

**Written Testimony of
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Before the House Committee on Energy and Commerce
Subcommittee on Communications, Technology and the Internet
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Thank you for inviting DIRECTV to discuss the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”). I sit before you today on behalf of more than eighteen million of your constituents. DIRECTV brings them hundreds of channels, amazing picture quality, state-of-the-art innovation, and industry-leading customer service. By doing so, DIRECTV, DISH Network, and others present a real challenge to our cable competitors. The result is better television for everybody.

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

This year, you have the opportunity to continue Congress’s commitment to consumers and competition as you consider reauthorization of SHVERA. As you do, we ask you to consider some modest changes that would give consumers access to and more choices for local content. In this regard, Congress should:

- Modify the DMA system to give consumers the stations that truly serve their communities.
- Allow all subscribers in markets missing one or more network affiliates to receive network programming through distant signals and modify how consumers can qualify for distant signals, to ease their burden when local signals are not available to them.
- Fix the significantly viewed rules to offer satellite customers the same choices as cable customers.

Implementing these recommendations will help ensure that your constituents continue to receive more choice and better service.

Moreover, in response to calls for local service in all 210 markets, DIRECTV does not believe that Congress should implement a universal carriage mandate on satellite alone – a mandate that would not apply to broadcasters and cable as well. In just ten years, DIRECTV has invested several billions of dollars to provide local television stations by satellite in 151 local markets, serving 95 percent of American households, and HD local service in 126 markets, serving more than 89 percent of American households. Broadcasters and cable operators, by contrast, have been around for decades and still reach fewer households than can receive local service by satellite. In these circumstances, it is inequitable to place universal carriage burdens only on satellite providers and their subscribers.

While we do not support a universal carriage mandate, we have outlined a set of minimum requirements that must be addressed by Congress should it decide to take such action. In such case, Congress should:

- Apply a capacity cap similar to that which applies to cable.
- Limit carriage rights to those stations with local content.

- Require broadcasters to shoulder their fair share of the financial burden for expansion of their over-the-air footprint.
- Prohibit broadcasters from increasing the already substantial costs of such a mandate through retransmission consent fees.

Any imposition of a universal carriage mandate also makes the need to allow distant signals in markets that are missing a local affiliate, and fixing the significantly viewed rules, even more imperative. It would disserve the public to impose such an uneconomical proposition on satellite and still not be able to offer your constituents a full complement of network signals.

I. Congress Should Update SHVERA to Improve Consumers' Access to and Choice of Local Stations

SHVERA permits satellite operators to deliver local stations within their own “local markets,” generally defined in terms of “designated market areas” (or “DMAs”). It also permits satellite operators to provide distant signals to those consumers that cannot receive local signals. We believe Congress should make changes to these licenses to improve consumers’ access to and choice of local stations, and ease the burden on consumers seeking distant signals when local signals are not available.

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

Congress could begin by modernizing “local markets” and the decades-old DMA system. Nielsen Media Research created DMAs as part of a private subscription service used primarily for advertising purposes. This system was never meant to determine which local signals are available to viewers. Using DMAs for this purpose means that viewers throughout the country cannot receive local news, sports, and entertainment because they happen to live on the wrong side of an arbitrary border.

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

One could solve this problem by allowing satellite and cable operators to offer television stations in “neighboring” DMAs as well as their own DMAs. This would allow, for example, Harrisburg, Pennsylvania stations to be shown in the Washington D.C. DMA, where Fulton County is located. We supported such an approach proposed by Congressman Ross last Congress. In an attempt to balance the interests of broadcasters with those of consumers, however, we would also support a more limited approach that would allow service *only* to orphan counties. Under this approach, Harrisburg stations could be provided only in Fulton County, not throughout the Washington, D.C. DMA. We believe this balanced approach best serves consumers, while also serving the economic interests of the broadcasters.

B. Simplifying the “Unserved Household” Provision Will Make the Law Fairer and More Understandable For Your Constituents

Congress could also help consumers by making modest changes to the distant signal license’s “unserved household” restriction. This restriction limits satellite distant signals to those consumers unable to get local signals over-the-air. The process for determining which households are really “unserved,” however, is hopelessly flawed. Satellite carriers think it is far too complicated and expensive. Broadcasters think it

allows satellite carriers to count too many households as unserved. Most importantly, consumers despise the process of computer prediction, waiver, and on-site testing.

