

**REAUTHORIZATION OF THE SATELLITE HOME
VIEWERS IMPROVEMENT ACT OF 1999 (SHVIA)**

HEARING

BEFORE THE

**COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION**

UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

MAY 4, 2004

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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CONTENTS

	Page
Hearing held on May 4, 2004	1
Statement of Senator Burns	3
Prepared statement	5
Statement of Senator Lautenberg	54
Prepared statement	54
Statement of Senator Lott	56
Prepared statement	60
Statement of Senator McCain	1
Letter dated April 28, 2004 to Hon. John McCain from Congressman Raúl M. Grijalva, Member of Congress, House of Representatives	2
Statement of Senator Sununu	3

WITNESSES

DeLeon, Araceli, Vice President and General Manager of Stations KDRX– TV, Phoenix and KHRR–TV, Tucson, Arizona	44
Prepared statement	45
Ergen, Charles, Chairman and Chief Executive Officer, EchoStar Communica- tions Corporation	6
Prepared statement	7
Hartenstein, Eddy, Vice Chairman, The DIRECTV Group	40
Prepared statement	42
Sohn, Gigi B., President, Public Knowledge	48
Prepared statement	50
Yager, Jim, Chief Executive Officer, Barrington Broadcasting Company	13
Prepared statement	14

APPENDIX

Letter dated August 19, 2003 to David R. Goodfriend, Director, Legal and Business Affairs, EchoStar Satellite Corporation from William J. Roberts, Jr., Senior Attorney, U.S. Copyright Office	69
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REAUTHORIZATION OF THE SATELLITE HOME VIEWERS IMPROVEMENT ACT OF 1999 (SHVIA)

TUESDAY, MAY 4, 2004

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 9:32 a.m. in room SR-253, Russell Senate Office Building, Hon. John McCain, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

The CHAIRMAN. Good morning. Today, the Committee reexamines its previous work, the Satellite Home Viewers Improvement Act of 1999, commonly known as SHVIA. Portions of SHVIA are set to expire at the end of this year, and efforts to reauthorize this legislation have begun in both the House and the Senate.

In 1999, Congress's goal in enacting SHVIA was to place satellite operators on equal footing with cable operators. Congress's attempt at achieving regulatory parity for these two providers of video subscription services has produced mixed results. Five years after the enactment of SHVIA, cable companies remain the dominant providers of subscription video services. According to the Federal Communications Commission, these companies have more than 75 percent of the market for delivering video programming, and continue to press forward each year with rate increases considerably above the rate of inflation.

Unfortunately, the General Accounting Office has found that the presence of a satellite operator in a local market has no competitive effect on the rates a cable operator charges. A February *USA Today* article noted recent rate hikes aptly stated, "So much for predictions Rupert Murdoch and News Corp. would start a cable-satellite-TV industry price war after taking over DIRECTV, the top U.S. satellite service."

There is good news, however; satellite operators are now offering more consumers the ability to receive their local broadcast stations. In 2000, approximately 19 percent of satellite subscribers were able to receive local signals. By the end of 2003, that number increased to 86 percent of the U.S. households. The General Accounting Office has found that DBS operators have 40 percent higher subscribership in markets where local broadcast stations are offered.

In 1999, I voted against SHVIA, not only because it was included as part of an appropriations bill, but also because I did not feel the

legislation went far enough in promoting regulatory parity and encouraging the growth of satellite-delivered television programming against the entrenched cable monopoly.

As we now look to reauthorize SHVIA, I believe we must keep the goal of real regulatory parity in mind. This time around, Congress must ensure satellite operators have the right tools to bring robust competition to the video subscription market, which will lead to more programming options and lower prices for consumers. Additionally, Congress must review SHVIA in light of the looming transition to digital television, and ensure that cable and satellite operators can provide consumers with outstanding high-definition digital television content to facilitate this transition.

I have a letter from Congressman Grijalva concerning the use or discrimination against Spanish language independent public broadcasters, and, without objection, it'll be included in the record at this time.

[The information referred to follows:]

HOUSE OF REPRESENTATIVES
Washington, DC, April 28, 2004

Hon. JOHN MCCAIN,
United States Senate,
Washington, DC.

Dear Senator McCain:

In further reference to our conversation on the reauthorization of the Satellite Home Viewers Improvement Act (SHVIA), EchoStar's practice of placing major English language network affiliated broadcasters on a favorable satellite dish, while relegating Spanish language, independent and public broadcasters to a second, disfavored dish is discriminatory and in violation of current law. As you are aware, the FCC found this practice to be inconsistent with SHVIA and its own agency rules. Still, EchoStar is clearly abusing the statute and is now seeking codification of their practices in the reauthorization of SHVIA.

I find it disturbing that in markets in which EchoStar "found it necessary" to split broadcasters between two dishes, Spanish language broadcasters were systematically relegated to a second dish, while other, often lower rated stations, were placed on the main satellite dish. While EchoStar made the case that capacity was the issue and that local-into-local service would need to be terminated in some areas if all broadcasters are placed on the same dish, it is surprising that EchoStar "found" capacity for some Spanish language broadcasters on the main dish after House members from both sides of the aisle questioned their practices. Still, many Spanish language stations remain on the disfavored dish. While I am pleased that some capacity was made available (after EchoStar made several statements that it was not), I am concerned that EchoStar reassigned these stations for political purposes and will move them back to the second dish after the SHVIA bill passes if it does not address the matter.

Spanish language, independent and public broadcast stations in Arizona and across the country are an important part of the broadcast television landscape and it is important that EchoStar follow the law in regards to equitable placement on their satellite network.

In this regard, I would reinforce the message expressed to you by the Congressional Hispanic Caucus to include language in the Senate version of SHVIA that requires all broadcasters be placed on one dish and ask you to establish a 6 month compliance deadline.

Sincerely,

RAÚL M. GRIJALVA,
Member of Congress.

The CHAIRMAN. Senator Sununu?

**STATEMENT OF HON. JOHN E. SUNUNU,
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator SUNUNU. Thank you, Mr. Chairman.

I'm very interested in what our panel has to say today about the success of the Satellite Home Viewer Act, and, in addition to the regulatory issues that you raised, I think the question is whether or not the Act has performed as hoped for, in terms of providing access and competition and good prices for consumers.

In addition, I'm very interested in an issue which I've been working with the Chairman and his staff on, dealing with an anomaly, in that we use these DMAs, these marketing areas, for regulatory purposes. And in small states, like New Hampshire, where we have very limited access to local affiliates, I think there's only one broadcast affiliate, sometimes satellite consumers are prevented from getting access to local signals. We want to try to deal with this anomaly, and have been working with most all of the participants in the issue. Everyone seems pretty receptive to some kind of a fix, and I'm working to structure legislation that will attempt to deal with this problem felt by New Hampshire and a couple of other small states, again where the number of local affiliates is limited to two or even fewer.

I hope to be able to come to some accommodation, and look forward to the testimony today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Burns, welcome, and thank you for your long involvement in this issue.

**STATEMENT OF HON. CONRAD BURNS,
U.S. SENATOR FROM MONTANA**

Senator BURNS. Thank you very much, Mr. Chairman. And thank you for this hearing to reauthorize this Act.

I think it's probably one of the really good pieces of legislation that we all got to work on. It's also important to my state of Montana. As you know, we have the highest penetration level of satellite television in the country, over 40 percent. Over-the-air broadcast signals, cable delivery limited to the geography of my state, of course, and satellite television has been a staple for our video marketplace for a long time.

I think today's hearing should focus on this reauthorization, which corrected problems that satellite TV's customers faced in getting access to network television programming and helped to level the playing field so that satellite TV could compete with cable. To a large degree, this bill has functioned as intended. In fact, it has had some dramatic effect on subscribers in my state.

While I'm a former broadcaster, I recognize the tremendous contribution that local broadcasting makes to our communities, particularly in rural states. The ability to receive local television signals is more than just having access to local sports or entertainment programming; it's critical for the way we receive our local news and our community information. Access to local signals is particularly critical where we are; when we experience extreme weather conditions, ranging from severe floods to intense blizzards.

Not to say that they need a little farm news out there in markets, too, every now and then, so I think that's pretty important.

Unfortunately, the vast majority of the local-to-local offerings by DBS operators serve urban markets, while Congress has heard numerous proposals and promises for local-into-local signals in rural areas by satellite broadcasters over the years, the reality seems to always be driven by raw economics. With this in mind, I was the author of the Local TV Act of 2000, which created a \$1.25 billion loan program, guarantee program, to fund local-to-local services to be administered by the Rural Utility Service. Unfortunately, as with so many issues, passing legislation was only the first step in moving forward. In fact, the board created under the local TV only issued final regulations for that program last December. Frankly, it is moving at a glacial pace, and it should be moving much more quickly. I will do everything in my power to make sure that that RUS makes up for lost time and moves quickly on the applications to provide local-to-local services in rural America.

I'd also like to touch on two areas in the current debate on the Home Viewer Act reauthorization which concerns me greatly. I have serious reservations about the idea of a digital white area which would supplant the current grade B contour definitions for purposes of allowing distance signal carriage by satellite providers. I'm concerned that localism would be significantly harmed by allowing for the import of out-of-market signals even when viewers are able to receive quality local over-the-air analog signals.

I'm troubled by EchoStar's requirement that consumers obtain a second dish to receive local Spanish language programming. I believe this is a direct violation of the Act's "carry one, carry all" provision.

Despite the inevitable challenges in what is still a relatively new technology, the future of the DBS industry in rural America remains bright. DBS has substantially contributed to the quality of rural life, opening up new sources of news, information, and entertainment. In turn, rural Americans have helped power-drive DBS into a major communications force.

Rural America needs access to local television stations and network programming. This former farm broadcaster also believes that rural America is unique in news and information needs, needs that are being met elsewhere. Whether it's information about mad-cow disease, commodity markets or equine West Nile virus, there are fewer and fewer outlets of this type of information being made available.

So bearing that in mind, the information needs of rural America, and I'm pleased that both DISH Network and DIRECTV carry RFD-TV, a rural public-interest television network which is helping to keep farm broadcasting alive. I'd like to hear more about that as we move along.

I want to thank all the people who have come here today, and I'm looking forward to the testimony, Mr. Chairman.

Thank you very much.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MINNESOTA

Thank you, Mr. Chairman, for holding today's hearing which is particularly crucial to rural states such as Montana. In fact, Montana has the highest penetration level of satellite television in the country at over 40 percent. With over-the-air broadcast signals and cable delivery limited by the geography of my state, satellite television has been a staple of our video marketplace for many years.

Today's hearing focuses on the reauthorization of the "Satellite Home Viewer Improvement Act," which corrected problems that satellite TV customers faced in getting access to network TV programming and helped to level the playing field so that satellite TV could compete with cable. To a large degree, the bill has functioned as intended, and in fact satellite providers have dramatically increased subscribers where they offer local signals.

As a former broadcaster, I recognize the tremendous contributions that local broadcasting makes to our communities, particularly in rural areas. The ability to receive local television signals is more than just having access to local sports or entertainment programming. It is a critical and immediate way to receive important local news and community information. Access to local signals is particularly critical in Montana, where we often experience extreme weather, ranging from severe floods to intense blizzards.

Unfortunately, the vast majority of "local-to-local" offerings by the DBS operators serve urban markets. While the Congress has heard numerous proposals and promises for local-into-local signals in rural areas by the satellite broadcasters over the years, the reality seems to always be driven by raw economics. With this in mind, I was the author of the LOCALTV Act of 2000, which created a \$1.25 billion loan guarantee program to fund local-to-local services to be administered by the Rural Utilities Service.

Unfortunately, as with so many issues, passing legislation was only the first step in moving forward. In fact, the Board created under the LOCALTV only issued final regulations for the program late last December. Frankly, I have been very frustrated at the glacial pace that the program has been implemented, which was recently criticized by GAO. I will do everything in my power to make sure that the RUS makes up for lost time and moves quickly on applications to provide local-to-local services for rural America under the program.

I would like to touch upon two areas in the current debate on SHVIA reauthorization which concern me greatly. I have serious reservations about the idea of a "digital white area" which would supplant the current grade 8 contour definition for the purposes of allowing distant signal carriage by the satellite providers. I am concerned that localism would be significantly harmed by allowing for the import of out-of-market signals even when viewers are able to receive quality local, over-the-air analog signals.

I am also troubled by EchoStar's requirement that consumers obtain a second dish to receive local Spanish language programming. I believe this is a direct violation of SHVIA's "carry one, carry all" provision.

Despite the inevitable challenges in what is still a relatively new technology, the future of the DBS industry in rural America remains bright. DBS has substantially contributed to the quality of rural life, opening up new sources of news, information and entertainment. In turn rural Americans have helped power drive DBS into a major communications force.

Rural America needs access to its local television stations and network programming. As a former farm broadcaster, I also believe that rural America has unique news and information needs that are not being met elsewhere. Whether it is information about mad cow disease, commodity markets or equine West Nile Virus, there are fewer and fewer outlets for this type of important information.

Bearing the unique information needs of rural America in mind, I am pleased that both Dish Network and DirecTV carry RFD-TV, a rural public interest television network, which is helping keep farm broadcasting alive. I would like to hear more about how the satellite TV industry sees its relationship with rural America and what the industry is doing to meet those special rural needs.

I look forward to the testimony of the witnesses. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Our panel this morning is Mr. Charlie Ergen, well known to this Committee, Chairman and Chief Executive Officer of EchoStar Communications Corporation; Mr. Jim Yager, Chief Executive Officer of Barrington Broadcasting Company; Mr. Eddy Hartenstein, Vice Chairman, Executive Board, DIRECTV; Ms. Araceli De Leon,

Vice President and General Manager of Telemundo Communications Group; and Ms. Gigi B. Sohn, President and Co-Founder of Public Knowledge.

Good morning, and welcome.

And, Mr. Ergen, we'll begin with you. Welcome back.

**STATEMENT OF CHARLES ERGEN, CHAIRMAN
AND CHIEF EXECUTIVE OFFICER,
ECHOSTAR COMMUNICATIONS CORPORATION**

Mr. ERGEN. Thank you, Mr. Chairman and distinguished Members of the Committee. On behalf of EchoStar Communications, I'm pleased to be invited to discuss the Satellite Home Viewer Act.

As you know, EchoStar led the fight in the late 1990s for the right to transmit local signals, arguing this was critical to our ability to compete. We've invested billions of dollars in technology to launch local markets, and today, in less than 5 years, we're in 119 markets servicing almost 90 percent of the United States with local signals.

While SHVIA has been a good first step in addressing huge disparities between DBS and dominant cable operators, it has not gone far enough. Reauthorization is a tremendous opportunity for Congress to cement the good parts of the Act and to bridge those disparities.

Let me point out ways to improve the law. First, the laws directed to the FCC to establish good faith obligations for retransmission consent bargaining agreements is not complete enough to adequately police the unreasonable behavior of powerful media conglomerates, and it was further watered down in its implementation. Many local broadcast stations are now controlled by companies with multi-video programming properties. In our experience, retransmission consent negotiations provide those companies with the opportunity every three or 4 years to foist on us additional channels that consumers do not want, and do not want to pay for, as a condition of retransmission consent. While good faith requirement has not been effective in preventing such practices, and needs to be strengthened, we do believe that it has had an influence on the bargaining behavior of some broadcasters, and should, at a minimum, be preserved.

Second, the must-carry obligations imposed on satellite carriers did not adequately take into account the enormous technical difficulties associated with satellite must-carry. EchoStar vehemently protested must-carry obligations in the 1999 Act, arguing that spectrum constraints would result in the inability to do all 210 local television markets, and would result in carriage of many stations that contain no local content and that were already being broadcast nationally by DBS companies. It doesn't make a lot of sense for home-shopping channels and many religious networks to be broadcast nationally, and have absolutely no local programming—no local news, no local weather—to be part of the must-carry act.

Third, with respect to distance stations, the law left some important things undone. While the law required the FCC to improve the model for predicting whether a household is unserved, the improvements that the FCC came up with did not take into consideration

two fundamental issues. It did not take into account interference to the over-air broadcasts which weaken stations, and it did not take into consideration the phenomenon of "ghosting," which makes many stations unwatchable in today's world. These households count as "served." Congress should require the FCC to implement improvements to the model in both these areas.

Fourth, we encourage you to improve the parity between cable and satellite by giving satellite TV providers the ability to retransmit significantly viewed stations with a community, and afford the same market modification opportunities that cable systems have.

And, finally, looking forward, we believe that the reauthorization of SHVIA offers Congress the opportunity to facilitate the digital transition. Today, 2 years before the transition deadline, we have a Satellite Home Viewer Act that addresses only analog unserved households. Consumers who cannot receive an over-the-air HD signal, either because a local broadcaster has only built a low-power facility or because he has not built any facility whatsoever, should be allowed to be broadcast via satellite.

DBS can speed the transition to digital broadcasting. We are now 2 years past the May 1, 2002, deadline for local TV broadcasters to make the conversion, and still more than half of the 1,600 broadcast stations are not providing full power digital broadcasts. While the broadcasters have told Congress that only a handful of networks have failed to build DTV stations that operate at full power, a study the NAB recently presented to the FCC contradicts this claim. Their own study, again, verifies that more than half the operational DTV stations are not licensed at their full power. But Congress can stimulate local broadcasters to speed up their digital transmission by allowing satellite TV providers to provide DTV programming to households that are not served with a local over-the-air digital signal.

In conclusion, while SHVIA has helped create a more level playing field between cable and satellite, there are many significant differences in the regulatory treatment that affect DBS's value to the consumers. In reauthorizing and revising SHVIA, Congress should eliminate these differences so that satellite can compete more vigorously and impose no new requirements that would further disadvantage us relative to our dominant cable competitors.

We believe you have a unique opportunity with SHVIA to spur the transition to digital. We hope you will seize it with both hands.

Thank you.

[The prepared statement of Mr. Ergen follows:]

PREPARED STATEMENT OF CHARLES W. ERGEN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, ECHO STAR COMMUNICATIONS CORPORATION

Thank you Chairman McCain, Senator Hollings, and distinguished members of the Committee, on behalf of EchoStar Communications Corporation, I want to thank you for inviting our company to discuss with you the Satellite Home Viewer Improvement Act. My name is Charles Ergen, and I am Chairman and Chief Executive Officer of EchoStar Communications Corporation.

The reauthorization of the Satellite Home Viewer Improvement Act ("SHVIA") offers Congress an excellent opportunity to preserve and extend the pro-competitive measures in the current Act, as well as to improve regulatory parity between cable and satellite TV providers. While SHVIA helped create a more level playing field for cable and satellite TV providers in the multichannel video programming dis-

tributor (“MVPD”) market, there are still many significant differences in the regulatory treatment of cable and satellite that affect their relative attractiveness to consumers. In reauthorizing and revising SHVIA, Congress should take steps to eliminate these regulatory differences and ensure that satellite carriers can continue to compete vigorously with cable in the MVPD market. At the same time, care should be taken not to impose new requirements on satellite carriers that further disadvantage them relative to their primary MVPD competitors, the dominant cable industry.

Reauthorization of Section 119—Carriage of Distant Network Signals

Under Section 119 of the Copyright Act, which is set to expire on December 31, 2004, satellite carriers are allowed to make distant network programming available to “unserved households.” Satellite carriers’ ability to provide distant signals is of crucial importance to millions of consumers, mostly in rural areas, who cannot receive an adequate, over-the-air local broadcast signal. One of the reasons there are so many unserved households is because the cost to broadcasters of serving these additional households often exceeds the advertising revenue that the broadcasters hope to generate. To ensure that such households continue to have access to distant network signals from their satellite providers, we urge you to reauthorize Section 119 and to make the statutory license permanent. Cable operators currently enjoy a permanent license with respect to distant signals. Satellite carriers should enjoy the same right.

Broadcasters have asked you to limit our ability to provide distant signals in markets in which we provide local-into-local service. We oppose this change to the distant signal license. Consumers who do not have access to an over-the-air signal, and who have to pay for their television service, should have a choice as to whether to watch their local broadcaster or a distant broadcaster on their satellite platform. Just as a consumer in Kalamazoo, Michigan can purchase either the Kalamazoo Gazette or the Los Angeles Times, satellite subscribers who qualify under the current law should continue to have this same basic choice. It is not right to penalize satellite carriers for making the substantial investments necessary to provide local-into-local service by taking away their distant signal rights. Nor is it right to penalize consumers by taking away an option they have today merely because a satellite carrier has worked to make available to them an additional option.

By reauthorizing the distant signal license, you will also be providing a spur to broadcasters to improve and extend their over-the-air signal to reach as many households as possible. In contrast, taking away that license would remove any such incentive for broadcasters who find it less costly to serve unserved households by cable or satellite than to improve their signals.

Section 119 also permits satellite carriers to retransmit non-network broadcast stations (*i.e.*, superstations) to satellite subscribers. Superstations are a staple of cable line-ups and their availability on satellite systems has been a key driver of growth in the satellite television industry. Reauthorization of Section 119 will ensure that satellite carriers will continue to have the same opportunity as cable to offer such popular programming to satellite subscribers.

Also, Congress should extend the “grandfather” clause in Section 119 so that households that subscribed to distant network signals prior to October 31, 1999 can continue to receive such signals. We have hundreds of thousands of satisfied, long-term subscribers that have come to rely on this provision. There is no reason to disenfranchise them now.

And Congress should not place a new deadline on eligible consumers’ ability to receive distant stations. Congress has now had long enough experience with the distant station license to appreciate its benefits. The license should become permanent.

Transition to Digital Television

The reauthorization of SHVIA also offers Congress an opportunity to broaden the existing definition of “unserved household” so that consumers who cannot receive a digital television (DTV) signal from their local broadcaster will have the ability to receive it from their satellite TV provider. This will spur the transition to digital TV broadcasting, which has lagged to date despite the statutory deadline of December 31, 2006 for the relinquishment of analog TV spectrum. Specifically, a significant number of viewing households (as of February 2004, all except 17 out of 210 markets) still lack access to a full complement (ABC, CBS, NBC, FOX, and PBS) of full power digital broadcasts from the networks serving their areas. And while the broadcasters have told Congress that only a handful of network stations have failed to build DTV stations that operate at full power, a study the NAB recently presented to the FCC contradicts this claim—even according to that partisan study, more than half the operational DTV stations are not operating at their licensed

power level. Consumers cannot reasonably be expected to make the investment in DTV equipment if they cannot even receive DTV signals.

By allowing satellite TV providers to offer DTV programming to households that are not served with a local over the air digital signal, Congress would increase demand for digital television sets among satellite TV subscribers. With more digital TV sets in the market, broadcasters will have increased incentives to make their digital signals available to more households sooner. To a significant extent, the rate of DTV adoption has been slow because consumers are not willing to buy DTV sets until there is more DTV programming, while broadcasters are not willing to provide DTV programming until more consumers have DTV sets. Allowing satellite carriers to beam distant DTV signals to unserved households would help cut this Gordian knot by leveraging the deployment of DTV in one part of the country into other parts of the country that have no such service. By accelerating the rate of DTV adoption in this way, the vicious cycle that impedes DTV deployment may at last be broken.

To achieve this, however, it is not enough to ask the FCC to submit a report to you about an appropriate predictive model. First of all, this is a “death by committee” approach: it would ensure that nothing happens to expedite the DTV transition until after the deadline for the transition has elapsed.

Second, no model is necessary in cases where the local broadcaster has not built any DTV facilities whatsoever. In those cases, there is no need for a prediction—*all* of the households that the broadcaster was supposed to reach with a DTV signal are certainly unserved. Consequently, Congress should allow immediate distant HDTV service to those DTV unserved households for which no prediction is necessary, and should require the FCC to establish a DTV predictive model by expedited rulemaking for all other cases.

Not surprisingly, this plan is vehemently opposed by broadcast interests. But these same broadcasters are busily developing lots of creative ideas for extracting all the benefits offered by digital spectrum, including a plan to use their DTV spectrum to set up wireless cable systems to compete with satellite and traditional cable systems. At the same time, they are failing to hold up their end of the bargain with the American public by providing full power DTV and returning the analog spectrum on a timely basis. The broadcasters should not be permitted to reap all of the benefits of digital, while shirking their obligations. Congress should adopt our proposal to hasten the digital transition.

Determining Which Households are “Unserved Households”

Congress also has an opportunity to improve the process for determining which households are “unserved households” under Section 119 in the following ways.

First, it can improve the model used to predict whether a household can receive a local network signal of grade B intensity so as to take into account interference conditions and “multi-path” transmission problems. Currently, the Individual Location Longley Rice (“ILLR”) model predicts many households to be served when in fact they cannot receive an adequate signal because local interference conditions have weakened the signal. In addition, even when the signal strength is adequate, a household may receive an unwatchable picture as a result of “ghosting” caused by multi-path transmissions. Such households should be treated as unserved. Congress should also consider directing the FCC to increase the grade B intensity threshold to reflect modern consumer expectations about picture clarity. The current standard was adopted in the 1950s and based on consumer quality expectations from that era of hazy TV reception. Modern consumer expectations are considerably higher.

Second, Congress could improve SHVIA’s waiver and signal strength testing process, which is not working as envisioned. Five years of experience with this process shows us that it often leads to a bad customer experience. In some instances, the law is unclear; in other cases consumers have unrealistic expectations; and in still other cases, DBS providers and their customers are subject to the whims of broadcasters. We recommend narrowing the waiver process to permit only consumers predicted as receiving *weak* Grade B signals to request a signal strength test. We also recommend an explicit clarification of what we believe to be the current law: that broadcasters may not revoke waivers once given so long as a subscriber receives continuous service from the DBS provider—the customer should not be victim to whimsical rescissions of previously granted waivers. Further, the rules should be clarified to eliminate consumer confusion when a subscriber is predicted to receive the same network signal from two local network affiliates in different DMAs. In those cases, a waiver should be required only from the network station in the subscriber’s DMA. This will eliminate the need for customers to get multiple waivers from affiliates of the same network.

Third, Congress should clarify that where there is not the full complement of four network stations in a given DMA (e.g. ABC, CBS, NBC are present, but not Fox), then satellite providers can import a distant signal of the missing network into that DMA, even though some households in the DMA might be predicted to be served by an affiliate of that network in a neighboring DMA.

