

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

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

**June 16, 2009**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>6</sup> SHVA Report and Order at ¶ 7.

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

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

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

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<sup>7</sup> *Id.* at ¶ 65.

<sup>8</sup> SHVERA Report at ¶ 148.

<sup>9</sup> *Id.* at ¶¶ 144, 148.

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

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

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

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

<sup>11</sup> SHVERA Report at ¶ 91.

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Conclusion**

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

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

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

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

## **Appendix A**

**LOOSENING THE TIES:  
WHY CONGRESS SHOULD ELIMINATE  
THE DISTANT NETWORK SIGNAL RESTRICTION ON THE  
DIRECT-TO-HOME SATELLITE TELEVISION INDUSTRY**

**by John Windhausen, Jr.  
President, Telepoly Consulting**

**June 15, 2009**

**This paper was commissioned by National Programming Services.**

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## **Executive Summary.**

Under current law, satellite television providers operate under an enormous handicap in trying to compete with cable providers. Satellite providers may only provide distant network television signals to households that are theoretically “unserved” by over-the-air broadcast stations, representing less than 5% of the total market. In contrast, cable operators may carry distant signals to virtually any household in the country. The distant signal restriction has become nonsensical. Any consumer with a broadband Internet connection can obtain any programming they want on-line, including from the television networks’ own web sites. The distant signal restriction was originally intended to protect local broadcasting stations from competition. Now that local broadcast stations have been handed digital spectrum and are expecting to generate significant new revenue streams from a variety of new technologies, there is little reason to protect them from competition.

The legal imbalance between satellite television and cable providers is glaring. Continuing to tie the hands of satellite broadcasters is an unjustified barrier to marketplace competition. The current policy effectively subsidizes the local broadcasting industry and favors the dominant cable industry at the expense of the nascent satellite industry. Congress should eliminate the distant signal restriction in the upcoming satellite re-authorization act and restore the right of consumers, not regulators, to make their own television programming choices.

## I. Introduction

Satellite television provides enormous benefits for American consumers. Direct-to-Home (DTH)<sup>13</sup> satellites offer a variety of program options, more affordable prices, and greater convenience than either cable or telephone company video offerings. Satellite providers have greatly increased their television services while maintaining fairly stable prices; in contrast, the price of basic cable television service has risen by 122% over the past 13 years, a rate far faster than the 34.3% increase in inflation over that same period.<sup>14</sup> For these reasons, the satellite DTH industry has grown substantially over the last few years and now serves approximately 30% of all homes that subscribe to a provider of multi-channel video service.

Unfortunately, DTH satellite providers must operate under rules that inhibit their ability to compete, rules that do not apply to their competitors. In particular, DTH satellite providers are barred from providing “distant” (out-of-market)<sup>15</sup> network broadcast programming to the vast majority of households in the U.S. DTH satellite providers may only provide distant network signals to households in “unserved” areas. While the exact number of households in “unserved” areas is not known, it is certainly less than 5 percent of all homes.<sup>16</sup> This means that DTH satellite providers are not allowed to

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<sup>13</sup> Although the terms Direct-to-Home (DTH) and Direct Broadcast Satellite (DBS) are often used interchangeably, this paper uses the broader term Direct-to-Home to encompass satellites operating in the C band as well as the Ku and Ka bands.

<sup>14</sup> “Report on Cable Industry Prices,” In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, released January 16, 2009, para. 2, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-53A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-53A1.pdf).

<sup>15</sup> Distant network signals are broadcast station signals that originate outside the television market in which a consumer lives.

<sup>16</sup> DirecTV estimates that nearly 1 million consumers rely on receipt of distant network signals today, while the National Association of Broadcasters (NAB) estimates that the number of DTH subscribers that receive distant network signals today is about 2% of the 31 million DTH subscribers. If it is assumed that approximately 30% of consumers in unserved areas subscribe to DTH service (roughly the national average), the total number of households in unserved areas would be between 2 million and 3.3 Million, or about 1.7% to 3% of all households. See, Testimony of K. James Yager, Barrington Broadcasting, on behalf of the NAB, before the Subcommittee on Communications,

provide the same program offerings as their cable competitors to at least 95% of consumers. Ironically, the same distant network signals that DTH providers may not carry are increasingly available over the Internet. For these reasons, the U.S. Copyright Office in 2008 found that the distant signal eligibility requirements “create a competitive disparity between satellite carriers and cable operators” and should be eliminated.<sup>17</sup>

The broadcast industry alleges that the distant network signal restriction on DTH satellite providers is necessary to protect localism and local broadcast stations. While preserving localism is important, the restriction on the DTH industry is not necessary for that purpose and actually injurious to consumers and competition. Allowing consumers the convenience of watching distant signals is unlikely to cause the dramatic harm to local broadcasting that the broadcasting industry fears. Local news and other local programming remain extremely popular, and the idea that consumers would abandon their local station completely is contrary to the evidence. Furthermore, local broadcasting stations’ revenues have consistently grown and are likely to expand even further in the near future. The transition to High-Definition Television (HDTV) gives local broadcasters an invaluable opportunity to deploy new services and generate additional advertising revenue, especially by multicasting several programming channels. Local broadcasters can also develop innovative uses of the Internet for their programming, just as the national networks are doing. Rather than imposing anti-competitive restrictions on satellite providers, local broadcasters should focus on enhancing the services that they provide to consumers.

Finally, the restriction on DTH satellite providers prevents the free flow of information, one of core principles of our democratic society. The current restrictions are antithetical to a society that values freedom of speech, consumer choice and the diversity of information. In fact, there may well be constitutional issues involved in continuing to restrict the freedom of satellite providers to carry the programs over their networks as they see fit.

Thus, there is little if any reason to prevent consumers from watching television signals from other markets, such as where they grew up or used to live. It is impossible to protect local broadcasters from

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Technology and the Internet of the House Committee on Energy and Commerce,  
February 24, 2009.

the march of progress. And there is less reason than ever to tie the hands of DTH satellite providers by imposing artificial restrictions that bar them from providing programming that their consumers can receive from other providers.

Fortunately, Congress has an opportunity this year to correct the competitive imbalance that prevents DTH satellites from providing the full range of services provided by other multi-channel video providers. The compulsory license that allows satellite providers to transmit programming expires on Dec. 31, 2009 and must be re-authorized before that date for satellite DTH providers to continue to provide distant signals. Congress can address the competitive disparity and provide consumers with additional programming options by making the distant network signal license in section 119 permanent and eliminating the unserved market limitation.

This paper provides a more detailed examination of the distant network signal restriction. It begins by reviewing the history of satellite television legislation, reviews the current satellite television marketplace, and then provides six reasons why the current distant signal restriction on the DTH satellite industry should be eliminated.<sup>18</sup>

## **II. The Disparity in Current Law Between Satellite and Cable Providers.**

The disparity between cable and satellite regulation is embedded in copyright law. Three statutory licenses in the Copyright Act govern the retransmission of distant and local over-the-air broadcast station signals. The first applies to cable TV systems and the remaining two licenses apply to satellites.

1. Cable License: Section 111 permits a cable operator to retransmit both local and distant signals (television and radio). There is no limit on the number of distant signals that a

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<sup>17</sup> Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, A Report of the Register of Copyrights, June 2008, p.xi. (hereinafter, "Copyright Office Section 109 Report"), available at <http://www.loc.gov/today/pr/2008/08-123.html>.

<sup>18</sup> This paper focuses on the issue of carriage of distant signals and touches only tangentially on royalty payment issues. For a fuller treatment of royalty payment issues, see the Copyright Office Section 109 Report.

hout any royalty obligation. Section 111 has not been significantly altered since its adoption in 1976.

