congress transformed its vision into reality through satellite legislation, it strove not only to promote competition to cable via satellite but to preserve the role of local broadcasters in providing free, over-the-air television. Localism has been the bedrock principle of broadcast policy since the Radio Act of 1927. Broadcasters must serve their communities by providing programming to meet the needs and interests of those communities. And they clearly do so, as acknowledged by Congress. Senator Leahy has described broadcast television this way:

> I want to make clear, as I did in my recent comment to the FCC, that I strongly believe in the local affiliate television system. Local broadcast

> stations provide the public with local news, local weather, local informational programming, local emergency advisories, candidate forums, local public affairs programming, and high quality programs. Local broadcast stations contribute to our sense of community.

Senator Jay Rockefeller has described broadcasters as a necessity:

> And as we've been reminded in the aftermath of the winter storms that have wreaked havoc on parts of our nation over the last week, television plays a very important role in keeping the public informed and safe.

Senator Kay Bailey Hutchison has, too:

> Many Texas residents are unprepared for the fast-approaching DTV transition, especially those who live along the border. Households that continue watching stations from Mexico, rather than taking steps to prepare for the transition, may not receive AMBER Alert and Emergency Alert System messages.

In light of the recognition of broadcasters' unique contribution to localism, Congress throughout the history of the satellite legislation has sought to balance the goal of preserving the broadcast television industry as it has promoted the competitive status of the satellite television industry. Summing up this balancing act, Senator Herb Kohl said in 1999 when local-into-local was being debated:

> Satellite companies will finally be allowed to legally broadcast local stations to local viewers--so-called ``local into local." The strange anomaly that restricted satellite from providing local signals will be a thing of the past. And to be balanced, satellite companies will also be subject to ``must-carry" obligations, just like cable. This bill will also reduce the royalty fees for those local signals to a level closer to that paid by cable companies. All of this moves us towards parity between satellite and cable, and it is a huge step forward for consumers. Let me tell you why.
>
> Increased competition will discipline the cable marketplace which, in turn, will create lower prices, increased choice, and wider availability of television programming for all Americans, no matter how remote. And we do this in the best way possible, by promoting competition, not increasing regulation. Moreover, it won't be at the expense of our local television stations, which provide a valuable

> community benefit in the form of local news, weather, sports and various forms of public service.

Senator Leahy echoed the need for equilibrium when the 2004 legislation cleared the Senate Judiciary Committee:

> I want to make one final point regarding those households who were permitted to continue to receive distant network broadcast signals via satellite while they also received competing local signals from the same network. I know one Senator wants to have termination of this "dual" service at some fixed date. I will certainly work with that Senator and others on this issue of promoting localism in network broadcasting.

CBS appreciates the fine line that Congress has walked over the last 20 years in crafting satellite legislation. As the owners of a major broadcast television network and a group of 30 local broadcast television stations, we believe that the indefinite or permanent congressional grant of a distant-signal license to satellite carriers will jeopardize the economic viability of stations affiliated with national networks. It would do so by placing at risk a significant and critical source of local news and information.

The broadcast television industry has the right, through the Copyright and Communications Acts, and private contracts, to control the distribution of the national and local programming that it transmits. The CBS Television Network alone invests billions of dollars each year in developing, producing and securing the highest quality entertainment, sports and news programming. A single, 30-minute episode of a sitcom series costs anywhere from $1 to $4 million to produce. And a single, 60-minute episode of a drama series anywhere from $4 to $5.5 million. With regard to sports programming, and in addition to the NCAA March Madness discussed earlier, CBS pays hundreds of millions of dollars

each year to the NFL for our package of games. That is before you consider millions of dollars in rights fees CBS pays each year for SEC Football, regular season NCAA basketball, to the PGA for golf, and to the USTA for rights to the U.S. Open Tennis Tournament.

We strongly believe that heavy investment in programming pays off: In the current television season that began last September, CBS is the most-watched television network and the only major broadcaster to increase its prime-time audience. Superior programming helps not only the CBS network and our owned-and-operated television stations, but also our affiliated stations nationwide. When network programming is of high quality and compelling, local stations benefit. From large DMAs like Philadelphia and Dallas to smaller DMAs like Burlington, Vermont and Johnstown-Altoona-State College, Pennsylvania, local stations are able to present this network programming to obtain advertising dollars so that they, in turn, can make significant financial investments in the production, gathering and reporting of local news, sports, weather and other information. Local stations also are able to invest in rights to syndicated programs, such as "Wheel of Fortune," "Jeopardy," "Oprah," "Live with Regis and Kelly," "Seinfeld" and "Friends," which are obtained from other content producers.

This network-affiliate arrangement, of course, is not unique to CBS –it is also enjoyed by others, including the ABC, FOX, NBC, the CW (of which CBS owns 50%), Univision and Telemundo networks and their affiliated stations across the country. In the end, however, it is the local viewers who profit most from this system.

Congress has recognized the invaluable nature of this relationship. That is why, in attempting to accommodate those households unable to receive network-affiliated stations directly over the air, Congress designed SHVA back in 1988 so as to carve but a narrow exception to the exclusive programming copyrights held by television networks and their affiliates. This limited compulsory copyright license under Section 119 of the Copyright Act permits satellite delivery of distant, or out-of-market, network broadcast stations to only "unserved" households.

In its wisdom, Congress made the license for local-into-local a permanent one, while the compulsory license for the satellite delivery of distant-network signals was never intended to be so. In 1988, SHVA provided that the distant-signal license sunset in 1994; in 1994, the license was extended for 5 years; and in 1999, the license was extended for another 5 years. At the end of this year, on December 31, 2009, the license comes to an end unless renewed. What was supposed to be a temporary license is now 21 years old.

We are now at an important crossroads in the decades-long history of satellite legislation. Rather than automatically renewing the distant signal license for satellite carriers for the stock five-year term, this Committee should carefully consider ways of encouraging MVPDs to provide local instead of distant television stations to American homes. We believe the best route to that end is by phasing out the distant-signal license over the next few years with a clear and precise sunset deadline. We understand that a sudden and immediate sunset would be disruptive to the small remaining number of consumers who still receive

distant signals and that it may take satellite carriers time to ramp up their operations to provide local signals in every market. But the deletion of the distant-signal license no doubt would motivate satellite carriers to provide local signals in all markets sooner rather than later.

Offering local broadcast stations to customers is apparently good business. A mere week after SHVIA was enacted into law in November 1999, DirecTV made local channels available to its subscribers in New York and Los Angeles. In making the announcement, then-DirecTV President Eddy W. Hartenstein said it best:

> The availability of local channels ushers in a new era for DIRECTV, and we are excited to commence our local channel offerings in the nation's two largest markets. By offering local channels on DIRECTV, our customers can access entertainment and information that's most relevant to their lives -- and they can watch their local channels with digital picture and CD-quality sound.

In the first full reporting quarter following enactment of the 1999 satellite legislation, the DBS companies realized positive results from their local-into-local offerings. DirecTV reported that it had added 405,000 subscribers during the three months ended March 31, 2000, a number that represented 33% more units than the 304,000 subscribers the company added during the same period the previous year. And EchoStar reported that the company's DBS subscribers had increased approximately 71% in the first quarter of 2000 compared to the same period in 1999. This strong subscriber growth, according to the EchoStar 10-Q filing, was due, among other things, to "increased interest in satellite television resulting from the availability of local network channels by satellite."

In my testimony regarding the local-into-local satellite legislation five years ago, I commended DirecTV and EchoStar for their rollout of local channels. I do so again today. Of the 210 television markets in this country, EchoStar reportedly is serving 179 with local stations and DirecTV is serving 150.

However, in suggesting a phase-out of the distant-signal license, I neither offer up a novel solution nor intend to do harm to my DBS friends, who are our partners in the television world. In fact, just last week, Dish Network and CBS successfully reached a new, long-term agreement for carriage by Dish of the stations we own. And I look forward to a continued positive and mutually beneficial relationship with our friends at DirecTV.

But rather than counting on my recommendation, look to the 225-plus-page "Satellite Home Viewer Extension and Reauthorization Act Section 109 Report" to Congress last summer from the Register of Copyrights who recommends a phase-out of the distant-signal license. The license, the report states, was a "stop-gap solution for a nascent satellite industry" and "in its present form, undergirded by outdated rationales set forth in 1988, is no longer necessary nor appropriate." Like cable operators, the report states, DirecTV and EchoStar "have the market power and bargaining strength to negotiate favorable program carriage agreements." The report suggests that Congress extend the distant-signal license for one final additional five-year term. By the year 2015, the report concludes, the DTV transition should be settled, broadband

penetration will be greater, and Americans will be able to receive video programming from many providers. "It will be a whole new era by then. . . "

We at CBS agree with these recommendations and we look forward to that new era in which CBS is prepared to compete and take our chances. In the meantime, we thank the Committee for helping to steer our industry through the complex technical and market conditions to get us where we are today, a robust video delivery marketplace, where, thanks to vigorous competition, broadcast television is still an integral player deeply valued by American viewers.

Thank you.

**Written Testimony of**
**Bob Gabrielli**
**Senior Vice President, Broadcasting Operations and Distribution,**
**DIRECTV, Inc.**
**Submitted to the Senate Judiciary Committee**

**February 25, 2009**

Thank you for allowing DIRECTV the opportunity to offer our views on the future of the satellite statutory copyright licenses. DIRECTV now serves more than seventeen million of your constituents. They get hundreds of channels, amazing picture quality, state-of-the-art innovation, and industry-leading customer service. DIRECTV, DISH Network, and others present a real challenge to our cable competitors. The result is better television for everybody.

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

This year, you have the opportunity to continue Congress's commitment to consumers and competition as you consider reauthorization of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"). SHVERA provides the basic legal infrastructure for delivery of television programming to millions of Americans. Their access to this programming depends on this infrastructure.



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But SHVERA, like all infrastructure, must be maintained. Just as our roads and bridges need repair and our aviation system demands modernization, SHVERA requires some updating to reflect the realities of a 21st century video market. DIRECTV offers the following suggestions:

- Congress should renew and improve the satellite distant signal license. It should *not* harm consumers by eliminating or rewriting the license.
- Congress should improve consumer access to and choice of local stations. It should *not* require satellite subscribers to bear the burden of nationwide mandatory carriage.
- Congress should modernize the retransmission consent system to reflect the new market structure brought about by competition. It should protect consumers from inflated prices and withheld signals.

Implementing these recommendations will help ensure both that your constituents continue to receive the channels on which they have come to depend and that the satellite licenses work efficiently, predictably, and in a consumer-friendly manner.

## I. The Satellite Distant Signal License Serves Consumers Across the Nation.

### A. Renewing the License Will Protect Consumers.

The satellite distant signal license lets consumers who can't receive over-the-air television receive out-of-market television stations from satellite. Since its inception, the license has brought network television to millions of Americans who otherwise wouldn't have access to it. For this reason, the distant signal license is a great success story that serves the public interest.

Today, most satellite subscribers receive network programming from their local stations. And the law now restricts satellite operators' ability to bring distant signals to those subscribers. Yet nearly a million satellite subscribers still rely on the distant signal license today. Others will rely on the license into the future, including those in markets



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where we don't yet offer local signals, those in markets missing one or more network affiliates, and those in places like parts of Alaska that are outside of any local market. To all of these people, the distant signal license is critical. Without it, they would be denied access to programming that they love and that virtually all other Americans get to see. Without this license, rural Americans would be cut out of the national conversation.

Copyright holders contend that there are other ways to serve these consumers. They hypothesize "market mechanisms," "voluntary licensing arrangements," "sublicensing" and the like. Yet nobody really thinks such alternatives will actually result in satellite carriers offering distant signals. Sublicensing, for example, depends on broadcasters amending all of their programming contracts to permit satellite distant signal retransmission. No one has explained why broadcasters, who oppose the very notion of distant signals in the first place, would undertake such an effort.

The satellite distant signal license, though far from perfect, is the only realistic way to bring network programming to millions. It should not be allowed to expire.

**B. "Harmonizing" the Cable and Satellite Statutory Licenses Will Lead to Unacceptable Consumer Disruption.**

Some have suggested that Congress should "harmonize" the cable and satellite distant signal licenses by creating one giant, omnibus license. This idea has theoretical appeal because it would apply the same rules to satellite and cable. Yet harmonization is better in theory than in practice. It would take an extraordinary amount of work to achieve results that, in a perfect world, would largely replicate the system already in place today.

In the *real* world, however, harmonization would almost certainly result in consumer disruption. The cable and satellite industries have built their contracts and



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delivery plans all around the country on the stability of their respective statutory licenses. DIRECTV, in particular, has spent billions of dollars to design its systems to comply with the satellite statutory licenses. Changing the rules now would disturb the settled expectations of viewers throughout the country and would cause compliance problems on all sides. Inevitably, both cable and satellite viewers would lose stations they now rely upon.

Harmonization would also ignore important differences between cable and satellite technologies and businesses. To take one example, the cable license ensures broadcast exclusivity through the network nonduplication and syndicated exclusivity rules, while the satellite license does so through the "unserved household" requirement. The cable exclusivity rules make sense for operators of localized cable systems, who can easily measure "zones of protection" for the handful of stations they carry and can manage blackouts where necessary. DIRECTV, which retransmits thousands of stations across the country from satellites above the equator, cannot do any of this.

Imposing cable rules on satellite is problematic. Imposing satellite rules on cable cannot be any better. Congress should resist the temptation to combine the cable and satellite licenses.

### C. Congress Should Maintain the *Status Quo* on Royalty Rates and Eligibility Rules.

As an alternative to eliminating the distant signal license or combining it with the cable license, some parties have called on Congress to make drastic changes to the mechanisms of the license itself. Because we believe that such changes will undermine the consumer experience, we urge Congress to resist these calls.



