Hearing on "Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act"

United States House of Representatives Committee on Energy and Commerce

Subcommittee on Communications, Technology, and the Internet

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INTRODUCTION AND SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Providing Local-To-Local Service in All Markets Would Virtually Eliminate the Number of Truly "Unserved" Households

Unlike the local-to-local compulsory license, the distant-signal compulsory license threatens localism and interferes with the free market copyright negotiations. As

a result, its only defensible justification is as a "hardship" exception—to make network programming available to the small number of households that otherwise have no access to it. The 1999 SHVIA Conference Report states that principle eloquently: "the specific goal of the 119 license . . . is to allow for *a life-line network television service to those homes beyond the reach of their local television stations*." 145 Cong. Rec. at H11792-793. (emphasis added).[7/]

As noted above, nearly 98 percent of all U.S. television viewers have the option of viewing their *local* network affiliates *by satellite*—and that number is growing all the time. Thus, as a real-world matter, *there are no unserved viewers* in areas in which local-to-local satellite transmissions are available, because it is no more difficult for subscribers to obtain their local stations from their satellite carriers than to obtain distant stations from those same carriers. Therefore no policy or other rationale justifies treating satellite subscribers in local-to-local markets as "unserved" and therefore eligible to receive distant network stations, and there is every reason to close this loophole.

The distant-signal compulsory license is *not* designed to, and should not be allowed to, permit satellite carriers to undermine the locally-oriented network/affiliate

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[7/] *See, e.g.*, Copyright Office Report at 104 ("The legislative history of the 1988 Satellite Home Viewer Act is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection."); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship"); *id*. at 26 ("The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely"); H.R. REP. No. 100-887, pt. 1, at 20 (1988) ("Moreover, the bill respects the network/affiliate relationship and promotes localism.").

relationship by delivering to viewers in *served* households—who can already watch their own local ABC, CBS, Fox, and NBC stations—network programming from another distant market. Consider, for example, a network affiliate in Sacramento, California, a DMA in which there are today no DBS subscribers who are genuinely "unserved" because both DIRECTV and DISH Network offer the local Sacramento ABC, CBS, Fox, and NBC affiliates by satellite. Nevertheless, for any Sacramento-area viewer who is technically "unserved" under the Grade B intensity standard, satellite companies can undercut the public's local service from their Sacramento stations with duplicative programming on distant signals from East Coast network affiliates. The Sacramento stations—and every other station in the Mountain and Pacific Time Zones that has local-to-local service—therefore can lose badly needed local viewers, even though the viewers have no need to receive a distant signal to watch network programming.

Similarly, the ability of satellite carriers to offer distant stations that carry alternative sports events is a needless and destructive infringement of the rights of copyright owners, who offer the same product—out-of-town games—on a free market basis. For example, the NFL has for years offered satellite dish owners (at marketplace rates) a package called "NFL Sunday Ticket," which includes all of the regular season games played in the NFL. The distant-signal compulsory license creates a needless "end-around" this free-market arrangement by permitting satellite carriers to retransmit distant network stations for a pittance through the compulsory license.

IV. PROPOSALS TO MODIFY STATION MARKETS COULD SEVERELY UNDERMINE LOCALISM

A. Cross-State Market Modifications Are Neither Necessary Nor Desirable.

Legislation has been proposed that would modify the copyright laws so that the programming broadcast by certain *in-state* television stations may be retransmitted by cable and satellite companies to residents of that state, regardless of the local television market in which these residents are located. This legislation is inconsistent with the carefully balanced system of "local" broadcast service established by Congress and would have significant adverse consequences for the public's local broadcast service, particularly the local services provided by local stations in small, rural markets.

Legislation is not necessary to enable cable and satellite companies to retransmit throughout a state the local news, weather, sports, public affairs, and informational programming broadcast by in-state stations. This kind of specific programming, not duplicating network and syndicated entertainment programming can already be imported by in-state cable and satellite services. Thus, the existing regulatory scheme already permits existing carriage of the type of in-state programming that the proposed legislation seeks to promote. To be explicit, these in-state produced programs may be retransmitted, with the consent of the originating stations, without any change in existing copyright or other laws.