2. Distant Network Signal License: Section 119 permits a satellite carrier to retransmit a maximum of two distant television signals (not radio signals) to homes and businesses to persons who reside in unserved households.<sup>19</sup> With a few exceptions, the term "unserved" means a household that cannot receive, through the use of a conventional, stationary outdoor rooftop antenna an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the FCC.<sup>20</sup> Thus, except for the few exceptions, satellite DTH providers may only provide two distant network signals to consumers residing in "unserved" households.
3. Local-into-Local License: Section 122 permits satellite carriers to carry local television signals in the stations' local market on a royalty-free basis (without the need to identify and obtain authorization from copyright owners). The section 122 license for local signals is permanent. However, there are several restrictions on the satellite providers' ability to provide these local signals:
  - a) The satellite provider must obtain the "retransmission consent" of the local broadcaster to carry the signal. This often means that the satellite provider must

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<sup>19</sup> The exact language of Section 119(a)(2)(B)(i) is as follows:

- (i) In general.—The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions of the signals of no more than two network stations in a single day for each television network to persons who reside in unserved households. The limitation in this clause shall not apply to secondary transmissions under paragraph (3) [pertaining to "significantly viewed" stations].

<sup>20</sup> The rule used to perform testing of individual locations is inconsistent with this statutory language. Section 73.686(b) of the FCC's rules sets out procedures for testing the Grade B Contour. That section requires tests to be performed using an antenna that is at least 30-feet high (which is not "conventional") and can be rotated (which is not "stationary"). The mismatch between the statutory language for testing individual residences and the FCC's rule reflects the fact that the FCC's Grade B contour rules were developed to prevent broadcast licensees from interfering with each other rather than for determining whether or not an individual household is "served" by a broadcast station network signal.

compensate the network-affiliated local broadcasters before the broadcaster will give its approval.

- b) The satellite provider must be willing to carry all the broadcast stations in a market if it provides one broadcast signal. (“Carry one, carry all”)

The differences between the treatment of distant network signals under the cable license (Section 111) and the satellite license (Section 119) are well-recognized by the FCC. In 2005, the FCC summarized the differences as follows:

67. . . . A cable operator generally may offer any distant broadcast signal to any household by paying the required copyright royalties, obtaining retransmission consent, and complying with the network non-duplication and syndicated exclusivity rules.

68. DBS operators, on the other hand, face greater restrictions in the retransmission of distant signals, especially for subscribers that are considered to be served by broadcast stations over-the-air. Specifically, a DBS operator may not offer distant network signals except to households shown to be “unserved” by network stations. On a going forward basis, a DBS operator will not be permitted to offer distant network signals to any subscriber where local-into-local service is available.<sup>21</sup>

In considering how to harmonize the rules regarding DTH and cable, the FCC considered and rejected applying the satellite DTH rules to cable providers because of practical and technological differences between the two systems.<sup>22</sup> The FCC then suggested instead applying the cable rules to DTH providers. The FCC said

If the cable provisions were applied to DBS, DBS operators would be allowed to retransmit any distant broadcast signals to any subscriber, whether or not the subscriber is considered an unserved household, and whether or not local-into-local service is

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<sup>21</sup> “Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, September 8, 2005, paras. 67-68. (“SHVERA Section 208 Report to Congress”). (available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260936A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf)).

<sup>22</sup> For instance, the FCC said that it was not clear that a cable operator could differentiate in its delivery of signals to households that are “served” as opposed to those that are “unserved”, because cable systems generally provide the same programming to all the households on its system.

provided, subject to retransmission consent and network non-duplication and syndicated exclusivity protection, as is currently permitted under the cable rules.<sup>23</sup>

But the FCC concluded that it did not have the authority to make this change. Instead, it recommended that Congress make changes to both the communications statute and the copyright law to harmonize the two regulatory regimes:

Regulatory parity is generally a worthy goal where disparities are not warranted by special circumstances. Consistent with the different technologies involved, every effort should be made to apply the same rules to cable operators, DBS operators, and other MVPDs. Thus, to the extent the Commission's exclusivity and retransmission consent rules are different with respect to cable and DBS and create distortions in the competitive landscape, we generally recommend that Congress continue its efforts to harmonize applicable laws to the extent feasible in light of differences in technology.

It is precisely this very change recommended by the FCC that Congress should adopt in the new authorization bill.

### **III. A Brief Review of Satellite Television Policy and Legislation.**

Since satellite-delivered television emerged in the 1980's, policy-makers have sought to balance three goals:

1. Encourage competition to cable companies in the provision of multi-channel video programming.
2. Ensure that copyright holders receive fair compensation for their work.
3. Protect local broadcasters as a means of promoting diversity of programming.

The first goal has grown even more important over time, as cable rates continue to rise under the deregulatory approach adopted in 1996. The second goal remains important, although the details of determining the proper amount of compensation are the subject of continuing proceedings. The third goal, however, has become difficult to justify in the face of new technologies and increasing competition. In fact, diversity of programming would be aided by ending the distant network signal

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<sup>23</sup> Id.,at para 74.

protections for local broadcasting and by encouraging them to develop more innovative local programming.

The following summarizes the efforts by policy-makers – largely Congress and the Federal Communications Commission (FCC) – to balance these objectives and explains how the disparity in treatment came into being.

#### **A. 1988 - The Satellite Home Viewer Act (SHVA)<sup>24</sup>**

Satellite television began primarily as a rural service provided by C-band satellites providing non-broadcast (e.g. cable programming) signals to households in areas where traditional, landline cable service was unavailable. C-Band satellites required the installation of large satellite dishes that were difficult to install in suburban and urban areas. Congress passed the Satellite Home Viewer Act (SHVA) of 1988 to give DTH providers the right (by granting them a limited copyright license) to retransmit the signals of distant network broadcast stations. But the license only allowed the transmissions of network signals for private home viewing, and only to “unserved households” that were (theoretically) unable to receive an adequate over-the-air broadcast signal through a conventional rooftop antenna.<sup>25</sup> Congress limited the copyright license to retransmissions to “unserved households”<sup>26</sup> in order to protect local broadcast stations’ ability to serve as the exclusive provider of network programming in their local markets. “Unserved households” were defined in part as those located outside a television station’s

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<sup>24</sup> The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) (codified at 17 U.S.C. §§ 111, 119)..

<sup>25</sup> SHVA also authorized DTH providers to carry superstations to any household. Since superstations are not affiliated with any network, they do not provide the same programming as network stations and are generally not considered a competitive threat by local broadcast stations. However, since consumers often wish to obtain network programming, the ability to carry superstations to any household is not enough of a benefit to offset the inability to carry network signals.

<sup>26</sup> Section 119(d)(10)(A) of the Copyright act defines an “unserved household” as a “household that cannot receive, through use of a conventional stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network television station affiliated with that network of Grade B intensity as defined by the Federal Commissions Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999.” An “unserved household” can also be one that is subject to one of four statutory waivers or exemptions. See 17 U.S.C. §119(d)(10)(B)-(E).

“Grade B contour,” as defined by the FCC.<sup>27</sup> The Act granted satellite providers permission to carry these network signals as a type of “last resort” for those households that could not receive network television signals any other way.