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First of all, Congress should not drastically increase royalty rates. As a business that depends on content, DIRECTV recognizes the value of intellectual property. DIRECTV is thus willing to pay its fair share, and was able to negotiate reasonable rates at arm's length with copyright holders during the last reauthorization. These, however, are exceptionally difficult economic times for all Americans. In such circumstances, Congressional action that would directly lead to drastic price increase for consumers would be especially difficult.

Second, Congress should not let the digital television transition change the distant signal eligibility rules. Congress set a "hard deadline" for the DTV transition *after* it last renewed the distant signal license. This created several ambiguities in the law. Some of these could make it easier to sign up for distant signals, others could make it harder, but none were intended. Thus:

- The DTV transition should *not* mean that everybody is "unserved," as the broadcasters fear.
- The DTV transition should *not* mean that DIRECTV can no longer offer high-definition distant signals in markets where it offers local signals in standard definition.
- The DTV transition should *not* mean that viewers become ineligible for distant signals when a local station adds network programming to a multicast feed.

If, as we believe, Congress never intended to change these rules after the transition, it should now clarify the law accordingly.



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**D. Simplifying the "Unserved Household" Provision Will Make The Law Fairer and More Understandable For Your Constituents.**

While DIRECTV does not advocate wholesale revision of the distant signal license, Congress could help consumers by making modest changes to the distant signal license's "unserved household" restriction. This restriction limits satellite distant signals to those consumers who can't get local signals over-the-air. But the process for determining which households are "unserved" satisfies no one. Satellite carriers think it is far too complicated and expensive. Broadcasters think it allows satellite carriers to count too many households as "unserved." Most importantly, consumers despise the process of computer prediction, waiver, and on-site testing.

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

1. Over-the-Air Qualification Is Unnecessary in Local Markets Served by Satellite.

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

This approach has numerous advantages. It is logical because, in markets where subscribers receive local signals over the satellite, over-the-air reception is irrelevant. It is simple because spot-beam coverage is a known quantity. It is fair because spot-beam



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coverage can be published so everybody knows who's eligible. Most importantly, it ensures that all subscribers can receive network programming.

2. Congress Should Address the "Grade B Bleed" Problem More Generally.

Under today's rules, subscribers in markets lacking one or more network affiliates, or subscribers outside the satellite spot beam, are ineligible for distant signals if they are within the service contour of a neighboring, out-of-market station. This is known as the "Grade B bleed" problem, and it can prevent subscribers from getting any network service via satellite.

The spot-beam proposal described above would address the Grade B bleed issue in the majority of markets in which DIRECTV provides local service. Yet the problem caused by neighboring stations' over-the-air signals harms consumers in the remaining markets, as well.

This harm is most acute for consumers in markets missing one or more network affiliates. Lafayette, Indiana, for example, has a CBS affiliate but no other affiliates. So one might logically expect DIRECTV to be able to deliver NBC, ABC, and FOX distant signals to Lafayette subscribers. But some subscribers in the Lafayette market are predicted to get one or more faint over-the-air signals from Chicago, Indianapolis, or Champaign. We cannot deliver these subscribers local network programming (because there is none), nor can we deliver them distant network programming (because they are technically "served"). These antiquated rules deny subscribers access to network programming based on the transmissions of non-Lafayette stations.

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



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

## II. Targeted Changes Would Greatly Improve the Satellite Local Signal Statutory License, But an Unfunded Carriage Mandate Would Harm Consumers.

A second statutory license permits satellite operators to deliver local stations within their own "local markets," generally defined in terms of "designated market areas" (or "DMAs"). This license has generated far less controversy than the distant signal license and, unlike the distant signal license, does not expire at the end of year. While it, too, needs updating and modernization, Congress should resist attempts by the broadcasters to rewrite it to impose onerous unfunded carriage mandates on consumers.

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

Congress could begin by modernizing "local markets" and the decades-old DMA system. DMAs are part of a private subscription service offered by Nielsen Media Research, used primarily for advertising purposes. This system was never meant to determine which local signals are available to viewers. Using it for this purpose means that viewers throughout the country are barred from receiving local news, sports, and entertainment because they happen to live on the wrong side of a DMA border.

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



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We understand Congressman Ross will soon introduce legislation, the Local Television Freedom Act that would begin to address these issues. It would allow viewers in counties like Fulton to receive stations from in-state "adjacent" markets that better serve their communities. DIRECTV urges members of the Committee to support this legislation.

**B. Fixing the "Significantly Viewed Rules" will Rescue Congress's Good Idea from the FCC's Implementation Mistakes.**

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

Satellite operators (unlike cable operators) must offer local stations the "equivalent bandwidth" offered to significantly viewed stations. But the FCC has interpreted this to mean that DIRECTV must carry local stations in the same format as significantly viewed stations every moment of the day. This is infeasible. DIRECTV cannot monitor the format of hundreds of station pairs around the clock. Nor can DIRECTV black out signals when, for example, a high-definition ballgame runs late on one station while the other offers standard definition hourly fare. We think the FCC's decision conflicts with Congress's intent to promote cable-satellite parity. Unless Congress revisits this issue, satellite operators will remain unable to carry signals that cable operators have carried for years.



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### C. Unfunded Carriage Mandates Unfairly Burden Satellite Subscribers.

This testimony suggests a few modest attempts to update the local signal license. Broadcasters, by contrast, seek to alter the very essence of the license with huge unfunded carriage mandates. These are technically infeasible, hugely expensive, and unfair to satellite subscribers.

DIRECTV today offers local television stations by satellite in 150 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 119 markets, serving more than 88 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.[1] We have devoted several billions of dollars to this effort. And we are working every day to serve more markets. In the meantime, we have developed equipment that allows subscribers in the remaining markets to integrate digital terrestrial broadcast signals seamlessly into their DIRECTV service.

All of this does not satisfy the broadcasters. Last week, legislation was introduced that would require satellite carriers to serve all remaining local markets by satellite within a year. Very respectfully, while expanding the reach of broadcast service might be a worthy goal, H.R. 927 is the wrong approach.

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[1] *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.



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H.R. 927 would upset the delicate balance that has guided Congressional policy in this area for decades. In enacting SHVIA's statutory copyright license for local broadcast signal carriage, Congress specifically recognized that the capacity limitations faced by satellite operators were greater than those faced by cable operators.[2] 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 all qualifying stations in that market.[3] 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.[4]

The same concerns that led Congress to limit satellite carriage requirements still apply today. Last year, the FCC "recognize[d] that satellite carriers face unique capacity, uplink, and ground facility construction issues" in connection with offering local service.[5] It concluded that, if faced with onerous carriage requirements, satellite carriers might be "forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity," or might be "inhibited from

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[2] 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").

[3] 47 U.S.C. § 338(a)(1).

[4] *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").

[5] *Satellite HD Carriage Order*, ¶ 7.



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adding new local-into-local markets."[6] In light of these findings, we respectfully urge Congress not to upset the balance it struck in 1999.

By imposing such burdens, H.R. 927 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.

**III. Retransmission Consent is Broken.**

Numerous parties have suggested that, in considering SHVERA reauthorization, Congress should examine the rules governing retransmission consent agreements. DIRECTV reluctantly agrees. I say "reluctantly" because DIRECTV has successfully negotiated thousands of programming agreements over the years – many hundreds of them with broadcasters. While these were often contentious, hard-fought battles, the marketplace generally worked to deliver consumers the programming they want. Because of recent changes in the market, however, many consumers now pay more than they should for broadcast programming and broadcasters withhold their signals far too often.

The retransmission consent marketplace worked, in part, because of the equilibrium that used to exist between broadcasters and cable operators. In 1992, Congress gave all full-power television stations the right to engage in private carriage

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[6] *Id.*, ¶ 8 (citations omitted).



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negotiations with cable operators.[7] Back then, these negotiations pitted one monopoly against another. Each broadcaster had a monopoly over the distribution of content within its local market. Each cable operator had a monopoly over multichannel distribution within its franchise area. Because the value to broadcasters of expanded carriage roughly equaled the value to cable operators of network programming, most retransmission consent agreements did not involve cash payments.

In 1999, Congress allowed satellite operators to carry local stations. This was an overwhelmingly good thing for consumers. But it had the unintended effect of skewing retransmission consent negotiations. Cable and satellite operators still had to negotiate with monopoly broadcasters. But broadcasters could now play cable and satellite against one another. In this new market, broadcasters found their relative bargaining power dramatically increased.

Today, the market is tilted even more heavily in favor of broadcasters. Every broadcaster has at least three competitors with whom to negotiate. Some have five or more. All the while, they maintain government-protected exclusive control over their content, not to mention the public airwaves they enjoy for free. The result is predictable: higher retransmission consent fees (which get passed along to subscribers), more frequent threats to withhold stations (which confuse subscribers), and more withheld signals (which deprive subscribers, who have done nothing wrong, of critical network programming).

Exacerbating this imbalance is the recent influx of private equity investments in broadcast television. This has resulted in broadcasters demanding ever increasing rates,

[7] This is not a copyright "exclusive right." Rather, retransmission consent is a right given to broadcasters separate and apart from copyright.



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in some instances two to three times what we were previously paying. One broadcaster reported a 23 percent rise in retransmission consent revenues between 2006 and 2007 alone.[8] Another broadcaster recently told the FCC that it could reasonably demand ***$20.00*** per-sub-per-month for a single station.[9]

It does not appear that this additional money is being used to provide more or better local programming. In fact, the opposite appears to be true. Many broadcasters are producing less local news, and others have replaced local programming with national infomercials.

As I said earlier, DIRECTV willingly pays for high-quality content that our subscribers value. All programming entities deserve fair and reasonable compensation for the product they produce. This includes value-added content we receive from broadcasters. But it does not serve the American public if broadcasters are allowed the unfettered ability to raise rates without any correlating benefit to consumers in the form of improved local content.

While I believe the retransmission consent regime is broken, I cannot sit here today and give you a specific solution. Rather, we would like to work with members of this committee to establish a construct that accomplishes the following policy goals:

- It should *fairly and reasonably compensate the broadcaster for its investment in high-quality content*. DIRECTV has always been willing to pay a fair price to

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[8] "Nexstar Expects $75M from Retrans Deals," TVNewsday, Feb. 19, 2009, *available at* http://www.tvnewsday.com/articles/2009/02/19/daily.12/.

[9] *See* Reply Comments of Hearst-Argyle Television, Inc., MB Docket No. 07-198, at 9-10 (filed Feb. 12, 2008) (arguing that the true market value of the average Hearst-Argyle station is $20.18 per subscriber per month and stating that, while it has not yet sought such fees, "the Commission could hardly conclude, on any basis of fairness of equity, that a negotiating request for such a fee was not based on marketplace considerations or was in any way inappropriate or unlawful").



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retransmit local signals. We are not looking at SHVERA reauthorization to change this.

- It should *protect consumers from withheld service*. Consumers caught in the middle of a retransmission consent dispute don't care about the particulars of the dispute. They simply want their programming. Congress should consider restricting, to all but the most limited circumstances, the ability of broadcasters to shut off signals.

DIRECTV hopes to work with this Committee and other stakeholders to develop specific proposals that would meet these criteria.

* * *

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



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## SUMMARY OF DIRECTV TESTIMONY RE SHVERA REAUTHORIZATION

The SHVERA licenses constitute the basic legal infrastructure for delivery of television programming to millions of Americans. But, like all infrastructure, they must be maintained. Just as our roads and bridges need repair, SHVERA requires some updating to reflect the realities of a 21st century video market.

- ***The distant signal statutory license remains critical to millions.*** Without it, consumers would lose access to programming they love and on which they depend. Alternatives to the license are unrealistic. Congress should renew it.

- ***"Harmonizing" the satellite and cable licenses would be unworkable.*** Harmonization would require extraordinary effort for no gain. It would disrupt consumers and disturb engineering decisions made in reliance on the two licenses.

- ***Today's royalty rates and eligibility rules generally serve consumers.*** Raising freely negotiated royalty rates in this economy would harm consumers. So would allowing the DTV transition to change the distant signal eligibility rules.

- ***Simplification of the eligibility rules will serve consumers even better.*** The "Grade B signal" test is complicated and outdated. Where we offer local channels, it makes more sense to ask whether the customer can receive local signals *from satellite*. Also, where TV signals "bleed" into neighboring markets, subscribers in those markets should still be eligible for distant signals.

- ***Modernizing the antiquated DMA system will promote truly local service.*** Sometimes, counties from one state are placed in a DMA from another state. Consumers in such "orphan counties" should be able to get in-state channels.

- ***Fixing the FCC's implementation mistakes will make the "significantly viewed" rules work as intended.*** The "equivalent bandwidth" rule was never meant to apply on a moment-by-moment basis.

- ***Unfunded carriage mandates would burden satellite subscribers.*** Satellite offers local channels to 98 percent of Americans. The FCC found that additional carriage obligations would require more satellite and ground resources and would jeopardize HD local service. Expanding broadcasters' reach may be a worthy goal, but it would be inequitable to place the entire burden on satellite subscribers.

- ***Retransmission consent should serve consumers.*** DIRECTV has always been willing to pay for content. But broadcasters have recently doubled or tripled their rate demands while offering *less* local programming. This harms consumers, especially in this economy. Retransmission consent should fairly compensate broadcasters for their investments while minimizing their ability to withhold their signal from consumers.



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## United States Senate Committee on the Judiciary

Testimony of State Senator Robert M. Hartwell, Bennington Senatorial District, Vermont

Home Viewer Extension Act Reauthorization

Good morning. Thank you Senator Leahy and Members of the Judiciary Committee for allowing me to testify today with regard to the reauthorization of the Satellite Home Viewer Extension Act.

My name is Robert Hartwell; I am State Senator from the Bennington Senatorial District in southwestern Vermont and represent the 17 towns located in Bennington County and the Town of Wilmington located in Windham County immediately to the east of Bennington County. I serve on the Senate Committee of Natural Resources and Energy and the Senate Committee on Finance. I reside in the Town of Dorset.