Satellite and cable operators wishing to provide locally-produced and locally-owned news, weather, sports, public affairs, and informational programming of "in-state" stations may simply carry the specific locally produced programming of one or more of these in-state stations. In some areas of the country, cable companies, do, in

fact, carry this kind of out-of-market *local* programming (without also importing "duplicating" out-of-market network and syndicated programming). The originating stations readily consent to the out-of-market retransmission of their local news, weather, sports, public affairs, and informational programming to other communities in the same state. Local cable companies can put these programs on a desirable, low dial "public access" channel without disrupting another cable entertainment program channel. Satellite carriers could also add these programs to a local satellite channel.

For Congress to artificially realign the scope of the local cable and satellite compulsory copyright licenses and reconfigure the boundaries of local television markets, overriding market conditions and natural viewing patterns would destabilize the television broadcast and advertising industries, would have adverse economic consequences for local stations, and, worst of all, would harm the public's localized broadcast service. In short, it would also disrupt the carefully balanced system of "local" broadcast service established by Congress in the Communications Act.

Stations in smaller, rural markets would sustain the most economic harm from legislation of this kind as a result of loss of viewers and advertisers to out-of-market big city stations that would be imported. For example, one can easily imagine the adverse financial consequences on local stations in small markets in Pennsylvania if duplicating programming from Philadelphia stations were to be imported into other markets within the state. The viewing fragmentation from distant duplicating network and syndicated entertainment and national sports programming would impair the economic ability of local stations to provide *local* news, weather, sports, and informational programming—a

result contrary to the interest of the very viewers the legislation is intended to serve and of many other viewers as well.

Measures to facilitate and encourage importation by satellite of out-of-market stations into local markets would also remove an important economic incentive for satellite carriers to uplink *local* stations in every market and retransmit those local stations by satellite. For years Congress and the FCC have encouraged—rather than discouraged—satellite carriers to retransmit *local*—not *distant*—television stations into each of the nation's 210 local television markets. Legislation to expand the distant signal compulsory copyright license would be inconsistent with that well-established policy. The effect of similar legislation for cable would similarly run counter to the careful balance that the Congress and the FCC have struck to protect the public against cable's power and incentives to injure the public's *local* television service.

Manipulation of the scope of the compulsory copyright license to achieve market modifications would not necessarily produce the intended result in any event. Networks and syndicated program suppliers have always *restricted* the area in which a station may give retransmission consent to cable and satellite companies. So even if the copyright laws were modified by Congress, and even if the network non-duplication and syndicated program rules were eliminated, program suppliers would not likely change their local market program licensing arrangements.

This kind of legislation has significant implications for local stations in terms of program licensing, program exclusivity, and retransmission consent negotiations. Stations and program suppliers have strong incentives to maintain the integrity of their

local markets and the exclusivity within those markets of their network and syndicated programming.

B. Harm to the Digital Transition.

As part of a very special public/private partnership, the broadcast industry, related industries and the federal government have all dedicated extraordinary energy, effort and resources to implement successfully the transition to digital broadcasting. Changes in television station markets at this time could jeopardize this unprecedented effort and substantial benefit of the transition, which include crystal-clear pictures and sound, more channels and more services – all provided for free.

As all members of this Committee are aware, by June 12 of this year every full-power television station in the nation will have made the switch to digital-only broadcasting. Broadcasters have worked tirelessly to implement the digital television ("DTV") transition. Thanks to the expenditure of billions of dollars and millions of person-hours, broadcasters have already built—and are on-air with—1655 DTV facilities providing digital service throughout the entire country.

Broadcasters are also fully committed to making certain that television viewers in all demographic groups understand what they need to do to continue receiving their local television signals after the switch to digital-only broadcasting. To that end, broadcast networks and television stations nationwide are participating in a multifaceted, multi-platform consumer education campaign that uses all of the tools available to broadcasters, their community partners, and related industries to ensure a smooth transition for viewers. The campaign includes DTV Action television spots, local speaking engagements, informational Web sites, a nationwide road show and a variety

of other grassroots initiatives. Valued at over a billion dollars, the campaign will reach nearly all television viewers and generate over 132 billion audience impressions before it is complete later this year. The success of this public education effort was demonstrated by the relatively limited number of viewer calls that occurred when over 400 stations terminated analog broadcasts on February 17, 2009.