Carriage of Broadcast Stations

Significantly Viewed Stations. We encourage the Senate to improve regulatory parity between cable and satellite by giving satellite TV providers the ability to retransmit “significantly viewed” stations within a community, and afford the same market modification opportunities that cable systems have. Significantly viewed signals should also be exempted from network nonduplication, syndicated exclusivity and sports blackout rules in the communities where those stations are significantly viewed. We note that, even with these changes, cable operators will still enjoy a broader copyright license than the license of Section 119, but these adjustments will help lessen the gap.

Retransmission Consent. The Committee should also eliminate the sunset on the non-exclusivity and good faith requirements for retransmission consent. Currently, for local stations that elect retransmission consent rather than must-carry, Section 325(b)(3)(C)(ii) of SHVIA and the Commission’s rules prohibit exclusive retransmission consent agreements and require the local station to negotiate retransmission agreements in good faith. These requirements sunset on January 1, 2006.

EchoStar considers these limitations on broadcasters’ ability to negotiate retransmission consent agreements to be essential for the preservation of a competitive MVPD market and for keeping video programming prices low. Exclusive retransmission consent agreements not only can result in limiting the distribution of a local station’s signal to a single MVPD (rather than all of the providers that choose to carry that signal), but may even give that unfair advantage to an affiliate of the local broadcaster. In addition, elimination of the good faith requirement might further encourage troublesome current practices such as bundling of programming networks. Many local broadcast stations are now controlled by conglomerates with many other video programming properties. EchoStar’s experience has been that retransmission consent negotiations provide such companies with the opportunity every three years to renegotiate video programming deals or to foist on MVPDs additional video programming that consumers do not want as a condition of retransmission consent for important local broadcast stations. While the good faith requirement has not been very effective in preventing such practices and may need to be strengthened, EchoStar believes that it does have an influence on the bargaining behavior of broadcasters and should, at a minimum, be preserved.

Also, Congress should resist the “symmetry” of imposing “reciprocal” requirements on distributors. Such restrictions make sense only when the negotiating party has market power that it can use as leverage in the negotiations. This is true of broadcast stations that elect retransmission consent versus must-carry, and it may also be true of the dominant MVPDs—cable systems. But it is not true of all MVPDs, and Congress should not impose such obligations across the board on all distributors. To do so would only give broadcasters a negotiating tool that would neutralize the discipline Congress intended to impose on broadcasters by making provision for a unilateral good faith obligation in 1999.

Local-into-local and Two-dish

EchoStar is a pioneer of local-into-local service. We knew that it was essential to provide such service if we were to compete effectively with cable. We lobbied Congress in the late 1990s for the rights to be able to retransmit such signals, and were pleased when Congress passed SHVIA to give satellite providers such rights. We then invested billions of dollars in satellite technology to launch local markets as quickly as possible. Today, EchoStar offers more local broadcasters’ signals within their local communities than any other cable or satellite TV provider. DISH Network was the first satellite TV provider to offer local channels with a roll-out of 13 markets. In less than five years since passage of SHVIA, EchoStar’s DISH Network has launched local-into-local service in 119 television markets, serving more than 86 percent of the country.

Early on, in order to make maximum use of scarce spectrum resources, we began providing local-into-local service in a number of markets using a 2-dish solution. Under this solution, subscribers who want local stations in certain markets are provided with a second dish completely free of charge so that they can receive all of their local stations. Once the second dish is installed, the fact that the local stations are being provided through two dishes instead of one is completely transparent to the consumer—all the local channels are listed contiguously on our electronic pro-

gram guide. The use of the 2-dish solution has allowed us to deliver local-into-local into more markets, more quickly than would otherwise have been possible.

Notably, our two dish solution is no different conceptually from the requirement, in many locations, of multiple over-the-air antennas to receive all local stations. The multiple antennas are necessitated by the fact that all broadcasters in a market seldom use the same transmitter tower, or even locate their individual towers in the same area. Where transmitter towers are located in different areas, multiple reception antennas pointed in the direction of the different transmitters are necessary. Ironically, while broadcasters have decried EchoStar's two-dish solution, broadcasters appear to expect consumers to accept the need for multiple over-the-air antennas as a fact of life.

Nevertheless, the broadcasters are asking Congress to outlaw our company's specific plan for complying with must-carry and require its abolition within one year. The wiser course is to resist these misguided calls and let consumer preferences be the guiding criterion that will lead to optimal carriage of local broadcast stations. There are many good reasons for this.

First of all, it is important to recognize that a "same dish" requirement for all broadcast stations does *not* necessarily mean a "single dish" for all consumers. If our two dish plan were prohibited, compliance with the new rule would still require many two-dish markets, albeit with all broadcast stations on the same dish. In those two-dish markets, all subscribers that want even one network station will need a second dish. Furthermore, compliance with the rule will likely require some current single-dish markets to be converted to two-dish markets, as shown by DIRECTV's own attempt at remapping EchoStar's system.

Second, prohibiting our plan would cause massive disruption and possibly loss of local service for our subscribers in 15 to 30 markets. This is because moving a market A station from a wing slot to a "full-CONUS" spot beam that now provides some local stations from markets A, B and C will require the displacement of markets B and/or C from the spot beam. This in turn means that the subscribers whose stations are displaced will need a second (or different) dish. To illustrate, take our EchoStar 7-11 spot beam. That beam currently provides more fully effective competition to cable, and more choice for consumers, in Chicago, Indianapolis, St. Louis and Grand Rapids. It has the physical capacity to carry a total of 24 channels. Some have suggested that we should increase the compression ratio of our signals to squeeze more channels onto the spot beam. We have concluded, however, that increasing the compression ratio above current levels would degrade signal reception quality to a level we are unwilling to impose on our customers. We do not compress our signal to a greater extent on any of our satellites, whether spot beam or full CONUS.

Consequently, the entire capacity of that spot beam is consumed by four channels from Chicago, seven channels from Indianapolis, six channels from St. Louis and seven channels from Grand Rapids. In order to be able to serve all of these markets, five channels from Chicago, two channels from Indianapolis and two channels from St. Louis were placed on the wing satellite located at 61.5 degrees in compliance with existing law. If the law is now changed, the five wing channels from Chicago could be placed in the spot beam, but since the capacity of the spot beam is limited to 24 channels, in order to comply with a single dish edict this would necessitate that all of the channels from Indianapolis, St. Louis and Grand Rapids which are currently in the spot beam be relocated to the 61.5 degree location, or to a satellite located at some other orbital position in order to make all markets in this spot beam "same dish" markets.

Equally important, the number of subscribers that will need second or new dishes will overwhelm EchoStar's capacity to install them. The result? With a one-year time frame, many subscribers will lose their local service.

Third, there are many misconceptions circulating about our two dish solution. For example, the argument that no one is willing to install dishes to watch programming from two locations is just plain wrong. Almost two million of our customers have had dishes installed to view programming from our 61.5 or 148 degree locations. While the "look angle" from those locations has been cited as a problem by detractors, in fact with respect to most of our 61.5 degree two dish markets, the angle for a dish pointed at EchoStar III, located at our 61.5 degree orbital location, is better than the angle of a dish pointed at the spot beam satellites located at our 119 and 110 degree orbital locations, where the remaining local channels are carried. That is, a consumer is actually more likely to be able to view programming from the 61.5 degree wing location, than from the 119 degree "core" location. Simple math, and the help of a map, confirms the mid-point of 119 and 61.5 degrees longitude to be approximately 90 degrees, a longitudinal line running approximately through Madison, Wisconsin, to Springfield, Illinois and Memphis, Tennessee, to

Jackson, Mississippi and New Orleans, Louisiana in the southern United States. From any location east of that line, the look angle to the 61.5 degree satellite is empirically better than is the look angle from a dish which must view programming from a satellite located at 119 degrees.

Another common misconception is that EchoStar charges more for channels located at wing slots, or charges for the dish required to view those channels. Again, this is simply not accurate. The second dish necessary to view those channels, together with professional installation of the second dish and the channels themselves, are in all cases offered absolutely free to the customer. While the cost to EchoStar to provide the second dish and installation is substantial, we absorb that cost, having concluded that it is more important to be able to offer the local channels in the greatest number of markets.

Detractors also have complained that EchoStar does not inform customers of the availability of the wing channels free of charge, and that we discriminate against the wing channels in channel guide location. These assertions are inaccurate. Channels at a wing location are located in our program guide in a fully integrated manner with the channels located at other locations. Channel numbering—regardless of location—is contiguous, with each local channel assigned the channel number it carries off air (with the exception of older EchoStar boxes where off air channel numbering is not possible for any local channels, but all local channels are in that event offered with contiguous numbering). Scrolling through the on screen channel guide, a consumer who has installed a second dish has no visibility to the existence of that second dish and can not in any way distinguish between channels being delivered from satellites located at different orbital positions.

Importantly, where a consumer decides not to take local channels from the wing satellite, the on screen guide boldly advertises the availability of the second dish and installation free of charge. Tuning to the wing channel produces the following bold message: “YOU MUST HAVE A SECOND DISH TO VIEW THIS CHANNEL. DISH NETWORK WILL PROVIDE THE DISH FREE OF CHARGE. CALL 1-800-333-DISH”. Clearly, we give our customers notice and the choice of getting the wing slot stations for free, *if they want them*.

Fourth, it is important to recognize that we have reduced the number of two-dish markets to only 38 out of 119 markets currently being served with local stations. Overall, we now carry a total of 895 of local broadcast stations. Of those, only 106 are offered from one of our wing satellites. Economics has been the driving force for this reduction. Economically, it is in our best interest to offer a single-dish solution where possible simply because we offer the second dish and related hardware, and a professional installation, free to every consumer who wants a second dish. The cost to EchoStar is well over \$100 for each second dish installed, a significant incentive to offer channels from a single dish wherever possible, and eliminating the need for governmental intervention. In fact, over the last year we have already transitioned eight two dish markets to a single dish solution (Charlotte, Cincinnati, Ft. Myers, Grand Rapids, Kansas City, Lexington, Miami and Raleigh), and based on the focus on this issue provided in recent weeks, we are pleased to advise that effective this week we have also been able to transition Albuquerque, Phoenix, San Antonio and Tucson from two dish, to one dish solutions. We are also moving a total of 27 channels from wing satellites to spot beams over the next week. As stated, this reduces our two dish markets from 42 to 38 and reduces the number of wing satellite channels from 133 to 106.

In fact, I am prepared to commit to you today that, barring changes in channel configurations in local markets, we do not intend to add any more 2-dish markets beyond the 38 that currently exist. We will continue to migrate existing 2-dish markets to single dish as we are able to find or create additional spectrum capacity to do so. We hope to be able to complete that process entirely within four years. But if we are required to complete the transition on an artificially compressed time schedule (such as the one-year time frame being mentioned), the result will be a lose-lose for consumers and competition. That deadline is both unrealistic and, in any case, unnecessary because EchoStar plans on migrating all of its subscribers to a same-dish solution for local-into-local service within four years anyway. Legislation is simply not necessary to address this transitory issue.

Conclusion

In conclusion, in reauthorizing SHVIA, I urge you to lessen the gap that still separates DBS providers from cable operators, create greater parity between the two competing modes, and resist the creation of obstacles that would further hamper our efforts to compete.

The CHAIRMAN. Thank you very much.

Mr. Yager?

**STATEMENT OF JIM YAGER, CHIEF EXECUTIVE OFFICER,
BARRINGTON BROADCASTING COMPANY**

Mr. YAGER. Thank you, Mr. Chairman, Members of the Committee.

There are two paramount goals that Congress has repeatedly reaffirmed since the first Satellite Home Viewer Act was enacted in 1988. First, the preferred method to provide network programming to viewers is through local affiliated stations. And, second, providing network programming by importing distance signals should only be used when the local station cannot be provided to a subscriber.

As you know, SHVIA contains two compulsory licenses.

The first, a license allowing DBS to deliver local stations to local viewers, the so-called local-to-local license, has been a tremendous success. Since Congress created this license, tens of millions of your constituents can now receive local news, weather, and sports programming via satellite. The number of viewers enjoying this important benefit will grow. DIRECTV should be commended for its pledge to provide local-to-local in all 210 television markets across this country as soon as 2006, and no later than 2008. This aggressive competition has prodded EchoStar to move forward with its own local-to-local carriage, currently serving, as Mr. Ergen said, 119 markets. Unfortunately, in many markets EchoStar forces consumers to obtain a second satellite dish in order to receive some stations. Most often Spanish language, religious, and public stations. We hope Congress will end this discriminatory practice.

The second license, the distance signal license, has been a recipe for DBS mischief and abuse. For decades, DBS ignored the rules for governing who should be eligible for distance signals, signing up anyone and everyone willing to say they were unhappy with their over-the-air signal. When the courts finally ended the illegal practice, there was a firestorm of consumer outrage, much of which DBS unfairly funneled toward Congress. Since that time, DIRECTV has complied with the law. EchoStar, however, continues providing illegal service to hundreds of thousands of subscribers. A Federal judge recently found EchoStar broke a sworn promise to a Federal court by failing to disconnect them. Fortunately, as the local-to-local rollout accelerates, the distance signal compulsory license will become increasingly irrelevant.

A major advantage in the expansion of local-to-local is that it eliminates the need for importing distance signals into local markets. In this regard, NAB urges that in any market in which local-to-local is offered, the right to import distance signals should be eliminated.

Today, some in DBS ask that you provide them a new benefit by vastly expanding the distance signal compulsory license to create a so-called digital white area. Their claim that this would accelerate the DTV transition is without merit.

Let me dispel some myths that some in the satellite industry recently spread. Today, according to the FCC's own figures, 1,411 television stations are on the air in digital in 203 television markets that serve over 99 percent of U.S. households, and broadcasters are

close to replicating their analog coverage areas. DTV stations already are reaching 92 percent of the populations they will be required to serve. Collectively, these stations have spent billions of dollars on their digital buildouts, and have every incentive to see the transition completed. EchoStar's claim that a majority of stations are not complying is false and misleading.

A few examples. Scores of stations cannot complete their digital buildouts because Mexico and Canada have not provided the necessary clearances. Under EchoStar's criteria, these stations are noncompliant. In other areas, particularly out West, stations must use translators to cover their vast market areas. The FCC has not authorized upgrading these translators to digital. In some cases, a station may need as many as 50 to 60 translators to cover their market. EchoStar counts these stations as noncompliant.

In short, EchoStar evidently asserts that 771 stations operating at special temporary authority power levels are not serving their full market area in digital. That's simply not true. Many of these stations, my three included, are not only serving their market area in digital, but exceeding their analog coverage area. EchoStar is simply playing fast and loose with the numbers. Letting EchoStar siphon off local television station viewers by providing distant digital signals will not expedite the DTV transition, but could well undermine localism. And EchoStar has no intention of returning these viewers, even after they receive local over-the-air digital signals.

I submit that the answer to stimulating the digital conversion is not massive importation of distance signals into a local station's markets. The answer is to have DBS carry the digital signals of local stations into their market.

At the end of the day, the Committee may choose to simply extend the Satellite Home Viewer Improvement Act in its current form for another 5 years. Should the Committee go any further, we would suggest two changes: ending EchoStar's two-dish scheme, and ending distance signal importation in any market that has local-to-local.

As the Committee is aware, the House has begun to legislate. During that process, NAB has worked with the House Committee and attempted to work with all affected parties to find reasonable compromise in these many issues. In that vein, we endorse the common ground outlined in DIRECTV's written statement, and will continue to seek accord as the Senate approaches SHVIA.

Mr. Chairman, this Committee has repeatedly emphasized that localism should be central to broadcasting. I strongly urge the Committee to adopt a SHVIA reauthorization that strengthens localism and does not harm it.

Thank you, sir.

[The prepared statement of Mr. Yager follows:]

PREPARED STATEMENT OF JIM YAGER, CHIEF EXECUTIVE OFFICER, BARRINGTON
BROADCASTING ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTING

Thank you, Mr. Chairman.

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DirecTV should be commended for its pledge to provide local-to-local in all 210 markets as soon as 2006 and no later than 2008.

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For decades, DBS ignored the rules governing who should be eligible for distant signals, signing up anyone and everyone willing to say they were unhappy with their over-the-air signal.

When the courts finally ended this illegal practice, there was a firestorm of consumer outrage . . . much of which DBS unfairly funneled towards Congress.

Since that time, DirecTV has complied with the law.

EchoStar, however, continues providing illegal service to hundreds of thousands of subscribers. A Federal judge recently found EchoStar broke a sworn promise to a Federal court by failing to disconnect them.

Fortunately, as the local-to-local rollout accelerates, the distant signal compulsory license will become increasingly irrelevant.

A major advantage of the expansion of local-to-local is that it eliminates the need for importing distant signals into local markets. In this regard, NAB urges that in any market in which local-to-local is offered, the right to import distant signals should be eliminated.

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Should the Committee go any further, we would suggest two changes:

- Ending EchoStar's 2—dish scheme and
- Ending distant signal importation into any market that has local to local.

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Mr. Chairman, this Committee has repeatedly emphasized that localism should be central to broadcasting.

I strongly urge the Committee to adopt a SHVIA reauthorization that strengthens localism . . . and does not harm it.

ATTACHMENT

WRITTEN TESTIMONY OF K. JAMES YAGER, CHIEF EXECUTIVE OFFICER, BARRINGTON
BROADCASTING ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Introduction and Summary

Ever since Congress crafted the original Satellite Home Viewer Act of 1988 (“SHYA”), 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.^s

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 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 their viewers. At the same time, Congress knew that allowing satellite carriers to 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 EchoStar, today deliver local stations by satellite to the overwhelming majority of American television households.

Thanks to the wise decision by the FCC and the Department of Justice to block the proposed horizontal merger of DirecTV and EchoStar, the two DBS firms continue to compete vigorously against one another in expanding their delivery of local stations. While EchoStar predicted when it sought to acquire DirecTV that it would never be able to serve more than 70 markets without the merger, EchoStar now serves 119 Designated Local Markets (“DMA's”) that collectively cover more than 85 percent of all U.S. TV households. Nor is there any sign that EchoStar's expansion of local-to-local service has stopped.

The story with DirecTV is even more dramatic. With the launch of a new satellite (set for this week), DirecTV expects to serve 100 DMAs covering 85 percent of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs covering 92

percent of all TV households. And as early as 2006 and no later than 2008, “DirecTV will offer a seamless, integrated local channel package in *all 210 DMAs.*” *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, ¶332, MB Docket No. 03–124 (released Jan. 14, 2004) (emphasis added).

The local-to-local compulsory license is the right way—and the distant-signal compulsory license is the wrong way—to address delivery of over-the-air television stations to satellite subscribers. If Congress wishes to do anything other than briefly extend the expiration date of Section 119, it should—as a matter of simple logic—limit the distant-signal compulsory license to markets in which the satellite carrier does not offer local-to-local service. It makes no sense, for example, to treat a satellite subscriber as “unserved” by its local CBS station when the subscriber’s DBS firm offers that station as part of its satellite-delivered package, with what the satellite industry describes as “a 100 percent, crystal-clear digital audio and video signal.” And even if Congress elects to allow certain subscribers who are technically considered “unserved” today to retain distant network signals, Congress should not allow any new signups for distant signals in local-to-local markets.

Although the rapid rollout of DBS local-to-local service has vindicated the actions that Congress took in SHVIA in 1999, there is one major blemish on the success story: an outrageous form of discrimination that EchoStar has inflicted on some local stations. EchoStar’s method of discrimination is simple, but devastating. While placing what it considers the most “popular” stations in a market on its main satellites, EchoStar relegates certain stations (particularly Hispanic and foreign-language stations) to a form of satellite Siberia—placing them on remote “wing satellites” far over the Atlantic or Pacific, which can be seen only if one obtains a second satellite dish. Very few subscribers actually do acquire a second dish, thereby rendering many local stations invisible to their own local viewers. As DirecTV has acknowledged, this practice violates the “carry one, carry all” principle of the SHVIA. The FCC has thus far tolerated this grossly improper practice, imposing only minor restrictions on this form of discrimination. Congress should step in to halt this misconduct.

While the local-to-local compulsory license has (with the exception of EchoStar’s two dish abuse) generally worked well, the history of the distant-signal compulsory license (codified in Section 119 of the Copyright Act) has been just the opposite. 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 litigation—culminating in a 1998 ruling against PrimeTime 24 and a 1999 ruling against DirecTV—were broadcasters able to bring a halt to most of this lawlessness. Even after those rulings, however, EchoStar has continued to serve hundreds of thousands of illegal subscribers, forcing broadcasters to spend years chasing it through the courts to obtain relief. Last June, a United States District Court found (after a ten-day trial) that EchoStar willfully or repeatedly violated the distant-signal provisions of the Copyright Act—and, in the process, broke a sworn promise to the court to tum off large numbers of illegal subscribers. This finding was only the latest in what has been a long string of instances in which courts and the FCC have found EchoStar to have violated statutes and rules—and abused legal processes—for its own private benefit.

Startlingly, EchoStar, having engaged in this widespread pattern of misconduct, and having been content to violate the distant-signal license until ordered by a court to stop breaking the law, now urges Congress to radically *expand* the distant-signal compulsory license. In particular, EchoStar now asks to be allowed to import ABC, CBS, Fox, and NBC programming from New York and Los Angeles stations to millions of households that can receive the same programming from their local stations over the air—and in most cases, can also get their local stations in superb quality, by satellite, from EchoStar and DirecTV as part of their local-to-local package. Although these homes are unquestionably “served” by their local stations, EchoStar proposes to be allowed to deliver the same programming from New York or Los Angeles if the household is—in their view—“digitally unserved.”

The EchoStar proposal—by a company with a long track record of lawlessness—is a recipe for mischief. As this Committee has repeatedly recognized, the distant-signal compulsory license is a departure from marketplace principles that is appropriate only as a “lifeline” for households that otherwise cannot view network programming. It would make no sense to override normal copyright principles for households that can readily view their own local stations. It would give the DBS firms a government-provided crutch that would set back for years what would otherwise be a market-driven race between DirecTV and EchoStar—further spurred by competition with cable—to deliver digital signals on a local-to-local basis. And when

local stations later sought to reclaim their own local viewers from the distant digital transmissions, there would be a consumer firestorm much like what occurred when two major satellite carriers were required to turn off (illegally-delivered) distant analog signals to millions of households in 1999.

Finally, given the rapid pace of technological and economic change, Congress should again specify that Section 119 will sunset after a limited, five-year period, so that Congress can decide then if there is any reason to continue this government intervention in the free market for copyrighted television programming.

I. The Principles of Localism and of Respect for Local Station Exclusivity are Fundamental to America's Extraordinarily Successful Television Delivery System

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 station exclusivity have been pivotal to the success of American television.

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

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 outlets 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. If satellite carriers can override the copyright interests of local stations by offering the same programs on stations imported from other markets, the viability of local TV stations—and their ability to serve their communities with the highest-quality programming—is put at risk.

The “unserved household” limitation 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 1927.¹ 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. Just a few years ago, the Supreme Court declared that

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 50 years in protecting the rights of local stations, over-the-air television stations today serve more than 200 local markets across the United States, including markets as small as Presque Isle, Maine (with only 28,000 television households), North Platte, Nebraska (with fewer than 15,000 television households), and Glendive, Montana (with fewer than 5,000 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, of course, available over-the-air for free to local viewers, unlike cable or satellite services, which require substantial payments

¹First Report and Order, 14 FCC Red 2654, ¶11 (1999); see SHVA Notice of Proposed Rule Making, ¶3 (“The network station compulsory licenses created by the Satellite Home Viewer Act are limited because Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public interest by making available to local citizens information of interest to the local community (e.g., local news, information on local weather, and information on community events). Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast network[s], might be jeopardized, thus undermining one important source of local information.”)

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 non-broadcast 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 nonbroadcast networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network affiliate provides a customized 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. In Appendix A, we list just a few examples of television broadcasters’ commitment to localism in the form of help to local citizens—and local charities—in need. It is through local broadcasters that local citizens and charities raise awareness and educate members of the community.

Community service programming—along with day-to-day local news, weather, and public affairs programs—is made possible, in substantial part, by the sale of local advertising time during and adjacent to network programs. These programs (such as “Alias,” “CSI,” “American Idol,” and “Friends”) 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, open video systems, 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 network/affiliate system, Congress or the Commission (or both) have acted to ensure that the retransmission system does not import duplicative network programming from distant markets. A recent example is the threat of unauthorized Internet retransmissions of television stations, which was quickly halted by the courts (applying the Copyright Act) and condemned by Congress as outside the scope of any existing compulsory license.²

In the case of cable television, for example, the FCC has since the mid-1960s imposed “network nonduplication” rules on cable systems. 47 C.F.R. §§ 76.92–76.97 (1996). As the Commission explained when it strengthened the network nonduplication rules in 1988:

[I]mportation of duplicating network signals can have severe adverse effects on a station’s audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR–TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary.³

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 as to which the owners enjoy 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 exclu-

² 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).

³ Report and Order, *In Re Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Red 5299, 5319 (1988), *aff’d*, 890 F.2d 1173 (D.C. Cir. 1989); see also *Southwestern Cable Co.*, 392 U.S. at 165; *Wheeling Antenna Co. v. WTRF–TV, Inc.*, 391 F.2d 179, 183 (4th Cir. 1968).

sive 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 certain 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 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 the SHVA and the SHVIA, Congress Reaffirmed the Central Role of Localism and of Local Program Exclusivity

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).

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 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.* That time, of course, is now.

II. Properly Implemented, The Local-to-Local Compulsory License 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 network/affiliate relationship, delivery of local stations to the stations’ own local viewers—*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 a 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).

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

As the FCC recognized in its January 2004 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, the Direct Broadcast Satellite (“DBS”) industry is thriving—and offering potent competition to cable. The DBS industry, which signed up its first customer only decade ago, grew to more than 20 million subscribers as of June 2003. Annual Assessment, MB Dkt. No. 03–172, ¶8 (released Jan. 28, 2004). The growth rate for DBS “exceeded the growth of cable by double digits” in every year between 1994 and 2002, and in 2003 exceeded the cable growth rate by 9.2 percent. *Id.* Just in the 12 months between June 2002 and June 2003, the DBS industry added 2.2 million net new subscribers, surging from 18.2 million to 20.4 million households. *Id.*

DirecTV is currently the second-largest multichannel video programming distributor (“MVPD”), behind only Comcast, while EchoStar is the fourth-largest MVPD. *Id.*, ¶67. The DBS firms take many subscribers away from cable: “according to [DirecTV] internal data, approximately 70 percent of its customers were cable subscribers at the time that they first subscribed to DirecTV.” *Id.*, ¶65.