I am testifying as to the importance providing local television access to residents in rural areas in rural states such as Vermont; these areas are exemplified by Bennington and Windham counties in Vermont. I am requesting the Committee to assure that Vermont commercial and public television will be available to Bennington and Windham Counties.

Many towns in the two southern counties are small towns and villages surrounded by the working landscape. Nine towns in my district have populations of less than 1,000 people. For many of these people, satellite is their only access to television news, weather and advertising. Most of these towns are located in mountainous areas accessible by one state secondary highway and many local rural and, in many instances, dirt roads.

My constituents inform me that they are unable to receive cable television due to the prohibitive cost of bringing cable to their rural homes; in fact, even those who are living within a few hundred feet of a road served with cable can not access the service due to the expense, often thousands of dollars to construct cable to their homes. These same people have access to television only through satellite but many have no access to any Vermont television, commercial or public due the fact that these areas are parts of the Boston DMA or the Albany DMA.

Thanks to the Leahy provision added in connection with the 2004 reauthorization, DirecTV subscribers in Bennington and Windham counties have access to Vermont television stations ; however, many viewers in the two counties are Dish Network subscribers which does not provide Vermont stations to its subscribers and cannot because of the injunction issued against it in 2006. This problem exists for cable subscribers most of which are not able to carry Vermont stations.



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**United States Senate Committee on the Judiciary**

Testimony of State Senator Robert M. Hartwell
February 25, 2009
Page two

I have constituents who are relegated to leaving home in search of a newspaper to attempt to learn what happened a day or two or three before, information freely available through television to people in less rural areas. A good example of this lack of access to news about their state, I believe, is lack of access to election returns until two days after the election when those returns become available in newspapers. This search is frustrated further by the absence of a state wide newspaper in Vermont.

Many of my constituents have served on their town select boards and school boards over the years and are now retired. Many of the proceedings of these boards and commissions are now carried on local cable access television. These people, in many instances are unable to attend these proceedings or have misgivings about driving at night. They are therefore cut off entirely from an important part of their lives of service to the community. The absence of coverage of these very localized proceedings is problematic, but the absence of any television connection to their home state is difficult for them to comprehend and, as a result, appears discriminatory to them.

Furthermore, my constituency is older than the state as a whole. This demographic factor renders access to Vermont commercial television and Vermont public television an even more critical need.

The placement of Windham County in the Boston DMA and the placement of Bennington County in the Albany DMA precludes the receipt of any Vermont news, weather and advertising. By way of specific example, when one watches the weather channel at my home and homes of many of my constituents, one finds out about the weather around the country, but there is no local weather status and no local forecast such as that routinely viewed by cable subscribers.

I believe that all residents including those in rural areas have a reasonable expectancy of access to news weather and other programming relative to their home states and, therefore, of interest to them. Therefore, I urge the Committee to work to assure that residents of rural areas such as the area I represent receive satellite television at reasonable cost with programming relevant to the states in which they live.

Again, thank you, Mr. Chairman and Members of the Judiciary Committee, for allowing me to testify on this important matter of public policy.



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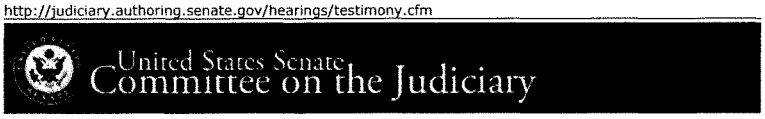


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Statement of

# The Honorable Patrick Leahy

United States Senator
Vermont
February 25, 2009

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Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing on "Ensuring Television Carriage in the Digital Age"
February 25, 2009

Last week, Vermont's broadcast television stations turned off their analog signals and began broadcasting only in digital. By June 13, all television stations across the country will have completed this transition. With the digital era upon us, consumers are accessing video content in ways virtually unimaginable just two decades ago. Network programs are available online, and consumers are increasingly viewing broadcast television stations through cable and satellite systems, rather than by using an antenna.

Congress has facilitated the growth of the cable and satellite industries by providing a statutory license to retransmit broadcast television to consumers. Important parts of the satellite license expire at the end of this year.

Congress first passed the Satellite Home Viewer Act in 1988, and with each reauthorization we have sought to improve it in a manner that both protects content owners and improves the ability of consumers to access local television stations. In 1999, I introduced legislation with Senators Hatch and Kohl and others that led to the creation of a license for satellite companies to provide local broadcast stations in local markets for the first time.

This provision has been tremendously successful. Both DISH Network and DirecTV use this license to provide local service in Vermont, and I thank them for making that service available. Local television plays a key role in cities and towns across the country by providing relevant news, weather and sports, and notifying residents in cases of emergency. The programming and services that local stations provide helps to foster a sense of community.

I appreciate that Bob Hartwell is here from Vermont to testify today. As a State Senator from Bennington County, Vermont, Senator Hartwell can testify about the importance of receiving home state television stations. Bennington County is one of two counties in Southern Vermont that is not considered part of the Burlington television market. Residents there were unable to receive the local Vermont broadcast stations by satellite for many years. During the 2004 reauthorization, I included a provision that made it possible for the Southern Vermont counties to receive Vermont stations by satellite. Senator Hartwell knows firsthand that for a Bennington County resident, seeing news of a fire in Clifton Park, New York, is not the same as seeing that news for Rutland, Vermont.

This provision has helped to keep Vermonters in all corners of the state connected. I appreciate that DirecTV took advantage of it to serve Southern Vermonters, but there is still more to do. For instance, DISH is currently not allowed to provide this service, and I understand that other states have similar issues in which residents are unable to access stations from their home states.

A healthy satellite industry promotes competition between video providers, and benefits consumers across the country. It is particularly important in rural areas that may be out of the reach of broadcast television



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and even cable access. Satellite has filled this role with great success in Vermont, which has a topography that can block broadcast signals and make cable access difficult. A healthy satellite and cable industry takes on a renewed importance because of the digital television transition, which has left many consumers unable to access stations over-the-air.

In this year's reauthorization, Congress will need to focus on modernizing and simplifying the licenses for the digital age. The United States Copyright Office released a report last summer that made recommendations for updating these licenses. One of the Office's recommendations is to harmonize the satellite and cable licenses, which currently operate very differently. I am interested in hearing the panelists' views on how this would affect competition between cable and satellite providers.

I look forward to working with the Senators on this Committee, and with the other Committees with jurisdiction over these issues, to craft legislation that will improve service to consumers and allow cable and satellite providers, broadcast television stations, and content creators to thrive in the digital era.

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# Testimony
# National Programming Service

Submitted by
Mike Mountford
CEO

Submitted to the Senate Committee on the Judiciary
February 25, 2009

"Ensuring Television Carriage in the Digital Age"



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National Programming Service (NPS) submits this testimony for inclusion in the record as part of the Subcommittee on Communications, Technology, and the Internet's oversight hearing entitled "Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act."

Introduction

NPS is a small business located in Indianapolis, IN that has been serving the direct-to-home satellite industry for the past two decades by offering satellite reception equipment, consumer electronics and programming to customers through its website. Since 2006 NPS has been offering DISH subscribers that qualify as unserved households distant network signals. The company has approximately 108,000 subscribers nationwide. That is the part of NPS' business that is the subject of this hearing.

The Satellite Home Viewer Act and its subsequent reauthorizations have been very successful in creating an alternative way for consumers to receive multi-channel video programming. Initially, the Act's focus was on rural and exurban households that utilized the big C-band satellite dishes to receive multiple channels of television programming. As technology has evolved the Act has been revised to keep pace with the latest developments in satellite technology. The dish sizes have gotten smaller, the technology has improved and all of these benefits have been passed on to the satellite consumer.



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Throughout the 20-plus year history of the Satellite Home Viewer Act, however, one category of satellite subscriber has seen little change. Satellite households that cannot receive a viewable picture of their local network station continue to face barriers and limited choices. Even in markets where local signals are available via satellite, many households are unable to get their local signals because of the limitations of the technology. As the nation converts to all digital television programming there is a concern that the number of households unable to receive a local network signal over-the-air may actually increase. An examination of the Satellite Home Viewer Act should include a discussion about changes to the law that could benefit the unserved household.

Satellite Home Viewer Act: The Need for Change

Many of the changes to the Satellite Home Viewer Act over the last 20 years have benefited the broadcaster at the expense of the consumer. As Congress considers legislation to reauthorize the Act it should be mindful that there will continue to be households that must rely upon distant network signals to access network programming.

**Picture Quality Standard** – Unserved households are disserved by the law's current methodology for determining an acceptable television signal. The Committee should take the opportunity to revise this methodology to ensure that all consumers have access to a viewable television picture. This is particularly important as the nation moves to all digital television.



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The law currently defines an acceptable television signal as 90% of the time the consumer receives 60% of the picture. Understandably most consumers are unhappy watching a signal with such low quality transmission but at least with an analog signal it is possible to follow the content being presented and to hear the audio accompanying the pictures. Digital television will operate quite differently. Applying this methodology for determining a viewable picture to digital transmissions doesn't make sense. With a digital picture the signal is either 100% on or the consumer sees nothing. A standard that accepts only 60% of a picture as viewable will not be acceptable to most television viewers. Nor will consumers stand for a picture that goes out 10% of the time. With digital transmissions even very short interruptions in the signal make it impossible to follow the content or to hear the action. Congress should ensure that a viewable digital picture is 100% of the signal 100% of the time with exceptions for periodic interference.

**Revise the Predictive Model** – The predictive model now in use to qualify subscribers for distant network signals is based on the analog signal contour of each television station. To be relevant for digital transmissions, the predictive model must be based on the new digital contours of broadcast stations. The model should also take into account all of the anomalies and differences that occur between the two different types of transmissions. While the predictive model has been extremely helpful in ensuring that only those consumers who are truly unserved receive access to distant network signals, the current fails to recognize that by its nature the model is only a *prediction* of whether a particular household should be able to receive an over-the-air signal. It is not 100%



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accurate. When the predictive model is wrong, the current law provides consumers with a difficult path to overcome the presumption that the consumer gets a viewable picture.

**Signal Testing Requirement** – The requirement that consumers get a signal strength test at their home has not worked in the past and should be eliminated. While it makes sense in theory, the reality is that this provision is never used. The high costs of the tests and the difficulty in finding someone to perform the tests have resulted in the consumers not using this provision.

**The Waiver Process** – The current system of consumers' obtaining waivers from their local broadcasters if they want to receive a distant network signal has not worked. NPS hears from frustrated subscribers every day who have attempted to get a waiver from their local broadcaster with no success. While some broadcasters are diligent in evaluating waiver requests, hundreds of broadcasters either reject them outright or worse – they don't even respond to the customer. Waivers haven't worked in the past and they won't work in the future if they are structured as they have been under the present Act.

The waiver provisions of the Act are in need of revamping. The burden under the current law is on the *consumer* to prove that they are unable to receive a viewable picture. NPS's experience shows that consumers want access to their local broadcast stations. They view distant network signals as a last resort to obtain access to network programming. Unserved households, eligible to receive distant network signals make up a small percentage of the total satellite television households. For this reason NPS



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believes the burden should be shift to the broadcaster to prove that the consumer *is* receiving a viewable signal. The broadcaster is in a better position to know the where the signal goes and where it doesn't.

NPS supports changing the law so that a consumer can sign a legal affidavit that declares the inability to receive a network signal. This affidavit would be sent to the satellite carrier. The consumer would be authorized to receive the signal. The affidavit would be filed and forwarded to the broadcaster. The broadcaster would have the option of challenging the affidavit and if successful there could be a fine and legal costs could be recovered by the broadcaster from the consumer. This is essentially the current process that is used to qualify owners of recreational vehicles to receive distant network signals. NPS is unaware of any abuse of process or unaware of any charges that consumers have falsified data on the affidavits.

Distant Signal Limitations

The world today is much different than it was when the Satellite Home Viewer Act was first enacted. Consumers have more access to content than before from a variety of sources. Today consumers can access television programming remotely through a Sling Box. You can be at any place in the world and watch local television with a broadband connection and the Sling Box. Networks are streaming much of their content over the Internet. With a computer and an Internet connection consumers can access local news programming as well as network programming from a variety of free and subscription sources. The digital video recorder allows consumers the flexibility and convenience to



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watch television programming when they want rather and studies show consumers are watching *more* television as a result.

Americans expect to have access to information and do not understand when that access is denied them. If you live in Washington, DC you can subscribe to the New York Times or the Chicago Tribune but you can't watch a Chicago or New York local network station. Our democratic society depends upon an informed electorate. Government policies have been designed to create *more* access to information not less. Rights holders should be compensated for the increased distribution of their works and as we have seen in other industries, such as radio and music licensing, there are schemes that facilitate payment and ensure adequate compensation.

Lifting the distant signal limitations would afford consumers' the same opportunity to access television programming that they currently enjoy for other sources of news and information like newspapers and radio. Opening the skies to consumers is an important improvement for consumers, especially consumers on a limited budget, that is justified given the way that technology is changing the way consumers access information. While some may resist that change, as we have learned from the past, technology ultimately will win. Congress should use the reauthorization of the Satellite Home Viewer Act to make fundamental changes to law to benefit the consumer.

Conclusion



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The Satellite Home Viewer Act's provisions authorizing the retransmission of network signals to households otherwise unable to obtain access to a local broadcast network signal have ensured that hundreds of thousands of homes can watch network television programming. The need for this provision continues today despite the many technological advances that have given most consumers more choices in how they receive television programming. Congress should use the reauthorization process to make needed pro-consumer improvements in the Act such as eliminating the signal testing requirement, creating an accurate digital predictive model and shifting the burden of proof in the waiver process. Satellite households that cannot receive local over-the-air television signals should not be penalized but rather the government should assist these consumers by making the process of obtaining distant network signals less burdensome.