As millions of television viewers can already attest, digital television—especially high definition television ("HDTV")—provides a dramatic improvement over analog television. Even at its most basic resolution, digital television offers service of a far higher quality than analog. Standard definition digital service is free from the snow, ghosts and lack of vertical hold that can plague analog signals. Sound is also vastly improved. Viewers with connected stereos can experience surround sound and the attendant subtleties of a high fidelity television experience. Programming seen in HDTV marks a revolutionary improvement, especially when viewed on newer televisions capable of handling higher resolution signals. HDTV programming is presented in a cinema-like 16:9 aspect ratio, or widescreen image, that more naturally suits the human eye. Everything seen in HDTV, from scripted shows to news to sports programming, is in brilliant detail. Viewers can see blades of grass on a football field, clearer depth of field in dramas, and the dimples on both a golf ball and a local news anchor.

Local broadcasters and networks have invested billions of dollars in high-definition ("HD") programming. Today, the majority of primetime programming shown by the major television networks is in HD. Nearly every major sporting event aired by the networks, including almost every NFL game, NBA game, the NCAA Basketball Tournament, most major golf tournaments, major tennis tournaments and both the

Winter and Summer Olympics, is broadcast in HD. Major network programs, including most scripted programs and non-scripted "reality" programs, are shown in HD. And increasingly local stations across the country are broadcasting their local news in HD. For local stations, this represents a major investment in advanced television technology, including costs for new cameras, new video processing and storage equipment, updated studios, and training.

In addition to improved picture quality, the switch to DTV allows local broadcasters flexibility to provide multiple channels of programming (i.e., multicasting) from a six MHz stream and substantially increases the overall amount of free programming. Stations across the country are experimenting with new formats and other ideas for multicast television, including local news, weather and sports programming.[8] As the transition to all-digital television progresses, broadcasters will continue to increase multicast offerings and provide alternatives to the increasingly costly cable and satellite programming.

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[8] Examples include: WRAL in Raleigh, NC, which on one of its subchannels airs local news and public affairs programming 24 hours per day with shows like "Focal Point" and "WRAL Listens"; KTVB in Boise, ID, which airs its "24/7" local news channel on a multicast channel; KFSN in Fresno, CA, which uses one of its subchannels to air local news, sports programming, and shows such as "Hispanic Today"; and WFSB in Hartford, CT, which is airing a local news and weather channel—Eyewitness News Now—and has, in conjunction with Connecticut Public Television, started Connecticut Television Sports Network, an all-local sports channel that covers local high school and college sports. In addition, niche programming, especially programming for Spanish-speaking audiences, has found a home on digital subchannels. LATV, based in Los Angeles, is a bilingual network channel distributed on digital multicast streams that offers music and entertainment programming for young Latino audiences. Likewise, Mexicanal Network, which features Spanish-language news, sports, and entertainment programs, is operating on multiple broadcast digital subchannels across the United States. MHz Network, based in northern Virginia, programs seven digital multicast channels to the Washington D.C. market, including channels that air Chinese, Nigerian, French, and Polish news and information in both English and foreign languages.

In light of this massive investment in and commitment to a successful DTV transition, this Committee should be wary of proposals to modify television markets in a manner that would ultimately undermine local stations' ability to provide free, over-the-air digital services to consumers. The digital transition has not altered the policy commitment to broadcast localism, but has reaffirmed it. The FCC has been worked to ensure that, to the extent possible, DTV stations replicate the same local coverage patterns of their companion analog television stations. And the national commitment to preserving free, over-the-air television for local viewers has been clearly demonstrated by Congress's and the President's decision to delay the transition until June 12, 2009, so that no viewer is accidentally left behind.