In enacting SHVA, Congress used the Grade B contour as an approximate measure of determining whether or not a home could receive a broadcast signal, even though the Grade B Contour was not designed for that purpose. The Grade B contour was initially developed by the FCC several decades earlier as a way to determine whether nearby broadcast signals would interfere with each other. In fact, many homes that formally lie inside the Grade B contour cannot receive an adequate broadcast signal.<sup>28</sup>

As a result of the 1988 Act’s limitations, DTH providers were unable to provide network stations to the majority of the nation’s households, including many that were inside the Grade B contour but could not receive an adequate television signal. These households could only be served by the local cable company, to whom the statute effectively conferred a monopoly. In the words of the FCC, “Congress adopted the SHVA as an amendment to the Copyright Act in order to protect the broadcasters’ interests while simultaneously enabling satellite carriers to provide broadcast programming to those satellite subscribers who are unable to obtain broadcast network programming over-the-air.”<sup>29</sup>

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<sup>27</sup> The Grade B contour is generally a circle around a television station’s antenna that represents the area in which households can receive an acceptable broadcast signal. Decades ago, the FCC defined the Grade B contour as the area that could deliver an acceptable picture over average terrain to 50 percent of the locations, 50 percent of the time. This definition was later changed by the FCC to 50% of the homes that can receive an acceptable signal 90% of the time. With respect to digital television transmissions, the FCC now uses the “noise limited service contour”, an area that is roughly similar to the Grade B contour. See, <http://www.current.org/dtv/dtv815reception.shtml>, and FCC Cable Services Bureau, report FCC 99-14, CS Docket 98-201, paragraph 33.

<sup>28</sup> In addition, SHVA also limited the definition of “unserved” to those households that subscribed within the past 90 days to a cable service carrying an affiliate of a network. According to then-FCC Chairman Bill Kennard, “Imposing a 90-day waiting period for network station access on those who wished to switch from cable to satellite service placed an unwarranted handicap on satellite carriers in their competition with cable.” See, letter of FCC Chairman Bill Kennard to Congressman Rick Boucher, Nov. 5, 1998, available at <http://www.fcc.gov/Speeches/Kennard/Statements/stwek888.html>. This 90-day waiting period was later eliminated in the SHVIA in 1999.

<sup>29</sup> Report and Order, In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, CS Docket No. 98-201,

## B. 1994 – Satellite Home Viewer Act Amendments

DirectTV launched the first DBS satellite in 1994, and EchoStar followed a year later. These DBS satellites offered the possibility of providing consumers broadcast and non-broadcast programming using much smaller dishes that could be used in urban and suburban, not just rural, areas.

In 1994, however, Congress had not yet realized the significance of these new satellites. In passing the Satellite Home Viewer Act of 1994, Congress simply extended the section 119 compulsory license for an additional five years and strengthened the hand of broadcasters seeking to enforce the “unserved” restriction.<sup>30</sup> The 1994 Amendments placed the burden of proof that a household was in an unserved area squarely on the satellite DTH provider.<sup>31</sup> The 1994 Amendments included a process to identify these consumers who were receiving satellite service in “served” areas and to terminate their service. The Act also designated a process for increasing the copyright fees paid by satellite carriers for the retransmission of network station and superstation signals. Congress expected that, by raising the fees to “marketplace” levels, the 1994 Act would set the stage for eliminating the compulsory license for distant signals altogether after it expired in 1999.

Over the next few years after passage of the SHVA Amendments, local network broadcasters aggressively challenged satellite carriers who they alleged were providing subscribers with distant network stations inside the local broadcaster's Grade B contour and in violation of the law. Upon receiving a written challenge with respect to a particular subscriber, the satellite provider was required either to turn off the subscriber's network signal or conduct a test at the subscriber's home to determine if the subscriber did in fact receive a signal of Grade B intensity. The cost of the test would be paid up front by the consumer, who would then be reimbursed by either the satellite carrier or the local broadcaster, depending upon the outcome (a “loser pays” provision).

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released Feb. 2, 1999. (available at <http://www.fcc.gov/Bureaus/Cable/Orders/1999/fcc99014.txt>.) (“SHVA Report and Order”).

<sup>30</sup> Satellite Home Viewer Act of 1994 (Public Law 103-369)

<sup>31</sup> The 1994 Amendments added the following provision to section 119(a)(5):  
“(D) In any action brought under this paragraph, the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a network station is for private home viewing to an unserved household.”

While this process had the appearance of fairness, it was skewed in favor of the broadcasters. Because of the up-front costs associated with conducting household tests, and the fact that there were so few testers available, virtually no tests were performed.<sup>32</sup> The satellite DTH provider often was forced to terminate service or face legal action even if a test had not been performed. As a result, many subscribers lost their satellite network service even though they could not receive an over-the-air broadcast signal.<sup>33</sup>

The controversy over these rules, and the DTH providers' inability to provide distant network signals, proved to be a significant deterrent to potential subscribers. Many households were simply not interested in subscribing to satellite if they could not receive network stations.

#### **C. 1999 – The FCC Adopts a Predictive Model to Enforce the Distant Network Signal Limitation.**

In 1999, just before the 5-year extension of the distant signal license was to expire, the FCC re-considered the use of the Grade B contour standard for enforcing the distant signal limitation. The FCC recognized that the Grade B contour was originally designed to define station service areas and to determine the proper allotments for television channels, not for making individualized decisions concerning whether or not a household was “served.” Nevertheless, the FCC refused to alter the standard. Instead, it adopted a new predictive model (called the Individual Location Longley-Rice (ILLR) model) to use as a proxy for determining whether a home was or was not served. The FCC expressed the belief that use of a predictive model would reduce costs, create more certainty, and reduce confusion for consumers.<sup>34</sup> If the FCC's predictive model indicated that a consumer could receive an adequate analog signal over the air – making the consumer ineligible for analog distant signal service – the consumer could challenge that prediction by requesting an on-location signal-strength test. Either the satellite DTH provider or the broadcaster would pay for the test, depending on who “lost.”

#### **D. 1999 – The Satellite Home Viewer Improvement Act (SHVIA)**

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<sup>32</sup> The FCC also noted that “anecdotal evidence suggests that both satellite carriers and broadcasters are disinclined to conduct tests, even when they are likely to win, because the tests could annoy their customers and generate ill-will.” See, SHVA Report and Order, para. 90.

<sup>33</sup> The process was reversed for those households residing outside the Grade B contour. In those cases, the broadcaster paid for the test. In reality, there were far more households residing inside the Grade B contour than outside the Grade B contour, which meant the satellite DTH provider had the higher burden and cost. See Satellite Home Viewer Act of 1994, Section 2(5) (adding new subsection (a)(8)).

The SHVA was a copyright law designed to balance the rights of copyright owners and users. It was not a communications law and did not include as an express purpose the need to increase competition among multi-channel video programming distributors (MVPDs).

This changed in 1999 with the passage of the Satellite Home Viewer Improvements Act (SHVIA), which revised and replaced the statutory provisions of SHVA.<sup>35</sup> The increasing popularity of satellite DTH services, combined with the dramatic increase in complaints from consumers who lost their television service because of the broadcasters' overly aggressive enforcement actions, convinced legislators to adopt a more positive view of the satellite DTH industry. Rather than allowing the compulsory license to expire, SHVIA officially endorsed competition as a central purpose of satellite policy, re-authorized the satellite compulsory license for another five years, and strengthened the rights of satellite providers to compete against cable providers.

SHVIA created a new permanent license in Section 122 to allow DTH providers to deliver local broadcast signals into local markets (so-called "local into local")<sup>36</sup> Technological innovations in the 1990's and additional frequency allocations by the FCC allowed satellite carriers to increase their channel capacity and offer local broadcast signals in many markets. SHVIA allowed satellite carriers for the first time to retransmit a local broadcast station's signal into that station's local market without obtaining the authorization of those holding copyrights in the individual programs broadcast by that station. Furthermore, the right to carry local signals was allowed without distinction between network and non-network signals and without distinguishing between served and unserved households.