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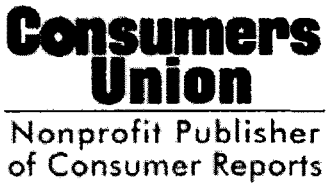

**Testimony of Gigi B. Sohn**
**President, Public Knowledge**

**Before the**
**U.S. Senate**
**Committee on the Judiciary**

**Hearing on:**
**Ensuring Television Carriage in the Digital Age**

**Washington, D.C.**
**February 25, 2009**



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**Ensuring Television Carriage in the Digital Age**

**February 25, 2009**

Chairman Leahy, Ranking Member Specter and distinguished members of the Committee, thank you for asking me to submit this testimony, which gives a consumer perspective on the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA). My name is Gigi B. Sohn. I am the President and Co-Founder of Public Knowledge, a non-profit public interest organization that seeks to ensure that citizens have access to a diversity of voices, a robust public domain, an open Internet, and flexible digital technology. This testimony is submitted on behalf of Public Knowledge, Consumers Union and Free Press.[1]

## Introduction

As Congress considers renewing satellite compulsory licenses and revisits the relevant regulations, it should take the opportunity to address the way in which the current, fragmented regulatory structure fails to meet consumer needs and the public interest by decreasing competition and creating unfair pricing practices in the Multichannel Video Programming Distributor (MVPD) market. To remedy this situation, Congress should strive to accomplish three goals:

1) treat all those who retransmit broadcast content and signals equally;

2) ensure special protections given to broadcasters do not result in unfair licensing terms for MVPDs; and

3) move towards a world without restrictive distant signal regulations.

Such measures would benefit consumers by promoting competition among MVPDs, increasing choice of programming, and lowering prices.

The current framework governing MVPD retransmission of broadcast signals is a patchwork of laws and regulations that unnecessarily differentiates between types of providers, restricts the availability of content to consumers, and sets the stage for discriminatory pricing. There are at least three sets of statutory provisions, regulations, and contractual relationships which

[1] I would like to thank Public Knowledge's Equal Justice Works Fellow Jef Pearlman, Staff Attorney Rashmi Rangnath, and Law Clerks Daniel McCartney and Michael Weinberg for assisting me with this testimony.



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contribute to this problem, and which apply differently (but with similar effect) to cable and satellite providers:

1) With few exceptions, an MVPD cannot retransmit a local broadcaster's signal without acquiring consent from that broadcaster.[2]

2) In most cases, a local broadcaster can elect to force an MVPD to carry their signal, either through must-carry on cable[3] or carry-one-carry-all on satellite.[4]

3) MVPDs are extremely limited in their ability to seek alternatives to a local broadcaster. Local broadcasters generally retain the exclusive right to offer retransmission of programs in a given geographic area.[5] Contracts between distant broadcasters and their programming providers prevent MVPDs from retransmitting their signals.[6] And with few exceptions, satellite MVPDs may only retransmit signals that originate in the customer's Designated Market Area (DMA).[7]

Taken as a whole, this scheme gives local broadcasters too much leverage and places smaller MVPDs at a disadvantage when it comes to offering consumers the content they want at reasonable prices. MVPDs are required to carry less valuable content and cannot seek competitive sources for more valuable content. This places MVPDs – especially small providers – in an untenable bargaining position that results in unreasonable costs that are passed on to the consumer and reduced competition.

In its report on SHVERA, the Copyright Office recognizes a number of problems in existing law and makes a number of recommendations about how Congress should address them.[8] Chief among these recommendations is achieving regulatory parity between cable, satellite, and other MVPDs, an objective which it refers to as "governmental goal of the first order." While our

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[2] *See* 47 U.S.C. § 325(b) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station; . . ."); 47 C.F.R. § 76.64.

[3] *See* 47 U.S.C. § 534(b) ("Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations . . ."); 47 C.F.R. § 76.56(b)(1).

[4] *See* 47 U.S.C. § 338(a)(1) ("secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market"); 47 C.F.R. § 76.66(b)(1).

[5] *See* 47 C.F.R. § 76.62 ("Cable network non-duplication"); 47 C.F.R. § 76.122 ("Satellite network non-duplication"), 47 C.F.R. § 76.101 ("Cable syndicated program exclusivity"); 47 C.F.R. § 76.123 ("Satellite syndicated program exclusivity"). *See also* 47 C.F.R. § 76.5(ii) (defining "syndicated programs" as those programs sold "in more than one market" but excluding "network programs"); 47 C.F.R. § 76.5(m) (defining "network programs" as "any program delivered simultaneously to more than one broadcast station").

[6] *See e.g.*, In the Matter of ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc., licensee of WSWG-DT, Valdosta, Georgia Retransmission Consent Complaint, *Memorandum Opinion and Order* 4 n.25, CSR-8010-C, DA 09-246 (Feb. 18, 2009) (quoting a CBS affiliate agreement restricting distant signal retransmission).

[7] *See* 17 U.S.C. § 122(a) (limiting satellite MVPDs' statutory license to retransmit only those from the "local market"); 17 U.S.C. § 122(f)(2) (detailing the harsh damages for satellite retransmission beyond the *local* market). *But see* 17 U.S.C. § 119 (allowing satellite MVPDs to retransmit distant signals, but only for 2 network stations and only to "unserved households").

[8] Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (June 30, 2008), *available at* http://www.copyright.gov/reports/section109-final-report.pdf) [hereinafter *Copyright Office Report*].



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organizations do not support all of the Copyright Office's specific recommendations for how to achieve that goal,[9] we wholeheartedly agree that however Congress chooses to address these issues, regulatory parity should be a part of the solution.

Finally, I urge the Committee to reject the inevitable flood of interests who will seek to make SHVERA a vehicle for unrelated changes to copyright and communications law. Congress should not allow this important and focused legislation to become a hodgepodge of disparate, unvetted, and potentially dangerous changes to the law.

**Recommendations**

*I. Unify the Regulatory and Licensing Systems for MVPDs*

While at one time there may have been justification for maintaining parallel, yet different regulatory structures for cable and satellite retransmission, that time has certainly passed. Cable and satellite offer comparable services, and new types of MVPDs entering the market are facing an uncertain and fractured statutory regime. When all MVPDs are able to compete on equal footing, consumers will reap the benefits.

The regulatory structures applied to cable and satellite MVPDs differ in several important ways. While the Copyright Act provides a compulsory license for the performance of copyrighted works to both services, it subjects them to different rates for the license. Cable licenses are based on a percentage of gross receipts for carriage of distant signals[10] and a minimum fee only for carriage of local signals.[11] Satellite carriers instead pay royalties based on a fixed fee per subscriber.[12]

These compulsory licenses are conditioned on compliance with provisions of the Communications Act, which impose different rules on which stations cable systems and satellite carriers may carry. As described above, cable systems are free to retransmit both local and distant stations, but are effectively restrained by the network non-duplication rules and syndicated exclusivity rules.[13] Satellite carriers cannot provide distant signals except for one or two channels to "unserved households."[14]

In addition, the Communications Act subjects cable systems and satellite carriers to different obligations with respect to carriage of local stations. While cable systems are required to carry all local stations that elect to be carried (up to a certain portion of their capacity),[15] satellite carriers are under no obligation to carry any local station. However, if the satellite carrier carries one

[9] For example, unlike the Copyright Office, we believe that the compulsory license should be available to MVPDs using the Internet to distribute programming, *see Copyright Office Report* at 205, that the license should be permanent, and not subject to sunset or the necessity of reauthorization, *see Copyright Office Report* at 223.
[10] 17 U.S.C. § 111(d)(1).
[11] *Copyright Office Report* at 4.
[12] 17 U.S.C. § 119(b)(1)(B).
[13] *See supra* note 5.
[14] *See supra* note 7.
[15] *See supra* note 3.



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local station, it is under an obligation to carry all local stations that request carriage.[16]

We agree with the Copyright Office's suggestion that disparities in treatment of cable systems and satellite services are a result of historical and technical factors that are no longer relevant.[17] Further, upgrades in cable and satellite technologies mean that now both services are "able to offer essentially the same programming mix of broadcast stations and non-broadcast networks."[18] Additionally, the Copyright Office points out that the unserved household rules which prohibit satellite carriers from importing distant signals in most situations creates a "competitive disparity" between the two systems.[19]

Such disparate treatment is simply no longer warranted. Both cable systems and satellite carriers provide essentially the same service. Leveling the playing field between these services would help them compete better for subscribership thereby benefiting consumers. Further, new types of MVPDs are entering the market, providing more choices. As the Copyright Office has recommended, fiber-based MVPDs should be subject to the same obligations and offered the same protections as existing providers.[20] Further fragmenting the regulatory structure will simply lead to more "competitive disparities" and less choices for consumers.

With the advent of Internet Video, regulatory parity should also be available to services that want to stream broadcast stations over the Internet and opt in to the regulatory regime which governs other MVPDs. Internet streaming has the potential to provide much needed competition[21] in the MVPD marketplace, as the Internet provides the ability for numerous providers to enter the market and offer new, competitive services. If an Internet-based MVPD wishes to be subject to the same regulatory obligations as facilities-based providers, there is no reason it should not have access to the same statutory licenses.[22]

Therefore, in renewing satellite carriers license to retransmit distant signals, Congress should create a single, unified structure for all MVPDs, including cable and satellite. This structure should extend the benefit of the compulsory license to all MVPDs, including Internet-based operators who wish to be treated as an MVPD. The same local carriage obligations and rates should apply to all providers. This would mean, presumably, that satellite carriers, like cable providers, would be required to carry all local broadcast stations wherever they provide service.

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[16] *See supra* n.4.
[17] *See Copyright Office Report* at 100-102, 151 (explaining the historical sources of the differences and why they no longer provide justification).
[18] *Id.* at 102.
[19] *Id.* at 153.
[20] *Copyright Office Report* at 220.
[21] Currently, cable systems and satellite carriers are the dominant MVPDs, serving 97% of all MVPD subscribers. *See* Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report* 4, M.B. Docket No. 06-189 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf. And although, arguably they compete with each other, cable prices have not gone down as a result of this competition. *See id.* at 3-4. Furthermore, very few customers have access to more than one cable system, further inhibiting competition. *See id.* at 5.
[22] To be clear, any such system should be *entirely* optional: an MVPD which uses the Internet for content delivery and wishes to be subject to the whole of the MVPD regulatory structure, including statutory licenses and carriage requirements, should be allowed to. Under no circumstances should an Internet-based video or other online service provider be *obligated* to participate in such a regime.



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As members of the Committee know, Congressman Stupak has introduced legislation, H.R. 927, which would do just that. While satellite carriers have expressed concern about the cost of a "local-into-local" requirement, should Congress unify the statutory license and reform retransmission consent and distant signal restrictions as the groups suggest below, carriage of local stations by a satellite carriers would appear to be a fair trade for significant regulatory relief.

The Copyright Office has expressed concern that a unified licensing system might result in licensing rates that have adverse effects on small MVPDs.[23] As such, in setting rates, Congress should consider the impact on small operators of all types, and provide them with statutory protection where necessary.

Regardless of whether Congress succeeds in unifying the disparate licensing regimes as a whole, it should eliminate the 5-year reauthorization cycle. There is no remaining rationale for imposing the burden of a periodic renewal on only one type of MVPD. Congress should therefore remove the renewal requirement for satellite copyright licenses and make changes to the regulatory structure when those changes become necessary.

*II. Reform Retransmission Consent Rules to Promote Competition and Eliminate Unfair Price Discrimination*

The Communications Act provides significant protections for local broadcasters. These protections are meant to promote localism and diversity of programming. But when taken as a whole, the entire scheme produces anticompetitive results. The current retransmission consent scheme, the must-carry/carry-one-carry-all rules, and distant signal restrictions combine to create an imbalance that allows broadcasters to engage in discriminatory pricing. This in turn raises prices for customers and hurts the ability of smaller MVPDs to compete in the marketplace. To remedy this, Congress must at the least provide for more transparency in pricing and effective remedies for anticompetitive behavior, and ideally create a regulatory structure to prevent such behavior in the first place.

As discussed above, broadcasters generally have the option of requesting mandatory carriage or negotiating transmission consent licenses with a given MVPD.[24] This means that when there is little consumer demand for a local channel, local broadcasters have a cost-free way to reach MVPD customers through must-carry or carry-one-carry all. On the other hand, if there is demand for a local broadcaster's channel in the region, the broadcaster can leverage that fact to demand higher prices from smaller MVPDs even though there is no correspondingly higher cost to the broadcaster. Broadcasters can afford to lose the small percentage of their viewers that come from small video providers, while those providers cannot afford not to offer a given network. And because MVPDs are unable to go outside the market area to find a competing local broadcaster[25] (and the law further forbids cable operators from offering service without broadcast

[23] *Copyright Office Report* at 121.
[24] *See supra* notes 2-4.
[25] *See supra* notes 5-7.



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stations for lower prices[26]), there is no other source for a network and little market discipline on the prices charged by broadcasters and the MVPD must "take it or leave it."

Larger MVPDs, with correspondingly larger customer bases, pay much lower (or even zero) retransmission consent fees[27] because broadcasters cannot forego the viewership. However, in order to get unrelated non-broadcast stations to more viewers, it can be to the broadcasters' advantage to condition consent for a larger MVPD not on cash, but on the carriage of unrelated non-broadcast stations owned by the same entity.[28] These tying arrangements use MVPD capacity and reduce the ability of providers to respond to consumer demand and carry other, more valuable programming that customers may desire.

These complex and non-uniform regulatory structures do a triple harm when they raise prices and primarily favor larger, incumbent MVPDs. First, the lack of competition between broadcasters forces increased costs on *all* MVPDs, which is in turn passed directly to the consumer, who faces higher prices. Second, higher costs paid by smaller MVPDs are passed on to their customers as an additional cost. Third, the unjustified cost differences produce an anticompetitive MVPD market, forcing smaller providers to charge higher prices and receive lower profit margins, reducing price discipline, and further entrenching larger incumbents. And even the large incumbents do not escape unscathed by disparate treatment, as they are often forced to carry undesired programming in order to acquire broadcast retransmission consent.