Sweeping market modification proposals could not only undermine this investment in and commitment to locally-oriented television service, but could ultimately jeopardize many of the benefits of the DTV transition for viewers. If "in-state" distant stations are imported in lieu of local stations, long-established viewership and service patterns will be disrupted.[9] The investment in replicating established analog coverage

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[9] The Communications Act already has a provision, and the FCC a process, to modify the television markets of must carry stations. *See* 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59. These provisions are utilized by television stations and cable operators to adjust market boundaries based on the statutory criteria. This system works. The FCC has recognized that there may be good reasons not to modify a market to incorporate an additional "in-state" county, even though that county is part of a local "out-of-state" television market—namely, that county has a greater nexus to the other market than to the "in-state" market. When it comes to localism, state boundaries may be as arbitrary as television market boundaries. For example, counties in Northern Virginia (such as Arlington and Alexandria) are clearly appropriately part of the Washington, D.C. television market, not other markets in Virginia, such as Richmond, Norfolk or Charlottesville. Programming imported from these other Virginia markets would certainly not be more "local" to residents of Arlington than programming from stations in Washington, D.C. The same is true in many other parts of the country as well. *See, e.g., Agape Church, Inc.*, 14 FCC Rcd 2309 (1999) (denying market modification

would be compromised as would the investment in educating viewers about the transition and how to be able to continue to watch the local television stations they have always seen.

In addition, one of the other key benefits of the digital transition, the ability of local television stations to program multiple channels (multicasts) will also be threatened. Reduced advertising revenue could inhibit, or even prevent, local television stations from producing and airing innovative local news and sports channels such as WFSB's Connecticut Television Sports Network in Hartford. Moreover, stations' incentive to develop local multicast channels airing, for example, news, sports or foreign language programming, could well be undermined if market modifications permit the importation of similar types of programming from outside their markets.

In short, market modification proposals actually stand to harm viewers by undermining localism; decreasing, rather than increasing, the diversity of voices and programming options; and jeopardizing many of the benefits of the digital transition.

V. WHAT CONGRESS SHOULD DO THIS YEAR

As Congress is aware, the local-into-local compulsory license in Section 122 of the Copyright Act is permanent. Congress, however, has wisely, upon each reauthorization of the satellite legislation, limited the duration of the distant signal

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petition to add Crittenden County, Arkansas, to the must carry market of a Jonesboro, Arkansas, television station because Crittenden County was really part of the core of the Memphis, Tennessee, television market and such modification would "modify the basic nature and competitive relationships within the core area of the Memphis" market).

license in Section 119 of the Copyright Act to five years. SHVERA's five-year extension of the distant signal license expires at the end of 2009.

A. Phase-Out of the Section 119 Distant Network Signal License

The Section 119 license both sunsets, in its entirety, and has phase-out provisions that affect the satellite retransmission of distant network signals to certain subscribers. The principal phase-out provision, which affects distant network signal delivery in local-into-local markets, has mooted much of the utilization of the license even before the license completely sunsets on December 31, 2009.

In particular, the Section 119 license contains a provision, known as the "if local, no distant" provision, that prohibits the delivery of distant network signals to new subscribers in television markets in which the satellite carrier offers local-into-local service under the Section 122 license. *See* 17 U.S.C. § 119(a)(4). Because the number of distant network signal subscribers has steadily declined since the introduction of local-into-local service at the same time that local-into-local service has expanded to 98% of all television households—the number of new subscribers to distant network signals, other than those for which local television stations have granted waivers of the restrictions, has diminished significantly. This phase-out of the utilization of the distant network signal license, and the expansion of local-into-local service under the Section 122 license, advances the Congressional policy goal of localism. Accordingly, Section 119 should sunset at the end of December 2009 with respect to the provision of distant network stations in markets where local-to-local is being

provided. As explained below, local-to-local should be made mandatory by the end of 2010, at which time Section 119 should sunset for those markets as well.[10]

B. Require Provision of "Local-into-Local" Satellite Service in All Television Markets

The next and final step in positioning DBS service as a competitor to cable service, and enhancing and preserving the public's stake in broadcast localism, is to require satellite carriers that provide "local-into-local" service to do so in *all* 210 television markets. Satellite carriers should be required, as a condition of reliance on the Section 122 "local-into-local" license in any television market, to extend "local-into-local" service to all 210 television markets no later than December 31, 2010, absent a waiver, for good cause, by the FCC. The extension of "local-into-local" satellite service in all markets would advance the longstanding national communications policy of localism, enhance multichannel video programming and price competition with cable and telco companies, and increase viewer choice. Congress could provide no greater service to assist viewers and consumers in this difficult economic climate than to enhance competition by mandating "local-into-local" satellite service in all 210 television markets.