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

First, Congress should allow distant signals to all subscribers in markets where there is no local affiliate. Some local markets lack one or more local network affiliates. Under today’s rules, subscribers in such markets are nonetheless ineligible for distant signals if they are within the service contour of a neighboring, out-of-market station. This is known as the “Grade B bleed” problem, and it can prevent subscribers from getting any network service via satellite even though there is no local broadcast affiliate in the DMA.

Lafayette, Indiana, for example, has a CBS affiliate but no other affiliates. So one might logically expect DIRECTV to be able to deliver NBC, ABC, and FOX distant signals to Lafayette subscribers. But some subscribers in the Lafayette market are predicted to get one or more faint over-the-air signals from Chicago, Indianapolis, or Champaign. We cannot deliver these subscribers local network programming (because there is none), nor can we deliver them distant network programming unless we obtain permission from each and every broadcaster that technically “serves” a sliver of the market. These antiquated rules deny subscribers access to network programming based on the transmissions of non-Lafayette stations.

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

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

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

This approach has numerous advantages. It is logical because, in markets where subscribers receive local signals over the satellite, over-the-air reception is irrelevant. It is simple because spot-beam coverage is a known quantity. It is fair because spot-beam coverage can be published so everybody knows who’s eligible. Most importantly, it ensures that all subscribers can receive network programming.

C. Fixing the “Significantly Viewed” Rules will Rescue Congress’s Good Idea from the FCC’s Implementation Mistakes

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

Satellite operators (unlike cable operators) must offer local stations the “equivalent bandwidth” offered to significantly viewed stations. The FCC has interpreted this to mean that DIRECTV must carry local stations in the same format as significantly

viewed stations every moment of the day. This is infeasible. DIRECTV cannot monitor the format of hundreds of station pairs around the clock. Nor can DIRECTV black out signals when, for example, a high-definition ballgame runs late on one station while the other offers standard definition hourly fare. We think the FCC's decision conflicts with Congress's intent to promote cable-satellite parity.

Moreover, obtaining retransmission consent from significantly viewed stations has proven a substantial impediment for satellite carriers. We have been told that some network-affiliation contracts prohibit stations from granting consent to satellite operators for significantly viewed carriage. Other broadcasters have proven uninterested in granting such consent – perhaps in hopes that their neighboring stations also will refuse to do so.

We recommend two changes that would level the playing field with cable. First, remove the equivalent bandwidth requirement. Second, remove the requirement to obtain retransmission consent for stations in significantly viewed areas, treating them like distant signals in this regard. Alternatively, Congress should require that broadcasters treat cable and satellite fairly; if a significantly viewed station gives retransmission consent to a cable provider in the market, then such broadcaster should similarly give retransmission consent to the satellite providers as well. Absent these modifications, satellite operators will remain at a competitive disadvantage, unable to carry signals that cable operators have carried for years.

II. DBS Should Not Be Unfairly Burdened by a Universal Carriage Mandate that Does Not Similarly Apply to Broadcasters and Cable

DIRECTV today offers local television stations by satellite in 151 of the 210 local markets in the United States, serving 95 percent of American households. (Along with

DISH Network, we offer local service to 98 percent of American households.)

DIRECTV also offers HD local service in 126 markets, serving more than 89 percent of American households. DIRECTV has designed and constructed its satellite fleet to comply with the “carry one, carry all” law, including the FCC’s most recent HD “carry one, carry all” order.

We have devoted several billions of dollars to this effort, and we are working every day to serve more markets. In fact, this year we will launch five new markets. In the meantime, we have developed equipment that allows subscribers in the remaining markets to integrate digital terrestrial broadcast signals seamlessly into their DIRECTV service.

It is troubling that in the face of this enormous investment, the satellite industry is being singled out for a universal carriage mandate. No such requirement exists for either the cable or broadcast industry. And while the satellite industry has reached 98 percent of the country with local service in only 10 short years, broadcast and cable, which have been in business since the 1920’s and 1940’s respectively, still don’t serve the entire country.