The existing set of regulations, which produces an uneven playing field and sets the stage for smaller MVPDs to receive the worst of all possible outcomes at the bargaining table, needs to change. Currently, most broadcaster-MVPD agreements are not public, preventing anyone from determining the scope of these discriminatory practices. Therefore, first and foremost among Congress' remedies should be transparency in retransmission consent deals. When paired with an effective and streamlined complaint process at the FCC, transparency would go a long way towards disciplining pricing imbalances. However, evidence suggests that existing processes, such as good faith negotiations regulations, are ineffective tools for smaller providers.[29]

Congress should therefore go farther. For instance, a transparency/reporting requirement combined with a requirement that retransmission consent be offered on reasonable and nondiscriminatory terms could be effective. Even more effective, though potentially more controversial, would be a statutory retransmission consent license that parallels the statutory copyright license for broadcast retransmission. A compulsory license with standardized rates would ensure price parity among MVPDs, as well as effectively eliminating the troubling tying

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[26] *See* 47 U.S.C. § 534(b) (requiring cable operators to offer commercial broadcast stations to all customers); 47 U.S.C. § 543(b)(7) (requiring cable operators to offer a "basic tier" including broadcast signals).

[27] Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* 44, M.B. Docket No. 07-198 (Jan 4., 2008), http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519821757.

[28] *See, e.g.*, Federal Communications Commission, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Noticed of Proposed Rulemaking*, FCC 07-169, M.B. Docket No. 07-198 (Sept. 11, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-169A1.pdf.

[29] *See, e.g.*, American Cable Association, *Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103* iv-v (Mar. 2, 2005), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517495117.



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arrangements[30] and preventing broadcasters from withholding important local content as leverage against smaller video providers. Regardless of what path Congress takes, parity, transparency, and effective enforcement are essential to protecting smaller MVPDs and consumers.

*III. Move Towards Eliminating Distant Signal Protection*

Distant signal protection is increasingly an anachronism in an Internet Age, where computers and broadband connections are providing content choices from around the globe for those citizens who have Internet access. Perhaps more pressingly, the rules that require satellite providers to carry only those local stations within a customer's DMA create situations in which satellite providers are effectively unable to provide customers with even the local channels they desire. Because DMAs often cross state boundaries and satellite providers are more inclined to retransmit channels from large metropolitan areas, many customers can only receive out-of-state channels, depriving them of the news, sports, weather and political information that is relevant to their daily lives. This harms localism rather than aiding it.[31]

Likewise, because satellite providers cannot offer channels even 1 mile outside a DMA unless they are deemed "significantly viewed,"[32] customers on the edge of a DMA may be cut off from the local content they could receive via broadcast. Additionally, a number of DMAs do not have a full complement of major networks, preventing satellite from offering those to customers *at all*.[33] And while cable's situation is currently different, the network nonduplication, syndicated exclusivity rules, and contractual obligations of broadcasters combine to produce similarly consumer-unfriendly restrictions on the availability of programming.

In the long term, Congress should move away from distant signal restrictions. While I recognize the value in ensuring that local broadcasts survive and are available to consumers, this need not be accomplished at the expense of consumer choice. All MVPDs should be free to respond to customer desires and offer, in addition to local stations, other stations their customers want, whether they're from next door, the next state, or the opposite coast. In the age of the Internet, where access to content is not restricted by state lines or artificial "market areas," attempts to force subscribers to watch only local stations are misguided and doomed to failure. Congress should recognize this and move towards a world where MVPDs can compete on equal footing with, and on, the Internet.

Recognizing that this world may be farther away than the reauthorization of SHVERA, Congress should, in the context of a unified regulatory structure, seek to fix the immediate problems caused by DMA-based and distance-based restrictions on MVPD retransmission. There are several approaches that could help alleviate the problems. At minimum, the rules should be relaxed as the Copyright Office suggests to allow retransmission of any in-state signals, and in cases where this still fails to provide a network, importing a signal from elsewhere should be

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[30] *See supra* at 5.
[31] *See Copyright Office Report* at 138 (citing *Broadcast Localism, Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324, 1345 (2008)).
[32] *See supra* note 7; 47 C.F.R. § 76.54 (defining "significantly viewed").
[33] *See Copyright Office Report* at 176 n.100.



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allowed.[34] Further, the rules should allow providers to import stations from all neighboring DMAs.[35] Fixes such as these could be taken as first steps towards a simpler national regulatory structure that promotes choice and competition instead of the complex web of restrictions that currently constrain choice and inflate prices.

**Conclusion**

In reauthorizing SHVERA, Congress should seek to achieve the following:

- Create regulatory and licensing parity between all types of MVPDs, including Internet-based providers.
- Eliminate the 5-year reauthorization cycle for satellite-based providers.
- As a step towards eliminating distant signal restrictions, relax DMA-based and distance-based restrictions on retransmission of broadcast signals.
- Reform retransmission consent by increasing transparency and reporting requirements, streamlining complaint processes, and considering compulsory retransmission consent licenses.
- Ensure that changes to unrelated copyright and communications laws are not attached to any bill reauthorizing SHVERA.

I would like to thank the Committee again for giving me the opportunity to testify today. Our organizations are eager to work with you to find ways to accomplish the goals discussed above. I look forward to your questions.

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[34] *Id.* at 220-21.

[35] In 2007, Congressman Ross introduced the *Television Freedom Act of 2007* (H.R. 2821), which would have allowed retransmission of broadcasts from "adjacent market[s]."



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**Hearing on "Ensuring Television Carriage in a Digital Age"**

**United States Senate**
**Committee on the Judiciary**

**February 25, 2009**

**Statement of K. James Yager**
**CEO, Barrington Broadcasting**

**On behalf of the National Association of Broadcasters**



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**INTRODUCTION AND SUMMARY**

Chairman Leahy, Ranking Member Specter, and members of the Committee, thank you very much for having me here today. My name is Jim Yager and I am the CEO of Barrington Broadcasting which owns and operates 21 television stations in 15 small to mid-sized markets.

Ever since Congress crafted the original Satellite Home Viewer Act of 1988 ("SHVA"), it has worked to ensure *both* (1) that free, over-the-air network broadcast television programming will be widely available to American television households, *and* (2) that satellite retransmission of television broadcast stations will not jeopardize the strong public interest in maintaining free, over-the-air local television broadcasting. Those two goals remain paramount today.

There can be no doubt that delivery of *local* stations by satellite is the best way to meet these twin objectives. The first two times Congress considered the topic—in 1988 and 1994—delivery of local stations by satellite seemed far-fetched. Congress therefore resorted to a considerably less desirable solution: permitting importation of *distant* television stations, although only to households that could not receive their local network-affiliated stations over the air.

When Congress revisited this area in 1999, the world had changed: local-to-local satellite transmission had gone from pipe dream to technological reality. And in response, in the 1999 Satellite Home Viewer Improvement Act ("SHVIA"), Congress took an historic step, creating a new "local-to-local" compulsory license to encourage satellite carriers to deliver *local* television stations by satellite to the viewers in their home communities. At the same time, Congress knew that allowing satellite carriers to



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use the new license to "cherry-pick" only certain stations would be very harmful to free, over-the-air broadcasting and to competition within local television markets. Congress therefore made the new "local-to-local" license available only to satellite carriers that deliver all qualified local stations.

Congress' decision to create a carefully-designed local-to-local compulsory license has proven to be a smashing success. Despite gloomy predictions by satellite carriers before enactment of SHVIA that the "carry-one-carry-all" principle would sharply limit their ability to offer local-to-local service, the nation's two major DBS companies, DIRECTV and DISH Network, today deliver local stations by satellite to the overwhelming majority of American television households.

DISH Network now serves 177 television markets, or Designated Market Areas ("DMAs"), that collectively cover 97 percent of all U.S. TV households. DIRECTV today serves 150 DMAs covering more than 94 percent of all U.S. TV households.

When Congress renewed SHVIA in 2004 with the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), the dramatic growth in satellite delivery occasioned by the enactment of the local-to-local license in 1999 was already apparent. Recognizing that service by local television stations was better than service by distant television stations, SHVERA incorporated the important new requirement colloquially known as "if local, no distant." Under this requirement, distant analog signals cannot generally be imported into a television market to new subscribers if the satellite carrier is delivering local analog signals in that market. Similarly, a distant network digital signal cannot be imported if the satellite carrier is offering local-to-local digital signal carriage of a local station affiliated with that network. Thus, distant signal importation by satellite



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carriers has, in the four plus years since SHVERA was enacted, been gradually phased out as the satellite carriers have extended analog and digital local-into-local service in more markets and new subscribers have signed up.

The distant signal license today is principally an artifact. Of the 31 million subscribers to DBS service only around 2 percent continue to receive a distant signal package, and that number continues to steadily decline.

While the local-to-local compulsory license has worked well, the distant-signal compulsory license (codified in Section 119 of the Copyright Act) has not. For the first ten years after this law was enacted, satellite carriers systematically ignored the clear, objective definition of "unserved household" and instead delivered distant signals to anyone willing to say that they did not like their over-the-air picture quality. Only through costly and protracted litigation were broadcasters able to bring a halt to this behavior.

Experience has shown that the local-to-local compulsory license has been the right way—and the distant-signal compulsory license has been the wrong way—to address delivery of over-the-air television stations to satellite subscribers. Congress's focus should be to require local-to-local service in all markets and to hasten the delivery of local-to-local service in high definition format ("HD") to subscribers. At most, the distant-signal compulsory license should be limited to markets in which the satellite carrier does not yet offer local-to-local service until such service in all markets is achieved.

To a great extent, Section 119 has outlived its usefulness and with respect to the provision of distant network stations in markets where local-to-local is being provided,



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should sunset at the end of 2009. Local-to-local should be mandatory in all television markets by the end of 2010, at which time Section 119 should sunset for those markets as well. If Congress should nevertheless choose to renew Section 119, it should again specify that Section 119 will sunset after a limited period (no longer than five years) so that Congress can decide then if there is any reason to continue this government intervention in free market negotiations for copyrighted television programming.

## I. THE PRINCIPLES OF LOCALISM AND OF RESPECT FOR LOCAL STATION EXCLUSIVITY ARE FUNDAMENTAL TO AMERICA'S EXTRAORDINARILY SUCCESSFUL TELEVISION SERVICE

As Congress has consistently stressed—going back to 1988, when it originally crafted the rules governing satellite importation of distant broadcast stations—the principles of localism and of local contract rights have been pivotal to the success of American television service.

### A. The Principle of Localism is Critical to America's Extraordinary Television Broadcast Service

Unlike many other countries that offer only national television channels, the United States has succeeded in creating a rich and varied mix of *local* television service providers through which more than 200 communities—including towns as small as Glendive, Montana, which has fewer than 4,000 television households—can have their own local voices. But over-the-air local TV stations—particularly those in smaller markets such as Glendive—can survive only if they can generate advertising revenue based on local viewership. For this reason, stations bargain for and obtain exclusive rights to present certain programming in their markets that they believe will attract viewers. If satellite carriers can override the copyright interests of local stations by



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offering the same programs on stations imported from other markets, the viability of local TV stations—and their ability to serve their communities with the highest-quality programming—is put at risk.

The "unserved household" limitation on importation of distant signals is simply the latest way in which the Congress and the FCC have implemented the fundamental policy of localism, which has been embedded in federal law since the Radio Act of 1927. In particular, the "unserved household" limitation in the SHVA implements a longstanding communications policy of ensuring that local network affiliates—which provide free television and local news to virtually all Americans—do not face importation of duplicative network programming.

The objective of localism in the broadcast industry is "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663 (1994) (*Turner I*); *see United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 & n.39 (1968) (same). That policy has provided crucial public interest benefits. As the Supreme Court has observed

> Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.

*Turner Broadcasting Sys. v. FCC*, 117 S. Ct. 1174, 1188 (1997).

Thanks to the vigilance of Congress and the Commission over the past 60 years, over-the-air television stations today serve more than 200 local markets across the



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United States, including markets as small as Presque Isle, Maine (with only 31,000 television households), North Platte, Nebraska (with 15,000 television households), and Glendive, Montana (with 4,000 television households).

This success is largely the result of the partnership between broadcast networks and affiliated television stations in markets across the country. The programming offered by network affiliated stations is available over-the-air for free to local viewers, unlike cable or satellite services, which require subscription payments by the viewer. *See Turner I*, 512 U.S. 622, 663; *Satellite Broadcasting & Communications Ass'n v. FCC*, 275 F.3d 337, 350 (4th Cir. 2001) ("SHVIA . . . was designed to preserve a rich mix of broadcast outlets for consumers who do not (or cannot) pay for subscription television services."); Communications Act of 1934, § 307(b), 48 Stat. 1083, 47 U.S.C. § 307(b). Although cable, satellite, and other technologies offer alternative ways to obtain television programming, tens of millions of Americans still rely on broadcast stations as their exclusive source of television programming, *Turner I*, 512 U.S. at 663, and broadcast stations continue to offer most of the top-rated programming on television.

The network/affiliate system provides a service that is very different from pay networks. Each network affiliated station offers a unique mix of national programming provided by its network, local programming produced by the station itself, and syndicated programs acquired by the station from third parties. As Congress recognized in drafting the original SHVA in 1988, "historically and currently the network-affiliate partnership serves the broad public interest." H.R. Rep. 100-887, pt. 2, at 19-20 (1988). Unlike pay networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network affiliate provides a customized



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blend of programming suited to its community—in the Supreme Court's words, a "local voice."

The local voices of America's local television broadcast stations make an enormous contribution to their communities. Television broadcasters' commitment to localism extends beyond just broadcasting itself in the form of help to local citizens—and local charities—in need. It is through local broadcasters that local citizens, civic groups and charities raise awareness and educate members of the community. Every year broadcasters raise many millions of dollars to support the needs of their local communities.