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 bullish industry analysts who predicted that “DBS will have nearly 21 million subscribers by 2007.” 2000 Annual Assessment, 15 FCC Red. 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 the 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. 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 just a few months ago that “[t]he expansion of local-into-local service by DBS providers *continues to be a principal reason that customers subscribe to DES.*” 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, EchoStar and DirecTV have repeatedly claimed that capacity constraints will 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—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 trotted out the same claims as a justification for the proposed horizontal merger of the Nation’s only two major DBS firms, DirecTV and EchoStar. As recently as 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, the two DBS firms *already* offer 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, EchoStar *already* serves 119 Designated Local Markets (“DMA’s”), which collectively cover more than 85 percent of all U.S. TV households.⁴ Nor is there any sign that EchoStar’s expansion of local-to-local service has stopped.

⁴EchoStar Press Release, www.dishnetwork.com, *DISH Network Satellite Television Brings Local Channels to La Crosse-Eau Claire, Wis., Area.* (April 29, 2004) (EchoStar now serving 119 DMAs); EchoStar Testimony on Reauthorization of the SHVIA Before the House Energy & Commerce Committee (April 1, 2004), available at <http://energycommerce.house.gov/108/Hearings/>

DirecTV's plans are still more ambitious. As of November 2003, DirecTV offered local-to-local to 64 markets covering more than 72 percent of all U.S. television households. With the launch of a new satellite in the next few months, DirecTV expects to serve 100 DMAs covering 85 percent of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs that collectively include 92 percent of all U.S. TV households.⁵ And as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in *all 210 DMAs*."⁶ In other words, DirecTV alone will soon offer local-to-local service to virtually all American television households—even though EchoStar told Congress and the FCC just two years ago that this result was unthinkable unless the two firms merged.

C. EchoStar and DirecTV Boast About the Excellent Technical Quality of Their Current Local-To-Local Service—Which Retransmits "Digitized" Analog Signals

As discussed below, the satellite industry now demands that Congress expand the *distant-signal* compulsory license—which EchoStar has systematically abused over the past eight years—by creating a new category of households that are "digitally unserved." But any suggestion that EchoStar and DirecTV have difficulty attracting customers under the *current* law is belied by the following facts.

First, both DirecTV and EchoStar can now—or will within a few months—each be able to deliver local television stations by satellite to nearly 90 percent of U.S. television households. *Second*, both DBS firms obtain excellent-quality analog signals from the stations, often working with the stations themselves to obtain a direct feed from the station's studios. *Third*, after receiving a high-quality analog signal, the DBS firms then "digitize" the signals and retransmit them in digital format to their customers. See www.dishnetwork.com/content/programming/index.shtml ("DISH Network now has your digital local channels.") <visited Feb. 16, 2004> (emphasis added). While these signals do not equal the quality of a signal originating from a digital broadcast, or particularly of a high-definition broadcast, the result, according to the DBS industry's trade association, is that DBS "*always delivers a 100 percent, crystal-clear digital audio and video signal*," even if the original source is an analog broadcast. SBCA Website, www.sbca.com/mediaguide/faq.htm <visited Feb. 19, 2004> (emphasis added).

In other words, consumers who receive an excellent-quality "digitized" analog signal from a local station from a DBS firm—as opposed to an imported digital station—are scarcely in a "hardship" position. Of course, it has *never* been the case that "obtaining the best-quality signal" would justify abandoning the principles of localism and free market competition. The principle behind the long-standing "Grade B intensity" standard for determining which households are "unserved" is that Grade B intensity is an objective proxy for an *acceptable* signal, not for the *optimal* signal. If localism could be so easily sacrificed, Congress would not have adopted—and twice reaffirmed—the Grade B intensity standard.⁷

Finally, these local channel offerings have made DBS so attractive to consumers that it is gaining millions of new subscribers every year while the number of cable subscribers is actually *shrinking*. 2004 Annual Assessment, ¶8 ("In the last several years . . . cable subscribership has declined such that as of June 2003, there were approximately the same number of cable subscribers as there were at year-end 1999.") While delivery of *local* digital signals by DirecTV and EchoStar would be a highly desirable development, there is no basis for suggesting that DirecTV and EchoStar need to import *distant* digital signals to serve their customers.

D. DirecTV and EchoStar Have Many Options for Continuing to Expand Their Ability to Deliver Local Signals, Including Local Digital Signals

As discussed above, DirecTV and EchoStar have brilliant engineers who constantly find ways to deliver more programming in the same spectrum. Nevertheless, in policy debates in Washington, the two firms regularly assure Congress (and the

04012004hearing1246/Moskowitz1923.htm (EchoStar offering local-to-local to more than 85 percent of all U.S. television households when it was serving 110 DMAs).

⁵ Press Release, *DIRECTV Names 18 New Local Channel Markets to Launch in 2004* (Jan. 8, 2004), www.directv.com/DTVAPP/aboutusheadline.dsp?id=01_08_2004B.

⁶ 1A *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferees and The News Corporation Limited, Transferee, for Authority to Transfer Control*, ¶332, MB Docket No. 03-124 (released Jan. 14, 2004) (emphasis added).

⁷ In the SHVIA, Congress directed the FCC to prepare a report about whether Grade B intensity—or instead some other standard—should be used for determining whether households are "unserved" by their local stations. In its report, the FCC recommended retaining the Grade B intensity standard. See *In Re Technical Standards for Determining Eligibility For Satellite Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act*, ET Docket No. 00-90 (released Nov. 29, 2000).

FCC) that no further technological improvement can be achieved. To mention one other example: even as DirecTV was doubling its “compression ratio” between 1998 and 2001 -enabling it to carry twice as many channels in the same amount of spectrum—it repeatedly told the FCC that it had hit a brick wall as far as any further progress in compression technology:

- July 31, 1998: “DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites. Therefore, the addition of more channels will necessitate expanding to additional satellites.. . .”
- Aug. 6, 1999: “DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites.”
- Sept. 8, 2000: “DIRECTV has *substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity.”
- Aug. 3, 2001: “DIRECTV has offered digitally compressed signals from its inception, and *has substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity.⁸

This year, the Committee can expect to hear from EchoStar yet again that it has no hope of significantly expanding their capacity. For example, we can expect to hear from EchoStar that it will never be able to carry the digital signals of local television stations, and that it should instead be given a crutch by Congress to help it compete with cable. In fact, the satellite firms have available to them a wide range of potential new techniques for massively expanding their capacity, including:

- spectrum-sharing between DirecTV and EchoStar;
- 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;⁹ and
- improved signal compression techniques.

If Congress allows the power of American technical ingenuity to continue to move forward, we can expect to see DirecTV and EchoStar continue to make tremendous progress in doing more with the same resources. Just as today’s desktop computers are unimaginably more powerful than those available just a few years ago, we can expect similar quantum improvements from America’s satellite engineers-if Congress leaves the free market to do its magic, and leaves necessity to continue to be the mother of invention.s

E. If the FCC Does Not Act, Congress Will Need to Step in to Correct A Major Abuse of Local-to-Local By EchoStar

In crafting the SHVIA, Congress was well aware that if a DBS firm were permitting to select only some—but not all—local stations for retransmission, the stations left off the service would have little chance of reaching viewers who obtain their TV service from the satellite company. In the same spirit as the requirement in the 1992 Cable Act that cable systems carry all qualified local stations in each market in which they operate, the SHVIA specifies that if a satellite carrier chooses to use

⁸See, e.g., Comments of DIRECTV, Inc., [1998] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98–102, at 5 (filed July 31, 1998); Comments of DIRECTV, Inc., [1999] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99–230, at 9 (filed Aug. 6, 1999); Comments of DIRECTV, Inc. [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00–132, at 16 (filed Sept. 8, 2000); Comments of DIRECTV, Inc. [2001] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01–129, at 16 (filed Aug. 3, 2001) (emphasis added in all cases).

⁹The 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).

the local-to-local license to carry signals in a particular market, it must carry *all* qualified local stations. 47 U.S.C. § 338(a)(1). That requirement has been upheld against constitutional attack by EchoStar, DirecTV, and their trade association. *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001). The purpose of the “carry one, carry all” principle is, of course, to ensure the continued availability of a wide variety of different over-the-air channels, and to prevent the local-to-local compulsory license from interfering with existing vigorous competition among all of the broadcast stations in each local market.

Since late 2001, EchoStar has egregiously violated the requirement that it carry all stations in a nondiscriminatory manner: in many markets, EchoStar forces consumers to acquire a second satellite dish to receive some—but not all—local stations. Here in the Washington, D.C. area, for example, EchoStar enables its customers to see the ABC, CBS, Fox, and NBC stations (and a handful of other local stations) with a single satellite dish, pointed at EchoStar’s main satellites. See EchoStar website, www.dishnetwork.com/content/programming/locals/index.shtml. On the other hand, viewers wishing to see Channel14 (Univision), Channel 32 (WHUT—PBS), Channel 53 (WNVN—International), Channel 56 (WNVN—International), or WJAL (Channel68—Independent) are forced to obtain a second satellite dish aimed at a satellite far over the Atlantic. *Id.* (In this and other markets, EchoStar targets public television, Hispanic, and other foreign-language stations for this discrimination.) Because few viewers will go to the time and trouble of obtaining a second dish—*e.g.*, a long wait at home for an installer—the net result is that only a tiny percentage of EchoStar subscribers can actually view all of their local stations. To date, the FCC has taken only ineffective steps to address this egregious form of discrimination,¹⁰ even though EchoStar’s fellow DBS company, DirecTV, has told the FCC that EchoStar’s two-dish ploy “is inconsistent with the language of the Satellite Home Viewer Improvement Act.” See Letter from Merrill S. Spiegel to Marlene H. Dortch, Dkt. No. 00–196 (Jan. 16, 2003).

The Commission has recently indicated that it plans to take action soon to address EchoStar’s two-dish practices,¹¹ but it remains uncertain when it will act on pending petitions for review. Should the Commission fail to take prompt action, Congress should step in to ensure that EchoStar can no longer thumb its nose at Congress’ unmistakable directive that DBS firms that local-to-local means carriage of *all* local stations, without relegating many of the stations to an inaccessible electronic ghetto.

III. The Distant-Signal Compulsory License Has Been Egregiously Abused by Satellite Carriers, and the Need for it is Rapidly Diminishing With the Growth of Local-to-Local

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” is whether the residence can receive an over-the-air signal of a certain objective strength, called “Grade B intensity,” from an affiliate of the relevant network. *Id.*, § 119(d)(10) (definition of “unserved household”). In 1994, Congress extended the distant-signal license for another five years, although it expressly placed on satellite carriers the burden of proving that each of their customers is “unserved.” 17 U.S.C. § 119(a)(5)(D).

In 1999, Congress again extended the distant-signal license as part of the 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 stations. 17 U.S.C. § 119(a)(2)(B)(ii). In the SHVIA, Congress also classified certain very limited new

¹⁰ Declaratory Ruling & Order, *In re National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, Dkt. No. CSR–5865–Z (Media Bureau Apr. 4, 2002). The Commission has to date required only that EchoStar fully disclose its discriminatory treatment and that it pay for the installation of the second dish. Not surprisingly, these requirements have not solved the fundamental problem that acquiring a second dish requires a major expenditure of time and effort on the part of the subscriber, with the result that—just as EchoStar hopes—few viewers ever actually acquire a second dish. And, as discussed in Appendix B, EchoStar has grossly violated even the minimal restrictions currently imposed by the Commission.

¹¹ See Separate Statement of Chairman Michael K. Powell, at 2 n.3, *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket No. 03–124 (released Jan. 14, 2004).

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 2004. 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. This special exception should therefore be allowed to expire routinely.¹²

A. *Delivery Of Distant Signals Is A Poor Substitute For Delivery of Local Television Stations*

From a policy perspective, there is no benefit—and many 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. Nor does viewership of distant stations provide any financial benefit to *local* stations to help fund their free, over-the-air service. To the contrary, distant signals, when delivered to any household that can receive local over-the-air stations, simply siphon off audiences and diminish the revenues that would otherwise go to support free, over-the-air programming.

Members of Congress and other candidates for election are uniquely injured by distant signals: a viewer in Phoenix, for example, will never see political advertisements running on local Phoenix stations if he or she is watching New York or Los Angeles stations from EchoStar or DirecTV instead. Such viewers become virtually unreachable by political advertising, unless (for example) a candidate in Phoenix wishes to purchase advertising on stations in the costliest media markets in the United States—New York and Los Angeles.

B. *Satellite Carriers Have Grievously Abused the Distant-Signal Compulsory License*

Satellite carriers—most egregiously EchoStar—have systematically abused the distant-signal compulsory license since its creation. To the extent that satellite carriers have complied with the limitations placed by Congress on the distant-signal license, it is solely as a result of litigation that broadcasters were forced to undertake to halt satellite carrier lawbreaking.

From 1988 until 1998, satellite carriers simply ignored the objective “Grade B intensity” standard and instead signed up anyone willing to say that they were dissatisfied with their over-the-air picture. Starting in the mid-1990s, when the large “C-hand” dishes began to be replaced by the hot-selling 18-inch dishes offered by DirecTV and EchoStar, the carriers’ distant-signal lawbreaking quickly became a crisis.

When DirecTV went into business in 1994, and when EchoStar did so in 1996, they immediately began abusing the narrow distant-signal compulsory license to illegally deliver distant ABC, CBS, Fox, and NBC stations to ineligible subscribers. In essence, the DBS companies pretended that a narrow license that could legally be used only with remote rural viewers was in fact a blanket license to deliver distant network stations to viewers in cities and suburbs.¹³

As a result of EchoStar’s and DirecTV’s lawbreaking, viewers in markets such as Meridian, Mississippi, Lafayette, Louisiana, Traverse City, Michigan, Santa Barbara, California, Springfield, Massachusetts, Peoria, Illinois, and Lima, Ohio were

¹² *First*, by the end of the year, DirecTV will offer local-to-local in no fewer than 130 DMAs, which collectively cover more than 90 percent of U.S. television households. EchoStar already offers local-to-local in 119 DMAs, and that figure is constantly growing. All of the subscribers in these markets (including subscribers claimed to be grandfathered) will be able to receive their local channels by satellite, making the availability of distant signals irrelevant. *Second*, a Federal judge found in 2003 that EchoStar forfeited the right to rely on grandfathering by defaulting at trial in proving that any of its subscribers actually satisfy the requirements for grandfathering. *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 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 to be able to view their own stations even if they obtain no network stations by satellite.

¹³ For the first few years, DirecTV and EchoStar relied on a distributor called PrimeTime 24 as their wholesaler of distant network station signals. *See CBS Broadcasting Inc. v. PrimeTime 24*, 48 F. Supp. 2d 1342, 1348 (S.D. Fla. 1998) (“PrimeTime 24 sells its service through distributors, such as DIRECTV and EchoStar . . . [M]ost of PrimeTime’s growth is through customer sales to owners of small dishes who purchase programming from packagers such as DirecTV or EchoStar.”). Starting in 1998 (for EchoStar) and 1999 (for DirecTV), the two companies fired PrimeTime 24 in an effort to dodge court orders to obey the Copyright Act.

watching their favorite network shows *not* from their local stations but from stations in distant cities such as New York. Since local viewers are the lifeblood of local stations, EchoStar's and DirecTV's copyright infringements were a direct assault on free, over-the-air local television.

When broadcasters complained about this flagrant lawbreaking, the satellite industry effectively said: if you want me to obey the law, *you're going to have to sue me*. Broadcasters were finally forced to do just that, starting in 1996, when they sued the distributor (PrimeTime 24) that both DirecTV and EchoStar used as their supplier of distant signals. But even a lawsuit for copyright infringement was not enough to get the DBS firms to obey the law: both EchoStar and DirecTV decided that they would continue delivering distant stations illegally *until the moment a court ordered them to stop*.

The courts recognized—and condemned—the satellite industry's lawbreaking. *See, e.g., CBS Broadcasting Inc. v. PrimeTime 24*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (entering preliminary injunction against DirecTV's and EchoStar's distributor, PrimeTime 24); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc. v. DIRECTV, Inc.*, No. 99-0565-CIV-NESBITT (S.D. Fla. Sept. 17, 1999) (permanent injunction after entry of contested preliminary injunction); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction).

By the time the courts began putting a halt to this lawlessness, however, satellite carriers were delivering distant ABC, CBS, Fox, and NBC stations to millions and millions of subscribers, the vast majority of whom were ineligible urban and suburban households. *See CBS Broadcasting*, 9 F. Supp. 2d 1333.

By getting so many subscribers accustomed to an illegal service, DirecTV and EchoStar put both the courts and Congress in a terrible box: putting a complete stop to the DBS firms' lawbreaking meant irritating millions of consumers. Any member of Congress who was around in 1999 will remember the storm of protest that DirecTV and EchoStar stirred up from the subscribers they had illegally signed up for distant network stations.

Even when the courts ordered the DBS firms to stop their massive violations of the Copyright Act, they took *further* evasive action to enable them to continue their lawbreaking. In particular, when their vendor (PrimeTime 24) was ordered to stop breaking the law, both DBS firms fired their supplier in an effort to continue their lawbreaking.

When DirecTV attempted this in February 1999, a United States District Judge promptly stopped it from doing so. *CBS Broadcasting Inc. et al. v. DirecTV*, No. 99-565-CIV-Nesbitt (S.D. Fla. Feb. 25, 1999); *see id.* (S.D. Fla. Sept. 17, 1999) (stipulated permanent injunction).

EchoStar has played the game of "catch me if you can" with greater success, thanks to a series of stalling tactics in court. But in 2003, a United States District Court judge for the Southern District of Florida held a 10-day trial in a copyright infringement case brought by broadcast television networks, and trade associations representing local network affiliates, originally filed against EchoStar in 1998.¹⁴ In June 2003, the District Court issued a meticulously-documented 32-page final judgment, holding EchoStar liable for nationwide, willful or repeated copyright infringement by violating the distant-signal compulsory license. *CBS Broad., Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237 (S.D. Fla. 2003).

EchoStar had the burden of proving that *each* of its subscribers receiving distant ABC, CBS, Fox, and NBC stations is an "unserved household." 17 U.S.C. § 119(a)(5)(D). Yet the District Court found that EchoStar had failed to prove that *any* of its 1.2 million distant-signal subscribers is in fact "unserved." That is, EchoStar did not prove that any of its subscribers is unable to receive a Grade B signal, is grandfathered, or is eligible on any other basis. *Id.*, ¶ 82.

Worst of all, the District Court found that EchoStar had deliberately sought to mislead the court about what it did with the vast pool of illegal subscribers it accumulated between 1996 and 1999. Most important, EchoStar made—and then deliberately broke—a sworn pledge (in a declaration by its CEO, Charles Ergen) to turn off the many ineligible subscribers it signed up using the unlawful do-you-like-your-picture method. *Id.*, ¶ 46. Far from turning off its accumulated illegal subscribers, EchoStar knowingly continued delivering distant signals to many hundreds of thou-

¹⁴The trial was conducted by the Hon. William Dimitrouleas, who took over the case after the original District Court judge, the Hon. Lenore Nesbitt, passed away in 2002. While Judge Nesbitt also ruled that EchoStar was committing massive copyright infringements, EchoStar was able—by making false claims about its supposed compliance efforts—to obtain a delay in enforcement of that ruling.

EchoStar's appeal of this decision was argued before the 11th Circuit in late February 2004.

sands of customers that it knew—from a study EchoStar itself ordered—to be ineligible. *Id.*, ¶¶ 38–47.

EchoStar’s decision to continue its highly profitable lawbreaking was the height of cynicism: as the District Court found, “EchoStar executives, including Ergen and [General Counsel] David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, *elected instead to break Mr. Ergen’s promise to the Court.*” *Id.*, ¶ 46 (emphasis added).

Nor is EchoStar’s abuse of the distant-signal compulsory license the only example of its flouting of laws and regulations and misuse of legal processes. Appendix B is a list of other violations by EchoStar of substantive legal rules, and of instances in which EchoStar has abused judicial and administrative procedures.¹⁵ This is, of course, the same EchoStar that now asks Congress to *expand* the distant-signal compulsory license—and to do so in ways that would allow EchoStar to offer highly profitable programming packages to millions of subscribers, at virtually no cost to EchoStar, but at great cost to broadcasters, program suppliers, and the principle of localism.

C. With the Widespread Availability of Local-to-Local Service, the Number of Truly “Unserved” Households is Minimal

Unlike the local-to-local compulsory license, the distant-signal compulsory license threatens localism and interferes with the free market copyright system. As a result, the only defensible justification for that compulsory license 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).¹⁶

Today, more than 80 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. Even satellite dish owners in local-to-local markets who cannot receive Grade B intensity signals over-the-air (*e.g.*, a household in a remote part of the Washington, D.C. DMA) are obviously not “unserved” by their local stations: they can receive them, with excellent technical quality, directly from their satellite carrier, just by picking up the phone. And they can do so without any need to obtain a waiver, and without regard to what the ILLR model predicts about the over-the-air signal strength at their home.

The widespread availability of local-to-local network affiliate retransmissions means that, as a real-world matter, *there are no unserved viewers* in areas in which local-to-local satellite transmissions of the relevant network are available, because it is no more difficult for viewers to obtain their local stations from their satellite carriers than to obtain distant stations. There is therefore no policy justification for treating satellite subscribers in local-to-local markets as “unserved” and therefore eligible to receive distant network stations.

The distant-signal compulsory license is *not* designed to permit satellite carriers to sabotage the network/affiliate 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 source. Yet satellite carriers have aggressively advertised the benefits to served households of obtaining distant signal programming, including most notably:

- time-shifting (*e.g.*, Mountain and Pacific Time Zone viewers watching network programming two or three hours earlier from East Coast stations)

¹⁵In concluding that the proposed takeover of DirecTV by EchoStar was not in the public interest, the FCC stated: “EchoStar’s record with respect to compliance with SHVIA’s must carry provisions and our rules suggests a resistance to taking steps to serve the public interest that do not also serve the company’s view of its own private economic interest.” *In Re* Application of EchoStar Communications Corporation, CS Docket No. 01–348 (released Oct. 18, 2002).

¹⁶See, *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.”) (emphasis added); 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”) (emphasis added); *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”) (emphasis added); H.R. Rep. No. 100–887, pt. 1, at 20 (1988) (“Moreover, the bill respects the network/affiliate relationship and promotes localism.”) (emphasis added).

- out-of-town sports: because TV networks often show different sports events (such as NFL games) in different cities, a subscription to an out-of-town network station enables viewers to see sports events that are not televised locally.

These abuses of the compulsory license damage both the network/affiliate system and the free market copyright regime. 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 EchoStar offer the local Sacramento ABC, CBS, Fox, and NBC stations by satellite. Nevertheless, for any Sacramento-area viewer who is technically “unserved” under the Grade B intensity standard, DIRECTV and EchoStar can scoop the Sacramento stations with the stations’ own programming by offering distant signals from East Coast stations. The Sacramento station—and every other station in the Mountain and Pacific Time Zones that has local-to-local service—therefore loses badly needed local viewers, even though the viewers have zero need to obtain a distant signal to watch network programming.

Similarly, the ability of satellite carriers to offer distant stations that carry attractive sports events is a needless 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.

The House Energy & Commerce Committee has approved a bill that would bar any new signups for distant network stations in local-to-local markets and create transitional procedures for existing distant network customers. In the spirit of compromise, on the understanding that other important reforms (such as elimination of the two-dish scam) will be implemented, and that other ill-advised proposals (such as the so-called “digital white area” and “ILLR reform” proposals) are not adopted, NAB believes that such an approach is reasonable.

D. For the Small Number of Markets in Which The DBS Firms Do Not Now Offer Local-to-Local, The FCC Has Repeatedly and Recently Reaffirmed that the Grade B Standard and the ILLR Model Are the Best Tools for Determining Which Households are “Unserved”

For the ever-shrinking number of markets in which the DBS firms do not offer local-to-local (which will encompass no more than 8 percent of U.S. television households by the end of 2004 for DirecTV), the Grade B intensity standard, implemented via the FCC-endorsed Individual Location Longley-Rice (“ILLR”) model, continues to be the logical method for predicting which households are unable to receive local stations over the air.

For years, the satellite industry simply ignored the objective signal intensity standard that Congress established in 1988, and instead used a meaningless subjective standard (“are you satisfied with your picture quality?”) that was effectively no standard at all. As discussed above, in 1998, the courts found that the satellite industry had broken the law by signing up millions of subscribers using this illegal method. Rather than coming into compliance, the satellite industry raced to the FCC to demand that the Commission alter (in the satellite industry’s favor) what the DBS firms characterized as an “antiquated,” “1950s-era” Grade B standard.

The FCC carefully considered the engineering data and other evidence presented by the satellite industry, but concluded that, in fact, there was no basis for changing the Grade B standard. *In Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, ¶¶ 32–43, Dkt. No. 98–201 (released Feb. 2, 1999). Although the Grade B standard was originally established in the 1950s, the Commission pointed out that it had repeatedly re-evaluated the standard during the intervening decades and found it to be still sound. *Id.*, ¶ 42. As the Commission observed, many of the changes that have occurred since the 1950s have made it *easier* to obtain a picture of acceptable quality with the same strength signal: for example, the “low cost noisy tubes and . . . components” of the 1950s have been replaced by “modern solid state components that produce lower set noise.” *Id.*, ¶ 41. Overall, the FCC found that the “environmental and technical changes that have taken place” since the Grade B standard was first established have moved “in opposite directions and tend to cancel each other out.” *Id.*, ¶ 42.