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<sup>34</sup> SHVA Report and Order, para. 65.

<sup>35</sup> The Satellite Home Viewer Improvement Act of 1999, Pub.L. No 106-113, 113 Stat. 1501 (1999) (codified in scattered sections of 17 and 47 U.S.C.). The SHVIA was enacted on November 29, 1999, as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright

licensing and carriage of broadcast signals by satellite carriers).

<sup>36</sup> Unlike satellite carriers, cable operators have never been required to obtain copyright clearances for transmitting local broadcast programming. Before 1976, cable operators were not subject to the copyright laws; their retransmission of local broadcast signals was not considered to be a "performance" that triggered application of the copyright protections. This situation changed only slightly in the 1976 Copyright Act. In that Act, Congress determined that a cable company's retransmission of local broadcast signals should indeed be considered a "performance" but simultaneously granted cable operators a statutory compulsory license that allows them to retransmit broadcast television signals without securing authorization from each and every program copyright holder. See 17 U.S.C. §111(c).

SHVIA extended the compulsory copyright license for distant signals for an additional five years to the end of 2004 (and also granted an exception to retransmission consent for these signals). As in prior Acts, SHVIA also permitted satellite carriers to retransmit non-network superstation signals to all (served and unserved) households in all markets. SHVIA also abandoned the marketplace standard for setting royalty rates and reduced the royalty fees for network station signals by 45% and for superstation signals by 30%.

Unfortunately, SHVIA retained the distant signal limitation that bars satellite DTH providers from providing distant network signals to “served” households.<sup>37</sup> Although Congress cast some doubt on the validity of the Grade B contour as the proper standard, it also codified the ILLR predictive model and directed that it be used “in determining presumptively whether a person resides in an unserved household”.<sup>38</sup> SHVIA also established a process that allows consumers to seek a “waiver” if the predictive model indicated that the consumer was in a “served” area. The statute requires the waiver request to be submitted to the local broadcast station.<sup>39</sup> If the local broadcast station denies the waiver (as was most often the case), and if the consumer wishes to challenge that finding, the statute directs the network station and satellite carrier to select a qualified and independent third party to conduct the signal test for that consumer’s location. Because it was often difficult for the two sides to agree on an independent tester, the FCC later chose the American Radio Relay League (ARRL) to serve as the independent and neutral entity to perform the testing functions specified in SHVIA.<sup>40</sup>

The process changes enacted by Congress in SHVIA had little impact. As a practical matter, very few consumers have been willing to incur the up-front cost and time-consuming process of challenging the FCC’s predictive model. Furthermore, several observers noted that there were no qualified testers available to perform the on-site testing. Consumers did not know where to look to find such testers.

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<sup>37</sup> While SHVIA left in place the distant network signal limitation, SHVIA included a grandfather provision to allow those consumers who had been receiving distant signals as of Oct. 31, 1999 or had their distant signals terminated after July 11, 1998 to continue receiving such distant signals, provided they could not receive over-the-air signals of Grade A intensity. A signal of Grade A intensity is a circle that is closer to the transmitter than the Grade B contour and reflects a more powerful signal than a signal of Grade B intensity.

<sup>38</sup> See Section 119(a)(2)(B)(ii).

<sup>39</sup> See Section 339(c)(4)(B).

<sup>40</sup> See, *In the Matter of Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, ET Docket No. 00-11, Released May 26, 2000,(FCC 00-185), para. 23.

The difficulty of the tests were magnified by the FCC's rules that required testers to raise an antenna 30 feet in the air to measure the availability of television signals. The FCC itself acknowledged the difficulties of its testing process as follows:

The Commission's current method of measuring the field strength of over-the-air signals in a station service area requires a so-called 100-foot mobile run. The run typically involves a truck with a 30-foot antenna that takes continuous measurements while being driven a distance of 100 feet. The antenna must be rotated to the best receiving position, and engineers record factors that might affect signals, such as topography, height and type of vegetation, buildings, obstacles, and weather. If overhead obstacles get in the way, a cluster of measurements must be taken at locations within 200 feet of each other. This elaborate procedure can cost several hundred dollars each time it is performed. This is an expensive proposition for a satellite company or a consumer who wants to prove that a household is unserved by over-the-air signals. When multiplied over hundreds of households at the outer edges of a station's service area, the cost may become prohibitive and may prevent many truly unserved consumers from receiving broadcast network service.

In addition to the difficulties inherent in this test, many of its assumptions may not hold in individual situations. For example, many homes do not have antennas 30 feet above the ground, especially if they are one-story homes. . . . [R]equiring clusters of tests and a 100-foot mobile run ignores the fact that homes are stationary and that reception may vary considerably over a mobile run on a nearby street.<sup>41</sup>

Because of the inherent limitations of the FCC's predictive model and the lack of qualified testers and testing procedures, many households were inaccurately considered "served". As a result, many consumers were not able to receive distant network signals from either the satellite DTH provider or the local broadcaster.

Even though SHVIA codified the ILLR predictive model, Congress expressed some discomfort with the Grade B contour as a standard for identifying unserved areas. SHVIA directed the FCC to evaluate all other standards and factors for determining whether or not a household was "unserved."<sup>42</sup> In a subsequent proceeding, the FCC once again recognized that the Grade B contour was not "created or

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<sup>41</sup> Notice of Proposed Rulemaking, In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, CS Docket No. 98-201, Nov. 17, 1998, paras. 38-39.

<sup>42</sup> See section 339(c)(1).

intended for evaluating service quality in individual households.”<sup>43</sup> Nevertheless, the FCC refused to abandon the Grade B contour standard and made only minor refinement of the standard.

The addition of the Section 122 license allowing DTH providers for the first time to carry local television signals into local markets was supported by both the broadcast and satellite DTH industries. However, the law contained two provisions sought only by the local broadcasters:

1. First, the law requires the DTH provider to obtain the consent of the local broadcaster before providing the local signal (a policy known as “retransmission consent”). This allows the local broadcaster to refuse to allow carriage by the satellite company unless the satellite firm agrees to pay some form of compensation.<sup>44</sup>
2. Second, the law also added the “carry one, carry all” rule. This rule says that if a DTH provider chooses to provide one local broadcast station to consumers in that same local market, it must carry ALL the local television broadcast stations located within that local market.<sup>45</sup> For instance, if a satellite DTH provider wishes to provide Channel 5 in Washington, D.C. to consumers living within the Washington, D.C. viewing area, the DTH provider must also carry all the other local broadcasting stations in the D.C. area to D.C. area households.<sup>46</sup> Congress chose this regime theoretically to promote the diversity of programming, but the effect was to protect small local broadcasting stations.

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<sup>43</sup> See, Report, In the Matter of Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Improvement Act, ET Docket No. 00-90, , Released Nov. 29, 2000, (FCC 00-416) para. 8.

<sup>44</sup> Congress granted similar “retransmission consent” rights to broadcasters when carried by local cable companies in the 1992 Cable Act. See 47 U.S.C. §325(b).

<sup>45</sup> SHVIA defines the "local market" as the designated market area ("DMA") established by Nielsen Media Research.

<sup>46</sup> There are some exceptions to the “carry one, carry all” requirement. For instance, a DTH provider is not required to carry local commercial stations whose signals substantially duplicate those of another station in the same market. In addition, satellite carriers are not required to carry more than one affiliate of a given network in any local market unless the market contains two affiliates of the same network that are licensed to serve communities in different states. 47 U.S.C. §338(c)(1). Also, the statute instructs the FCC to issue regulations limiting satellite carriers’ obligations to carry multiple noncommercial broadcast stations in the same market. 47 U.S.C. §338(c)(2).