Community service programming, along with day-to-day local news, weather, and public affairs programming, is made possible, in substantial part, by the sale of local advertising time during and adjacent to network programs. These programs (such as "Desperate Housewives," "CSI," "American Idol," and "The Office") often command large audiences, and the sale of local advertising slots during and adjacent to these programs is therefore a crucial revenue source for local stations.

A variety of technologies have been developed or planned—including cable, satellite, telco, and the Internet—that, as a technological matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the locally-oriented network/affiliate system, Congress or the Commission or the courts have acted to ensure that the retransmission system does not import duplicative network programming from distant markets and thereby erode the public's local television service. For example, the threat of unauthorized Internet retransmissions of television stations was quickly halted by the courts (applying the



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Copyright Act) and condemned by Congress as outside the scope of any existing compulsory license.[1/]

**B. Protecting the Rights of Copyright Owners to License Their Works in the Marketplace Is Another Principle Supporting a Highly Circumscribed Distant-Signal Compulsory License**

By definition, the Copyright Act is designed to *limit* unauthorized marketing of works to which the content creators or owners hold exclusive rights. *See* U.S. Constitution, art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

While Congress has determined that compulsory licenses are needed in special circumstances, the courts have emphasized that such licenses must be construed narrowly, "lest the exception destroy, rather than prove, the rule." *Fame Publ'g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975); *see also* Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590 (1991) (same). The principle of narrow application and construction of compulsory licenses is

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[1/] *See National Football League v. TVRadioNow Corp. (d/b/a iCraveTV)*, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. 2000); 145 Cong. Rec. S14990 (Nov. 19, 1999) (statements by Senators Leahy and Hatch that no compulsory license permits Internet retransmission of TV broadcast programming).



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particularly important as applied to the distant-signal compulsory license, because that license not only interferes with free market copyright transactions but also threatens localism.

### C. In Enacting SHVA, SHVIA and SHVERA, Congress Reaffirmed the Central Role of Localism and of Marketplace Negotiations for Local Program Distribution

When Congress crafted the original Satellite Home Viewer Act in 1988, it emphasized that the legislation "respects the network/affiliate relationship and promotes localism." H.R. Rep. No. 100-887, pt. 1, at 20 (1988). And when Congress temporarily extended the distant-signal compulsory license in 1999, it reaffirmed the importance of localism as fundamental to the American television system. For example, the 1999 SHVIA Conference Report says this:

> "*[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. . . .* [T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of *local* television broadcast stations to subscribers who reside in the *local* markets of those stations."
>
> SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).



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The SHVIA Conference Report also stressed the need to interfere only minimally with marketplace arrangements—premised on protection of copyrights—in the distribution of television programming:

> "[T]he Conference Committee is aware that *in creating compulsory licenses* . . . [it] *needs to act as narrowly as possible to minimize the effects of the government's intrusion* on the broader market in which the affected property rights and industries operate. . . . *[A]llowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right—bought and paid for in market-negotiated arrangements—to show the works in question undermines those market arrangements.*"
>
> *Id.*

The SHVIA Conference Report also emphasized that "the specific goal of the 119 license, which is to allow for *a life-line network television service to those homes beyond the reach of their local television stations*, must be met by *only* allowing distant network service to those homes which cannot receive the local network television stations. Hence, the 'unserved household' limitation that has been in the license since its inception." *Id.* (emphasis added).

Finally, the SHVIA Conference Report highlighted "the continued need to monitor the effects of distant signal importation by satellite," and made clear that Congress would need to re-evaluate after five years whether there is any "continuing need" for the distant signal license. *Id.*



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Against this consistent historical backdrop, SHVERA continued to confirm the importance of minimizing the abrogation of the rights of local broadcast stations and content creators/distributors:

> The abrogation of copyright owners' exclusive rights and the elimination of transaction costs for satellite carriers are valuable accommodations that benefit the DBS industry. The terms and conditions of § 119, therefore, are crafted to represent a careful balance between the interests of satellite carriers who seek to deliver distant broadcast programming to subscribers in a manner that is similar to that offered by cable operators, and the need to provide copyright owners of the retransmitted broadcast programming fair compensation for the use of their works.
>
> [. . .]
>
> An element of the § 119 license since inception, the unserved household limitation has been a central tenet of congressional policy on distant signal carriage. Its primary purpose is to ensure that those residing in rural areas or in areas where terrain makes it impossible to receive an acceptable over-the-air signal from their television stations can receive a "life-line" network television service from a satellite provider.
>
> Where a satellite provider can retransmit a local station's exclusive network programming but chooses to substitute identical programming from a distant network affiliate of the same network instead, the satellite carrier undermines the value of the license negotiated by the local broadcast station as well as the continued viability of the network-local affiliate relationship. . . .



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> The Committee has consistently considered market-negotiated exclusive arrangements that govern the public performance of broadcast programming in a given geographic area to be preferable to statutory mandates. Accordingly, a second purpose of the unserved household limitation is to confine the abrogation of interests borne by copyright holders and local network broadcasters to only those circumstances that are absolutely necessary to provide the "life-line" service.
>
> H.R. REP. NO. 108-660, at 9-11 (2004).

But SHVERA is not merely a continuation of the Section 119 *status quo*. Building upon the local-into-local Section 122 compulsory license enacted in SHVIA, SHVERA also began to *phase out* the Section 119 distant compulsory license. The class of viewers to whom satellite carriers may retransmit distant duplicating network signals was considerably narrowed through the principle of "if local, no distant," as discussed above. Thus, Section 103 of SHVERA, codified in 17 U.S.C. § 119(a)(4), created a new limitation on the distant signal license, greatly restricting its applicability where local-into-local retransmissions are available. Section 204 of SHVERA, codified in 47 U.S.C. § 339(a)(2), created a Communications Act analogue to the Copyright Act amendment. The new, fundamental limitation imposed by SHVERA is the *ineligibility* of distant network signals for satellite delivery to subscribers who are served by the network-affiliated signals of local broadcast stations via local-into-local satellite service. This principle applies as fully to digital signals as it does to analog signals.[2] The relationship

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[2] *See* 17 U.S.C. § 119(a)(4)(D); 47 U.S.C. § 339(a)(2)(D).



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between localism and the congressional policy preference for local-into-local service was expressed by Congressman Buyer as follows:

> The act imposes a variety of limits designed to protect free, local, over-the-air broadcasting. . . . Put another way, local-to-local service is the right way, and—except when there is no other choice—distant network stations are the wrong way, to deliver broadcast programming by satellite. Local-to-local fosters localism and helps keep free, over-the-air television available to everyone, while delivery of distant network stations to households that can receive their own local stations (whether over the air or via local-to-local service) has just the opposite effect.
>
> 150 CONG. REC. H8221-H8222 (Oct. 6, 2004) (statement of Rep. Buyer).

## II. THE LOCAL-TO-LOCAL SERVICE IS A WIN-WIN-WIN FOR CONSUMERS, BROADCASTERS, AND SATELLITE COMPANIES

Unlike the importation of distant network stations, which can do grave damage to the public service made possible by effective network/affiliate relationships, delivery of *local* stations to the stations' own *local* communities—*e.g.,* San Antonio stations to viewers in the San Antonio area—is a win-win-win for consumers, local broadcasters, and DBS firms alike. As Congress explained in 1999 when it created the new local-to-local compulsory license in Section 122 of the Copyright Act, the new Act "structures the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of *local* television broadcast stations to subscribers who reside in the *local* markets of those stations." 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).



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### A. Satellite Firms Have Enjoyed Extraordinary Growth, Thanks in Major Part to the Local-to-Local Compulsory License

As the FCC recognized in its most recent Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, the Direct Broadcast Satellite ("DBS") industry is thriving—and offering potent competition to cable. The DBS industry, which enrolled its first customer only 15 years ago, grew to almost 28 million subscribers as of June 2006. 13th Annual Assessment, MB Dkt. No. 06-189, ¶ 75 (released Jan. 16, 2009). In recent years the growth rate for DBS has far exceeded the growth of cable every year. Thus, in June 2002, DBS subscribers grew by 13.5% over the prior year, followed by growth of 11.6% by June 2003, another 13.8% by June 2004, and yet another 12.8% by June 2005. At the same time, cable subscription penetration was essentially stagnant. 13th Annual Assessment, Appendix B, Table B-1. Just in the 12 months between June 2005 and June 2006, the DBS industry added another 1.9 million new subscribers, surging from 26.12 million to 27.97 million households. 13th Annual Assessment at ¶ 75. Today, the total subscriber base tops 31 million.[3]

DIRECTV is currently the second-largest multichannel video programming distributor ("MVPD"), behind only Comcast, while DISH Network is the third-largest MVPD. *Id.*, ¶ 76.

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[3] DIRECTV, Inc., Press Release, The DIRECTV Group Q4 Results Cap Record Setting Financial Performance in 2008 (Feb. 10, 2009), *available at* <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=364395> (stating that DIRECTV ended 2008 with 17,621,000 subscribers); DISH Network Corp., Press Release, DISH Network(R) Reports Third Quarter 2008 Financial Results (Nov. 10, 2008), *available at* <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=346565> (stating that DISH Network ended the third quarter of 2008 with 13,780,000 subscribers).



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The growth of the DBS industry has far outstripped even optimistic predictions made just a few years ago. In its January 2000 Annual Assessment, for example, the FCC quoted industry analysts who predicted that "DBS will have nearly 21 million subscribers by 2007." 2000 Annual Assessment, 15 FCC Rcd. 978, ¶ 70. As the statistics quoted above show, DBS reached that level not in 2007, but in *2003*—four years earlier than predicted.

As the FCC has repeatedly pointed out, delivery of local stations by satellite has been a major spur to this explosive growth. *E.g.*, 2004 Annual Assessment, ¶ 8. In June 1999, just before the enactment of the new local-to-local compulsory license in SHVIA, the DBS industry had 10.1 million subscribers. 2000 Annual Assessment, ¶ 8. Only four years later, the industry had more than doubled that figure to 20.4 million subscribers. 2004 Annual Assessment, ¶ 8. And in the nine years since 1999, that 10 million subscriber number has tripled to more than 30 million subscribers today. That this growth has been spurred by the availability of local-to-local is beyond doubt: the DBS industry's own trade association, the Satellite Broadcasting & Communications Association, stressed that "[t]he expansion of local-into-local service by DBS providers *continues to be a principal reason that customers subscribe to DBS*." SBCA Comments at 4, Dkt. No. 03-172 (filed Sept. 11, 2003) (emphasis added).

**B. Contrary to the DBS Industry's Pessimistic Predictions, Satellite Local-to-Local Service is Now Available to the Overwhelming Majority of American Television Households**

Over the past few years, DISH Network and DIRECTV have repeatedly claimed that capacity constraints severely limit their ability to offer local-to-local service to more than a small number of markets. The DBS firms used that argument—unsuccessfully—



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in 1999 in attempting to persuade Congress that it should permit DBS companies to use a new compulsory license to "cherry-pick" only the most heavily-watched stations in each market. They used it again in arguing—again unsuccessfully—in 2000 and 2001 that the courts should strike down SHVIA's "carry one, carry all" principle as somehow unconstitutional. And they made the same claims as a justification for the proposed horizontal merger of the nation's only two major DBS firms, DIRECTV and EchoStar. In 2002, for example, the two DBS firms claimed that unless they were permitted to merge, neither firm could offer local-to-local in more than about 50 to 70 markets. *EchoStar, DIRECTV CEOs Testify On Benefits of Pending Merger Before U.S. Senate Antitrust Subcommittee*, www.spacedaily.com/news/satellite-biz-02p.html ("Without the merger, 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.") (quoting DIRECTV executive).

Contrary to these pessimistic predictions, each of the two DBS firms today offers local-to-local programming to the overwhelming majority of U.S. television households. Although the DBS firms claimed they would *never* be able to serve more than 70 markets unless they merged, DISH Network today serves 177 television markets which collectively cover 97 percent of all U.S. TV households.[4/]

DIRECTV currently offers local-to-local in 150 markets covering more than 94 percent of all U.S. television households.[5] In other words, the consistently pessimistic

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[4/] *See* DISH Network Local ChannelMarkets, *available at* <https://customersupport.dishnetwork.com/netqualweb/localmarkets.pdf>.

[5] *See* DIRECTV Local Channel Markets, *available at* <http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=1000013.



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predictions of DISH and DIRECTV concerning their ability to provide local-into-local service via satellite have been consistently wrong.

### C. DIRECTV and DISH Network Can and Should Deliver Local Signals, Including Local Digital Signals, Into All Markets

As discussed above, DIRECTV and DISH Network have consistently found ways to deliver more programming in the same spectrum. Nevertheless, in policy debates in Washington, the two firms regularly assure Congress (and the FCC) that no further technological improvement can be achieved.

This year, the Committee can again expect to hear from DIRECTV and DISH Network that they have no hope of finding enough capacity to provide local-into-local signals in all 210 television markets. Yet, in fact, the satellite carriers have available a wide range of techniques for expanding capacity to carry local station signals, including:

- spectrum-sharing between DIRECTV and DISH Network;
- use of Ka-band as well as Ku-band spectrum;
- higher-order modulation and coding;
- closer spacing of Ku-band satellites;
- satellite dishes pointed at multiple orbital slots;
- use of a second dish to obtain all local stations;[6/] and
- improved signal compression techniques.

Congress should not allow unsupported assertions by DIRECTV and DISH Network to undermine good public policy. Rather, Congress should commission a study

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[6/] SHVIA permits a satellite carrier to offer *all* local stations via a second dish, but not to split local channels into a "favored" group (available with one dish) and a "disfavored" group (available only with a second dish).



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independently to verify satellite operators' present and future capacity, not only in absolute terms, but relative to providing public service such as local-to-local in all television markets. Just as today's desktop computers are unimaginably more powerful than those available just a few years ago, we can expect similar improvements from America's satellite engineers.