Despite this exhaustive review by the Commission in 1998 and 1999, when Congress approved the SHVIA, it directed the Commission to conduct yet another proceeding to evaluate whether Grade B intensity is an appropriate standard. After carefully evaluating the submissions by all interested parties, including engineering data submitted by the satellite industry, the Commission recommended that the

Grade B standard remain unchanged in virtually all respects. *In Re Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act*, ET Dkt. No. 00–90 (released Nov. 29, 2000).

Similarly, the FCC’s ILLR predictive model, first announced in 1999, grew out of years of Commission experience with the Longley-Rice model in other contexts. *In Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, at ¶¶ 61–88. In response to Congress’ directive in the SHVIA, and after reviewing all of the satellite industry’s submissions, the Commission made further refinements to the ILLR model in May 2000 and reaffirmed that ILLR is an accurate and reliable model. *In Re Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, ET Docket No. 00–11 (released May 26, 2000). In doing so, the Commission considered how ILLR predictions fared when compared to actual signal intensity measurements at the same location, and found that in many cases ILLR actually *underpredicts* the actual signal strength available at particular households—precisely the opposite of the satellite industry’s claims. *Id.*

IV. The DBS Industry’s Proposal to *Expand* the Distant-Signal Compulsory License Defies Logic and Would Set Back Local-to-Local Carriage of Digital Signals for Years

Having elected to deliberately violate the limits that Congress imposed on the existing compulsory license unless and until ordered by a Federal court to obey them, EchoStar now demands that Congress radically *expand* the distant-signal license they have abused. The Committee should reject this irresponsible proposal out of hand.

In essence, EchoStar asks the Committee to create a brand-new compulsory license to permit them to deliver the digital broadcasts of the New York and Los Angeles ABC, CBS, Fox, and NBC stations to millions of households nationwide, even though (a) the households can receive the *same programming* over the air from their local station’s analog signal and (b) in the overwhelming majority of cases, EchoStar and DirecTV already deliver the *same programming* via what SBCA describes as “a 100 percent, crystal-clear digital audio and video signal” retransmitted from the local station’s analog broadcasts.

The simple greed behind this proposal is clear, and the tactic is familiar. In the 1990s, the DBS industry sought to offer network broadcast programming “on the cheap” by delivering the analog broadcasts of New York and Los Angeles stations nationwide—completely bypassing the network/affiliate system that Congress and the FCC have worked so hard to foster. (Indeed, in the 1990s satellite companies urged Congress to eliminate the “unserved household” restriction entirely and to permit *universal* distribution of New York and Los Angeles stations in return for payment of a “surcharge.”) This Committee, and Congress as a whole, blocked those maneuvers, instead insisting on localism and on marketplace solutions. By standing its ground against the “quick fix” urged by the DBS industry, Congress has fostered the win/win/win result described above: DirecTV and EchoStar (and their contractors) dug deep to find technical solutions to enable them to offer *local-to-local* broadcast programming to the overwhelming majority of U.S. television households—and soon to all of them. (They found these solutions, of course, only after repeatedly telling Congress and the FCC that the technical problems were unsolvable.)

EchoStar’s current proposal is equally self-serving. EchoStar would enjoy a tremendous financial benefit from being able—again “on the cheap”—to deliver the digital broadcasts of New York and Los Angeles ABC, CBS, Fox, and NBC stations to many millions of viewers nationwide. Instead of investing in delivering *local* digital broadcasts, as cable systems are gradually beginning to do, EchoStar could use a single, inexpensive *national* feed (*e.g.*, of WCBS in New York) to deliver digital programming of a particular network around the country. Although this gambit would cost the DBS firms virtually nothing, they would gain enormously, both in additional customers (at \$40, \$50 or more per month) and in selling additional network packages (at \$6 per month) to both old and new customers.

While the “distant digital” proposal would be a tremendous windfall for EchoStar, it would be a disaster for Congress, the public, and broadcasters. As discussed in detail below, the supposed “factual” basis for this proposal—that the broadcast television industry has not been diligent in pushing the digital transition—is palpable nonsense. And as also described below, this gift to the DBS industry would come at a crippling cost in terms of Congress’ public policy objectives.

A. *The Broadcast Industry Has Spent Enormous Sums and Dedicated Extraordinary Efforts to Implementing the Transition to Digital Broadcasting—With Tremendous Success in Rolling Out Digital to the Vast Majority of American TV Households*

Contrary to the satellite industry's ill-informed accusations, broadcasters have worked tirelessly to implement the transition to digital broadcasting. Thanks to the expenditure of billions of dollars and millions of person-hours, broadcasters have built—and are on-air with—digital television (“DTV”) facilities in 203 markets that serve 99.6 percent of all U.S. TV households.¹⁷ Midway through the transition, almost three-quarters—73.7 percent—of U.S. television households have access to *at least six* free, over-the-air digital television signals.¹⁸ Nationwide, 1411 television stations in 203 markets are delivering free, over-the-air digital signals today.¹⁹ More than 70 million households receive six or more DTV signals; 49 million households receive *nine* or more DTV signals; and a full 30 million households receive *12* or more DTV signals. More digital stations are resolving their obstacles and going on the air almost daily. The digital transition is working and moving ahead quickly, and the claims of the satellite industry to the contrary are empty rhetoric, not fact.

In the top ten markets, covering 30 percent of U.S. households, all top four network affiliates are on-air 38 with licensed full power digital facilities and two New York city stations with Special Temporary Authority (“STA”) currently covering a significant chunk of their service areas and with plans to expand even more. In markets 11–30 (representing another 24 percent of U.S. households), all 79 top four affiliated stations are on-air—72 with full power licensed digital facilities and seven with STAs. Thus, *all* ABC/CBS/Fox/NBC affiliates in the top 30 markets, representing 53.5 percent of all U.S. households, are on-air with DTV—110 stations with full power licensed digital facilities and nine with STAs.²⁰

Even as to smaller stations in these markets and stations in smaller markets—which have far fewer resources but equally high costs—1292 of 1524 stations are on air with digital,²¹ having overcome enormous challenges and in many cases mortgaging their stations to do so, despite having no immediate prospect of revenues to offset these huge investments.

Those who do not understand the digital transition sometimes claim that DTV stations operating with STAs broadcast with very low power. That is simply wrong. Many stations, particularly those outside the largest stations in the largest markets, are “DTV maximizers,” *i.e.*, are maximizing their power to greatly *exceed* their analog coverage. Many maximizers need only a fourth or less of their maximum (licensed) power to cover their entire analog service area. Maximizers operating at even much reduced power are still covering 70 percent or more of their analog service areas. Almost 19 percent of current DTV stations operating pursuant to STAs currently serve *more* than 100 percent of their analog service area with a digital signal.²² This number will expand exponentially as the transition continues. This high percentage is particularly striking given that there are still no FCC rules for digital translators or booster stations, which will further expand digital signals in rural areas (at still further cost to local broadcasters). Free, over-the-air broadcasters take seriously the potential for expanding their service area and diminishing the very small number of households nationwide that cannot receive local signals, and the digital transition will provide an opportunity to increase nationwide broadcast service.

An authoritative study from last fall shows that on-air DTV facilities are serving 92.7 percent of the population served by the corresponding analog stations.²³ The small percentage of viewers who do not yet receive a fully replicated digital signal of their local television stations is shrinking by the day as broadcasters work hard, at great expense, to expand the coverage of their digital stations.

On the programming side, broadcasters, both networks and local stations, are providing an extraordinary amount of high-quality DTV and high-definition television (“HDTV”) programming to entice viewers to join the digital television transition and purchase DTV sets to display the glory of dazzling HDTV programs and the mul-

¹⁷ National Association of Broadcasters, *DTV Stations in Operation*, <http://www.nab.org/Newsroom/issues/digitaltv/DTVStations.asp> (last checked Apr. 30, 2004).

¹⁸ See Mark R. Fratrick, Ph.D., *Reaching the Audience: An Analysis of Digital Broadcast Power and Coverage* (BIA Financial Network, Oct. 17, 2003) (prepared for the Association for Maximum Service Television, Inc.) (“MSTV Study”).

¹⁹ See www.fcc.gov/mb/video/dtvstatus.html (“FCC statistics”).

²⁰ *Id.*

²¹ *Id.*

²² See MSTV Study, *supra*, at 16.

²³ MSTV Study, *supra*, at 1.

multiple offerings of the growing DTV multicasts. Three networks offer virtually all their prime time programming in HDTV, as well as high-profile specials and sporting events, such as

- The Academy Awards
- The Grammys
- 11 National Hockey League playoff games
- The Kentucky Derby
- The Super Bowl
- The AFC Championship
- Masters' Golf
- US Open Tennis
- College football
- NCAA Tournament games
- The Stanley Cup
- The NBA Finals
- The primary NFL games of the week
- The entire schedule of Monday Night Football

PBS is launching its HD Channel, in addition to its multicast channels of educational fare. WB is doubling its amount of HD programming this fall to account for more than half of its program schedule. PAX is multicasting on its digital channels, including prime time fare. And now many special effects, like the first-down marker and graphics, are also going high definition, to enhance the viewer experience and move the transition along faster and faster.

While it is local stations that bring these national HDTV programs to the vast majority of viewers, these local stations also are doing more and more on the local level to supplement the network HDTV and multicast fare. Examples abound of local HDTV and multicast broadcasts (at an enormous cost for full local HD production facilities):

- WRAL-TV produces its local news in HDTV
- Post-Newsweek's Detroit station broadcast live America's Thanksgiving Day Parade in HD
- WRAZ-TV in Durham NC broadcast 10 Carolina Hurricanes hockey games in HD last winter
- KTLA in LA broadcast last January's Rose Parade in HD in a commercial-free broadcast simulcast in Spanish and closed captioned and repeated it throughout the day and distributed it on many Tribune and other stations
- Last April, Belo's Seattle station KING-TV began producing its award-winning local programs Evening Magazine and Northwest Backroads in HDTV. Evening Magazine is daily. These programs are broadcast on Belo's other Seattle and Portland and Spokane stations
- KTLA last March broadcast live LA Clippers and the Lakers in HD. It was the third sports presentation by KTLA, which included two Dodgers games
- Many public TV stations are providing adult and children's education, foreign language programming and gavel-to-gavel coverage of state legislatures
- NBC and its affiliates are planning a local weather/news multicast service
- ABC is multicasting news/public affairs and weather channels at its KFSN station in Fresno, Calif. It plans to replicate this model at the nine other stations it owns.
- WKMG in Orlando plans to broadcast a Web-style screen with local news, weather maps, headlines and rotating live traffic views.

This ever-increasing variety of DTV and HDTV programming, being broadcast to the vast proportion of American households, will attract consumers to purchase DTV sets. Another major driver of the transition is the FCC's August 2002 Tuner Order, which requires all new television sets, on a phased-in basis and starting this summer with the half of the largest sets, to have a DTV tuner. As a result, DTV tuners will be available in an ever-increasing number of households, thereby further hastening the transition.

In short, the suggestion that broadcasters have somehow failed America in the transition to digital broadcasting is demonstrably false. Indeed, EchoStar's General Counsel, David Moskowitz, admitted as much in testimony before the Judiciary

Committee in February: “I agree with you completely [that broadcasters can’t be blamed for decisions by consumers not to invest in digital sets]. I’m not saying the NAB or the broadcasters are at fault.”²⁴

Moreover, the notion that new compulsory license for “digital white areas” would *improve* matters is sheer fantasy. In fact, allowing satellite carriers to deliver distant digital (or HD) signals to so-called “digital white areas” would set the stage for a consumer nightmare almost identical to what occurred in 1999, when hundreds of thousands of households had to switch from (illegally-delivered) distant signals to over-the-air reception of local stations.

The reason is simple: as Congress painfully experienced from mountains of letters, e-mails, and phone messages in 1999, viewers who are accustomed to receiving all of their TV programming (including network stations) by satellite are often enraged when told that they must switch to a hybrid system in which they combine satellite reception with an off-air antenna or cable service. The import of the “distant digital” proposal is therefore clear: after EchoStar had “grabbed” customers with a distant digital signal, the costs to local broadcast stations of reclaiming those viewers would go sky-high, since stations would face not only the same financial costs they do now but *also* the high costs of confronting thousands of angry local viewers with the need to change their reception setup. EchoStar knows all of this, and it fully understands the implication: the “distant digital” plan would *not* encourage a smooth digital transition, and would *not* encourage stations to invest in the digital rollout, but would simply make it easy for EchoStar to hook customers on (distant) satellite-delivered digital signals and keep them forever.²⁵

If there were any doubt about EchoStar’s tenacity in retaining distant-signal customers once they begin serving them regardless of the legality of doing so—EchoStar’s behavior with regard to analog distant signals would eliminate it. As a District Court found last year after a 10-day trial, EchoStar was so determined to retain its illegal distant-signal customers that, “when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers,” the key “EchoStar executives, including [CEO Charles] Ergen and [General Counsel] David Moskowitz,” choose instead “to break Mr. Ergen’s promise to the Court” that it would turn them off. *CBS Broad., Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d at 1246, 46.

B. The Radical New Compulsory License Demanded by EchoStar Is Unnecessary and Would Do Lasting Damage to Localism

At all times since 1988, the purpose of the distant-signal license has been to make over-the-air broadcast programming available by satellite solely as a “lifeline” to satellite subscribers that had no other options for viewing network programming.²⁶ The EchoStar proposal would do exactly the opposite: Congress would override normal copyright principles to permit DBS companies to transmit distant network stations to many millions of additional households, even though (1) the households get a strong signal from their local stations over the air and (2) in most cases, the DBS firm already offers the local analog broadcasts of the same programming, in crisp, digitized form, as part of a local-to-local package. The suggestion that Congress needs to step in to offer a “lifeline” under these circumstances is baffling.²⁷

The consequences of this radical proposal, if adopted, would be likely to be grave. According to EchoStar, for example, if a station (through no fault of its own, *e.g.*, because of a local zoning obstacle) has been unable to go on-air with a digital signal, *every household in that station’s market* would be considered “unserved”—and there-

²⁴ Testimony of David Moskowitz before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee (Feb. 24, 2004).

²⁵ In his oral testimony in February before a subcommittee of the House Judiciary Committee, SBCA spokesman (and EchoStar General Counsel) David Moskowitz said that once DBS firms begin delivering a distant digital signal to a household, they should *never* have to turn off that signal. Far from encouraging stations to expand their digital service areas, this naked “land grab” would have the opposite effect: no matter what they did, stations would have forever lost many of their local customers to a distant signal.

²⁶ *E.g.*, SHVIA Conference Report, 145 Cong. Rec. H11792 (“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).

²⁷ The Committee should be aware that, in the guise of a letter seeking advice about how to fill out a Copyright Office form, EchoStar sought last year to obtain from the Copyright Office a statement that the Copyright Act *as now in force* already recognizes the “distant digital” concept. See Letter from David Goodfriend, EchoStar Communications Corp. to David O. Carson, General Counsel, Copyright Office (June 18, 2003). The Office swiftly, and properly, rebuffed that back-door effort. Letter from William J. Roberts to David Goodfriend (Aug. 19, 2003).

fore eligible to receive a retransmitted signal from the New York or Los Angeles ABC, CBS, Fox, and NBC affiliates' digital broadcasts. In these markets, EchoStar would take us back to the dark days of the mid-1990s, when, before courts began to intervene, the DBS firms used national feeds to deliver ABC, CBS, Fox, and NBC network programming to any subscriber who asked for it.²⁸ And they would do so even though, in most cases, the DBS firms are themselves already delivering the same programming by satellite from the local stations. With DBS penetration already at more than 20 million households nationwide, and with the highest levels of DBS penetration in smaller markets, the impact on the viability of local broadcasters could be devastating.²⁹ Worse yet, based on the misconduct of EchoStar in their retransmission of distant analog signals, once EchoStar has begun delivering distant digital stations, it will take enormous efforts (and years of struggle) to get them to ever stop doing so, even if they have "promised" to do so, and even if the law squarely requires them to do so.

Granting this enormous government subsidy to the DBS industry, at the expense of local broadcasters (and ultimately at the expense of local over-the-air audiences), would also have profoundly negative long-term consequences for the continued progress of the satellite industry. Over-the-air broadcasting is a *local* phenomenon, and the right way to deliver local stations is on a local-to-local basis. In their drive to compete with cable, and with each other, DirecTV and EchoStar are likely to devise ingenious technical solutions to enable them to carry digital broadcasts on a local-to-local basis, just as they have—despite their gloomy predictions—found a way to do so for analog broadcasts. But rewriting the laws to give EchoStar a cheap, short-term, government-mandated "fix" will take away much of the incentive that would otherwise exist to continue to find creative technological solutions. Congress wisely refused to abandon the bedrock principles of localism and free market competition in the 1990s, when the satellite industry made similar proposals, and Congress should do the same now.³⁰

The EchoStar proposal would also sabotage another key objective of the SHVIA, namely minimizing unnecessary regulatory differences between cable and satellite. If EchoStar could deliver an out-of-town digital broadcast to anyone who does not receive a digital broadcast over the air, it would have a huge (and wholly unjustifiable) leg up on its cable competitors, which are virtually always barred by the FCC's network non-duplication rules from any such conduct. *See* 47 C.F.R. §§ 76.92–76.97 (1996).

Finally, it would be particularly inappropriate to grant EchoStar a vastly expanded compulsory license *when it has shown no respect for the rules of the road that Congress placed on the existing license*. If Congress were to adopt this ill-conceived proposal, it can expect more years of controversy, litigation, and—ultimately—millions of angry consumers complaining to Congress when their "distant digital" service is eventually terminated. This Committee should rebuff the invitation to participate in such a reckless folly.

V. DBS Carriage of "Significantly Viewed" Stations

The concept of "significant viewing" of TV stations—as applied to cable carriage—dates back more than 30 years. In 1972, the FCC adopted a rule, using data about over-the-air viewing in 1971, to establish which television stations were viewed over the air by a significant number of households in each community (usually by county). Local cable systems that would not otherwise have been allowed to carry these stations were permitted to do so on the theory that, if significant numbers of viewers could watch a station over the air in a given area, cable subscribers in that area should also be able to view the station. *See* 47 C.F.R. § 76.92(f) (exception to "network nonduplication" rule permitting cable carriage of stations in areas in which the stations are significantly viewed).

The FCC maintains a list of significantly-viewed stations, based on standards set forth in 47 C.F.R. § 76.54. If a station is significantly viewed in the community served by a cable system, the cable operator may carry that station on a copyright-

²⁸In other markets, while stations have gone on-air with their digital signals, their coverage area is temporarily reduced for reasons entirely beyond their control—such as the destruction by terrorists of the World Trade Center and its broadcasting facilities.

²⁹Of course, the tiny number of *genuinely unserved* households (*e.g.*, those unable to receive Grade B intensity analog signals over the air) can receive either an analog or a digital signal from a distant affiliate of the same network. *See* Letter from William J. Roberts, U.S. Copyright Office, to David Goodfriend (Aug. 19, 2003).

³⁰When analog broadcasting ceases several years from now, there may-but may not-be a need for a distant-signal compulsory license. If the DBS firms are then providing local-to-local broadcasts of local TV stations in a digital (or HD) format, for example, there may be no need for a distant-signal license at all, or a need only for an extremely limited license.

free basis in that community under 17 U.S.C. § 111. The Commission has procedures for adding stations to the list for additional communities based on new data, as well as a waiver procedure by which stations can effectively be removed from the list for particular communities. If a station is dropped from the list for a particular area, the network nonduplication rules once again apply to carriage of that station in that area.

The local-to-local compulsory license for satellite carriers is currently limited to retransmissions within a station's own local market, or DMA. The DBS industry has asked Congress to modify the law to permit satellite carriers to deliver TV stations outside of their own local markets into areas in which the stations are considered "significantly viewed" by the FCC.

In the spirit of accommodation, NAB does not oppose a carefully-tailored amendment extending to DBS the ability to retransmit "significantly-viewed" television stations. Any amendment to allow DBS firms to retransmit TV stations into "significantly viewed" areas, however, needs to be consistent with the principles of localism that underlie the entire Satellite Home Viewer Improvement Act. Such amendments should, to the extent possible, provide the satellite industry with the same right to retransmit "significantly viewed" stations that the cable industry now enjoys, and impose the same restrictions now imposed on cable. In addition, given the years of violations of existing copyright law and abuse of FCC processes by EchoStar, any amendments must be airtight—and create the strongest possible incentives to those companies to comply with the law—to reduce the risk that a new exception will become the basis for a new round of lawbreaking.

In particular, an amendment to add "significantly-viewed" stations to the list of those that DBS firms may carry should implement the following principles:

1. *Strict enforcement provisions to protect against abuse by DBS firms.* As Congress is aware, EchoStar has broken a sworn promise to a Federal judge to tum off illegal distant-signal subscribers, and in many other instances has shown a disregard for compliance with the law.³¹ Any "significantly-viewed" amendment should guard against a new wave of lawbreaking by creating strict, objective, verifiable, and enforceable rules about when satellite carriers can deliver out-of-market signals into "significantly viewed" areas. In particular:

- The FCC, and not any DBS company, should make the determination about whether a particular TV station is "significantly viewed" in a particular community.
- To make it easier to check on their compliance, DBS firms should indicate separately which subscribers are being served under the "significantly viewed" provision in their monthly reports to networks listing new local-to-local subscribers..
- If DBS firms violate these simple, objective rules after being notified of the violation, they would forfeit the privilege of delivering stations in that market to "significantly viewed" areas outside the market. For example, if EchoStar illegally delivered Washington, D.C. stations to viewers in Florida, falsely claiming that the stations are "significantly viewed" over the air there, EchoStar should lose the privilege of retransmitting any Washington, D.C. station outside of the Washington, D.C. DMA. In addition, if the FCC determines that a station is no longer significantly viewed in a defined geographic area, the compulsory license permitting DBS to carry that station should expire shortly thereafter.
- The FCC should be directed to establish expedited enforcement procedures so that affected stations can obtain quick relief from the Commission for violations by a DBS firm. (In the example above, stations in Florida could quickly obtain relief against the unlawful retransmission of Washington, D.C. stations to subscribers in Florida.)

³¹The following very recent examples (from 2003 and 2004) illustrate EchoStar's indifference to legal requirements: *CBS Broad., Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237, ¶ 46 (S.D. Fla. 2003) ("EchoStar executives, including [CEO Charles] Ergen and [General Counsel] David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, elected instead to break Mr. Ergen's promise to the Court"); *In Re Agape Church, Inc. v. EchoStar Communications Corp.*, CSR-6249-M (FCC Media Bureau Mar. 16, 2004) (EchoStar violated Commission's Order on local-to-local service by unlawfully discouraging subscribers from obtaining access to local religious station); *In Re Tri-State Christian, Inc.*, Mem. Op. & Order, Dkt. No. CSR-5751 (FCC Media Bureau Feb. 5, 2004) (same); *EchoStar Satellite Corp. v. Brockbank Ins. Servs., Inc.*, No. 00-N-1513, at 3 (D. Colo. Feb. 5, 2004) (imposing \$30,000 sanction against EchoStar and finding that its actions "rose to the level of conscious wrongdoing").

2. *Protection against potentially severe harm to localism.* Delivery of out-of-market stations to a household should be a *supplement* to the DBS firms' delivery of a viewers' local stations, not a *substitute* for true local-to-local. (This is always true for cable, which always offers local stations.) For example, in the case cited by the DBS firms in their testimony, delivery by DBS firms of New York City stations to "significantly viewed" areas in the Hartford/New Haven DMA would be *in addition* to DirecTV's and EchoStar's delivery of local Hartford/New Haven stations.

It would be extraordinarily damaging, however, if the DBS firms could deliver an out-of-market station into a market in which they do *not* offer local-to-local service. For example, if EchoStar could deliver out-of-market stations into DMAs in which EchoStar does *not* offer local-to-local, EchoStar subscribers in the latter markets would see an *out-of-town* station on their DBS lineup, but would not see their own local stations. Particularly because the DMAs in which local-to-local is not yet available are generally small markets, the economic health, and even the viability, of free, over-the-air local stations could be threatened as out-of-town stations siphoned off their local viewers.

For the same reasons, delivery of an out-of-market station in *digital* (or high-definition) format into a market in which the local stations are available only in an analog form would be very damaging to the local stations in the "invaded" market. Congress should therefore draft any amendment carefully to ensure that any importation of digital signals into a market does not harm the local stations in the market.

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

To ensure that expanding the DBS license to include carriage of "significantly viewed" stations does not have these harmful effects, therefore, any proposal to do so must permit delivery of stations into "significantly-viewed" areas only if the satellite carrier is already providing local-to-local service in those areas. When the DBS firm carries the "significantly viewed" station in a digital format, it should be allowed to import the station into another market into the relevant community only if doing so will not unfairly harm the local stations—for example, if the DBS firm is already offering the local stations in digital.

Finally, an additional amendment is necessary to put broadcasters' carriage negotiations with satellite carriers on the same footing as negotiations with cable operators, once both cable and DBS have the benefit of delivering stations in "significantly viewed" communities. The amendment should direct the FCC to amend its regulations to allow broadcasters, in appropriate cases, to make their elections between retransmission consent and mandatory carriage on a community-by-community, rather than DMA-wide, basis.

VI. What Congress Should Do This Year

As the Committee is aware, the local-to-local compulsory license is permanent, but Congress has wisely extended the distant-signal license (in Section 119 of the Copyright Act) only for five-year increments. Given the short legislative calendar and the press of other urgent business, Congress may wish simply to extend Section 119, as now in force, for another five years.

If Congress wishes to do anything other than a simple extension of the existing distant signal compulsory license, NAB urges:

- *No distant signals where local-to-local is available.* For the reasons discussed above, Congress should amend the definition of "unserved household" to exclude any household whose satellite carrier offers the household's own network stations on a local-to-local basis. There is no logic to interfering with localism—and with basic copyright principles—under these circumstances. It makes no sense, for example, to give satellite carriers the right to "scoop" local stations on the West Coast (and in the mountain West) by delivering *8 Simple Rules*, *Everybody Loves Raymond*, *24*, or *The Tonight Show* two or three hours early, or to permit EchoStar to evade normal copyright restrictions by delivering out-of-town NFL games to local-to-local households without ever negotiating for the rights to do so. (At a minimum, Congress should cease any *new* signups for distant signals in local-to-local markets, and establish appropriate transition provisions for existing customers who are (under current law) legally receiving distant network signals today.)