The DTH industry challenged the “carry one, carry all” rule in court, alleging that it unconstitutionally infringes on the DTH providers’ first amendment rights and that it imposes an uncompensated “taking.” The court denied the appeal and upheld the law, largely on the theory that a DTH provider can voluntarily choose whether or not to carry a local broadcast station signal and thereby accepts the requirement to carry all other stations.<sup>47</sup> In truth, however, satellite DTH providers have virtually no choice but to carry at least some local broadcast signals if they are to compete with the dominant cable firm.

Through SHVIA, Congress sought to place satellite carriers on a more equal footing with local cable operators regarding local broadcast programming, and give consumers more and better choices in selecting a multichannel video program distributor. Unfortunately, by retaining the prohibition on providing distant network signals to consumers within the Grade B Contour, a limitation not faced by the cable industry, SHVIA failed to correct the regulatory disparity initiated several years earlier.

#### **E. 2004 – The Satellite Home Viewer Extension and Re-Authorization Act (SHVERA)**

In December 2004, Congress passed the Satellite Home Viewer Extension and Re-Authorization Act (SHVERA), which again amended the 1988 copyright laws and the Communications Act.<sup>48</sup> As in prior Acts, SHVERA extended the compulsory copyright license for distant network signals (and the exception to the retransmission consent rules) for an additional five years to December 31, 2009.<sup>49</sup> But SHVERA also included a complex set of rules to further *limit* the importation of distant network signals into local television markets. For instance, the law requires satellite DTH carriers to phase out the retransmission of distant signals in markets where they offer local-into-local service. In other words, households that can receive local-into-local

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<sup>47</sup> See, *Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337 (4<sup>th</sup> Cir. 2001)

<sup>48</sup> SHVERA can be found at Title IX of the Consolidated Appropriations Act, 2005 (H.R. 4818), codified at 47 U.S.C. 338, 339, and 340.

<sup>49</sup> Unlike prior acts, SHVERA did not set the royalty rates for carriage of distant signals because the copyright owners and satellite carriers negotiated new rates.

satellite signals are not able to receive distant network signals (even if they are unserved by over-the-air television signals).

In two respects, SHVERA expanded the rights of satellite providers. First, it allowed for the delivery of superstation signals to commercial establishments. Second, SHVERA created a slight exception to the distant network signal ban for “significantly viewed”, out-of-market signals. “Significantly viewed” signals are those that technically originate outside a local market but are nevertheless viewed by a significant number of households in that local market. For example, a household in Silver Spring, Maryland may be located in the Washington, D.C. DMA but may frequently view signals from Baltimore. The Baltimore signals may be carried by the local cable operator in Silver Spring, but, prior to 2004, could not be carried by the DTH provider. SHVERA established a copyright license that allows satellite providers to carry these out-of-market “significantly viewed” channels if it obtains retransmission consent of the broadcast station, and provided that the local station affiliated with the same network as the significantly viewed station is offered as well. As in the cable context, satellite carriers pay copyright royalty fees for the retransmission of significantly viewed stations. Satellite carriers are not required to carry out-of-market significantly viewed stations, and, if they do wish to carry them, retransmission consent is required.<sup>50</sup>

#### **IV. The Satellite Television Market**

The DTH industry originated in the 1980’s with satellites operating only in the “C-band”.<sup>51</sup> C-band satellites require consumers to use large satellite dishes that are 6 to 10 feet in diameter, and thus were limited to providing service to customers in rural areas. During the 1990s, direct broadcast satellite

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<sup>50</sup> The copyright provisions in SHVERA also modified the copyright law to recognize the difference between analog and digital signals. In general, if a satellite carrier offers local-into-local digital signals in a market, it is not allowed to offer distant digital signals to subscribers in that market, unless it was offering such distant digital signals prior to commencing local-into-local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the distant digital signal of the network with which the station is affiliated if it is offered by the subscriber’s satellite carrier. If the satellite carrier offers local-into-local analog service, a subscriber must receive that service in order to qualify for distant digital signals. A household that qualifies for distant signal service can receive only signals from stations located in the same time zone or in a later time zone, not in an earlier time zone.

<sup>51</sup> C-band service is defined as “a service that is licensed by the Federal Communications Commission and operates in the Fixed Satellite Service under part 25 of title 47 of the Code of Federal Regulations.” 17 U.S.C. § 119(a)(2)(B)(iii)(II).

service was initiated, enabling consumers to use much smaller dishes and giving consumers in urban and suburban areas a competitive choice of multi-channel video programming providers.

#### **A. DTH Technology and Background.**

Providers of DTH satellite service deliver television programming by uplinking video signals to satellites orbiting in space and then beaming those signals to receiving dishes connected to subscribers' television sets. DTH satellite providers often subsidize the consumer's costs of obtaining the satellite dish and the set-top box required to receive programming. DBS satellites operate in the 12.2-12.7 GHz band.

DTH is primarily a national service. The satellites currently used by DTH satellite providers occupy one of three positions in the Earth's orbit. The FCC licenses the use of 32 frequencies at each orbital slot; thus, there are 96 total frequencies that satellite carriers can use to reach satellite subscribers across the United States. With the aid of compression technologies, DTH satellite providers have the ability to carry several hundred channels of television programming. Every television channel carried on these satellites is beamed to the homes of all subscribers; however, channels that individual subscribers do not pay to receive, or are not allowed to receive, are blocked by the equipment at the subscriber's home.

#### **B. DTH Market Share**

The DBS market has increased significantly over the past decade. There are now two facilities-based U.S. DBS operators: DIRECTV and EchoStar (which markets itself as the "DISH Network").<sup>52</sup> DIRECTV and EchoStar both offer service to all states, including Hawaii and Alaska.<sup>53</sup> As of the end of 2008,

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<sup>52</sup> Some of the following information is taken from the FCC's most recent report on video competition, formally known as the Thirteenth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Report, MB Docket No. 06-189, FCC 07-206 (released January 16, 2009). The issuance of this 13<sup>th</sup> Video Competition Report, however, was long delayed and is based on 2006 data.

<sup>53</sup> DBS providers are required, if technically feasible, to serve the entire United States, including Alaska and Hawaii. 47 CFR §25.148(c).

approximately 31.3 million U.S. households subscribed to DTH service (17.6M for DirecTV and 13.7M for Dish Network/EchoStar).<sup>54</sup> .

While the DBS market is growing rapidly, the C-band market is shrinking. The FCC reports that the number of C-band subscribers declined 45% between June 2005 and June 2006, and declined another 38.3% in the last six months of 2006. Some C-band operators are migrating to provide DBS services. National Programming Service, LLC (NPS), headquartered in Indianapolis, Indiana, began providing C-band satellite television service in 1986. In 2006, NPS began offering distant signals to former EchoStar subscribers by leasing satellite capacity from EchoStar.<sup>55</sup> Superstar/Netlink is another C-band provider providing DBS service.

The total number of MVPD households is expected to increase somewhat over the next five years as the nation converts to High-Definition Television (HDTV). Nevertheless, the market shares of the various industries are likely to be fairly stable. SNL Kagan predicts that the market share of cable firms will decline slightly from 64% to 59% in 2012, telephone companies may increase their share from 3% to 9%, while the market share of the DTH industry is expected to drop somewhat to 27%.<sup>56</sup>

### C. DTH Services

DTH providers offer a variety of attractive programming packages and services. Both DirecTV and EchoStar provide numerous Spanish language packages, packages for Hawaii and Alaska, and a variety of digital and High-Definition TV (HD) offerings. DBS providers offer prices that are generally much less expensive than cable operators. For instance, EchoStar offers a promotional price of \$9.99 per month

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<sup>54</sup> US: Digital Service Provider Scorecard; Rider Research, March 5, 2009. These figures also appear on the web site of the Satellite Broadcasting and Communications Association of America (SBCA), available at <http://www.sbca.com/index.asp>.