## III. THE DISTANT-SIGNAL COMPULSORY LICENSE HAS BEEN ABUSED; REQUIRING LOCAL-TO-LOCAL SERVICE IN ALL MARKETS WOULD ELIMINATE THE NEED FOR IT.

America's free, over-the-air television system is based on *local* stations providing programming to *local* viewers. When satellite carriers began delivering television programming in the 1980s, however, retransmission of local television stations by satellite was not yet technologically feasible. In 1988, Congress therefore fashioned a stopgap remedy: a compulsory license that allows satellite carriers to retransmit *distant* network stations, but only to "unserved households." 17 U.S.C. § 119. The heart of the definition of "unserved household" has always been whether the residence can receive an over-the-air signal of a certain objective strength, called "Grade B intensity," from a local affiliate of the relevant network. *Id.*, § 119(d)(10)(A) (definition of "unserved household"). In 1994, Congress extended the distant-signal license for another five years, but expressly imposed on satellite carriers the burden of proving that each of these customers is "unserved." 17 U.S.C. § 119(a)(5)(D).

In 1999, Congress again extended the distant-signal license as part of SHVIA and statutorily mandated use of the FCC-endorsed computer model (called the "Individual Location Longley-Rice" model, or "ILLR") for predicting which households are able to receive signals of Grade B intensity from local network-affiliated stations. 17



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U.S.C. § 119(a)(2)(B)(ii). In SHVIA, Congress also classified certain very limited new categories of viewers as "unserved," including (1) certain subscribers who had been illegally served by satellite carriers but whom Congress elected to "grandfather" temporarily, *see* 17 U.S.C. § 119(e), and (2) qualified owners of recreational vehicles and commercial trucks, *see id.*, § 119(a)(11).

By its terms, grandfathering will expire at the end of 2009. 17 U.S.C. § 119(e). Unlike in 1999, when Congress saw grandfathering as a way to reduce consumer complaints by allowing certain ineligible subscribers to continue receiving distant signals, the end of grandfathering will have little impact in the marketplace. *First*, DIRECTV and DISH Network offer local-to-local in 180 DMAs, which collectively cover nearly 98 percent of U.S. television households. All of the subscribers in these markets (including subscribers claimed to be grandfathered) are able to receive their local channels by satellite, making the availability of distant signals unnecessary, irrelevant, and undesirable. *Second*, a federal court found in 2006 that EchoStar (i.e., DISH Network) forfeited the right to rely on grandfathering because of its abusive practices. *Third*, because of ordinary subscriber churn and relocation, many grandfathered subscribers are no longer DBS customers or are no longer grandfathered. *Fourth*, for the small number of subscribers in non-local-to-local markets that they might claim are currently grandfathered, DIRECTV and EchoStar are free to seek (and may already have obtained) waivers from the affected local stations. *Finally*, any grandfathered subscriber is (by definition) predicted to receive at least Grade B intensity signals over the air from their local network stations and thus are able to view their own local stations



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even if they obtain no network stations by satellite. This special exception should therefore be allowed to expire routinely.

### A. Delivery of Distant Signals Is a Poor Substitute for Delivery of Local Television Stations

There is no benefit—and many public interest drawbacks—to satellite delivery of distant, as opposed to local, network stations. Unlike local stations, distant stations do not provide viewers with their *own* local news, weather, emergency, and public service programming. Viewership of distant stations undercuts *local* stations' ability to fund their free, over-the-air localized service. Distant network signals delivered to any household that can receive local over-the-air stations simply siphon off audiences and diminish the revenues that would otherwise support free, over-the-air programming, and including local programming services.

Members of Congress and other candidates are also impacted by importation distant signals: a viewer in Phoenix, for example, will not see political messages running on local Phoenix stations if he or she is watching New York or Los Angeles stations from DIRECTV instead. And, it seems most unlikely that a candidate in Phoenix would want to purchase advertising on stations in the costliest media markets in the United States—New York and Los Angeles. It is also significant that viewers would not receive other political programming (such as debates between candidates for Arizona offices) if they are watching out-of-market stations.

### B. Providing Local-To-Local Service in All Markets Would Virtually Eliminate the Number of Truly "Unserved" Households

Unlike the local-to-local compulsory license, the distant-signal compulsory license threatens localism and interferes with the free market copyright negotiations. As



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a result, its only defensible justification is as a "hardship" exception—to make network programming available to the small number of households that otherwise have no access to it. The 1999 SHVIA Conference Report states that principle eloquently: "the specific goal of the 119 license . . . is to allow for *a life-line network television service to those homes beyond the reach of their local television stations.*" 145 Cong. Rec. at H11792-793. (emphasis added).[7]

As noted above, nearly 98 percent of all U.S. television viewers have the option of viewing their *local* network affiliates *by satellite*—and that number is growing all the time. Thus, as a real-world matter, *there are no unserved viewers* in areas in which local-to-local satellite transmissions are available, because it is no more difficult for subscribers to obtain their local stations from their satellite carriers than to obtain distant stations from those same carriers. Therefore no policy or other rationale justifies treating satellite subscribers in local-to-local markets as "unserved" and therefore eligible to receive distant network stations, and there is every reason to close this loophole.

The distant-signal compulsory license is *not* designed to, and should not be allowed to, permit satellite carriers to undermine the locally-oriented network/affiliate

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[7] *See, e.g.*, Copyright Office Report at 104 ("The legislative history of the 1988 Satellite Home Viewer Act is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection."); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship"); *id.* at 26 ("The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely"); H.R. REP. No. 100-887, pt. 1, at 20 (1988) ("Moreover, the bill respects the network/affiliate relationship and promotes localism.").



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relationship by delivering to viewers in *served* households—who can already watch their own local ABC, CBS, Fox, and NBC stations—network programming from another distant market. Consider, for example, a network affiliate in Sacramento, California, a DMA in which there are today no DBS subscribers who are genuinely "unserved" because both DIRECTV and DISH Network offer the local Sacramento ABC, CBS, Fox, and NBC affiliates by satellite. Nevertheless, for any Sacramento-area viewer who is technically "unserved" under the Grade B intensity standard, satellite companies can undercut the public's local service from their Sacramento stations with duplicative programming on distant signals from East Coast network affiliates. The Sacramento stations—and every other station in the Mountain and Pacific Time Zones that has local-to-local service—therefore can lose badly needed local viewers, even though the viewers have no need to receive a distant signal to watch network programming.

Similarly, the ability of satellite carriers to offer distant stations that carry alternative sports events is a needless and destructive infringement of the rights of copyright owners, who offer the same product—out-of-town games—on a free market basis. For example, the NFL has for years offered satellite dish owners (at marketplace rates) a package called "NFL Sunday Ticket," which includes all of the regular season games played in the NFL. The distant-signal compulsory license creates a needless "end-around" this free-market arrangement by permitting satellite carriers to retransmit distant network stations for a pittance through the compulsory license.



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## IV. PROPOSALS TO MODIFY STATION MARKETS COULD SEVERELY UNDERMINE LOCALISM

### A. Cross-State Market Modifications Are Neither Necessary Nor Desirable.

Legislation has been proposed that would modify the copyright laws so that the programming broadcast by certain *in-state* television stations may be retransmitted by cable and satellite companies to residents of that state, regardless of the local television market in which these residents are located. This legislation is inconsistent with the carefully balanced system of "local" broadcast service established by Congress and would have significant adverse consequences for the public's local broadcast service, particularly the local services provided by local stations in small, rural markets.

Legislation is not necessary to enable cable and satellite companies to retransmit throughout a state the local news, weather, sports, public affairs, and informational programming broadcast by in-state stations. This kind of specific programming, not duplicating network and syndicated entertainment programming can already be imported by in-state cable and satellite services. Thus, the existing regulatory scheme already permits existing carriage of the type of in-state programming that the proposed legislation seeks to promote. To be explicit, these in-state produced programs may be retransmitted, with the consent of the originating stations, without any change in existing copyright or other laws.

Satellite and cable operators wishing to provide locally-produced and locally-owned news, weather, sports, public affairs, and informational programming of "in-state" stations may simply carry the specific locally produced programming of one or more of these in-state stations. In some areas of the country, cable companies, do, in



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fact, carry this kind of out-of-market *local* programming (without also importing "duplicating" out-of-market network and syndicated programming). The originating stations readily consent to the out-of-market retransmission of their local news, weather, sports, public affairs, and informational programming to other communities in the same state. Local cable companies can put these programs on a desirable, low dial "public access" channel without disrupting another cable entertainment program channel. Satellite carriers could also add these programs to a local satellite channel.

For Congress to artificially realign the scope of the local cable and satellite compulsory copyright licenses and reconfigure the boundaries of local television markets, overriding market conditions and natural viewing patterns would destabilize the television broadcast and advertising industries, would have adverse economic consequences for local stations, and, worst of all, would harm the public's localized broadcast service. In short, it would also disrupt the carefully balanced system of "local" broadcast service established by Congress in the Communications Act.

Stations in smaller, rural markets would sustain the most economic harm from legislation of this kind as a result of loss of viewers and advertisers to out-of-market big city stations that would be imported. For example, one can easily imagine the adverse financial consequences on local stations in small markets in Pennsylvania if duplicating programming from Philadelphia stations were to be imported into other markets within the state. The viewing fragmentation from distant duplicating network and syndicated entertainment and national sports programming would impair the economic ability of local stations to provide *local* news, weather, sports, and informational programming—a



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result contrary to the interest of the very viewers the legislation is intended to serve and of many other viewers as well.

Measures to facilitate and encourage importation by satellite of out-of-market stations into local markets would also remove an important economic incentive for satellite carriers to uplink *local* stations in every market and retransmit those local stations by satellite. For years Congress and the FCC have encouraged—rather than discouraged—satellite carriers to retransmit *local*—not *distant*—television stations into each of the nation's 210 local television markets. Legislation to expand the distant signal compulsory copyright license would be inconsistent with that well-established policy. The effect of similar legislation for cable would similarly run counter to the careful balance that the Congress and the FCC have struck to protect the public against cable's power and incentives to injure the public's *local* television service.

Manipulation of the scope of the compulsory copyright license to achieve market modifications would not necessarily produce the intended result in any event. Networks and syndicated program suppliers have always *restricted* the area in which a station may give retransmission consent to cable and satellite companies. So even if the copyright laws were modified by Congress, and even if the network non-duplication and syndicated program rules were eliminated, program suppliers would not likely change their local market program licensing arrangements.

This kind of legislation has significant implications for local stations in terms of program licensing, program exclusivity, and retransmission consent negotiations. Stations and program suppliers have strong incentives to maintain the integrity of their



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local markets and the exclusivity within those markets of their network and syndicated programming.

**B. Harm to the Digital Transition.**

As part of a very special public/private partnership, the broadcast industry, related industries and the federal government have all dedicated extraordinary energy, effort and resources to implement successfully the transition to digital broadcasting. Changes in television station markets at this time could jeopardize this unprecedented effort and substantial benefit of the transition, which include crystal-clear pictures and sound, more channels and more services – all provided for free.

As all members of this Committee are aware, by June 12 of this year every full-power television station in the nation will have made the switch to digital-only broadcasting. Broadcasters have worked tirelessly to implement the digital television ("DTV") transition. Thanks to the expenditure of billions of dollars and millions of person-hours, broadcasters have already built—and are on-air with—1655 DTV facilities providing digital service throughout the entire country.

Broadcasters are also fully committed to making certain that television viewers in all demographic groups understand what they need to do to continue receiving their local television signals after the switch to digital-only broadcasting. To that end, broadcast networks and television stations nationwide are participating in a multifaceted, multi-platform consumer education campaign that uses all of the tools available to broadcasters, their community partners, and related industries to ensure a smooth transition for viewers. The campaign includes DTV Action television spots, local speaking engagements, informational Web sites, a nationwide road show and a variety



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of other grassroots initiatives. Valued at over a billion dollars, the campaign will reach nearly all television viewers and generate over 132 billion audience impressions before it is complete later this year. The success of this public education effort was demonstrated by the relatively limited number of viewer calls that occurred when over 400 stations terminated analog broadcasts on February 17, 2009.

As millions of television viewers can already attest, digital television—especially high definition television ("HDTV")—provides a dramatic improvement over analog television. Even at its most basic resolution, digital television offers service of a far higher quality than analog. Standard definition digital service is free from the snow, ghosts and lack of vertical hold that can plague analog signals. Sound is also vastly improved. Viewers with connected stereos can experience surround sound and the attendant subtleties of a high fidelity television experience. Programming seen in HDTV marks a revolutionary improvement, especially when viewed on newer televisions capable of handling higher resolution signals. HDTV programming is presented in a cinema-like 16:9 aspect ratio, or widescreen image, that more naturally suits the human eye. Everything seen in HDTV, from scripted shows to news to sports programming, is in brilliant detail. Viewers can see blades of grass on a football field, clearer depth of field in dramas, and the dimples on both a golf ball and a local news anchor.

Local broadcasters and networks have invested billions of dollars in high-definition ("HD") programming. Today, the majority of primetime programming shown by the major television networks is in HD. Nearly every major sporting event aired by the networks, including almost every NFL game, NBA game, the NCAA Basketball Tournament, most major golf tournaments, major tennis tournaments and both the



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Winter and Summer Olympics, is broadcast in HD. Major network programs, including most scripted programs and non-scripted "reality" programs, are shown in HD. And increasingly local stations across the country are broadcasting their local news in HD. For local stations, this represents a major investment in advanced television technology, including costs for new cameras, new video processing and storage equipment, updated studios, and training.

In addition to improved picture quality, the switch to DTV allows local broadcasters flexibility to provide multiple channels of programming (i.e., multicasting) from a six MHz stream and substantially increases the overall amount of free programming. Stations across the country are experimenting with new formats and other ideas for multicast television, including local news, weather and sports programming.[8] As the transition to all-digital television progresses, broadcasters will continue to increase multicast offerings and provide alternatives to the increasingly costly cable and satellite programming.