- *No expansion of the distant-signal compulsory license.* Congress should flatly reject any proposal to *expand* the distant-signal compulsory license, such as the irresponsible “distant digital” proposal discussed above. Since the compulsory license is intended only to address “hardship” situations in which viewers have no other means of viewing network programming, there is no policy basis for *expanding* the compulsory license to cover households that receive can view their local station’s analog signals over the air. Still less would it make any sense to declare a household to be “unserved” when it already receives (or can receive with a phone call) a crisp, high-quality digitized retransmission of their local station’s analog broadcasts from DirecTV or EchoStar.
The Committee not take seriously EchoStar’s predictable claims that it lacks the technological capacity over time to offer local digital signals, since—as discussed above—EchoStar and DirecTV are notorious for “underpredicting” their ability to solve technological challenges. Moreover, it would be wholly inappropriate to reward companies such as EchoStar, which have knowingly violated the existing law and broken sworn promises to courts about compliance, by *broadening* the compulsory license they have abused.
- *Five-year sunset.* Congress should again provide that Section 119 will sunset after a five-year period, to permit it to evaluate at the end of that period whether there is any continuing need for a government “override” of this type in the free market for copyrighted television programming.
- *Stopping the “two-dish” scam.* As discussed above, Congress should—if the FCC does not do so first—bring a halt to EchoStar’s two-dish gambit, which is thwarting Congress’ intent to make all stations in each local-to-local market equally available to local viewers.
- *Significantly-viewed stations.* As an accommodation to the satellite industry, NAB does not oppose adoption of a provision allowing importation, in certain instances, of stations that are considered “significantly viewed” in the community to which they are delivered by the DBS firm—provided that the amendment contains strong safeguards (and potent penalties) to ensure against damage to localism.

Conclusion

With the perspective available after 16 years of experience with the Act, Congress should adhere to 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 enjoyed by free, over-the-air local broadcast stations.

If Congress makes any change to the existing distant-signal license, it should amend the Act to specify that a household that can receive its own local stations by satellite from the satellite carrier is not “unserved” (subject, perhaps, to limited transitional provisions). The Committee should flatly reject reckless bids by companies like EchoStar—which have scoffed at the law for years—to *expand* the distant-signal license.

Far from rewarding EchoStar for its indifference to congressional mandates, Congress should—if the FCC does not—make clear that EchoStar’s flouting of “carry one, carry all” through its two-dish gambit must come to an end. And as it has done in the past, Congress should limit any extension of the distant-signal license to a five-year period, to enable a fresh review of the appropriateness of continuing this major governmental intervention in the free marketplace.

APPENDIX A

RECENT EXAMPLES OF LOCAL TV STATION PUBLIC SERVICE

Helping People In Need

WXYZ “Can Do” Raises 500,000 Pounds of Food for Food Banks

WXYZ-TV Detroit (E.W. Scripps-owned ABC affiliate) undertook its 22nd annual “Operation Can-Do” campaign this winter, bringing in more than 500 thousand pounds of canned and non-perishable food to help feed families and individuals through soup kitchens and food banks in the tri-county area. Since it began the program, WXYZ has collected more than six million pounds of food, providing more than 20 million meals to the hungry of Metropolitan Detroit. (Jan/Feb 2004)

WHSV-TV Builds a Habitat House

WHSV-TV Harrisonburg, VA (Gray Television-owned ABC affiliate) decided the best possible way to celebrate its October 2003 50th Anniversary would be to part-

ner with Habitat for Humanity to raise \$50 thousand over the summer to build a house for a needy family. January 2003 marked the first time that the Staunton-Augusta-Waynesboro Habitat affiliate partnered with a television station to build a house and show the public the Habitat miracle. WHSV had several fundraisers, including production and distribution of a Shenandoah Valley cookbook commemorating the station's 50 years of service and the Habitat chapter's 10 years of service. In August, WHSV hosted a special benefit screening of "From Here to Eternity," which won the Academy Award in the same year WWSA-TV (now WHSV) sent out its first broadcast. Community members who supported the screening were driven by limousine to the theater and entered on a red carpet. WHSV sent out calls for and coordinated volunteers throughout the fundraising and building process. The station met its goal, the house was built and a grateful family of four moved in. (Jan/Feb 2004)

Children

WFAA-TV Collects 82,000 Toys in Four-Week Campaign

WFAA-TV Dallas/Fort Worth (Belo-owned ABC affiliate) in 2003 ran its most successful Santa's Helpers campaign in the 34-year history of this program. WFAA was able to collect more than 82,000 toys over the course of the four-week campaign, allowing the station to help more than 50,000 children in the North Texas area. In 2002 the station collected 76,000 toys. Santa's Helpers is promoted on air through numerous promos and PSAs, and also by WFAA's chief weathercaster, Troy Dungan, who has served as Santa's Helpers spokesman for 28 years. Each year, the highlight of the campaign is a "drive-thru" event that is held in front of the station, where WFAA anchors and reporters greet viewers as they drop off toys. After all of the toys have been collected, they are distributed to needy children by more than 40 nonprofit organizations in the Dallas/Fort Worth area. (Jan/Feb 2004)

Healthy Communities

KTTC-TV: 50 Years On-Air, 50 Years Fighting Cancer

KTTC-TV Rochester, MN (QNI Broadcasting-owned, NBC) celebrated its 50th anniversary in July and nearly 50 years of partnership with the local Eagles Lodge producing and airing a 20-hour telethon to raise money for cancer research. Fifty years ago young Rochester television sportscaster Bernie Lusk was searching for a way to use the powerful new medium of television to make a difference. At a time when the battle with polio garnered much attention, Bernie wanted to tackle another disease that claimed many lives-cancer. Bernie shared his idea with fellow Eagles Lodge members, and the now 50-year-old, totally local telethon was born.

In its first year, the 1954 KTTC/Eagles Cancer Telethon raised \$3,777. In 2003, \$702,900 was raised for the Mayo Clinic, the University of Minnesota, and the Hormel Institute of Research. To date the telethon has raised more than \$9 million dollars. (Nov/Dec 2003)

KLAS-TV Promotes Breast Cancer Awareness

KLAS-TV Las Vegas (Landmark Broadcasting, CBS) runs the Buddy Check 8 program asking viewers to call a buddy on the 8th day of the month to remind her to do a breast self examination. KBLR-TV (Telemundo) also produces the same messages in Spanish. (September 2003)

Helping Animals

KEYE Raises \$172,000 for Humane Society

KEYE-TV Austin, TX (Viacom, CBS) hosted the Austin Humane Society's 6th Annual Pet Telethon June 20 and 22, raising \$172,000 and resulting in the adoption of 104 animals. The society runs a no-kill shelter, where animals accepted into the adoption program are kept for as long as it takes to find them a loving home. The society has saved approximately 2,700 animals in the past year alone. (July 2003)

Drug Prevention

Hawaii TV Stations Forego New Network Shows to Blanket Islands with Drug Documentary

Television stations in the Hawaiian Islands simultaneously aired an unprecedented, commercial-free drug documentary at 7 p.m. on September 24, with network affiliates pre-empting the first hour of primetime during the networks' debut of their new fall shows. The stations were honoring their commitment to help battle Hawaii's biggest drug problem. "Ice: Hawaii's Crystal Meth Epidemic," produced by Edgy Lee's FilmWorks Pacific, details the epic proportions of crystal meth abuse, with grassroots reaction and views. Originally conceived as a 30-minute show, it

was expanded to an hour because of the magnitude of the epidemic and originally was to air in August to avoid the fall network season. The commercial-free airing agreement did not come without a cost. It meant thousands of dollars in lost ad revenues for the stations and the canceling or delayed airing of the season premieres of "Ed," "60 Minutes II," "My Wife and Kids" and "Performing As." KITV-TV (Hearst Argyle, ABC) general manager Mike Rosenberg estimated the loss was as much as \$10 thousand per station. Stations that simulcast the program included: Honolulu stations KITV-TV (Hearst Argyle, ABC), KBFD (Independent), Raycorn Media stations KHNL (NBC) and KFVE (WB), KIKU (International Media Group, Independent), Ernrnis Communications stations KHON (Fox) and KGMB (CBS) and KWHE (Independent). Some stations even added additional ice programming to follow Lee's film. Among them were KHON, which showed an hour-long panel including Governor Linda Lingle and Lt. Governor James Aiona; and KFVE, which aired a half-hour program focusing on teen drug usage. (October 2003)

Broadcasters Without Borders

Roanoke Station's Viewers Come Through for Troops

A six-day promotion at WDBJ-TV Roanoke, VA (Schurz Communications, CBS) to gather items such as toiletries and snack foods for American troops serving in the Iraq war resulted in more than two tons of welcome supplies. Viewers overwhelmed the station and collection points at several Roanoke area automobile dealerships with more than 4,000 pounds of Packages from Home to be sent overseas. The American Red Cross local chapter helped get the goods to the Middle East. "Thursday and Friday afternoons, the cars were bumper to bumper at our front door," said WDBJ President and General Manager Bob Lee. "We filled up the lobby, and then the packages started to spill over into other areas of the building." Red Cross and station volunteers sorted the DOD-approved personal items. Said Lee, "Who would have thought we would end up with more than two tons of merchandise! We were beginning to think we'd need our own C-130 for the delivery." (April 2003)

Education

KTLA Student Scholarships

KTLA-TV Los Angeles (Tribune-owned WB affiliate) is launching its sixth Annual Stan Chambers Journalism Awards competition a partnership with area county departments of education and member school districts. The station has invited more than 300 high schools to have their seniors submit essays on "What Matters Most," for the opportunity to receive scholarships to further their education. Five winners will receive \$1,000 and a chance to experience work in the KTLA Newsroom. Winners will produce videos of their entries, with guidance from KTLA News writers, producers and reporters. The program honors KTLA's veteran reporter and journalist Stan Chambers for his contributions to the community. (Jan/Feb 2004)

KRON-TV's "Beating the Odds"

KRON-TV San Francisco's "Beating the Odds" is a series of news stories and specials reported by anchorwoman Wendy Tokuda and other KRON News reporters. Tokuda's "Beating the Odds" series features extraordinary high school students who are rising above tough circumstances. Some are growing up without parents, others are homeless and some are raising siblings. All of them want to go to college. The stories are tied to a scholarship fund established by KRON and the Peninsula Community Foundation to help low-income, high-risk Bay Area high school students pay for college. Following each "Beating the Odds" report, viewers are encouraged to donate to the fund. Since 1997, the fund has raised more than \$1.5 million for students profiled in the series. The Foundation waives all its fees, so 100 percent of the tax-deductible donations go to the students. KRON is an independent station owned by Young Broadcasting. (March 2003)

Belo/Phoenix Launches Statewide Education Initiative

Belo Broadcasting/Phoenix has launched a six-month, statewide initiative on education to address major issues affecting students and schools. Running through March, "Educating Arizona's Families" involves monthly topics ranging from early brain development and learning readiness to literacy, accountability, dropout, post-secondary education, the teaching profession and the economic impact of education on the state. The stations focus on each initiative for one month, producing two dozen stories per topic. Weekly public affairs programming is directed toward the specific issues being covered each month and guests on mid-day newscasts, three times weekly, offer insight to parents, caregivers and other viewers. KTVK-TV Phoenix (Independent) is driving the initiative through news and daily promotional

announcements that also air in Tucson on Belo's KMSB-TV (Fox) and KTTU-TV (UPN). Promotion spots change monthly and individual 30-second sponsor announcements address education interests of each sponsor. (Nov/Dec 2003)

Protecting the Environment/Endangered Species

Emmis Makes \$90,000 Grant to Indianapolis Zoo For Endangered Species

Radio and television station owner Emmis Communications will donate \$90,000 to the Indianapolis Zoo for a multi-year conservation research project aimed at saving one of the planet's most endangered species, the ring-tailed lemur. A portion of the donation will be used to research potential problems that could occur from the re-introduction of the animals into the wild from zoos around the world, paving the way for future reintroduction of the species into their native range. (January 2002)

APPENDIX B

RECENT EXAMPLES OF MISCONDUCT BY ECHOSTAR

1. The owners of the ABC, CBS, Fox, and NBC television networks, along with the ABC, CBS, Fox, and NBC Affiliate Associations, sued EchoStar in 1998 in the Southern District of Florida for violations of the Copyright Act relating to delivery of distant network stations. The case was tried to the Hon. William Dimitrouleas for ten days in April 2002. The Court's Findings of Fact and Conclusions of Law are reported at *CBS Broadcasting Inc. v. EchoStar Communications Corporation*, 276 F. Supp. 2d 1247 (S.D. Fla. 2003). The Court found that EchoStar had failed to meet its burden of proving that any of its 1.2 million subscribers to distant network stations met the statutory standard. *Id.* ¶82. Rejecting testimony provided by EchoStar CEO Charles Ergen, U.S. District Court William Dimitrouleas found that "[n]o credible evidence was presented to the Court to support the contention that EchoStar turned off distant signals for compliance reasons . . ." *Id.* ¶45.

2. The Court also found that EchoStar had knowingly broken a sworn promise to the Court to turn off ineligible subscribers. The Court stated:

It appears that EchoStar executives, including Mr. Ergen and David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, elected instead to break Mr. Ergen's promise to the Court.

Id. ¶46.

The Court also found that "when Mr. Moskowitz, an EchoStar executive who worked closely on SHVA compliance, was questioned during his deposition about the 1999 Decisionmark ILLR analysis, he paused for an unusually long period of time and then answered the questions concerning the ILLR analysis in a vague manner, unable or unwilling to give any details on the results of the analysis or EchoStar's actions following the analysis." *Id.*, ¶47.

3. In a lawsuit filed by EchoStar claiming antitrust violations for alleged conspiracy and boycott by an insurance company, a United States District Judge imposed a \$30,000 sanction on EchoStar under the Court's inherent authority to punish discovery misconduct. Order, *EchoStar Satellite Corp. v. Brockbank Ins. Servs., Inc.*, No. 00-N-1513 (D. Colo. Feb. 5, 2004). The Court found that EchoStar's action "rose to the level of conscious wrongdoing." *Id.* at 23. With respect to testimony by EchoStar's General Counsel, David Moskowitz, who was required to present knowledgeable testimony as EchoStar's designated spokesperson, the Court found that "either Mr. Moskowitz was not knowledgeable or he was not candid." *Id.* at 22. The Court also found that Mr. Moskowitz' testimony was "evasive[]." *Id.* at 22 n.16.

4. In a 2002 proceeding, the FCC's Media Bureau found that EchoStar had, in numerous respects, violated the SHVIA through its practices relating to delivery of certain local television stations in a manner requiring subscribers to obtain a second satellite dish. Declaratory Ruling & Order, *In re National Ass'n of Broadcasters and Ass'n of Local Television Stations: Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, Docket No. CSR-5865-Z, 17 FCC Red 6065 (2002). See *id.* ¶12 ("EchoStar's 'two dish' plan, as implemented, violates both the Act and the Commission's rules."); *id.* ¶25 ("EchoStar's 'two-dish' plan violates the contiguous channel placement requirement of the statute . . ."); *id.* ¶34 ("We cannot consider or grant a waiver insofar as EchoStar's actions directly violate the statute."); *id.* ¶35 ("Given our concerns about EchoStar's violations, and the severe impact they have on certain local stations and subscribers, EchoStar is required to submit a Compliance Report and Plan within 30 days after release of this Order.")

5. Since the Commission's 2002 ruling, EchoStar has, on many occasions, violated even the minimal requirements imposed by the FCC for carriage of some (but not

all) local stations through use of a second dish. Among other things, EchoStar has discouraged subscribers from obtaining a second dish, falsely told subscribers they would have to pay for a second dish, and falsely stated that customers could not have a second dish installed at the time of their original installation. *In re University Broadcasting, Inc. v. EchoStar Communications Corp.*, Mem. Op. & Order, Dkt. No. CSR-6007-M (Feb. 20, 2003); *In Re Entravision Holdings, LLC*, Mem. Order & Op., Dkt. No. CSC-389 (April 15, 2002); *In Re Tri-State Christian, Inc.*, Mem. Op. & Order, Dkt. No. CSR-5751 (Feb. 5, 2004).

6. In its April 2002 Declaratory Ruling & Order, the FCC Media Bureau provided the following summary of earlier instances in which the Commission had sanctioned EchoStar for illegal or improper conduct:

“EchoStar has previously been fined by the Commission for rule violations and admonished for its ‘disingenuous’ behavior and lack of candor. In June 1998, the Commission fined EchoStar, and its subsidiary Directsat, the maximum forfeiture amount permitted under the Commission’s rules for operating satellites from non authorized locations. . . . The FCC justified the forfeiture amount based on EchoStar’s degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission’s rules. In November 1999, EchoStar tried to disregard its public interest programming requirements by placing all of its public interest programming on secondary satellites in violation of the Commission’s DBS rules. See *American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint*, Declaratory Ruling and Order, 14 FCC Red 19976 (1999). In this instance, the Commission assessed a forfeiture against EchoStar, finding that it had willfully violated the Communications Act and the Commission’s rules, that it had been ‘disingenuous’ in its legal interpretations, and that none of the circumstances EchoStar presented supported mitigation of the forfeiture. *In the Matter of EchoStar Satellite Corporation, Notice of Apparent Liability for Forfeiture*, 15 FCC Red 5557, 5558-59 (EB 2000). In August 2001, the Commission found that ‘EchoStar failed in its duty of candor’ by withholding information from the Commission. See *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Red 15070, 15075 (CSB 2001).”
Id. ¶ 37, n.116.

7. In 2001, EchoStar Satellite Corporation filed a complaint at the FCC alleging that Young Broadcasting has “breached its obligation to negotiate in good faith terms for EchoStar’s local retransmission” of Young’s ABC and NBC affiliates. In a decision in that proceeding, the Commission found that:

“EchoStar failed in its duty of candor to the Commission. EchoStar began publicly disclosing on March 19, 2001, portions of the documents for which it sought confidentiality in their entirety, yet failed to apprise the Commission of this fact for 23 days until it filed its request for modification.”

EchoStar Satellite Corp. v. Young Broadcasting, Inc., 16 FCC Red. 15070 (Cable Services Bureau 2001).

The Commission also found that EchoStar’s conduct “constituted an abuse of the Commission’s processes.” *Id.*

8. In March 1999, the United States District Court for the District of Colorado (Nottingham, J.) granted a request by broadcaster parties to transfer to Florida a lawsuit that EchoStar had filed in Colorado, finding that EchoStar had engaged in “flagrant forum-shopping.” Hearing Transcript, *EchoStar Communications Corp. v. CBS Broadcasting Inc.*, No. 98-2285 at 21 (D. Colo. Mar. 24, 1999).

The CHAIRMAN. Thank you.
Mr. Hartenstein?

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

Mr. HARTENSTEIN. Chairman McCain and Members of this Committee, my name’s Eddy Hartenstein. I’m the Vice Chairman of the DIRECTV Group. And it’s my great honor and pleasure to be here today, and I thank you for allowing me to testify on behalf of DIRECTV regarding the SHVIA reauthorization. The Members of this Committee, even if you didn’t vote for it, deserve a great deal

of credit for creating interest in, and ultimately creating competition in, the subscription television industry.

SHVIA, which you helped enact, extended a compulsory copyright license to the retransmission of local television signals within each station's local market, known as local-into-local. This, combined with improved technology, has allowed satellite operators to offer a programming service much more comparable to that offered by cable, unleashing, for the first time, real competition in the subscription television market.

In particular, the ability to offer local-into-local service has enabled satellite operators such as ourselves to offer a full slate of quality programming comparable to cable offerings. With this morning's successful launch, just about an hour ago, of our DIRECTV 7S spot-beam satellite, we will soon be able to provide local-into-local service in just over a hundred DMAs nationwide. And we also have pending, before the FCC, other proposals that'll give us the capacity to reach 130 DMAs by the end of this year, and maybe even as soon as this summer. At that point in time, just a few months away, we'll be offering local broadcast channels in markets serving 92 percent of American television households.

The results have been nothing short of astounding. When SHVIA was enacted in 1999, the DBS industry, as a whole, had 10 million customers. In the last 5 years, that number has more than doubled, reaching, collectively, between DIRECTV and EchoStar, 22 million subscribers, of which DIRECTV serves over 12 million. The increased competition to cable is, in the large part, due to our ability to retransmit local-into-local signals. In other words, SHVIA has been an extraordinary success, and we hope Congress will build on its success through this opportunity.

We know it's difficult and a complex issue, and we also know that this is a very busy legislative session, and this country has a lot of other issues that are extremely important. Congress does not have a lot of time to act, and with this realization in mind, we've been meeting with representatives of the broadcast industry to see if we could reach a common ground in some of the issues associated with SHVIA reauthorization.

The discussions are ongoing, but we have been able to find some common ground, at least conceptually, on several basic issues.

Number one, legislation should extend satellite operators' ability to import distance signals for at least 5 years, if not permanently. Legislation should allow, subject to some limitations, satellite operators to offer the same out-of-market significantly viewed stations that cable operators already offer today.

Next, legislation should extend for 5 years existing retransmission consent exemption for distance network signals. Legislation should extend for 5 years the existing statutory provision prohibiting television stations from entering into the exclusive rate transmission consent agreements. The legislation should extend the good faith negotiating requirement to distributors and broadcasters, alike.

Next, legislation should provide a mechanism for grandfathered distant distant and local signals. Legislation should also gradually implement a no-distance-where-local concept, whereby satellite operators cannot offer new

subscribers distance signals where local-into-local signals are available. In doing so, however, legislation must ensure that existing subscribers with both distant and local-into-local service get to keep both.

Finally, legislation should clarify that “carry one, carry all” means that satellite operators cannot split local analog or local digital signals, respectively, in one market between two dishes.

Now, do these principles reflect everything DIRECTV would want from SHVIA reauthorization? Well, no, of course not. We still think, for example, that Congress should authorize a distance signal compulsory license on a permanent basis so that we don’t find ourselves, once again, discussing these very same issues in another 5 years.

All in all, we think that these principles represent a reasonable compromise between the two parties and two entities and two industries that entered these discussions with very different points of view. We think these principles represent a modest improvement over current law. Yet I must point out that, although the issue is outside the Committee’s jurisdiction, any SHVIA reauthorization that includes a satellite-specific royalty fee hike would not—I repeat, not—represent an improvement over current law.

Others sitting at this table have their own ideas and will doubtless submit their own proposals, if they haven’t already done so. That’s as it should be. That’s this great American process. Their ideas, like ours, must stand or fall on their own merits. DIRECTV looks forward to working through these issues with the Committee to craft the best possible legislation to continue SHVIA’s pro-competitive legacy.

In conclusion, I would like to thank you for all that Congress has done to nurture the satellite television industry as a vibrant competitor in the subscription television market. And with your help, we’ll continue to provide the highest quality, best priced, competitive service to consumers across America.

I’m happy to take your questions later. Thank you.

[The prepared statement of Mr. Hartenstein follows:]

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

Chairman McCain, Senator Hollings, and members of the Committee, my name is Eddy Hartenstein and I am the Vice Chairman of The DIRECTV Group, Inc. It is my great honor and pleasure to be here today and I thank you for allowing me to testify on behalf of DIRECTV regarding the reauthorization of the Satellite Home Viewer Improvement Act (“SHVIA”).

This is a return visit for me, as I testified in front of this Committee in 1999 when Congress was deliberating SHVIA. I am pleased to return to report on the progress that the Direct Broadcast Satellite (“DBS”) industry has made as a competitor to cable since that time.

The members of this Committee deserve a great deal of credit for their role in creating competition in the subscription television industry. SHVIA, which you helped enact, extended a compulsory copyright license to the retransmission of local television signals within each station’s local market (known as “local-into-local”). This, combined with improved technology such as high power DBS satellites, digital signal compression and small receive dishes, has allowed satellite operators to offer a programming service more comparable to that offered by cable, unleashing for the first time real competition in the subscription television market.

In particular, the ability to offer local-into-local service has enabled satellite operators to offer a full slate of quality programming comparable to cable offerings. With this morning’s successful launch of our DIRECTV 7S spot beam satellite we will

soon provide local-into-local service in just over 100 DMAs nationwide. We also have pending before the FCC other proposals that will give us the capacity to reach 130 DMAs by the end of this year—and maybe even as soon as this summer. At that time we will be offering local broadcast channels in markets serving 92 percent of American television households. In coming years, we plan to continue rolling out local-into-local service in as many markets as we possibly can.

The results have been nothing short of astounding. When SHVIA was enacted in 1999, the DBS industry had 10 million subscribers. In the last five years, that number has more than doubled, reaching 22 million subscribers, of which DIRECTV serves over 12 million. The result is that, while cable still has about 66 million subscribers, DBS has played at least some small part in limiting cable price increases and forcing cable companies to provide better customer service, improved content, and digital services. We believe that none of this would have been possible without more robust DBS competition, and that DBS competition in turn would not have been possible without SHVIA.

In other words, SHVIA has been an extraordinary success. And we hope Congress will build on its success.

But we know that SHVIA is a difficult and complex issue, and we also know that, in this busy legislative session, Congress does not have a lot of time to act. With this realization in mind, we have been meeting with representatives of the broadcast industry over the last month or so to see if we could reach common ground on some of the issues associated with SHVIA reauthorization. We thought that, if we could reconcile our differences on these issues, the end result would likely represent sound and reasonable public policy.

These discussions are still ongoing. But we have been able to find some common ground, at least conceptually, on several basic SHVIA issues. Among these issues are the following:

- Legislation should extend satellite operators' ability to import distant signals for five years.
- Legislation should allow, subject to some limitations, satellite operators to offer the same out-of-market "significantly viewed" stations that cable operators already offer.
- Legislation should extend for five years the existing satellite carrier retransmission consent exemption for distant signal stations.
- Legislation should extend for five years the existing statutory provision prohibiting television stations from entering into exclusive retransmission consent agreements.
- Legislation should extend the good faith negotiating requirement to all multi-channel video providers.
- Legislation should provide some sort of mechanism for "grandfathered" distant signal subscribers (also known as "Grade B Doughnut" subscribers) to choose between distant and local-into-local signals.
- Legislation should gradually implement a "no-distant-where-local" concept, whereby satellite operators cannot offer new subscribers distant signals where local-into-local signals are available. In doing so, however, legislation must ensure that existing subscribers with both distant and local-into-local service get to keep both.
- Finally, legislation should clarify that "carry one carry all" means that satellite carriers may not "split" local analog or local digital signals, respectively, in one market between two dishes.