<sup>55</sup> EchoStar is barred from providing any distant network programming as a result of its violation of the distant signal limitations. See, *CBS v. EchoStar*, 472 F.Supp.2d 1367 (S.D. Fla. 2006).

**I.** <sup>56</sup>“MULTICHANNEL VIDEO SERVICES TO GROW SLOWLY OVER NEXT FIVE YEARS; MULTICHANNEL VIDEO SUBSCRIBERS SHOULD ACCOUNT FOR ALMOST 89% OF TV HOUSEHOLDS IN FIVE YEARS, ACCORDING TO A REPORT FROM SNL KAGAN,” BY [K.C. JONES](#)  
**INFORMATIONWEEK** , MAY 16, 2008  
([HTTP://WWW.INFORMATIONWEEK.COM/NEWS/PERSONAL\\_TECH/TV\\_THEATER/SHOWARTICLE.JHTML?ARTICLEID=207800667](http://www.informationweek.com/news/personal_tech/tv_theater/showarticle.jhtml?articleid=207800667)).

for six month, and offers a “family-friendly” package of programming for only \$19.99 per month, while DirecTV offers a “family” package of 50+ digital channels at \$29.99 per month.

Most, but not all, markets can receive local-into-local broadcast signals from their satellite provider. As of June 2008, DirecTV offers local-into-local service in 150 markets and provides HD local-into-local service in 119 markets.<sup>57</sup> EchoStar offers local-into-local service in 178 markets and HD local-into-local service in 104 markets.<sup>58</sup>

Both providers are expanding their offering of DVR services, which allow viewers to control their viewing experience in a variety of ways. For instance, a DVR can be used to record pay-per-view movies, and it can be used to mark the consumer’s favorite scenes and jump back and forth between them. In addition, both providers are offering set-top boxes that provide multiple interactive applications, which are particularly attractive to sports viewers and gaming enthusiasts.

#### **D. Distant Network Signal Services.**

NPS is the primary provider of Distant Network Signals in the U.S. NPS offers distant network signals to qualified subscribers of the Dish Network either as a separate package of channels or at a per channel price. NPS (d/b/a All American Direct) offers individual distant networks at \$3.49 per month and the four primary network signals (ABC, CBS, NBC and Fox) for \$12.99 per month.<sup>59</sup>

DirecTV is permitted to offer distant network signals, but its web site does not advertise the availability of these services and points out the challenges that consumers may encounter in determining whether or not they may qualify to receive distant network signals:

Federal legislation allows consumers to arrange a digital signal strength test to verify whether the predictive model used to determine DNS [Distant Network Signal] eligibility is correct. If the test indicates that your location cannot receive a sufficiently strong signal from your local stations,

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<sup>57</sup> Testimony of Bob Gabrielli, Senior Vice President, Broadcasting Operations and Distribution, DIRECTV, before the Communications, Technology and the Internet Subcommittee of the House Committee on Energy and Commerce, February 24, 2009.

<sup>58</sup> Testimony of Charlie Ergen, President and CEO, DISH Network, before the Senate Judiciary Committee, Feb. 25, 2009.

<sup>59</sup> See, <https://www.mydistantnetworks.com/faq.php>.

DIRECTV may add DNS service to your account. DIRECTV will provide you with information about testing requirements but you must make all the necessary arrangements and pay for any associated costs. (Pricing varies but typically runs between \$150 and \$500.)<sup>60</sup>

DirecTV provides consumers with a form to request assistance in having its location tested. The form suggests that it may be difficult to find testers and that results of the test will take from four to six weeks.<sup>61</sup>

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<http://www.directv.com/DTVAPP/customer/faqPage.jsp?assetId=P4700010&Id=196006063#category4>.

<sup>61</sup> See, <http://www.directv.com/DNS/DNS%20Fullfilment%20Letter.pdf>.

#### **E. Other Important Data concerning the Video Marketplace**

Number of TV households (2009):	114.5 Million <sup>62</sup>
Number of Households subscribing to a MVPD service (June 2008):	97.7 Million <sup>63</sup> (about 87% of all TV households)
Cable Subscribers:	64.6 Million (66% of all MVPD subscribers) (56% of all TV households)
DTH subscribers:	31.0 Million (32% of all MVPD subscribers) (27% of all TV households)

#### **V. Six Reasons Why Congress Should Eliminate the Distant Signal Restriction.**

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

##### **A. The distant signal restriction prevents consumers from obtaining the programming that they desire.**

There are many reasons why consumers enjoy the opportunity to view a distant signal. In this increasingly mobile society, consumers often attend school, work and settle in areas of the country that are far from where they grew up; yet they would like to remain up-to-speed on the developments in their “home” community. Many other consumers have parents or other relatives in distant locations and would like to stay abreast of the latest developments in that region by tuning to that local station’s news or weather. Or, if there is an interesting story in a particular local area (a natural disaster, a police

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<sup>62</sup> According to the Television Bureau of Advertising (available at [http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02\\_TVHouseholds.asp](http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02_TVHouseholds.asp).)

<sup>63</sup> According to SNL Kagan (available at <http://cable.tmcnet.com/topics/cable/articles/39876-snl-kagan-cable-operator-revenues-poised-growth.htm>.)

situation, a local election), a subscriber may wish to watch the local news in that area to obtain up-to-date or detailed information that he/she could not obtain from the local broadcast station where he/she resides. The current distant signal restriction effectively bars most consumers from obtaining distant broadcast channels from satellite television providers (even though the cable operator is permitted to carry these channels).

Another reason a subscriber may be interested in receiving a distant signal is to obtain access to network programming at a different time of day (i.e. “time-shifting”). For instance, a viewer on the West Coast may prefer to watch “The Late Show with David Letterman” at 8:30 p.m. Pacific Time from an East Coast local broadcast station, rather than wait to watch the show on the local West Coast station at 11:30 p.m. Although such “time-shifting” can also be accomplished through the use of a DVR, time-shifting is a convenience for consumers without a DVR and enhances the overall level of television viewership.

One of the realities of life in the United States is the increasing mobility of American consumers. According to the U.S. Census Bureau, 40% of the American population lives in a state that is different from where they were born.<sup>64</sup> This represents a steady increase from 36.1% in 1980 and 38.2% in 1990. Although comparing the state of residence to the state of birth is not a precise indicator of one’s programming tastes, it is a significant piece of evidence that Americans would enjoy the opportunity to view the programming in another state in addition to their local programming.

**B. The distant signal restriction has become obsolete with advent of Internet-based video.**

While satellite providers may not transmit distant network programming, the exact same programming is increasingly available on the Internet. In fact, each of the four major networks offers streaming versions of the full episodes of its television shows for free on the Internet, simply by going to their web sites (cbs.com; nbc.com; abc.com; fox.com). It is curious, and perhaps contradictory, for the major television networks to claim that satellite distribution of distant signals would undermine local broadcasting, when the networks themselves are bypassing their network affiliates by offering

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<sup>64</sup> See, the “State of Residence by State of Birth” tables provided by the U.S. Census, available at <http://www.census.gov/population/www/socdemo/migrate.html>.

programming directly to consumers through the Internet. Apparently, the television networks are confident that their local stations can withstand the growth of this alternative channel of programming.