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[8] Examples include: WRAL in Raleigh, NC, which on one of its subchannels airs local news and public affairs programming 24 hours per day with shows like "Focal Point" and "WRAL Listens"; KTVB in Boise, ID, which airs its "24/7" local news channel on a multicast channel; KFSN in Fresno, CA, which uses one of its subchannels to air local news, sports programming, and shows such as "Hispanic Today"; and WFSB in Hartford, CT, which is airing a local news and weather channel—Eyewitness News Now—and has, in conjunction with Connecticut Public Television, started Connecticut Television Sports Network, an all-local sports channel that covers local high school and college sports. In addition, niche programming, especially programming for Spanish-speaking audiences, has found a home on digital subchannels. LATV, based in Los Angeles, is a bilingual network channel distributed on digital multicast streams that offers music and entertainment programming for young Latino audiences. Likewise, Mexicanal Network, which features Spanish-language news, sports, and entertainment programs, is operating on multiple broadcast digital subchannels across the United States. MHz Network, based in northern Virginia, programs seven digital multicast channels to the Washington D.C. market, including channels that air Chinese, Nigerian, French, and Polish news and information in both English and foreign languages.



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In light of this massive investment in and commitment to a successful DTV transition, this Committee should be wary of proposals to modify television markets in a manner that would ultimately undermine local stations' ability to provide free, over-the-air digital services to consumers. The digital transition has not altered the policy commitment to broadcast localism, but has reaffirmed it. The FCC has been worked to ensure that, to the extent possible, DTV stations replicate the same local coverage patterns of their companion analog television stations. And the national commitment to preserving free, over-the-air television for local viewers has been clearly demonstrated by Congress's and the President's decision to delay the transition until June 12, 2009, so that no viewer is accidentally left behind.

Sweeping market modification proposals could not only undermine this investment in and commitment to locally-oriented television service, but could ultimately jeopardize many of the benefits of the DTV transition for viewers. If "in-state" distant stations are imported in lieu of local stations, long-established viewership and service patterns will be disrupted.[9] The investment in replicating established analog coverage

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[9] The Communications Act already has a provision, and the FCC a process, to modify the television markets of must carry stations. *See* 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59. These provisions are utilized by television stations and cable operators to adjust market boundaries based on the statutory criteria. This system works. The FCC has recognized that there may be good reasons not to modify a market to incorporate an additional "in-state" county, even though that county is part of a local "out-of-state" television market—namely, that county has a greater nexus to the other market than to the "in-state" market. When it comes to localism, state boundaries may be as arbitrary as television market boundaries. For example, counties in Northern Virginia (such as Arlington and Alexandria) are clearly appropriately part of the Washington, D.C. television market, not other markets in Virginia, such as Richmond, Norfolk or Charlottesville. Programming imported from these other Virginia markets would certainly not be more "local" to residents of Arlington than programming from stations in Washington, D.C. The same is true in many other parts of the country as well. *See, e.g., Agape Church, Inc.*, 14 FCC Rcd 2309 (1999) (denying market modification



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would be compromised as would the investment in educating viewers about the transition and how to be able to continue to watch the local television stations they have always seen.

In addition, one of the other key benefits of the digital transition, the ability of local television stations to program multiple channels (multicasts) will also be threatened. Reduced advertising revenue could inhibit, or even prevent, local television stations from producing and airing innovative local news and sports channels such as WFSB's Connecticut Television Sports Network in Hartford. Moreover, stations' incentive to develop local multicast channels airing, for example, news, sports or foreign language programming, could well be undermined if market modifications permit the importation of similar types of programming from outside their markets.

In short, market modification proposals actually stand to harm viewers by undermining localism; decreasing, rather than increasing, the diversity of voices and programming options; and jeopardizing many of the benefits of the digital transition.

## V. WHAT CONGRESS SHOULD DO THIS YEAR

As Congress is aware, the local-into-local compulsory license in Section 122 of the Copyright Act is permanent. Congress, however, has wisely, upon each reauthorization of the satellite legislation, limited the duration of the distant signal

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petition to add Crittenden County, Arkansas, to the must carry market of a Jonesboro, Arkansas, television station because Crittenden County was really part of the core of the Memphis, Tennessee, television market and such modification would "modify the basic nature and competitive relationships within the core area of the Memphis" market).



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license in Section 119 of the Copyright Act to five years. SHVERA's five-year extension of the distant signal license expires at the end of 2009.

**A. Phase-Out of the Section 119 Distant Network Signal License**

The Section 119 license both sunsets, in its entirety, and has phase-out provisions that affect the satellite retransmission of distant network signals to certain subscribers. The principal phase-out provision, which affects distant network signal delivery in local-into-local markets, has mooted much of the utilization of the license even before the license completely sunsets on December 31, 2009.

In particular, the Section 119 license contains a provision, known as the "if local, no distant" provision, that prohibits the delivery of distant network signals to new subscribers in television markets in which the satellite carrier offers local-into-local service under the Section 122 license. *See* 17 U.S.C. § 119(a)(4). Because the number of distant network signal subscribers has steadily declined since the introduction of local-into-local service at the same time that local-into-local service has expanded to 98% of all television households—the number of new subscribers to distant network signals, other than those for which local television stations have granted waivers of the restrictions, has diminished significantly. This phase-out of the utilization of the distant network signal license, and the expansion of local-into-local service under the Section 122 license, advances the Congressional policy goal of localism. Accordingly, Section 119 should sunset at the end of December 2009 with respect to the provision of distant network stations in markets where local-to-local is being



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provided. As explained below, local-to-local should be made mandatory by the end of 2010, at which time Section 119 should sunset for those markets as well.[10]

### B. Require Provision of "Local-into-Local" Satellite Service in All Television Markets

The next and final step in positioning DBS service as a competitor to cable service, and enhancing and preserving the public's stake in broadcast localism, is to require satellite carriers that provide "local-into-local" service to do so in *all* 210 television markets. Satellite carriers should be required, as a condition of reliance on the Section 122 "local-into-local" license in any television market, to extend "local-into-local" service to all 210 television markets no later than December 31, 2010, absent a waiver, for good cause, by the FCC. The extension of "local-into-local" satellite service in all markets would advance the longstanding national communications policy of localism, enhance multichannel video programming and price competition with cable and telco companies, and increase viewer choice. Congress could provide no greater service to assist viewers and consumers in this difficult economic climate than to enhance competition by mandating "local-into-local" satellite service in all 210 television markets.

### C. Accelerate the Provision of Local Television Signals in High Definition

The full benefits of the digital television transition will not be experienced by all Americans if the satellite industry is permitted to delay the availability of local television signals in high definition format. Unfortunately, in 2008 the FCC allowed the satellite

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[10] There are other dimensions of Section 119, however, including delivery of superstations and delivery of signals to "significantly viewed" areas, that are not subject to phase-out. Those provisions should be renewed for an additional five-year term.



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industry to delay for five years the retransmission of local television stations in high definition throughout the nation, thereby allowing satellite carriers to discriminate against certain local broadcast stations, especially in smaller, rural television markets. Moreover, independent stations, Spanish and other foreign language stations, and other minority and ethnic stations, even in larger television markets, are not, in general, being retransmitted by satellite carriers in HD. Thus, consumers in these markets who have purchased HD television sets in anticipation of the digital transition are deprived of receiving by satellite various local HD television broadcast signals. Congress should, accordingly, accelerate from February 17, 2013, to December 31, 2010, the date by which satellite carriers that retransmit local-into-local digital signals must retransmit those signals in HD if the station is broadcasting in HD.

**D. Revise the Signal Intensity Standard to Reflect the Digital Transition**

If Congress reauthorizes the distant network signal license, then Congress should revise that license to comport with the nation's transition to digital television service. Currently, due to an oversight, the license permits a satellite carrier to deliver a distant network signal to an "unserved household," as defined in 17 U.S.C. § 119(d)(10)(A), which is a household that cannot receive an over-the-air signal of Grade B intensity, as defined by the FCC in 47 C.F.R. § 73.683(a) (1999), of a station affiliated with the requisite network. That definition, in turn, applies a signal intensity standard—the Grade B standard—that has meaning with respect to *analog* signals but not *digital* signals. Because analog signals will not generally be transmitted after June 12 of this year, the definition of "unserved household" should be changed to one in which the household cannot receive an acceptable digital signal. Congress,



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accordingly, should substitute the FCC's noise-limited *digital* signal intensity standard, as set forth in 47 C.F.R. § 73.622(e)(1) of the FCC's Rules, for the existing Grade B *analog* standard. This substitution would change the definition of an "unserved household" in 17 U.S.C. § 119(d)(10)(A) to a household that cannot receive a *digital* signal from a local network station whose intensity is less than the signal standard the FCC has established for an acceptable *digital* signal in 47 C.F.R. § 73.622(e)(1) (i.e., the digital "noise limited" service standard). It is our understanding that the satellite carriers concur in this recommendation.

The "unserved household" provision in 17 U.S.C. § 119(d)(10)(A) should also expressly recognize that a subscriber that receives the relevant network programming from a local television station broadcasting that programming on a *multicast* digital channel is a "served" household. In other words, a household should be considered served without regard to which digital channel the local network station uses to broadcast its network's programming. In smaller markets, especially (but not exclusively) those that do not have a full complement of affiliates of the four major networks (ABC, CBS, FOX, and NBC), the "missing" network, as well as newer networks that satisfy the programming thresholds embodied in 17 U.S.C. § 119(d)(2), may affiliate with an existing full power television station for broadcast of that network's programming on a multicast channel of the station. Such arrangements are widespread, promote diversity and support other, often localized, programming initiatives on that and other multicast channels.



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**E. Adopt a Digital Signal Predictive Methodology**

In determining whether households are "unserved" under the Section 119 license, Congress, in 1999, established a predictive methodology, based on the FCC's development of the Individual Location Longley-Rice ("ILLR") computer algorithm, whose application provides a rebuttable presumption of Grade B quality *analog* television service. Subsequently, with SHVERA in 2004, Congress directed the FCC to recommend to Congress an ILLR *digital* signal predictive methodology. In response, and following an extensive proceeding, the FCC recommended an ILLR digital signal predictive methodology to Congress in ET Docket No. 05-182, FCC 05-19 (released December 9, 2005). Congress should now adopt the ILLR digital signal predictive methodology that the FCC has recommended to Congress for predicting whether a household can receive an acceptable *digital* signal from a local *digital* network station.

**F. Apply Network Non-Duplication and Syndicated Programming Exclusivity Protections Against All Distant Stations and For All Programming Channels, Including Digital Multicast Channels**

The Satellite Act as a general matter only provides network non-duplication and syndicated programming exclusivity protections to programming distributed by national superstations. That limited protection, however, creates a lack of parity with the traditional program exclusivity protections afforded broadcast stations from duplicative programming retransmitted by cable systems. The Copyright Office has recognized this lack of parity and has previously recommended to Congress that Section 119 be amended to provide program exclusivity protection for local broadcast stations whose programming is duplicated by *any* distant station. *See* U.S. Copyright Office, SATELLITE



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HOME VIEWER EXTENSION AND REAUTHORIZATION ACT § 110 REPORT (2006) ("Section 110 Report"), at 52. Congress should implement the Copyright Office's recommendation.

In addition, the digital television transition creates the opportunity for new services to be made available to the public via multicasting. Many stations, particularly in smaller markets, have launched additional channels of programming that may contain programming of the principal television networks (ABC, CBS, FOX, NBC, CW, MyNetworkTV) as well as other types of programming, including syndicated and sports programming. While some multichannel video programming distributors have recognized that the network non-duplication and syndicated programming exclusivity and sports blackout rules apply to programming contained on these multicast channels, others have refused to honor station notices invoking exclusivity protection. Congress should confirm that these rules apply to programming contained on all digital channels, including multicast digital channels, with respect to both satellite carriers and cable systems.

### G. Terminate All Grandfathered "Illegal" Subscribers

SHVIA in 1999, and then SHVERA in 2004, grandfathered certain otherwise "illegal" distant signal subscribers as new provisions of the statute were being phased in. Because this provision has outlived its usefulness, any remaining grandfathered "illegal" subscribers should be brought into compliance.

### H. Make Any Remaining Provisions of the Section 119 License Fully Digital

With the digital television transition, no useful purpose would be served in continuing to afford a compulsory copyright license for satellite retransmission of distant *analog* signals; thus, the distant *analog* signal compulsory license (and various



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references to "analog" in the statute) should now be eliminated. This housekeeping step will eliminate confusion and ambiguity in the law and to ensure full compliance. NAB has other, purely technical recommendations that it will share with you as appropriate.

### I. Require Companies That Rely on Section 111's Compulsory Copyright License to Comply with the Communications Act's Regulatory Requirements

Some companies utilize a video signal delivery technology using Internet Protocol ("IPTV") to provide video services rather than technologies traditionally used to deliver television signals to subscribers. But while these companies claim the benefit of Section 111's cable television compulsory copyright license, they nevertheless contend that they are not subject to the Communications Act's cable television regulations. In the interest of copyright and regulatory parity, Congress should clarify that Section 111's cable compulsory copyright license is available only to parties that comply with the Communications Act's cable television regulatory requirements.

## CONCLUSION

With the perspective gained from 21 years of experience with the Act, Congress should be guided by the same principles it has consistently applied: that localism and free-market competition are the bedrocks of sound policy concerning any proposal to limit the copyright protection that supports the public's free, over-the-air local broadcast service.

Reauthorization of the Act should not be used to effect market modifications that would undercut localism, disrupt local viewing and service patterns and run roughshod



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over the fair, balanced and market-based principles that underlie the current statutory retransmission consent system.

The distant signal license, which dates back to the inception of the Act, has outlived its usefulness and should expire. At the same time, Congress should promote the principle of localism by requiring local-to-local satellite service for all Americans in each of the 210 television markets and to ensure that all satellite customers reap the benefits of the digital transition by accelerating the satellite carriers' provision of high definition programming in local television markets.



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