Do these principles reflect everything DIRECTV would want from SHVIA reauthorization? Of course not. We still think, for example, that Congress should reauthorize the distant signal compulsory license on a permanent basis, so that we don't find ourselves once again discussing these same issues in five years. But all in all, we think that these principles represent a reasonable compromise between two parties that entered these discussions with very different points of view. We think these principles represent a modest improvement over current law. Yet I must point out that—although the issue is outside of this Committee's jurisdiction—any SHVIA reauthorization that includes a satellite-specific royalty fee hike would *not* represent an improvement over current law.

Others, perhaps including some at this table, have their own ideas, and will doubtless submit their own proposals if they have not already done so. That is as it should be. Their ideas—like ours—must stand or fall on their own merits. DIRECTV looks forward to working through these issues with the Committee to craft the best possible legislation to continue SHVIA's pro-competitive legacy.

Conclusion

In conclusion, Chairman McCain and members of the Committee, I would like to thank you for all that Congress has done to nurture the satellite television industry as a vibrant competitor in the subscription television market. With your help, we will continue to provide the highest quality, best-priced competitive service to consumers.

I am happy to take your questions.

Senator SUNUNU [presiding]. Thank you.
And Ms. De Leon?

**STATEMENT OF ARACELI DELEON, VICE PRESIDENT
AND GENERAL MANAGER OF STATIONS KDRX-TV, PHOENIX
AND KHRR-TV, TUCSON, ARIZONA**

Ms. DELEON. Thank you. Good morning.

Good morning to Chairman McCain and the Members of the Senate Commerce Committee. My name is Araceli DeLeon, and I'm the General Manager of Telemundo Phoenix and Telemundo Tucson Channel 40, which also includes Digital Channel 42. It's an honor and a privilege to appear before you today to address an issue of vital importance to Telemundo's Spanish language broadcasters generally and our Nation's growing Hispanic population.

It is critical that Congress ensures that DBS providers do not discriminate against Spanish language broadcasters and their predominantly Spanish-speaking audiences by requiring these viewers to use a second dish, which most English language broadcast programming is primarily on a primary dish. This discriminatory practice is a direct threat to media diversity. It undermines our ability to serve the rapid-growing Spanish language population, and it has no place in our communications laws or in our society.

The two-dish policy used by EchoStar/DISH Network in many markets violates SHVIA's nondiscrimination principle and it's "carry one, carry all" rule, which provides all broadcasters in a market with equal access to potential viewers served by satellite carriers. The purpose of "carry one, carry all" is to prevent satellite carriers from carrying only the most popular local stations, and depriving other less-popular stations with access to potential viewers in their service areas. This policy preserves free television and promotes diverse sources of news and information. Telemundo's local broadcast stations are the very type of stations that Congress sought to protect with the "carry one, carry all." A discriminatory two-dish policy circumvents the "carry one, carry all."

The real victims in this discriminatory practice are the Spanish-speaking viewers. This community is paying hard-earned dollars to have access to Spanish language news and programming, and they should not be burdened with confusing sales practices forcing them to take additional steps, to pay additional charges, just to get local news and programming in their native language. Indeed, consumers generally are not even notified or informed at the time of purchase or installation that they need a second dish in order to receive Telemundo.

We are working hard to make Telemundo the premier outlet for Spanish language programming, local news, and information in the Tucson and Phoenix communities. For many viewers, Telemundo and other Spanish language broadcasters urge their ability to par-

ticipate fully and receive critical information concerning quality-of-life issues and their respective communities. From health information to elections, and education to employment opportunity, it is critical to the entire community that everyone has an understandable source of news and information about their local community. Satellite carriage is essential to fulfilling that mission.

Last week, the House Energy and Commerce Committee's Subcommittee on Telecommunications and the Internet approved SHVIA reorganization legislation that will eliminate the two-dish discriminatory practices. That legislation requires satellite carriers offering local-into-local service in the market to all local broadcast stations in that market available to subscribers on one receive dish. The DBS providers would be free to use another dish, if necessary, to accommodate capacity limits, but it would no longer be permitted to discriminate against Spanish language, religious, or public local broadcasters, or the Spanish-speaking community. Telemundo respectfully urges this Committee to adopt similar language in its SHVIA reauthorization.

Thank you.

[The prepared statement of Ms. DeLeon follows:]

PREPARED STATEMENT OF ARACELI DELEON, VICE PRESIDENT AND GENERAL MANAGER OF STATIONS KDRX-TV, PHOENIX, AND KHRR-TV, TUCSON, ARIZONA

Chairman McCain, Senator Hollings, and Members of the Senate Commerce Committee. My name is Araceli DeLeon, and I am Vice President and General Manager of Station KDRX TV (Telemundo Channel 48) in Phoenix, and KHRR-TV (Telemundo Channel 40) in Tucson. It is an honor and a privilege to appear before you today to address an issue of vital importance to Telemundo, Spanish language broadcasters generally, and our Nation's growing Hispanic population: the need to ensure that DBS providers do not discriminate against Spanish language broadcasters and their predominantly Spanish-speaking audiences by requiring these viewers to use a second dish, reserved for "less popular" programming, all too often translated to include local Spanish language broadcast programming. This discriminatory practice is a direct threat to media diversity and to the imperative of serving the rapidly growing Spanish-speaking population, especially in states such as my home state of Arizona. It has no place under our communications laws or in our society. Unfortunately, this is not just a theoretical concern; it is a real problem that I have encountered personally.

In providing local-into-local service under the Satellite Home Viewer Improvement Act ("SHVIA"), EchoStar has adopted a "two-dish" policy for local television stations in many Designated Market Areas ("DMAs"). Under EchoStar's two-dish plan, subscribers who want to view all local television stations in a DMA must obtain and install two receive dishes. To date, most subscribers have installed only the single main dish, which is the dish that receives signals from EchoStar's continental United States ("CONUS") satellites. The CONUS satellites carry all local English language commercial broadcast network affiliates (ABC, CBS, NBC, Fox, UPN and WB) in the Station's DMA, as well as other EchoStar non-broadcast programming, including basic cable programming networks, premium services such as HBO and sports packages, and pay per view and adult content services. In contrast, EchoStar carries local television stations that EchoStar deems "less popular" on secondary "wing" satellites.¹ Relatively few subscribers have the capability to receive signals from the "wing" satellites, because subscribers who wish to receive these signals must first obtain a second receive dish. EchoStar's practice of requiring subscribers to obtain a second dish to receive local Spanish language programming that they already pay to receive discriminates against local Spanish language broadcasters

¹Declaratory Ruling, 17 FCC Red 6069, citing "EchoStar Subs Will Need Dish for Some New Local Stations," Satellite Business News, Fax Update, Vol. 7, No. 139 (Dec. 17, 2001) (quoting an EchoStar executive who stated, "If the customer wants the less popular channels, they will need a second dish").

and Spanish-speaking subscribers in violation of SHVIA's nondiscriminatory principles, as well as the "carry one, carry all" requirement.

The 2000 Census revealed that 12.4 percent of the U.S. population is Hispanic, an increase of almost 60 percent from 1990.² The Census Bureau estimates that by 2020, the U.S. Hispanic population will grow to represent 17.8 percent of the U.S. population, and by 2050 Hispanics will account for 24.4 percent of our Nation's population.³ As our Nation's Hispanic population continues to grow, local Spanish language television is becoming an increasingly important source of news and information nationally.

Telemundo is responding to this growing need. Telemundo was launched in 1987 as a national Spanish language broadcast network, providing original programming and vitally important local news to Spanish-speaking viewers across the United States. Telemundo's owned and operated stations currently serve 59 percent of all Hispanic households in the United States, and provide 150 hours of local news weekly to our local communities.

In Arizona, I manage both the Phoenix and Tucson Telemundo Stations. Our stations are relatively new, and we are working hard to make them premier outlets for Spanish language programming, news, and information in the Tucson and Phoenix communities. I am pleased to tell you we have had great success to date. Not only do our Tucson and Phoenix Telemundo stations provide daily local news programming, but we also provide a strong commitment to public service in the form of public service announcements, and we continue to increase our participation in our local communities by supporting important community activities and initiatives. For instance, in Phoenix, Telemundo 48 continues to sponsor the Summer Safety Campaign, where, working with Phoenix Fire Fighters, we are combating summertime increases in incidents of drowning by promoting awareness among our Hispanic viewers of the dangers posed by swimming pools for children during the summer. We give our viewers weekly tips in order to keep this problem from becoming even more widespread. In Tucson, Telemundo 40 partners with the Tucson Police Officer's Association to increase awareness about missing children, and to educate parents about the steps they can take to help protect their children by fingerprinting them and taking their picture. Both stations participate in numerous community and cultural events throughout the year.

As a network formed in 1987, Telemundo is still young, but growing, just like the U.S. Hispanic population. Our ratings continue to grow, our popularity continues to grow, and we are proud of the work we have done to improve and increase Telemundo's reach within the Hispanic community. EchoStar's "popularity" practices, however, utterly ignore Telemundo's growth and increasing popularity and undermine Telemundo's efforts to serve Spanish-speakers by effectively closing off satellite subscribers to our programming.

Until just last week, EchoStar had placed almost all of Telemundo's Stations, including our Tucson station, on wing satellites, along with virtually every other Spanish language station in that station's DMA. EchoStar has just switched several Telemundo stations from its second dish to its primary dish.⁴ Unquestionably, this is a welcome development for which we commend EchoStar. However, this is far too important a matter to be left to the discretion of a DBS provider. Congress must ensure that DBS operators provide nondiscriminatory treatment to all local broadcast stations carried as part of their local-into-local service.

SHVIA requires satellite carriers to carry local broadcast signals in a nondiscriminatory manner.⁵ The essence of Telemundo's concern with EchoStar's two-dish policy, ostensibly based on EchoStar's assessment of a station's popularity, is that it has an unlawful discriminatory effect on Spanish language stations and Spanish-speaking subscribers. As the Federal Communications Commission itself has recognized,⁶ in SHVIA, Congress prohibited satellite carriers from requiring subscribers to obtain a second dish to receive *some* local signals if such a requirement would have a discriminatory effect on local broadcasters.⁷

²U.S. Census Bureau, "The Hispanic Population," Issued May 2001, U.S. Department of Commerce, Economics and Statistics Administration.

³U.S. Census Bureau, 2004, "U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin," <http://www.census.gov/ipc/www/usinterimproj/> (rel. March 18, 2004).

⁴San Antonio, Los Angeles, Dallas, Albuquerque, Tucson and Phoenix (KPHZ-TV Ch. 11, Holbrook, AZ, is the Telemundo station carried by EchoStar for the Phoenix DMA) will be received by EchoStar subscribers through their primary dish effective April 21, 2004.

⁵47. U.S.C. 338(d) (requiring satellite carriers to provide subscribers' access to local signals in a nondiscriminatory manner).

⁶*In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Order on Reconsideration*, 16 FCC Red 16544, 16566 (2001).

⁷47. U.S.C. 338(d).

The issue is whether the *de facto* segregation of local television stations on the basis of language is a prohibited “discriminatory effect.” The answer is obvious. EchoStar’s satellite-assignment policy has a disparate adverse effect on Spanish-speaking stations and Spanish-speaking subscribers, because it results all too frequently in the placement of Spanish language stations on satellites that require separate receive dishes, while *all* English language ABC, CBS, NBC, Fox, UPN and WB affiliates remain accessible to all subscribers via their single main satellite dish. Spanish-speaking subscribers, who are overwhelmingly Hispanic, are required to obtain and install a second dish to receive local Spanish language television programming. This policy has a discriminatory effect because all subscribers in a market have the reception equipment necessary to access the “more popular” English language network affiliates, but only those subscribers that request and install an additional dish are able to access Spanish language broadcast stations, such as Telemundo’s Stations. The discriminatory effect is particularly pernicious because it affects a group-Spanish-speaking subscribers—more likely to encounter language barriers while navigating EchoStar’s obscure and cumbersome process of arranging for the installation of a second dish.

Putting aside for the moment the discriminatory effect of EchoStar’s two-dish policy on Spanish-speaking subscribers, the more general notion that it is permissible to discriminate between local television stations on the basis of popularity is also inconsistent with the very purpose of SHVIA. SHVIA includes what is referred to as the “carry one, carry all” rule,⁸ which requires a satellite carrier carrying one station in a market to carry all stations in that market. The purpose of the “carry one, carry all” rule is to prevent satellite carriers from carrying only the most popular local stations, and depriving other less popular stations with access to potential viewers in their service areas.⁹ By adopting the “carry one, carry all” rule, Congress intended to “preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources.”¹⁰ Congress determined that without such a rule (1) satellite carriers would continue to deny carriage to significant numbers of independent stations in markets where they choose to offer local-into-local service, and (2) non-carried stations in those markets would be harmed by losing access to parts of their potential audiences.¹¹ Telemundo’s complaint against EchoStar’s two-dish policy thus goes to the essence of the “carry one, carry all” rule. Telemundo’s stations, which broadcast Spanish language news, information, and entertainment programming for a largely Spanish-speaking audience, are the very type of broadcast stations that Congress intended to preserve and to promote with SHVIA. EchoStar’s two-dish policy, however, intentionally and pervasively deprives the stations of access to parts of their potential local audiences. It harms consumers because subscribers who do not have a second dish are unable to receive the programming of all local broadcast stations, and subscribers who wish to receive all such local stations must go through the trouble of contacting EchoStar to order the second dish with the attendant burdens and confusion that entails.

Congress, in adopting SHVIA’s “carry one, carry all” rule, recognized that subscribers might as a practical matter not be willing to endure the burden of installing the requisite additional equipment to receive local channels if not carried by satellite carriers: “Although the conferees expect that subscribers who receive no broadcast signals at all from their satellite service may install antennas or subscribe to cable service in addition to satellite service, the Conference Committee is less sanguine that subscribers who receive network signals and hundreds of other programming choices from their satellite carrier will undertake such trouble and expense to obtain over-the-air signals from independent broadcast stations.”¹² By analogy, it is overly optimistic to expect that subscribers will obtain second dishes if they can receive all local English language network signals and hundreds of other programming choices using the main dish alone.

In enacting SHVIA, Congress intended to ensure that satellite carriers provide *all* local stations in a market without discrimination. Requiring subscribers to install additional equipment to receive local Spanish language stations but not local English language stations constitutes illegal discrimination against alternative media and this country’s growing Hispanic population. Such discrimination is unac-

⁸ 47 U.S.C. § 338(a)(1).

⁹ See *Joint Explanatory Statement of the Committee of Conference on HR. 1554*, 106th Cong., H.R. Conf. Rep. No. 106-464, at 102 (1999).

¹⁰ *Id.* at 101.

¹¹ *Id.* at 102.

¹² *Id.* at 102 (1999).

ceptable, and has no place in a carriage scheme carried out by a company utilizing the public's spectrum.

Telemundo is striving to provide Spanish language programming to our nation, and to Spanish-speakers eager for the additional content, news, and information that a unique service like Telemundo and local Spanish language broadcasting generally can provide. EchoStar is frustrating our efforts by closing off large swaths of the satellite subscriber base to our signal in a discriminatory manner. Last week the House Energy and Commerce Committee's Subcommittee on Telecommunications and the Internet approved SHVIA reauthorization legislation that will eliminate this discriminatory practice. That legislation, the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), requires satellite carriers offering local-into-local service in a market to make all local broadcast stations in that market available to subscribers through *one* receive dish. EchoStar would be free to use another dish if essential to accommodate capacity constraints, but it will no longer be permitted to discriminate against some local broadcasters, including local Spanish language broadcasters.

Telemundo respectfully urges this Committee to advance the same one-dish policy for local broadcast signals in Senate SHVIA reauthorization legislation.

Thank you, and I look forward to answering any questions you may have.

Senator SUNUNU. Thank you very much, Ms. DeLeon.
Ms. Sohn, welcome.

**STATEMENT OF GIGI B. SOHN, PRESIDENT,
PUBLIC KNOWLEDGE**

Ms. SOHN. Chairman McCain and distinguished Members of the Committee, my name is Gigi Sohn. I'm the President and Co-Founder of Public Knowledge, a nonprofit organization that seeks to ensure that citizens have access to a robust public domain, an open Internet, and flexible digital technology. I have more than a decade of experience working on digital television policy issues.

I want to thank the Committee for inviting me to give a public-interest perspective on the reauthorization of the Satellite Home Viewer Improvement Act, or SHVIA.

Public Knowledge has two core interests in SHVIA, which has benefited consumers by allowing the satellite TV industry to become a competitive alternative to cable. Our foremost interest is that SHVIA remains a bill that addresses only the carriage of local-broadcaster network signals by satellite providers. We are concerned that, because SHVIA must pass by year's end, it may become a vehicle for other intellectual-property-related legislation. Some of these bills would make radical changes to copyright and trademark laws, some are more benign, and some Public Knowledge even supports. These bills should be debated separately on their merits, and not simply attached to SHVIA.

The bill that we are most concerned about is H.R. 4077, the Piracy Deterrence and Education Act of 2004. This bill would lower the legal standard for criminal copyright infringement, making felons out of people who accidentally make copyrighted works available over computer networks. It would also require Internet service providers to share personal information about their customers with the government and the content industries. A coalition of ISPs, Web-based e-mail providers, software providers, tech companies, and public-interest groups oppose this measure. We urge the Committee to reject any and all attempts to turn SHVIA into a Trojan horse for those who would like to change copyright and trademark law.

Public Knowledge's second interest in SHVIA is its potential to speed the transition to digital television, which actually started in 1986 when the FCC, at the behest of broadcasters, set aside unused broadcast spectrum for what was then known as analog high-definition television. Much has changed in 18 years, not the least of which has been the explosion of new wireless telephone and broadband technologies, none of which will realize their full potential without access to the extra spectrum that broadcasters are holding.

If you haven't seen *The New York Times* today, there's a whole separate section on the explosion of wireless technology, called "Wireless Living." I would commend you all to read it.

Now, perhaps more than at any other point over the past two decades, completing the digital television transition is vitally important to the economic and social well-being of this country. Reclaimed spectrum could help to vastly improve current licensed and unlicensed wireless services, including, one, permitting interoperability among local and national public safety and law enforcement personnel, and enabling those end-users to send and receive video, pictures, data, and phone calls. Imagine if the FBI could send, via broadband networks, mug shots and fingerprints to local law enforcement officials or public safety officials; two, filling in cell phone dead zones where signals routinely get dropped; and, three, providing wireless last mile Internet connections that can compete with DSL and cable modem services. These more powerful and lower cost connections would improve Internet access for healthcare agencies, schools, and people in underserved areas, such as rural and poor communities.

Improvements in these services will undoubtedly speed broadband deployment in the U.S., which lags far behind countries like South Korea and Japan. Moreover, and equally as important, the reclamation of the spectrum will permit great future innovation, the creation of new technologies and services, that will redound to the public's benefit.

In the absence of a hard deadline for the transition to DTV, this country is caught in a vicious cycle. Viewers don't buy digital television sets because there is little compelling digital programming, and broadcasters don't provide digital programming because viewers lack the equipment. The only way to break this cycle is to ensure that viewers have access to programming that would encourage them to buy digital televisions. But the ability for them to do so is hampered by the fact that many broadcasters are not operating digital stations at their full transmission power.

One way that Congress can help to ensure that viewers have access to digital television programming is to permit satellite TV companies to provide distant digital TV signals to those viewers who cannot receive additional television signals from their local broadcaster. Congress can do this simply by broadening SHVIA's definition of "unserved households" to include those viewers.

There are no good reasons why Congress should not adopt this digital wide areas plan. To the extent that the ability to view distant digital television signals gets viewers hooked on the technology, the public interest is served. To the extent that the importation of digital signals propels local broadcasters to complete the

transition and broadcast their digital signals in full power, the public interest is served. To the extent that these two actions together lead to the completion of the digital television transition, which then frees up valuable “beachfront” spectrum for critical public uses, the public interest is served. But it is not in the public interest for Congress to shield broadcasters from competition, and, thereby, extend the digital television transition, when there are so many important economic and social reasons to complete it at or near the 2006 deadline.

I want to, again, thank this Committee and Chairman McCain for giving me the honor of appearing before you today.

[The prepared statement of Ms. Sohn follows:]

PREPARED STATEMENT OF GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE

Chairman McCain, Senator Hollings and distinguished members of the Committee, my name is Gigi B. Sohn. I am the President and Co-Founder of Public Knowledge, a nearly three-year old nonprofit public interest organization that seeks to ensure that citizens have access to a robust public domain, an open Internet and flexible digital technology. Previously, I worked on digital television issues for nearly a decade as the Executive Director of the Media Access Project and as a member of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. I want to thank the Committee for inviting me to give a public interest perspective on the reauthorization of the Satellite Home Viewer Improvement Act (SHVIA).

Public Knowledge has two core interests in SHVIA. Our first and foremost interest is that SHVIA remains a bill that addresses only the carriage of local broadcast and network signals by satellite providers. As discussed below, we are concerned that because SHVIA must pass by September 30, 2004, it may become a vehicle for other intellectual property-related legislation, some of which proposes radical changes to copyright law.

Public Knowledge’s second interest in SHVIA involves its potential to speed the transition to digital television. As discussed in detail below, it is both in the public interest and in the interest of many communications industries, including the wireless, telecommunications, cable and broadcast industries, to complete the transition to digital television as close to the FCC’s original December 31, 2006 deadline as possible. Completion of the transition and the subsequent return of the spectrum now used for analog television service will permit an explosion in new wireless broadband, public safety and cellular telephone services that will benefit the public in a myriad of ways. One way to encourage greater adoption of digital television by consumers would be to permit satellite providers to import distant digital network television signals into markets where viewers cannot receive such a signal locally. This “digital white areas” plan will allow satellite customers to see the benefits of digital television and hopefully encourage them to purchase the equipment they need to make the switch.

I. SHVIA Should Remain A “Clean” Bill

As this Committee knows, the current SHVIA expires on September 30 of this year. SHVIA and its predecessor, the Satellite Home Viewer Act of 1988, have been key drivers in ensuring that satellite TV providers can compete with cable TV providers. Indeed, in just ten years since the inception of direct broadcast satellite service (DBS), viewership has grown to almost 20.4 million households representing nearly 22 percent of the multichannel video provider (MVPD) market.¹ This competition has benefited the public with lower prices and more programming when they choose an MVPD.

It is for this core reason that Congress should reauthorize SHVIA without delay. But in doing so, it should be wary of attempts to turn this proposed law into something that it is not and should not be: a vehicle for other copyright and trademark legislation. Some of these bills would make radical changes to copyright and trademark law, some are more benign, and some Public Knowledge supports. In any event, these copyright and trademark bills should be debated separately on their merits, and not simply attached to SHVIA.

¹ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03–172 (released January 28, 2004).

As of today, there are no fewer than four copyright and trademark-related bills pending in the Senate and nine pending in the House that Public Knowledge believes their sponsors may wish to attach to SHVIA. The bill that we are most concerned about is H.R. 4077, “The Piracy Deterrence and Education Act of 2004.” Among other things, this bill would lower the legal standard for criminal copyright infringement from one of “willfulness” to one of “reckless disregard,” making felons out of people who accidentally make copyrighted works available over computer networks. H.R. 4077 would also require Internet Service Providers to share personal information about their customers with the government and the content industries, in contravention to the D.C. Circuit’s recent ruling in *Recording Industry Association of America v. Verizon Internet Services*, 351 F.3d 1229 (C.A.D.C. 2003). A coalition of Internet Service Providers, web-based e-mail providers, software providers, tech companies and public interest groups oppose this measure.

Thus, we urge the Committee to reject any and all attempts to turn SHVIA into a Trojan Horse for those who would like to change copyright and trademark law. SHVIA should be kept to its intended purpose—as a means by which satellite TV providers are permitted to carry local and network television signals under certain conditions.

II. Rapid Completion of the Transition to Digital Television is in the Public Interest

Whenever the beginning of the transition to digital television is discussed in this country, three government actions are inevitably mentioned: (1) passage of the Telecommunications Act of 1996, which required the FCC to give broadcasters an extra six Mhz block of broadcast spectrum “if the Commission determines to issue additional licenses” for digital television services;² (2) the FCC’s 1997 *Fifth Report and Order*, which set out the schedule for the digital television transition, including the December 31, 2006 deadline for the return of the “analog” spectrum,³ and (3) passage of the Balanced Budget Act of 1997, which permits broadcasters to keep their extra channel until, among other things, no less than 85 percent of household’s in a broadcaster’s market are: (a) capable of receiving digital television broadcasts using either a digital television set or an analog set equipped with a digital-to-analog set-top box or (b) able to receive at least one digital programming channel of each broadcaster in a market from an MVPD.

If we view the digital television transition in this light—as a mere seven year process imposed by the government on an unwilling broadcast industry, then there might be a colorable argument to be made that the transition is moving apace and that broadcasters should be commended for their diligence in promoting digital television irregardless of the costs.

Unfortunately, that vision is revisionist history. As journalist and author Joel Brinkley recounted in his book “Defining Vision: How Broadcasters Lured the Government into Inciting a Revolution in Television,” the transition to what we know now as digital television actually started a full decade before the 1996 Act was passed, and as the book’s title indicates, was promoted by the broadcast industry itself. In 1986, as the FCC was on the brink of giving the spectrum to the “land mobile” industry for use in two-way radios, the National Association of Broadcasters embarked on a campaign to convince the government to let it keep the spectrum because each broadcaster needed two channels to broadcast in analog high definition television. The NAB argued that ignoring their request would allow the Japanese, who had just started broadcasting in analog high definition, to beat out U.S. industry again, as it had several times in the 1970s and 1980s. The NAB was victorious and the FCC took billions of dollars of unused “beachfront” spectrum off the market, where it has lain largely underutilized for eighteen years.