According to the FCC’s most recent figures, cable still does not pass 3.8 million households – a figure larger than that of households unable to receive local signals by satellite. The broadcast industry’s track record is worse. Today, there are over 50 DMAs lacking one or more network affiliate, leaving almost 7 million households without a full complement of network programming because broadcasters apparently deemed those markets too small or unimportant to merit *any* service from the missing networks. Moreover, even in markets with a full complement of network affiliates, millions of

viewers live in “white areas” where their broadcasters have chosen not to reach them. Again, these figures dwarf the relatively small (and dwindling) number of households that cannot yet receive satellite-delivered local channels.

If every home in the country is to be given the full spectrum of video programming, many entities should fairly be asked to play their part. Yet the broadcasters would prefer that the entire burden be placed on satellite operators and their subscribers. This is simply unfair to our subscribers, who ultimately bear the cost of such mandates.

If Congress is determined to move forward with a universal carriage mandate, Congress should ensure that satellite subscribers can receive competitive programming choices, and satellite operators do not have to shoulder this burden alone. As described above, allowing all subscribers in markets that are missing a local affiliate to receive distant networks, and fixing the significantly viewed rules is imperative. In addition, the following set of minimum requirements must be addressed by Congress:

- Replace the satellite “carry one, carry all” rules with one-third capacity cap comparable to the cap that applies to cable operators.
- Permit only local stations with at least 20 percent locally-produced programming to assert carriage rights.
- Require local broadcasters to share in the costs of a satellite provider offering local service to each of the markets not currently served by such provider (“Unserved Markets”).
- Prohibit broadcasters from charging additional fees in such markets through the retransmission consent process.

A. Any New Carriage Requirements Should Have One-Third Capacity Cap Comparable to That For Cable.

When Congress established the “carry one, carry all,” rules, it did so recognizing that the capacity limitations faced by satellite operators were greater than those faced by cable operators.¹ In light of those limitations, Congress adopted a regime in which satellite operators can choose whether to enter a market, and only then must carry all qualifying stations in that market.² Indeed, both Congress and the courts concluded that the “carry one, carry all” regime was constitutional largely because it gave satellite carriers the choice of whether not to serve a particular market.³

Cable operators are subject to a mandatory carriage requirement rather than “carry one, carry all,” but they need to carry local commercial television stations only “up to one-third of the aggregate number of usable activated channels of such system[s].”⁴ The one-third limitation was the key to the Supreme Court’s finding that the cable must-carry rules were constitutional. In particular, Justice Breyer, whose concurrence constituted the crucial fifth vote for upholding the statute, concluded that “the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers, is limited and will diminish as typical cable system capacity grows over time.”⁵

¹ 145 Cong. Rec. H11,769 (1999) (joint explanatory statement), 145 Cong Rec H 11769, at *H11792 (LEXIS) (“To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.”) (“Conference Report”).

² 47 U.S.C. § 338(a)(1).

³ See Conference Report at *H11795 (“Rather than requiring carriage of stations in the manner of cable’s mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license.”); *SBCA v. FCC*, 275 F.3d 337, 354 (4th Cir. 2001) (holding that the carry-one, carry-all rule was content-neutral because “the burdens of the rule do not depend on a satellite carrier’s choice of content, but on its decision to transmit that content by using one set of economic arrangements [*e.g.*, the statutory license] rather than another”).

⁴ 47 U.S.C. § 534(b)(1)(B).

⁵ *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. at 180, 228 (“*Turner II*”)(Breyer, J., concurring); see also *id.* at 219 (“While we acknowledge appellants’ criticism of any rationale that more is better, the scheme in question does not place limitless must-carry obligations on cable system operators.”).

The same concerns that led Congress to limit satellite carriage requirements still apply today. Last year, the FCC “recognize[d] that satellite carriers face unique capacity, uplink, and ground facility construction issues” in connection with offering local service.⁶ It concluded that, if faced with onerous carriage requirements, satellite carriers might be “forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity.”⁷

If Congress were to change satellite local carriage requirements from “carry one, carry all” to “must carry,” it must not impose higher burdens on satellite (which has comparatively less capacity) than it did on cable (which has comparatively more capacity). Any new rules for satellite should therefore include a one-third capacity cap comparable to the cable cap found in Section 614(B)(1)(b) of the Communications Act.