Of course, the television networks are not the only ones to offer this programming over the Internet. YouTube has expanded its library of full-length movies and TV shows that it offers online, thereby moving beyond the home-produced video clips.<sup>65</sup> Web sites such as “TVchannelsfree.com” and “WFiTV.com” offer hundreds of local television channels, including some network affiliates, that require no user registration or fee.<sup>66</sup> The web site <http://www.seabreezecomputers.com/tips/tv.htm> lists a variety of different web sites that offer full-length television shows, generally free of charge. Anyone who has a broadband connection, or has the means to acquire a broadband connection, can receive network television programming that satellite broadcasters are not allowed to carry.<sup>67</sup>

Several other sites offer television programming over the Internet for a small charge. Apple’s iTunes Music Store and Amazon’s Unbox allow consumers to purchase programs for \$1.99 per episode (analog) or \$2.99 for digital (high-definition). Downloading the programs allows the consumer to own the program and transfer it to a memory stick for viewing on other computers or television sets. The programs are usually offered without advertisements. SlingMedia allows consumers to use a set-top box (called a “Slingbox”) at their home to receive and then send programs out over their home broadband connection through the Internet to the user, no matter where he or she may be located.

In addition, providers of set-top boxes allow television programming to be downloaded for viewing on television sets. Apple TV, Unbox, Xbox Live, Playstation, Vudu, Blockbuster and Netflix are all developing or deploying set-top boxes that enable downloading and viewing of television shows. The major networks are also partnering with YouTube, AOL, Joost, MSN, MSpace and Hulu to make their programs

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<sup>65</sup> Its long-form videos are available at <http://www.youtube.com/shows>.

<sup>66</sup> See, <http://www.tvchannelsfree.com/channels/13/USA-local-TV>.

<sup>67</sup> According to the National Cable and Telecommunications Association (NCTA)(citing data from SNL Kagan), over 92% of households in American have access to broadband services today. This percentage may be even higher if satellite broadband and telephone company broadband connections are included. See, “Moving the Needle on Broadband: Stimulus Strategies to Spur Adoption and Extend Access Across America,” issued by NCTA, March 17, 2009, p. 1 available at

available on-line. Sports leagues are also beginning to develop their own web presence for streaming live games, often through web portals.<sup>68</sup>

Mobile phone providers are jumping into the programming market as well. AT&T's Mobile TV,<sup>69</sup> Verizon's V CAST Mobile TV and Sprint's Power Vision both offer cellular service customers the option of watching programming on their mobile phone. SlingMedia is planning to roll out television programs to the iPhone and iPod Touch in the near future. The use of mobile broadband services is likely to become even more popular with the emergence of next-generation 4G wireless technologies.

The increasing prevalence of Internet-based television sites allows consumers to choose to watch virtually any television program at any time of day or night, as long as they have a broadband connection. Over 50% of American households now have a broadband connection, and this figure is increasing each year. In fact, Microsoft Chairman Bill Gates predicts that Internet-based television viewing will replace standard broadcast television within five years.<sup>70</sup>

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<http://www.ncta.com/PublicationType/WhitePaper/Moving-the-Needle-on-Broadband.aspx>.

<sup>68</sup> See, "Yahoo! And MLB.com Enter Video Distribution and Advertising Sales Partnership," BusinessWire, Apr. 10, 2008. In April, Disney and Hulu announced a major new partnership that will allow Hulu to offer a variety of ABC and other Disney programming on the video streaming site. According to one report, this partnership means that Hulu has now locked up programming from three of the six largest movie production studios. See, "Hulu-Disney Deal Hurts YouTube, Helps Cable," April 30, 2007, available at [http://news.cnet.com/8301-1023\\_3-10231195-93.html](http://news.cnet.com/8301-1023_3-10231195-93.html).

<sup>69</sup> AT&T's web site specifically advertises that its service provides access to network programming: "AT&T Mobile TV brings your favorite prime-time and other full-length TV programs right to your mobile phone! Just press the TV button to enjoy popular programs from CBS, Comedy Central, ESPN, FOX, NBC, MTV and Nickelodeon. The crisp, clear video and audio makes watching AT&T Mobile TV as enjoyable as your home TV." See, <http://www.wireless.att.com/learn/messaging-internet/mobile-tv/mobile-tv-faqs.jsp>.

<sup>70</sup> Microsoft chairman Bill Gates told an audience at the World Economic Forum in Davos, Switzerland, "I'm stunned at how people aren't seeing that with TV, in five years from now, people will laugh at what we've had. . . . In the years ahead, more and more viewers will hanker after the flexibility offered by online video and abandon conventional broadcast television, with its fixed program slots and advertisements that interrupt shows." Ben Hirschler, "Internet To Revolutionize TV in 5 Years: Gates," REUTERS, Jan. 27, 2007, <http://www.reuters.com/article/ousiv/idUSL2791097520070128>.

Limiting the ability of satellite carriers to offer distant signals is a policy that is now obsolete. The distant network signal restriction places satellites at a severe competitive disadvantage compared to Internet-based services and cannot be justified as new technologies give consumers more and more options to watch the programming they want on-line.

**C. The distant signal restriction is anticompetitive and unfairly burdens satellite operators with rules that do not apply to cable operators.**

Cable operators are allowed to carry distant signals to any subscriber, while satellite broadcasters are not. This is a policy that is extremely difficult to justify, given the strong competition between the two industries. Furthermore, telephone companies may also carry distant network programming as a part of their cable services. . Verizon has been seeking and obtaining cable franchises from many districts where it is deploying its FiOS (fiber optic) service. AT&T has instead adopted a business plan (called U-Verse) that offers consumers the ability to order their own video signals on-line<sup>71</sup>. Both companies are permitted to offer distant network signals to their consumers in competition with DTH providers.

In contrast, DTH satellite providers may only provide distant network signals to small minority of households that live in unserved markets. Even in those markets, satellite providers may not provide distant signals if the consumer has “local-into-local” service available from any satellite provider. The effect of this policy is that satellite DTH providers are unable to provide distant network signals to approximately 95% of the nation’s households, even though cable, telephone and Internet-based competitors may provide distant network signals to those same consumers.

This disparity harms not only satellite providers; it harms cable subscribers as well. The FCC has noted that cable prices continue to increase, perhaps because cable providers are protected from competition. According to the FCC’s most recent report on cable pricing:

The average monthly price of expanded basic service (the combined price of basic cable service and cable programming service) increased by 3.9 percent over the 12 months

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<sup>71</sup> “AT&T U-Verse TV to Include NBC Universal Content.”, Nov. 27, 2006, (“Under the agreement, AT&T will distribute to U-verse customers the analog and digital signals of the NBC and Telemundo owned-and-operated broadcast stations, as well as NBCU’s cable properties.”) See, AT&T Press Release at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23209>.

ending January 1, 2006; by 4.6 percent over the 12 months ending January 1, 2007; and by 5.0 percent over the 12 months ending January 1, 2008. . . . Over this 13-year period, the price of expanded basic service has grown from \$22.35 to \$49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period.<sup>72</sup>

Removing the distant network signal restriction would enhance the ability of satellite DTH providers to provide a competitive check on the prices and practices of the dominant cable industry. Both the FCC and the U.S. Copyright Office have recognized the disparate regulatory treatment of cable and satellite providers, and both agencies have recommended harmonizing the licenses of the two types of competitors.<sup>73</sup>

**D. Lifting the distant signal restriction is unlikely to cause economic hardship to local broadcasters.**

The broadcasting industry maintains that allowing the satellite providers to carry distant network signals will be “destructive” to free local broadcasting.<sup>74</sup> For many reasons, this fear seems to be greatly exaggerated. First, only a small proportion of consumers receive “free” over-the-air television. According to industry statistics, only about 15% of households receive over-the-air television service, and this percentage is likely to decline even further with the implementation of HDTV later this year.<sup>75</sup>

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<sup>72</sup>“Report on Cable Industry Prices,” In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, released January 16, 2009, para. 2.