Much has changed during that time. Analog high definition television gave way to digital television, but the extra spectrum was still needed to ensure that viewers did not lose broadcast television during the transition. Cable and satellite television both grew tremendously during that time (indeed, DBS services did not exist until 1993), so much so that almost 90 percent of households subscribe to an MVPD. And perhaps most important, new wireless telephone and broadband technologies have

²47 USC § 336(a)(1).

³*Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 12 FCCRcd 12809 (1997).

proliferated to such an extent that the extra spectrum that broadcasters are holding is preventing these industries from realizing their full potential.⁴

So now, perhaps more than any other point over the past two decades, completing the transition to digital television is vitally important for the economic and social well being of this country. While some have derided calls to speed the transition to digital television as a mere spectrum reclamation project, reclaiming that spectrum has undeniable and very palpable public interest benefits.⁵ These benefits include the ability to vastly improve current licensed and unlicensed wireless telephone and wireless broadband services, including:

- permitting interoperability among local and national public safety and law enforcement personnel and enabling end users to send and receive video, pictures, data and phone calls;
- filling in cellphone “dead zones” where signals routinely get dropped; and
- providing wireless “last mile” Internet connections that can compete with copper-based DSL and coax-based cable modem services. These more powerful and lower cost connections would improve Internet access for health care agencies, schools and people in underserved areas such as rural and poor communities;⁶

Improvements in these services will undoubtedly speed broadband deployment in the U.S., which lags behind far countries like South Korea and Japan. Moreover, and equally as important, the reclamation of this prime spectrum will permit great future innovation—the creation of new technologies and services that will redound to the public’s benefit. But for now, as it has been for nearly two decades, this public “beachfront” is occupied by just one industry.

What can be done to move the transition to its completion so that the public can benefit from these new uses of spectrum? One way is to repeal the 85 percent cap and reinstate the December 31, 2006 deadline. Another way, as some FCC staff have proposed, is to interpret the 85 percent threshold to include all MVPD households regardless of whether those households are receiving a real digital television signal or a digital television signal that is down-converted to analog. These proposals may be controversial for broadcasters, but would ensure that the transition would be completed close to or at the deadline.

In the absence of those two solutions, the 85 percent threshold will be met only if people are educated about, and can see the benefits of, digital television. The consumer electronics industry has done a fine job educating retail sales staff and the public about digital television, and as a result, sales have increased enormously over the past several years. By contrast, there is little evidence that the vast majority of broadcasters have used the power of their local stations to embark on a similar campaign. Confusion about digital television is rampant. A recent Consumer Electronics Association study showed that nearly a quarter of digital television consumers are confused about some aspect of the purchase—and these are the people that wanted to buy a digital television set!⁷

The ability to actually see digital television is in part hampered by the fact that many broadcast stations are not operating at full transmission power. There may be sound technological or other reasons why this not the case, but these do not argue for Congress to stand idly by while these problems eventually get resolved. As discussed in the next section, there is a small fix that Congress can make that will ensure that millions of viewers without access to digital television can see and enjoy it.

III. Congress Should Permit Satellite Providers to Carry Distant Digital Network Signals in Areas Where Viewers Cannot Receive Them

In the absence of a hard deadline for the transition, this country is caught in a vicious cycle—viewers don’t buy digital television sets because there is little compelling digital programming and broadcasters don’t provide digital programming because viewers don’t have the equipment. The only way to break this cycle is to en-

⁴Demand for wireless services has grown from \$30 billion in 1997 to \$78 billion in 2002. See Statement of Reed E. Hundt before the United States Senate Committee on Commerce, Science and Transportation, April 28, 2004 at 3.

⁵Statement of Reed E. Hundt, *supra* at 7–18.

⁶Perhaps the biggest barrier to providing pervasive wireless broadband service in many areas, and in particular rural areas is that because of the quality of the spectrum now used to provide those services, signals cannot easily pass through trees, houses and bad weather. Using high-quality broadcast spectrum would vastly ameliorate, if not eliminate, that problem.

⁷Sean Wargo, Director, Industry Analysis, Consumer Electronics Association, “HDTV Summit: A Market in Control,” presented at the Consumer Electronics Association’s Ninth Annual HDTV Summit, March 30, 2004.

sure that viewers do have access to the kind of programming that would encourage them to buy digital television sets.⁸

One way that Congress can help ensure that viewers have access to digital television programming is to permit satellite TV companies to provide distant digital TV signals to those viewers who cannot receive a digital television signal from their local broadcaster. Congress can do this simply by broadening SHVIA's definition of "unserved household" to include those viewers. This "digital white area" proposal would not only encourage the purchase of digital television sets, but would provide local broadcasters an incentive to provide a full power digital signal.

Predictably, the broadcast industry is opposed to this plan. Their arguments can be grouped into three categories: (1) the change is not necessary because most of the country's television viewers do receive digital television signals; (2) importation of distant signals would harm localism; and (3) EchoStar, the main proponent of the plan, is a bad actor whose intention is to provide distant signals in perpetuity.⁹

As to the first argument, if we assume that the broadcasters' numbers for what percentage of television viewers are served by digital signals are correct, then one must ask, "where is the harm?" The broadcasters claim that on-air digital television facilities are serving 92.7 percent of population served by corresponding analog stations.¹⁰ If that is indeed the case, then it is curious why they are so bitterly opposed to a plan that would, by their own estimation, affect not even eight percent of television households.

The broadcasters' second argument is equally suspect, and is just one of the many times that broadcasters have hidden under the cloak of "localism" to stave off competition. To the extent that local broadcasters provide excellent local news, weather, public affairs and other programming, importation of a signal from New York or Los Angeles cannot begin to compete with their programming. And if importation of a distant digital network signal compels a local broadcaster to transition to digital faster, shouldn't such a policy be applauded?

As to the third argument, Public Knowledge believes that it is up to Congress and the FCC to set guidelines to ensure that bad actors are prevented from providing distant digital signals in perpetuity. The fact that some satellite providers have in the past ran afoul of the law does not diminish the positive effect that permitting digital white areas could have on the transition to digital television.

In short, there are no good reasons why Congress should not permit satellite providers to import distant digital TV signals to those households who cannot receive them. To the extent that the ability to view distant digital television signals gets viewers hooked on the technology, the public interest is served. To the extent that the importation of distant signals propels local broadcasters to complete the transition and broadcast their digital stations in full power, the public interest is served. To the extent that these two actions lead to the completion of the digital television transition, which then frees up valuable "beachfront" spectrum for critical public uses, the public interest is served. But it is not in the public interest for Congress to shield broadcasters from competition and thereby extend the digital television transition when there are so many important economic and social reasons to complete it at or near the 2006 deadline.

Conclusion

I want to again thank the Committee for permitting me to present a public interest perspective on SHVIA. That perspective is uncomplicated. First, it is in the public interest for Congress to ensure that the reauthorization of SHVIA remains a vehicle for permitting satellite television providers to carry local and network broadcast signals under certain circumstances, and not also for non-germane intellectual property matters. Second, it is in the public interest for Congress to accelerate the transition to digital television by broadening the definition of "unserved households" to permit the importation of distant digital network signals to those viewers who cannot receive such digital signals from their local broadcasters. The sooner the digital television transition is concluded, the sooner the American public can benefit from better and new wireless broadband and telecommunications services that have

⁸As the New York *Times* reported on Sunday, analog format television shows, which are predominant on local television stations, appear distorted and out of focus on flat-panel high definition television sets. The report went on to say that "[b]ased on that factor alone, diving into the flat-panel market now would seem grossly unwise, like buying a great-looking car with shoddy brakes, or trading in an 18-inch, all-meat hero sandwich for something smaller in a pita with a side salad." Matt Richtel, "See the Big Picture? Don't Forget to Examine the Fine Print," *NY Times*, May 2, 2004.

⁹See March 22, 2004 Letter of Marsha McBride, Executive Vice President—Legal & Regulatory Affairs, National Association of Broadcasters to Hon. Michael K. Powell.

¹⁰McBride Letter, *supra* at 4.

been unavailable because of the spectrum that has been tied up for nearly two decades.

Senator SUNUNU. Thank you, Ms. Sohn.
We'll begin the questioning with Senator Lautenberg.

**STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM NEW JERSEY**

Senator LAUTENBERG. Thanks very much, Mr. Chairman.

I would just take a minute to set the stage for my interest, and that is that in our state of New Jersey we have very little activity by the satellite companies that get through to the subscribers. We have, in the more than 560 little towns and municipalities in New Jersey—and that the cable and satellite providers have effective competition in only 53 of those 562 towns. And it doesn't represent a picture that tells me that there's real choice for the subscribers.

And, Mr. Chairman, I would just ask that my full statement be recorded as if read.

Senator SUNUNU. Without objection.

Senator LAUTENBERG. Thank you.

[The prepared statement of Senator Lautenberg follows:]

PREPARED STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM NEW JERSEY

Mr. Chairman:

Thank you for holding this hearing on the Satellite Home Viewer Improvement Act (SHVIA) and our continuing effort to promote *regulatory parity* between *cable* and *satellite*.

I supported the Satellite Home Viewer Improvement Act in 1999 because I believed then, *as I believe now*, that regulatory parity and competition between cable and satellite is necessary to ensure that consumers will get more options, better rates and service when they buy multi-channel video services.

According to the FCC, franchised cable operators control about 75 percent of the multi-channel video program distributor (MVPD) market. Direct Broadcast Satellite (DBS) providers account for 22 percent of subscribers and the number is growing.

While recent data reveal that DBS service is winning the battle for *new* subscribers, effective competition *currently* exists in very few markets.

In my home state of New Jersey, for example, the FCC has determined that there is "effective competition" between traditional cable and satellite providers in just 53 of 562 towns and municipalities.

"Effective competition" means that satellite has a *penetration rate* of as little as 15 percent of the market.

The numbers for New Jersey are disappointing because GAO has found that competition from satellite providers leads to lower rates and improved quality and service for *all* subscribers.

Since 1999, when satellite operators acquired the legal right to broadcast the signal of *local broadcast stations*, satellite emerged as a real competitor to cable.

In areas where subscribers can receive local broadcast stations from DirecTV and EchoStar, the satellite penetration rate is approximately 40 percent *higher* than it is in areas where subscribers *cannot* receive local broadcast stations from DBS operators.

We need to do everything we can to promote more *head-to-head competition* between cable and satellite providers. That's clearly in the public interest. I look forward to hearing from our witnesses today about the best way to foster that competition.

Thank you, Mr. Chairman.

Senator LAUTENBERG. What's been the experience of—any of you—in the state of New Jersey? Why is it, do you think, that there are so few options for the subscriber in the number of communities where the satellite is available?

Mr. HARTENSTEIN. I'll take a stab, Senator Lautenberg. As far as I know, there is—you used a term, “effective competition”—the FCC has a definition for that, which means when satellite has, I believe, achieved some 15 percent of the homes passed. Now, nationwide, with some 100-plus million television households collectively as an industry, we are just coming up to, as I said before, about 22 million. That's not the same everywhere. So where we might not have met the FCC, if you will, “artificial test” of effective competition by that percentage, I think we, from DIRECTV's perspective, are very much alive and are hoping to, as our results that I think both of our companies are going to be announcing—us later today, and Mr. Ergen later this week—announce that we are still growing nationwide.

I'd be happy to sit down with you or your staff and talk about specific cities, specific towns, what we are doing. We are, more and more, realizing that to be an effective competitor, we do need to provide local service, first by the local stations and next by local service with our representatives, both installation and service, on a local basis. We're doing everything we can to promote that and to promote a whole-house solution for every television set in every home.

Senator LAUTENBERG. Mr. Ergen?

Mr. ERGEN. Senator, if I may add, your comments I get from every Senator and every staff that I have talked to over the last 7 years on satellite issues, which is, How do we bring more and provide more competition? For example, more local cities. And, on the one hand everybody wants local cities, and our company has gone out and done more local cities, almost by double, than anybody else in our industry; at the same time, broadcasters then say, “Well, you can't do it on two dishes,” even though that's the law that we all agreed to 5 years ago. So it never seems to be enough.

The SHVIA law allows broadcasters from markets outside of New Jersey to have restrictions on what we can do, as satellite companies, in the state of New Jersey's so-called DMAs, and we think that should be eliminated and fine-tuned in this legislation.

High-definition television, your customers in New Jersey want high-definition television today. The fact of the matter is, is that the broadcasters in New Jersey aren't broadcasting high enough power to broadcast over the entire state of New Jersey. But our company today can broadcast every square inch, high-definition television in New Jersey.

I was very disappointed to hear the Senator from Montana talk about Montana, with 40 percent of the people in that great state of Montana have satellite television today, it's a great geographic area, and we broadcast to every square inch high-definition television. Local broadcasters may broadcast in low power, or they may not broadcast at all, and so customers are being denied that service. So it's no wonder we can't provide effective competition to cable.

Senator LAUTENBERG. So to kind of sum it up for me, is it because of restrictions that you find that are beyond your control. Mr. Hartenstein, did I understand you to kind of rhetorically say that, “Well, there are things that we—more things that we should offer”? Was I correct in describing what you said?

Mr. HARTENSTEIN. Yes. In the next, roughly, three to 4 months, we hope to double the number of designated market areas, DMAs, that we will be serving local-into-local, going from where we are today, at about 64 markets, to about 130 hopefully by the end of this summer. We still need some action from the FCC. And we took a big step this morning with the launch of our eighth satellite, our second spot-beam satellite, which should now be operational and online in about 30 days. Beyond that, that will take us to about 130 markets.

And, as everybody has indicated, there are some 210 markets. We have made a promise to deliver local channels to all 210 markets by the end of 2008, and, if possible, by 2006. We intend to live up to that, not just because we promised the FCC we would do that, but because it makes competitive good sense for us as a business.

Senator LAUTENBERG. So the subscribers across the country can look forward to the result of keen competition—that is better pricing. Does that represent a point of view that you have?

Mr. HARTENSTEIN. We think we deliver a better product, superior performance, and, we think, at a better value, more economic for consumers.

Senator LAUTENBERG. Is better value the same as better price? [Laughter.]

Mr. HARTENSTEIN. Yes, I believe so. Yes. If you look at what we deliver, yes, sir.

Senator LAUTENBERG. Thank you very much.

Thanks, Mr. Chairman.

Senator SUNUNU. Senator Lott?

**STATEMENT OF HON. TRENT LOTT,
U.S. SENATOR FROM MISSISSIPPI**

Senator LOTT. Thank you, Senator Sununu. And you're doing an excellent job presiding over this hearing.

[Laughter.]

Senator LOTT. Thank you to the panel for being here this morning. Your part of this technology revolution is just breathtaking, the things that are occurring, the access, and the choices we have, so we appreciate you being here and giving us your thoughts on how you're doing and how we can be helpful to you in providing good quality competition in this tremendous area.

I'm looking forward to the day when I only have to pay one bill to one company after selecting between competing companies for my television service, my utility bill, my telephone bill, Internet, long distance, the whole package, one company. It sure would save me a lot of time. I'm getting dang tired of paying all these bills. And, of course, I know it's all going to be digital and high quality and all of that.

I was very interested, Mr. Hartenstein, that you said that your intent is to have local-to-local service by 2008 or perhaps even 2006. Now, that would be really well received by people in Mississippi. You only have two areas that get the local-to-local in my state: Jackson, Mississippi, the Columbus/West Point area. You're not on the Gulf Coast, but you're continuing to work in that direction. Is the technology there to do that?

Mr. HARTENSTEIN. Senator, yes, the technology is there. We are just in the process of getting it launched and utilizing the spectrum that we have within our resources. That means more satellites, and that's exactly what we intend to do.

In about three more months, we will hit our tenth anniversary of the first DIRECTV system, the first DBS system, 18-inch system, sold, and that, indeed, happened in Jackson, Mississippi. And we just brought local—

Senator LOTT. Oh, we were first in that area. Good, we like to make note of any area that we're first.

[Laughter.]

Mr. HARTENSTEIN. Yes, one of your good constituents, the Maloney family, was, indeed, there with us as we launched. And we intend to bring local channels to such DMAs as Biloxi and others in the time-frame that I outlined, yes, sir.

Senator LOTT. I discussed that with you, too, Mr. Ergen, about the hope that we could have that service on the Gulf Coast. But it's bigger than just my own state. I mean, we're hoping we can have this service all over the country. I know you want that and you're working on that. How are you doing?

Mr. ERGEN. Well, good. First I want to mention that we were first to switch a DIRECTV customer over to the DISH Network—

[Laughter.]

Mr. ERGEN.—in the state of Mississippi.

But we've had a lot of discussions, as you know—

Senator LOTT. Sure.

Mr. ERGEN.—and you have been a great champion of providing competition for video in the state of Mississippi and all across the country. And, again, your comment—I'll just repeat my previous comment—every single Senator or Congressman asked us to deliver their local channels and provide competition in HD in their local areas. There's only so much spectrum to do that. And, of course, with technology, enough time, and enough money, I think we can accomplish great things.

Senator LOTT. You all seem to be making plenty of that, so—

Mr. ERGEN. There's FCC. There's FCC.

[Laughter.]

Mr. ERGEN. We're spending a lot of money. More than we're making, I can tell you that.

Senator LOTT. Good.

Mr. ERGEN. But the FCC needs to provide us more spectrum. And, again, the two-dish solution, I want to point out to this Committee, as you know, was a compromise. While we fought vehemently against must-carry, the compromise that the broadcasters agreed to, even the broadcaster on this panel, was, if we have to do must-carry, that we could do it on two dishes. They want to change those rules now. That rollback would—we do Jackson, Mississippi. We have plans to put Biloxi, Mississippi, up later this year. Without a two-dish solution, we wouldn't be able to put up Biloxi. So there's a compromise we have to make—and this Committee needs to look at that—as to whether you want more cities with more competition or whether you want to eliminate a two-dish solution for consumers, that we all agreed to 5 years ago.

We don't want to be on two dishes, because we're not as effective of a competitor as we can. But we don't discriminate against anybody with two dishes. It's free to all those customers. All those Spanish-speaking customers, not one of them has to pay for it. I am not aware of any single household in the United States today who wants two-dish who cannot get it from us for free.

Senator LOTT. What are you saying now? You have two dishes, but you only have to pay for one? Did you say that?

Mr. ERGEN. That's right. There is actually no extra charge for two dishes, and we have over two million customers today that have two dishes, for a variety of reasons. And, of course, local is one of those. So we don't discriminate. It is the law. It was the law that broadcasters agreed to. They want to change that now, and somehow think we're doing something that we're not supposed to be doing. And it's a compromise. And I personally think that if given enough time and money—we very much want to be on a single dish, and it's just really a question of working with broadcasters to find a transition plan that we can—so we're able to do that.

Senator LOTT. Ms. DeLeon, you've already commented on this, but—

Ms. DELEON. Yes.

Senator LOTT.—would you like to sum up what your—

Ms. DELEON. Just to add and to clarify—

Senator LOTT.—response was and further response to what he just said.

Ms. DELEON. Yes. I just want to clarify that the problem, I suppose, that I have as a Spanish language broadcaster is that most Spanish language, if not all Spanish language, are on the second dish. And I have a—from a personal experience with my parents, who live in San Antonio, Texas, when they called to get satellite service, they were not told that they needed a second satellite dish to get Spanish language, and it wasn't until they come out and install it, and you realize that you don't get the Spanish language networks, that you then have to go back and ask for someone else to come out and install that second dish. So it makes it complicated, you know, not knowing at the beginning that you need two dishes, and then having to request to get the second one installed. And it's—in some cases, it's hard enough to have one dish installed, let alone a second one.

Senator LOTT. But it is for free, huh?

Ms. DELEON. Well, if—you know, I have been told—I mean, I've heard different stories. I've had people call the station, who say that they were asked to pay another \$5 or another \$10 for installation. I mean, I don't know that personally, but I've heard that. Once it has been installed, and if you get it installed under a certain—whether it's a promotion or something that's happening, and then they have to come back and install the second one, but there may be a small charge.

Senator LOTT. Let me, if I could, move along, because my time's about to run out.

Mr. Yager, obviously your association has some problem with this distant digital usage by the dishes here. I apologize for missing your statement. Could you, sort of, sum up—

Mr. YAGER. Well——

Senator LOTT.—your concerns there?

Mr. YAGER. We believe strongly, Senator, in localism as the foundation for the broadcast system in this country. It has worked, and worked very well——

Senator LOTT. I agree, but your networks apparently don't agree with that.

Mr. YAGER. Well, strangely enough, I think the networks do agree with that, because their local stations are an extremely important part of——

Senator LOTT. I hope they know that.

Mr. YAGER.—their corporations. But we believe that that localism is fundamental. Anytime you bring in a distant signal into a local market that diminishes the value or the viewing of your local station, it affects the advertising rates you can charge for your station. Now, how does that impact the public? It impacts the public in the resources you have to devote to local news, local public service, local sports, anything you might do in terms of community involvement.

We are not a subscription-based service. Free, over-the-air broadcasting is just that—free, local. We don't get a monthly subscriber fee from anyone. You don't write us a check each month, Senator. We provide that service based upon one single source of revenue, and that is advertising. Anytime that our audience is diluted or diminished, it affects the rates we can charge our advertisers. It also affects the effectiveness of the local advertiser in his market, or our markets, to reach the right population, and the population that would either buy their service or their products.

Senator LOTT. Mr. Chairman, if you would give me just one more question, I——

Senator SUNUNU. Is there objection?

[Laughter.]

Senator LOTT. Well, thank you very much.

Mr. Ergen, in your testimony, which I did not get to hear when you presented it, you talked about this carriage of broadcast stations or significantly viewed stations. Would you sum up what you're saying there and how we need to treat this area, in your opinion, in the bill?

Mr. ERGEN. Before I get to that, let me just respond to Mr. Yager. We're not asking to broadcast HDTV where the local broadcaster is broadcasting it. We'd love for the local—the problem is that most Americans today—I'd dare say if you'd go back to your home state of Mississippi, or any of the staff here goes back to their home state, and you tried to get HDTV from the local broadcaster today, I'd dare say you can't do it. In America, we're trying to lead the technological revolution. Right? And since we can do that today via satellite through every square inch of the United States, in every hometown, those HD signals, we think that, at least for a transition period, we need to be able to do that. And, of course, that does speed up the digital transition, which frees up the spectrum to help us. We're a country that is not in the top ten for Internet connections anymore, and we're going to go fall behind technologically, productivity, and everything else if we're not able to free up that spectrum and use it for more productive uses.

So on the significantly viewed areas what happens is, and sometimes Washington is a great example, where you have Washington and Baltimore, cities very close together, and a cable company can broadcast, in some cases, both to Baltimore and to Washington network stations, where satellite's restricted to just one station. And so in a market where more than one local broadcaster of a network is widely viewed, and Washington is an example, then we would like to technically be allowed to do that to put us on a more level playing field.

Senator LOTT. And the law does not now allow you to do that?

Mr. ERGEN. The law allows cable to do it, but not satellite, today.

Senator LOTT. Thank you, Mr. Chairman.

[The prepared statement of Senator Lott follows:]

PREPARED STATEMENT OF HON. TRENT LOTT, U.S. SENATOR FROM MISSISSIPPI

Mr. Chairman, thank you for holding this hearing today so that the Committee can begin the essential process of considering the reauthorization of the Satellite Home Viewers Improvement Act of 1999—or SHVIA. That was an important piece of legislation which required quite a bit of hard work in order to guarantee that the Nation had updated and fair guidelines for the provision of Direct Broadcast Satellite (DBS) services. I learned many years ago that Americans have increasingly come to rely on competitive options for television viewing, and that the government should be very cautious when legislating and regulating in this area.

Mississippi is primarily a rural state, and the deployment of Direct Broadcast Satellite services has been a welcome development for television viewers in my home state. Currently, approximately 300,000 homes in Mississippi subscribe to Direct Broadcast Satellite services, which is one of the highest DBS penetration rates in the country. For many of these viewers, they have no other option for receiving a full complement of television channels, and the deployment of "local-into local" satellite signals is another positive step in the right direction. Unfortunately, "local-into-local" is not yet available in most Mississippi markets, so I am eager for the Direct Broadcast Satellite providers to offer this service to all markets in the state. DBS has provided a competitor to cable in many communities in my State, and I believe the multichannel video market is healthier as a result.

As we look at reauthorizing the Satellite Home Viewers Improvement Act of 1999, Congress should be prudent and make certain that any such new legislation is fair to everyone. We should take great care that any changes or revisions to this law do not cause unwarranted disruptions to American television viewers, but we must also be sure that any new legislation is fair to the various industries which are affected by the law—including copyright holders, broadcasters, and the Direct Broadcast Satellite companies.

I am hopeful that this issue will not become sidetracked by partisanship, because Congress has historically been able to find common ground in this area. As we approach the end of the year and the expiration of provisions in the Satellite Home Viewers Improvement Act of 1999, I also encourage my colleagues to focus on working across Committee jurisdictional lines and in a bicameral fashion to find the legislative approach that would best benefit the American public.

I am looking forward to hearing the testimony of the witnesses today as the Committee gathers the information needed to address this reauthorization. Thank you again, Mr. Chairman, for holding this hearing.

Senator SUNUNU. Thank you, Senator Lott. You're a shining light in this Committee.

[Laughter.]

Senator LOTT. Well, there are only two of us.

[Laughter.]

Senator SUNUNU. I need all the help I can get.

Mr. YAGER, did you want to respond to that last point?

Mr. YAGER. Well, if I may, the significantly viewed status that cable was afforded in 1972, and that was because there were many markets that had stations on the air early, let me give you an ex-

ample of Charlotte, North Carolina. They had a station that was on the air in 1947. I happened to run stations in Columbia, South Carolina, for a number of years. Charlotte was considered significantly viewed in Columbia, South Columbia, in 1971. Today, that would not be the case.

We believe there's a compromise that can be reached in significantly viewed for satellite, but it is a very slippery slope that you don't destroy local television stations, the audiences they've developed, as you try to apply a 1972 rule to satellite in 2004. We're willing to discuss it, we're willing to talk about it, but we think we have to take it very judiciously.

Senator SUNUNU. Thank you, Mr. Yager.

There are some industries that would probably think applying 30-year-old rules to be advanced compared to some of the rules that we're applying that were in more like 60 or 70 years ago.

