

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵ *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Report and Order, 14 FCC Rcd 2654 ¶ 64 (1999) (“SHVA Report and Order”).

⁶ SHVA Report and Order at ¶ 7.

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

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

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

⁷ *Id.* at ¶ 65.

⁸ SHVERA Report at ¶ 148.

⁹ *Id.* at ¶¶ 144, 148.

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

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

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

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

¹¹ SHVERA Report at ¶ 91.

to 12 per hour lasting 3 seconds each. At this standard, the viewer would still be able to detect fleeting outages; however, most would consider the picture quality overall to be watchable.

However, even once the modified ILLR has been established, the FCC must continue to assess the accuracy of the model and make the appropriate adjustments and corrections on an ongoing basis.

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

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

Several local broadcasters are simply not abiding by the spirit of the law.

We have been selling distant networks since December 1, 2006, about two and one half years, and during that time we have had over 450,000 waivers denied. That is three times the amount of customers we currently have.

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

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

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

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

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

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

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

Conclusion

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

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

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

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