C. Accelerate the Provision of Local Television Signals in High Definition

The full benefits of the digital television transition will not be experienced by all Americans if the satellite industry is permitted to delay the availability of local television signals in high definition format. Unfortunately, in 2008 the FCC allowed the satellite

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[10] There are other dimensions of Section 119, however, including delivery of superstations and delivery of signals to "significantly viewed" areas, that are not subject to phase-out. Those provisions should be renewed for an additional five-year term.

industry to delay for five years the retransmission of local television stations in high definition throughout the nation, thereby allowing satellite carriers to discriminate against certain local broadcast stations, especially in smaller, rural television markets. Moreover, independent stations, Spanish and other foreign language stations, and other minority and ethnic stations, even in larger television markets, are not, in general, being retransmitted by satellite carriers in HD. Thus, consumers in these markets who have purchased HD television sets in anticipation of the digital transition are deprived of receiving by satellite various local HD television broadcast signals. Congress should, accordingly, accelerate from February 17, 2013, to December 31, 2010, the date by which satellite carriers that retransmit local-into-local digital signals must retransmit those signals in HD if the station is broadcasting in HD.

D. Revise the Signal Intensity Standard to Reflect the Digital Transition

If Congress reauthorizes the distant network signal license, then Congress should revise that license to comport with the nation's transition to digital television service. Currently, due to an oversight, the license permits a satellite carrier to deliver a distant network signal to an "unserved household," as defined in 17 U.S.C. § 119(d)(10)(A), which is a household that cannot receive an over-the-air signal of Grade B intensity, as defined by the FCC in 47 C.F.R. § 73.683(a) (1999), of a station affiliated with the requisite network. That definition, in turn, applies a signal intensity standard—the Grade B standard—that has meaning with respect to *analog* signals but not *digital* signals. Because analog signals will not generally be transmitted after June 12 of this year, the definition of "unserved household" should be changed to one in which the household cannot receive an acceptable digital signal. Congress,

accordingly, should substitute the FCC's noise-limited *digital* signal intensity standard, as set forth in 47 C.F.R. § 73.622(e)(1) of the FCC's Rules, for the existing Grade B *analog* standard. This substitution would change the definition of an "unserved household" in 17 U.S.C. § 119(d)(10)(A) to a household that cannot receive a *digital* signal from a local network station whose intensity is less than the signal standard the FCC has established for an acceptable *digital* signal in 47 C.F.R. § 73.622(e)(1) (i.e., the digital "noise limited" service standard). It is our understanding that the satellite carriers concur in this recommendation.

The "unserved household" provision in 17 U.S.C. § 119(d)(10)(A) should also expressly recognize that a subscriber that receives the relevant network programming from a local television station broadcasting that programming on a *multicast* digital channel is a "served" household. In other words, a household should be considered served without regard to which digital channel the local network station uses to broadcast its network's programming. In smaller markets, especially (but not exclusively) those that do not have a full complement of affiliates of the four major networks (ABC, CBS, FOX, and NBC), the "missing" network, as well as newer networks that satisfy the programming thresholds embodied in 17 U.S.C. § 119(d)(2), may affiliate with an existing full power television station for broadcast of that network's programming on a multicast channel of the station. Such arrangements are widespread, promote diversity and support other, often localized, programming initiatives on that and other multicast channels.