Mr. Ergen, Ms. DeLeon described the process of getting the second dish installed for some of her viewers that didn't sound very simple or streamlined or maybe common sense to me. Is the process that she described a reasonable reflection of the way EchoStar operates?

Mr. ERGEN. No, I don't believe it is. First of all, it is free. There is no \$5 charge. There is no charge for installation of a second dish, either at the time of installation or later. If, by chance, a customer is unaware, for some reason, they need a second dish, if her parents didn't know they needed the second dish, even after the system's installed, our on-screen guide—and this was a recommendation by the FCC that we voluntarily have put into action—every one of our channels on the guide is contiguous. And if you keypunch to a Telemundo channel in a certain city—and, by the way, we carry her stations on one dish today in the state of Arizona and Tucson and Phoenix—and we carry the vast majority of Telemundo stations on one dish—but if you're in a city where we don't, and you punch on Telemundo, a screen will come that says, you know, "To get a free—you'll need a dish for this signal. It's free. Call 1-800 DISH Network, and we'll come out and put it in for you." So nothing could be farther from the truth. And, again, this is the law.

And we want to be on one dish. We're not in disagreement with anybody on this panel from the broadcasts, and it's in our best interest. If cable doesn't have a dish, if DIRECTV's on a single dish, then we're disadvantaged in the marketplace, and the marketplace is going to force us to go a single dish. On the other hand, we have to make a decision, do we do 60 markets, and put everything on a single dish, or we do 119 markets and, for a period, have things on two-dish while we work toward those things? And the vast majority of channels that are on two-dish have no local programming, no local news, no local weather. Things like home shopping, who don't do anything for the local community, and were already broadcasting their station on a nationwide basis. The signal is not indifferent from a local broadcast to the national broadcast. So it's very misunderstood that some of the broadcasters want to point to without giving you all of the facts.

Senator SUNUNU. Other than the issue or the question of whether there's local content, how do you decide what goes on the second dish?

Mr. ERGEN. It typically is that, where you have local content. So if a Telemundo station does not have—

Senator SUNUNU. Well, but the majority of stations, the majority of channels that you provide don't have local content, correct?

Mr. ERGEN. The majority probably do have some local content, whether it be a PBS station that has local input, or whether it be local news, weather, or sports. But we have only about 15 percent of our channels are on a wing. It's typically a home shopping channel, a religious channel, where we carry, for example, Trinity Broadcasting under a nationwide license for nationwide, but local signal is exactly the same. Those would be ones that would go. Sometimes it's a technical reason, where we just don't physically have the capacity from a particular spot beam of a satellite. We pioneered that technology, so it's not like a spot beam suddenly can get bigger and bigger and bigger, and more and more channels. It's pretty fixed in the number of channels that it can do.

It's simply a balance between, Would you rather us do more local markets, or would you rather do us on a single dish? That's a decision for this Committee to make. You made that decision in 1999. We honored our agreement to every single Congressman and Senator. We have 48 states today. Within 2 weeks, we'll be in all 50 states with local-to-local, the first company to do that. We did that because we promised people that we'd do it, with the legislation of 1999.

Now the broadcasters want to change the rules. Now they want to change the rules. And if you want to change the rules, going forward, I think that makes sense. We don't have a problem with that. But to retroactively change a rule, it would be like if you went to the car companies and said, "Well, you know, your gas mileage is 15 miles a gallon, and we want it to be 17 miles a gallon. You've got to go back and give people free cars for the cars you sold last year, or 2 years ago, or 3 years ago, under the old rules. We're going to change the rules now. You've got to replace all those cars." We're not capable of doing that without massive disruption to our customers.

Long term, I think we can do it, and I think we're happy to. I'm glad to hear Mr. Yager talk about compromise on the widely viewed. By the same token, I think it's the kind of thing that we can have dialogue with both DIRECTV and the broadcasters as to how we might make a transition to two-dish that'll work for everybody.

Senator SUNUNU. I want to give Ms.—

Mr. ERGEN. One dish. Excuse me. Not two dish.

Senator SUNUNU. I want to give Ms. DeLeon a chance to respond, although I do want to clarify—while EchoStar provides local-into-local into New Hampshire, not all of New Hampshire gets their local station because—

Senator SUNUNU. I'm surprised you get it at all. That's really—

Senator SUNUNU.—because of the issue with the definition of DMAs that I described. I know you've been very helpful, and your staff, in trying to deal with this issue. But this is the kind of thing that drives consumers crazy, is when they see the president of EchoStar saying, you know, "48 states have got local-into-local," and one of your customers is in Northern New Hampshire, and

they're going, "I've been calling EchoStar," or, "I've been calling Senator Sununu," or, "I've been calling the local broadcaster about this for a year or for 2 years, and now he's on—I see him on C-SPAN saying that"——

Mr. ERGEN. Well, let me make——

Senator SUNUNU.—"that the problem's"——

Mr. ERGEN.—let me—let me make the point.

Senator SUNUNU.—"been solved."

Mr. ERGEN. Let me make the point. This is not the president of EchoStar who doesn't want to deliver the local channels throughout the country.

Senator SUNUNU. I understand that.

Mr. ERGEN. This is the law that was passed in 1999. For example, if we would enact the DMA rule, as cable companies enacted, if we enacted widely viewed, if we would enact high-definition legislation to be proposed, then your customers would, in fact, be able to get——

Senator SUNUNU. And I'm simply trying——

Mr. ERGEN. You know, I feel for customers. But we need waivers from broadcasters who don't give the waivers. I guess I would say it's time we put satellite home viewer—put the satellite home viewer back in the Act. Today, it's—today it is not——

Senator SUNUNU. I recognize that.

Mr. ERGEN.—a home viewer Act.

Senator SUNUNU. That's the point in the clarification that was I was precisely trying to make so that your switchboard doesn't light or up our local broadcaster's switchboard doesn't light up or my switchboard doesn't light up. Simply because you are able to offer local-into-local under the current law doesn't mean all viewers are served with the benefit of that technology.

Ms. DeLeon, you had wanted to——

Ms. DELEON. Yes, what I wanted to say is that, yes, EchoStar did put the Telemundo full-powered stations on the primary dish, but that happened just recently. That was within the last two to 3 weeks that we saw that change.

And also, regarding the changing of the law, we don't want to change the law. It is, you know, "carry one, carry all." We are just asking to be all on the primary dish so that we can be seen and we're next to the other general market stations in English language/Spanish combined. So that's really what we're asking for.

Senator SUNUNU. Mr. Yager, let me ask you this question, and I think you had wanted to add something there. In your testimony, you talked about 1400 stations providing digital broadcasts covering 99 percent of the country, 92 percent of the population with those digital broadcasts. But, at the same time, you said that you don't want the legislation to be modified at all to allow any white area definition if there is no digital broadcast being received by consumers. Now, it would seem to me that if 92 percent of the population, or 99 percent of the country, is being covered, then allowing that digital white space to be defined should make no difference.

Mr. YAGER. I would agree with you, Senator, if we were not in the middle of the digital transition. We are not complete with the digital transition, from broadcasting's point of view. And what do

I mean by that? We still have zoning problems. We still have certain tower-siting problems to get certain stations up in digital. We still have tremendous interference problems to work out with Canada and Mexico. We still have a number of stations that have until 2005 to elect their final power.

If we let this camel get its nose under the tent in terms of bringing distant signals into areas that are served and plan to be served by local stations, we are going to have the same kind of mess on our hands that we had in 1999, when Congress first dealt with the distant signal problem. What we're saying is that the digital white-area problem is a problem that doesn't exist at this point as broadcasters fully build out their digital stations.

And let me respond to one thing, if I might, that Mr. Ergen said, that broadcasters don't grant waivers. Broadcasters, to date, have granted over seven million distant signal waivers.

Senator SUNUNU. Am I misreading your testimony when I state that only 8 percent of the population isn't served by digital, and, therefore—

Mr. YAGER. They're not being—

Senator SUNUNU.—only 8 percent would—

Mr. YAGER. Only 8 percent are not being replicated with the analog signal, to the extent that their analog signal reaches them under the Grade B contour standard—

Senator SUNUNU. So it was—

Mr. YAGER. That's correct.

Senator SUNUNU. So only 8 percent would be affected by the creation of a digital white space for the—

Mr. YAGER. Today that would be the case. My bet is—

Senator SUNUNU. But it would—

Mr. YAGER. Excuse me.

Senator SUNUNU. Then it would be even less in the future.

Mr. YAGER. Yes, I would think so.

Senator SUNUNU. Mr. Ergen?

Mr. ERGEN. Yes, I think your point is exactly on point, Senator. I don't believe, for a minute, that the broadcasters are delivering an HD signal to 92 percent of the country today. I read my mail, too. My customers can call me and send me—and we get more requests, particularly in states like Montana and places out west, where people just don't have access to a digital signal. And I think that we can—they're 2 years behind. And there are some valid reasons. I think that some of the interference issues on the borders are valid reasons. But those are not valid reasons in Denver, Colorado. Those are not valid reasons in Grand Junction, Colorado. Those are not valid reasons in Biloxi, Mississippi. And I think that you need a little carrot and stick, and I think it would be great government policy to—if these customers are economic, if they value those advertising dollars, then they will build their towers. And if they build their towers, we wouldn't have the right to bring a distant signal in. But if they refuse to build those towers, if they drag their feet building those towers, should we deprive the American public, who's watching this broadcast today—should we refuse to give them an HD signal when we have the technical ability to do it? I say it's time to get them the signal.

Senator SUNUNU. Would you commit to cutting off those customers from their distant digital signals as soon as the local digital signal is available?

Mr. ERGEN. I think that that is a plan that can be endorsed, so that we can get—we can get this digital revolution going and make sure the consumers are able to get a choice.

Senator SUNUNU. And you think that's a plan that could be endorsed. Is that a yes?

[Laughter.]

Mr. ERGEN. Well, you'd have to see the details of that. And I think that we—we didn't have a good transition in 1999, so I think that—I think that is something that we'd have to work with broadcasters on. But I believe that, yes, that you can—you can keep the integrity of local broadcasting and have some kind of transition plan so that customers can get it today, and you can get the digital spectrum back, as government policy.

Senator SUNUNU. Senator Lott?

Senator LOTT. Mr. Chairman, with your permission, I'd like to ask that my whole statement be made a part of the record after the conclusion of the—

Senator SUNUNU. Without objection.

Senator LOTT.—statements by the witnesses.

Second, I want to urge the two satellite folks here, remember your installers and their rights and needs, too, as you go forward. And I think you know, Mr. Ergen, why I say that.

And then last, but not least, Senator Sununu, you don't have to carry those Boston stations in New Hampshire, do you, on the satellite?

Senator SUNUNU. Yes.

Senator LOTT. You do? That's a shame.

[Laughter.]

Senator LOTT. Are you working on resolving that problem?

[No response.]

Senator LOTT. I yield the floor.

[Laughter.]

Senator LOTT. Thank you all very much.

Senator SUNUNU. Very expensive to advertise in Boston.

The last question is a technical question. I had, at one point, a technical background. I guess I still have the technical background, but the longer I serve in public officer, the grayer some of that education gets. But on the issue of unserved households, whatever technical education I have seems absolutely useless. I start reading about Grade B intensity in the ILLR model, and I'll sit down with a broadcaster and talk about this issue of how you define technically when a household is served and when it isn't, and I finish the conversation thinking, "I think I understand this whole Grade B contour model thing." And then I'll sit down with someone who's affiliated with one of the DBS providers, a satellite provider, and have the same conversation, and get a completely different answer.

So I just want to give Mr. Yager and Mr. Ergen—I think you mentioned it in your testimony—so I'll kick it to you, give you each a short time, just a couple of minutes, to try to summarize your side of the unserved household technical argument.

Mr. ERGEN. Well, thank you. If you want to further confuse yourself, talk to consumers.

[Laughter.]

Mr. ERGEN. Right?

Senator SUNUNU. Well—

Mr. ERGEN. Because I can't—I helped write the law, and I can't—

Senator SUNUNU.—in a way, it's not confusing to consumers, because—

Mr. ERGEN. They just don't get it.

Senator SUNUNU. Yes, well, they know for—they know, with absolute certainty, whether they're served or not served. There's no question in their mind. So—

Mr. ERGEN. Well, the confusion to them is that they aren't served many times because of interference and things that SHVIA doesn't take into consideration in ILLR, and then they wonder why—they call us, they call you—and they wonder why they can't get this signal.

Now, on digital, that's solved. So our digital plan to broadcast digital in is very easy because digital, as you know, is—you either get the signal or you don't. There's no ghosting, there's no drop-off—

Senator SUNUNU. But I don't want to talk about digital, at least at the moment; I want to talk about the current definitions—whether you think the current definition is accurate and whether you think it's fairly applied.

Mr. ERGEN. OK. There's no question that it's not accurate. It was in the 1950s that the model was predicted, when there were very few broadcast stations. Now that we've got broadcast stations in buildings and things that have—and trees that have grown up over the last 40 years, 50 years, there's quite a bit of interference and ghosting that the model does not take into consideration. So I think would be very imperative that the legislation have the FCC go back and update ILLR to be—rather than a predictive model, to be an accurate model.

Senator SUNUNU. Mr. Yager?

Mr. YAGER. Senator, it's a great question. But really you can't change physics. ILLR is based on physics. A Grade B intensity signal is based on predicted contours of the television station signal at a certain height at a certain power. Now, we can talk about all of these other elements that you want, but that's what it's based on, and the physics aren't going to change. They were the same in 1953 as they are in 2004.

Let me say that I believe this Committee directed the FCC twice to review the ILLR techniques. The FCC came back in 2000 and said it was a good standard, it met the tests. It came back in 2002 and said it was the standard—the best standard they could come up with.

Senator SUNUNU. Mr. Hartenstein, is the FCC being unreasonable in reaffirming the validity of the standard?

Mr. HARTENSTEIN. I haven't sat down and reviewed what they've looked at. We've chosen to, you know, accept the standard, move on with it, try to make amends, and try to level the playing field as best we can, through opportunities such as this hearing today,

on all issues regarding the satellite business and how we, at DIRECTV, see it. Like any model, it's never perfect, but it is what it is, and we try to make do with what we can.

It is—I will echo Mr. Ergen's comments—it is often very confusing to customers that live out in the far reaches of some of the states to understand why something is not allowed to them when they, in fact, have trouble seeing it. But, on the other hand, you know, in an imperfect world, we'll work with what we have.

Senator SUNUNU. I want to thank all the panelists very much. I appreciate your patience and your testimony.

The hearing is adjourned.

[Whereupon, at 10:45 a.m., the hearing was adjourned.]

A P P E N D I X

August 19, 2003

DAVID R. GOODFRIEND,
Director, Legal and Business Affairs,
EchoStar Satellite Corporation,
Littleton, CO.

Dear Mr. Goodfriend:

I am in receipt of your letter dated June 18, 2003, wherein you seek assistance in completing Form SC, the Statement of Account for Secondary Transmissions by Satellite Carriers for Private Home Viewing. Form SC is used by satellite carriers making royalty payments under the statutory license set forth in 17 U.S.C. § 119 for the retransmission of distant broadcast signals. The circumstances of your request for guidance, as you present them, are as follows.

You state that EchoStar has entered into a private agreement to carry the digital high-definition (HDTV) signals of over-the-air CBS television network stations. Under the agreement, EchoStar “may distribute the CBS HDTV programming to any subscriber residing in (a) a market served by a CBS [owned and operated] station (*i.e.*, CBS granted us a waiver for such distribution); (b) a market served by a CBS affiliate which has granted EchoStar a waiver; and (c) an ‘unserved’ area.” Letter at 1. You note that Form SC requires reporting the number of subscribers who receive distant over-the-air network television stations but does not distinguish between receipt of an analog over-the-air signal and a digital over-the-air signal. Your inquiry to us is whether EchoStar should report carriage on Form SC of the distant subscribers who receive the digital CBS over-the-air signals. You conclude that, as a matter of law, the section 119 statutory license covers the retransmission of distant digital over-the-air signals as well as distant analog over-the-air signals.

The statutory license set forth in section 119, with respect to network stations, applies to “secondary transmissions of a performance or display of a work embodied in a primary transmission made by a network station. . . .” 17 U.S.C. § 119(a)(2)(A). A “primary transmission” is defined as a “transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.” 17 U.S.C. § 119(d)(4), quoting 17 U.S.C. § 111(±). No mention is made of the character or type of signal that makes up the primary transmission, *i.e.*, whether it can be analog, digital, or both. Section 119 requires that a television station retransmitted by a satellite carrier must be licensed by the Federal Communications Commission. It is our understanding that the Commission does permit over-the-air television stations that it licenses to transmit a digital as well as an analog signal.¹ Because section 119, by its terms, does not distinguish between analog or digital over the-air television signals, it appears that the license applies to secondary transmissions of both, provided, of course, that all other terms and conditions of the license are satisfied. Thus, in completing Form SC, it is correct to include all distant subscribers receiving digital CBS over-the-air signals, plus the distant subscribers of the analog CBS over-the-air signals that EchoStar is retransmitting.

In support of your argument that section 119 applies to carriage of digital as well as analog over-the-air network stations, you assert a distinction between the digital network of CBS stations and the analog network of CBS stations. You submit that EchoStar may provide distant digital network signals to subscribers who reside in unserved households and then offer an interpretation of the definition of an “unserved household” that distinguishes between receipt of digital versus analog network signals. We do not agree with your approach. First, the “unserved household” provision of section 119 has nothing to do with whether the statutory license applies to digital as well as analog over-the-air television signals. Consequently,

¹There is apparently at least one Florida broadcast station that transmits in digital only.

there is no reason to address, let alone interpret, that provision of the law. Second, for the reasons stated above, section 119 does not distinguish between retransmission of a digital or analog distant signal of an over-the-air television station. There is, therefore, no such thing as a digital network of CBS stations and a separate analog network of CBS stations for purposes of the section 119 license.

Sincerely,

WILLIAM J. ROBERTS, JR.
Senior Attorney.

ECONOMIC POLICY INSTITUTE
Washington, DC, May 4, 2004

FCC POLICIES STYMIE TELECOM INDUSTRY
ILL-ADVISED POLICIES CONTRIBUTED TO THE LOSS OF 380,000 JOBS

Outdated rules in the Telecommunications Act of 1996 strangle the established local wired phone companies and have contributed to the loss of 380,000 jobs across the entire economy, or as much as 15 percent of the total jobs lost in the last recession. Stephen Pociask lays out the facts in *A Failure to Communicate: Reforming Public Policy in the Telecommunications Industry*, released today by the Economic Policy Institute.

“Reforming and updating current policies will promote job growth and revitalization of the telecom industry,” said Jeff Keefe, EPI telecommunications project director.

The Telecommunications Act of 1996 was intended to promote investment and innovation, thus lowering prices to consumers and encouraging investment in local wired phone networks. In reality, it pits the established local wired telephone companies, like Verizon, Bell South, SBC and Qwest, against other phone companies, including AT&T and WorldCom, in ways that discourage investment in building and stymie technological advances.

The FCC set rules under the Act that obligate established local wired phone companies to make their telephone facilities available to other companies at prices substantially below the actual cost of building and maintaining those facilities. According to *A Failure to Communicate*, the established telephone companies are not receiving enough return on their investment to continue building and maintaining their wired facilities.

Although other companies poured into the market initially, the bargain wholesale rates competitors pay are so low that there is no incentive to build new and more advanced networks. As a result, both the established local wired phone companies and other companies have cut their capital spending significantly.

The obvious competition to the wired phone industry is from intermodal companies, *i.e.*, competitors using wireless cell phones and cable networks capable of providing voice, data, and video services. The outdated FCC rules did not anticipate that these intermodal competitors would come to define the market.

Established local wired phone companies lost nearly 193,000 jobs between January 2000 and November 2003 (*See Figure 1 attached*). Many jobs were lost due to the collapse of the Internet bubble in 2000. However, a significant number of jobs were lost when phone companies failed to invest in new and upgraded lines to meet the demands of the broadband market. That market is now dominated by the cable industry. “Established local wired phone companies were caught in a regulatory time warp that discouraged growth and innovation,” said Stephen Pociask, president of TeleNomic Research.

Hardest hit states

The job loss in this industry is geographically widespread and affects other industries. All states where data were available lost telecom jobs. The hardest hit states were Texas and California, with the loss of 26,700 and 20,200 wired telecommunications jobs, respectively, between August 2001 and August 2003. New Jersey, Colorado, Virginia, Massachusetts, and Maryland also suffered losses of over 20 percent of their telecom services jobs. (NJ lost 24.30 percent, CO lost 26.30 percent, VA lost 23 percent, MA lost 22.90 percent, and MD lost 20.60 percent. *See Table 1 below for more state listings.*) Employment levels in firms that make telephone equipment fell 56 percent since December 2000, for a loss of another 57,000 jobs nationwide.

Lowering consumer prices is another goal the Act has failed to achieve. *A Failure to Communicate* shows that local telephone prices have increased by nine percent since 1996, compared to the seven years prior to the Act, when prices fell by 13 percent.

Policy recommendations

A Failure to Communicate recommends raising the prices that established telecom companies can charge to market challengers. When it is no longer cheaper to rent than to build new and efficient facilities, challengers will be driven to invest in new technology, thereby creating more jobs.

Cable, cell phones, and Internet services also compete in the race to transport electronic voice, data, and video. Cell phones, in particular, are making a serious impact on the established wired phone companies. As the soaring number of cell phone subscribers cuts into the demand for wired phone lines, regulations need to keep pace. The study recommends that the FCC look beyond the wired phone technology and include cable, cell phone, and Internet services when defining the marketplace.

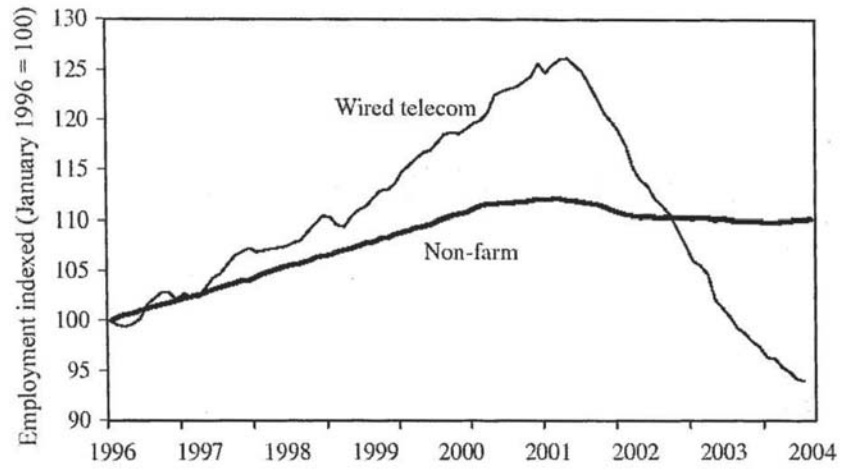
Stephen Pociask is president of TeleNomic Research, a consulting firm specializing in public policy analysis for information technology industries. He is affiliated with the New Millennium Research Council and previously served as chief economist and executive vice president for Joel Popkin and Co.

The *Economic Policy Institute* is a non-profit, non-partisan economic think tank founded in 1986. The Institute is located on the web at <http://www.epinet.org>.

Table 1.—Telecommunications services employment
August 2001 and August 2003 (thousands of jobs)

	2001	2003	Difference	% change
Texas	125.3	98.6	-26.7	-21.30%
California	142.6	122.4	-20.2	-14.20
New York	79.2	64.1	-15.1	-19.10
New Jersey	55.6	42.1	-13.5	-24.30
Florida	79.5	66.6	-12.9	-16.20
Colorado	46.0	33.9	-12.1	-26.30
Georgia	66.9	55.0	-11.9	-17.80
Virginia	47.4	36.5	-10.9	-23.00
Massachusetts	28.8	22.2	-6.6	-22.90
Missouri	32.5	26.2	-6.3	-19.40
Washington	31.2	25.3	-5.9	-18.90
Maryland	25.7	20.4	-5.3	-20.60
Illinois	50.7	46.2	-4.5	-8.90
Ohio	37.5	33.2	-4.3	-11.50
Pennsylvania	47.3	43.3	-4.0	-8.50
Michigan	26.8	23.5	-3.3	-12.30
Minnesota	17.6	14.9	-2.7	-15.30
Oklahoma	17.5	14.8	-2.7	-15.40
Alabama	17.9	15.4	-2.5	-14.00
Arizona	21.6	19.2	-2.4	-11.10
Connecticut	16.1	13.8	-2.3	-14.30
North Carolina	28.8	26.8	-2.0	-6.90
Indiana	16.7	14.9	-1.8	-10.80
Oregon	10.7	9.2	-1.5	-14.00
Kansas	31.0	29.6	-1.4	-4.50
Tennessee	18.2	16.8	-1.4	-7.70
Nevada	8.6	7.3	-1.3	-15.10
Utah	6.5	5.4	-1.1	-16.90
New Mexico	8.8	7.9	-0.9	-10.20
Mississippi	9.2	8.4	-0.8	-8.70
West Virginia	6.5	6.0	-0.5	-7.70
Hawaii	4.9	4.5	-0.4	-8.20
Kentucky	10.3	9.9	-0.4	-3.90
South Carolina	13.6	13.2	-0.4	-2.90
Louisiana	13.9	13.6	-0.3	-2.20
Arkansas	8.9	8.7	-0.2	-2.20
Alaska	4.5	4.3	-0.2	-4.40
Idaho	3.3	3.2	-0.1	-3.00
<i>U.S. Total</i>	<i>1,293.0</i>	<i>1,129.1</i>	<i>-163.9</i>	<i>-12.70%</i>

Note: Telecommunications services data were not available for Delaware, Washington D.C., Iowa, Maine, Montana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming. Data are not seasonally adjusted. These data include wired and wireless telecommunications. U.S. totals are from Bureau of Labor Statistics industry employment data; therefore, column totals do not sum to the U.S. totals shown in the last row.

FIGURE 1 Telecommunications industry employment (1996-2004)

Note: Telecommunications figures are not seasonally adjusted and exclude the strike affecting August 2000.
Source: Bureau of Labor Statistics, detailed reports at www.bls.gov

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