B. Local Stations Should Provide its Viewers with a Minimum of 20 Percent Locally-Produced Programming In Order to Assert Carriage Rights

One of Congress’ goals in establishing the must-carry rules was to “preserve[e] the benefits of free, over-the-air local broadcast television”⁸ and the corresponding interest in “promoting the widespread dissemination of information from a multiplicity of sources.”⁹ Yet, today, the vast majority of the programming offered by “local” broadcasters is not local at all. It is instead national network or syndicated programming. It is overly burdensome and inefficient for satellite providers to utilize sparse satellite capacity to carry the same programming on hundreds of different channels. If a station

⁶ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Rcd. 5351, ¶ 7 (2008) (“*Satellite HD Carriage Order*”).

⁷ *Id.*, ¶ 8 (citations omitted).

⁸ *See Turner II*, 520 U.S. at 235; *SBCA*, 275 F.3d at 356, 363.

cannot commit to a minimum of 20 percent of local programming, there should be no corresponding carriage obligation for that station. In such cases, consumers should be able to continue to receive the national programming they desire through distant signals.

C. Local Broadcasters Should Share in the Costs of Providing Local Service in Unserved Markets

If Congress were to impose a universal carriage mandate, broadcasters should pay their fair share of the costs of expanding their coverage area in the Unserved Markets. DIRECTV has already spent billions of dollars to serve 95 percent of the country with local broadcast signals by satellite. DIRECTV also has provided (at great expense) a seamless method for its subscribers to integrate over-the-air signals with its satellite-delivered service. Yet broadcasters have shown far more interest in increasing their coverage by riding on the investments of others rather than investing in their own facilities. The significant costs of providing local-into-local in the smaller markets – much of which will never be recouped – should not be placed on satellite subscribers alone.

Today, if a broadcaster wants carriage on DIRECTV, its only obligation is to provide us with a good quality signal at our local collection facility (“LCF”) in their market. For broadcasters, this is a non-obligation, as we can usually pick up the signals over-the-air. DIRECTV pays for the cost of the LCF – often paying a local broadcaster to lease space at their station for the needed equipment. DIRECTV pays the cost of the fiber backhaul to one of its centralized uplink centers. DIRECTV pays for the cost of uplinking the station to its satellites. DIRECTV pays for the costs of the building, launching and operating these satellites. The broadcaster bears no burden whatsoever.

⁹ *Turner II*, 520 U.S. at 189-90

These financial and operational burdens are substantial, particularly when measured against DIRECTV's inability to recoup its costs in the smallest markets. In order to serve the remaining markets, DIRECTV estimates the cost of the satellite and uplink facilities to be an additional \$200 million beyond what has already been spent to date. The current costs of the LCF and fiber backhaul generally average about \$2.7 million per market on a non-recurring basis, and an additional \$1-2 million a year.

DIRECTV simply requests that, if satellite carriers are asked to serve the smallest markets, broadcasters share in this burden by providing a good quality signal at one of DIRECTV's centralized uplink centers, rather than the LCF. It is our understanding that this was precisely the proposal that Capitol Broadcasting once put forth when asking for carriage of local stations by satellite in all 210 markets. To the extent local broadcasters cannot afford this investment and recurring cost, the government can assist by allowing broadcasters to apply for a rural fiber subsidy. As part of the recent stimulus package (not to mention the Universal Service Fund and other existing programs), the government is spending billions to subsidize otherwise uneconomic investment to reach rural areas or otherwise isolated consumers. It is inconsistent to ask satellite operators to make similarly expensive and, in many cases, uneconomic investments without similar aid.

D. Local Broadcasters Should Not Increase the Cost of Satellite-Provided Local Service by Charging Retransmission Consent Fees

Given the substantial cost of serving the remaining markets, any Congressional mandate should prevent broadcasters from adding to those costs in these Unserved Markets through the retransmission consent process. Broadcasters clearly benefit through the increased number of viewers and consequently their potential for advertising revenue. That, after all, is why they seek a universal video service mandate. Indeed,

NAB and radio broadcasters justify not paying fees to record labels for the right to rebroadcast their songs because of the audience reach that broadcasters provide to the artists. The same principle holds true for satellite retransmission of broadcast signals. Any government universal carriage mandate should not permit broadcasters to obtain additional, windfall profits in the form of fees to satellite subscribers.

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

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