E. Adopt a Digital Signal Predictive Methodology

In determining whether households are "unserved" under the Section 119 license, Congress, in 1999, established a predictive methodology, based on the FCC's development of the Individual Location Longley-Rice ("ILLR") computer algorithm, whose application provides a rebuttable presumption of Grade B quality *analog* television service. Subsequently, with SHVERA in 2004, Congress directed the FCC to recommend to Congress an ILLR *digital* signal predictive methodology. In response, and following an extensive proceeding, the FCC recommended an ILLR digital signal predictive methodology to Congress in ET Docket No. 05-182, FCC 05-19 (released December 9, 2005). Congress should now adopt the ILLR digital signal predictive methodology that the FCC has recommended to Congress for predicting whether a household can receive an acceptable *digital* signal from a local *digital* network station.

F. Apply Network Non-Duplication and Syndicated Programming Exclusivity Protections Against All Distant Stations and For All Programming Channels, Including Digital Multicast Channels

The Satellite Act as a general matter only provides network non-duplication and syndicated programming exclusivity protections to programming distributed by national superstations. That limited protection, however, creates a lack of parity with the traditional program exclusivity protections afforded broadcast stations from duplicative programming retransmitted by cable systems. The Copyright Office has recognized this lack of parity and has previously recommended to Congress that Section 119 be amended to provide program exclusivity protection for local broadcast stations whose programming is duplicated by *any* distant station. *See* U.S. Copyright Office, SATELLITE

HOME VIEWER EXTENSION AND REAUTHORIZATION ACT § 110 REPORT (2006) ("Section 110 Report"), at 52. Congress should implement the Copyright Office's recommendation.

In addition, the digital television transition creates the opportunity for new services to be made available to the public via multicasting. Many stations, particularly in smaller markets, have launched additional channels of programming that may contain programming of the principal television networks (ABC, CBS, FOX, NBC, CW, MyNetworkTV) as well as other types of programming, including syndicated and sports programming. While some multichannel video programming distributors have recognized that the network non-duplication and syndicated programming exclusivity and sports blackout rules apply to programming contained on these multicast channels, others have refused to honor station notices invoking exclusivity protection. Congress should confirm that these rules apply to programming contained on all digital channels, including multicast digital channels, with respect to both satellite carriers and cable systems.

G. Terminate All Grandfathered "Illegal" Subscribers

SHVIA in 1999, and then SHVERA in 2004, grandfathered certain otherwise "illegal" distant signal subscribers as new provisions of the statute were being phased in. Because this provision has outlived its usefulness, any remaining grandfathered "illegal" subscribers should be brought into compliance.

H. Make Any Remaining Provisions of the Section 119 License Fully Digital

With the digital television transition, no useful purpose would be served in continuing to afford a compulsory copyright license for satellite retransmission of distant *analog* signals; thus, the distant *analog* signal compulsory license (and various

references to “analog” in the statute) should now be eliminated. This housekeeping step will eliminate confusion and ambiguity in the law and to ensure full compliance. NAB has other, purely technical recommendations that it will share with you as appropriate.

I. Require Companies That Rely on Section 111’s Compulsory Copyright License to Comply with the Communications Act’s Regulatory Requirements

Some companies utilize a video signal delivery technology using Internet Protocol (“IPTV”) to provide video services rather than technologies traditionally used to deliver television signals to subscribers. But while these companies claim the benefit of Section 111’s cable television compulsory copyright license, they nevertheless contend that they are not subject to the Communications Act’s cable television regulations. In the interest of copyright and regulatory parity, Congress should clarify that Section 111’s cable compulsory copyright license is available only to parties that comply with the Communications Act’s cable television regulatory requirements.

CONCLUSION

With the perspective gained from 21 years of experience with the Act, Congress should be guided by the same principles it has consistently applied: that localism and free-market competition are the bedrocks of sound policy concerning any proposal to limit the copyright protection that supports the public’s free, over-the-air local broadcast service.

Reauthorization of the Act should not be used to effect market modifications that would undercut localism, disrupt local viewing and service patterns and run roughshod

over the fair, balanced and market-based principles that underlie the current statutory retransmission consent system.

The distant signal license, which dates back to the inception of the Act, has outlived its usefulness and should expire. At the same time, Congress should promote the principle of localism by requiring local-to-local satellite service for all Americans in each of the 210 television markets and to ensure that all satellite customers reap the benefits of the digital transition by accelerating the satellite carriers' provision of high definition programming in local television markets.