<sup>73</sup> See, “Copyright Office Section 109 Report”, p. xi; and FCC “SHVERA Section 208 Report to Congress”.

<sup>74</sup> See, for example, the testimony of Mr. Martin D. Franks, Executive Vice President, CBS Television, before the House Subcommittee on Telecommunications and the Internet, March 10, 2004 (“As this Subcommittee has consistently recognized, delivery of distant network stations, like salt in a soup, works well only if used in small amounts, and quickly spoils the broth if overused. . . . [W]hen satellite carriers deliver distant network stations to households that *can* receive their own local network stations, without permission from the local affiliate(s) in the viewer’s area, distant signals quickly become a destructive force, undermining localism and subverting the economics of local broadcasters.”)

<sup>75</sup> The percentage of households receiving free over-the-air television is likely to decline even further with the transition to digital TV. Most industry observers expect many consumers

The broadcasters' concern that eliminating the distant network signal restriction will undermine free local broadcasting is most certainly overstated.

Second, roughly 55% of all television households already receive distant network signals from their cable provider. The broadcasting industry has made no showing that cable carriage of these distant signals has significantly harmed the revenues of local broadcasters.

Third, satellite television providers have a small share of the total television market; satellite DTH providers serve approximately 27% of all television households. While allowing satellite DTH providers to carry distant network signals will allow them to compete more favorably with cable operators, it is highly doubtful that allowing a non-dominant participant in the multi-channel video programming market to carry a few distant signals will have a significant effect on the economics of local broadcasting. Satellite DTH providers and cable operators offer hundreds of channels of programming; allowing satellite providers to carry a few distant network signals is unlikely to cause a massive shift in the number of "eyeballs" viewing the local broadcasting station or their advertising revenues simply because each consumer has so many viewing options.

Fourth, it is unlikely that satellite viewers would abandon their local affiliate even if they have distant network signals available to them. Why? Because, according to NAB President CEO and President David Rehr, consumers love their local television news. As Mr. Rehr explained recently, a study in Spokane Washington found that the households watching local broadcast stations' local news outnumbered those watching cable news by 35,000 to less than 1,000.<sup>76</sup> Consumers tune in to their local television station news precisely because that is the programming that is of most interest to them. Since television viewers are unlikely to abandon their local station, it is extremely difficult to imagine that allowing satellite providers to carry distant network signals would have a "destructive" effect on local broadcasters' revenues.

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will have difficulty receiving the same quality of over-the-air signals when the stations turn off their analog signal and only transmit the digital signal. The lack of transmission quality is likely to encourage more consumers to subscribe to pay services.

<sup>76</sup> Speech by David Rehr, President and CEO of the National Association of Broadcasters (NAB) at the National Press Club, Oct. 4, 2006, available at [http://www.nab.org/AM/Template.cfm?Section=News\\_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937](http://www.nab.org/AM/Template.cfm?Section=News_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937).

The likely result of lifting the distant signal restriction is that viewers will watch the distant network signal on special occasions – such as to watch isolated news stories – and then return to his/her local station for local news and other programming. Rather than taking viewers away from the local affiliate, it may increase the overall amount of viewing. Thus, the financial impact on local broadcasters from allowing satellites to carry distant network signals is likely to be minor, especially in comparison to all the other major technological shifts currently taking place in the market.

**E. Local broadcasters can take advantage of new revenues streams from the Internet and from HDTV.**

Local broadcasters have an enormous opportunity to generate additional revenues from the transition to high-definition television and the other technologies. As described by Mr. Yager in his testimony to the House Commerce Committee earlier this year:

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. 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.<sup>77</sup>

There are at least six different sources of revenue and cost-cutting measures that can increase the profitability of local television stations over the next few years:

- a. Broadcasters enjoy steadily increasing political advertising revenue, including a record amount of revenue from the most recent 2008 Presidential campaign.<sup>78</sup>
- b. The switch to HDTV allows local broadcasters to “multicast” several channels of programming over their spectrum, which also allows them to sell more advertising.<sup>79</sup>

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<sup>77</sup> See, Testimony of K. James Yager, Barrington Broadcasting, on behalf of the NAB, before the Subcommittee on Communications Technology and the Internet of the House Committee on Energy and Commerce, February 24, 2009.

- c. Local broadcasters are expecting to generate at least \$2 billion in additional advertising revenue from distributing mobile digital TV on cellphones and other handheld multimedia devices.<sup>80</sup>
- d. Many local broadcasters have reached retransmission consent agreements with cable and satellite operators that generate additional revenue opportunities or reduce costs of promoting their programs. Some broadcasters in small markets are even carrying a different network on their second channel because there is no other affiliate of that network in the market.
- e. Broadcasters are also developing revenue from their web sites. Private label desktop and mobile applications allow broadcasters to customize their delivery of news and information to each individual.
- f. New central-casting technology allows broadcasters to reduce their operational and delivery costs and allow them to operate more efficiently.<sup>81</sup> Centralcasting centralizes the master controls of multiple stations at a single, centralized network operations center.

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**II.** <sup>78</sup> SEE, "NEARING RECORD, OBAMA'S AD EFFORT SWAMPS MCCAIN," OCT. 17, 2008 , [HTTP://WWW.NYTIMES.COM/2008/10/18/US/POLITICS/18ADS.HTML](http://www.nytimes.com/2008/10/18/us/politics/18ads.html). ("SENATOR BARACK OBAMA IS DAYS AWAY FROM BREAKING THE ADVERTISING SPENDING RECORD SET BY PRESIDENT BUSH IN THE GENERAL ELECTION FOUR YEARS AGO, HAVING UNLEASHED AN ADVERTISING CAMPAIGN OF A SCALE AND COMPLEXITY UNRIVALED IN THE TELEVISION ERA.:) SEE ALSO, [ "PRESIDENTIAL ADS PROVIDE WINDFALL TO LOCAL STATIONS," [HTTP://WWW.ROANOKE.COM/POLITICS/WB/180256.](http://www.roanoke.com/politics/wb/180256), OUTLOOK 2008: ON-LINE POLITICAL ADVERTISING, ("BROADCAST TELEVISION, CORNERING NEARLY 60 PERCENT OF TOTAL POLITICAL SPENDING, WILL STILL BE THE UNDISPUTED CHAMPION IN THE POLITICAL ADVERTISING SPACE AND MAY SEE SOME FOLLOW-ALONG AD DOLLARS FROM ONLINE COMBO BUYS FROM THE CAMPAIGNS. WITH 95 PERCENT PENETRATION, TV IS STILL THE FASTEST WAY TO REACH THE BROADEST AUDIENCE OF REGISTERED VOTERS.") AVAILABLE AT [HTTP://WWW.RESEARCHANDMARKETS.COM/REPORTS/586943/2008\\_OUTLOOK\\_ONLINE\\_POLITICAL\\_ADVERTISING.](http://www.researchandmarkets.com/reports/586943/2008_outlook_online_political_advertising)

<sup>79</sup> See Note 65 above.

<sup>80</sup> Mr. Rehr stated at the most recent NAB convention, that "by 2012, we expect 130 million phones and 25 million media players will be able to receive mobile television. An NAB study concluded that TV broadcasters could see incremental revenue of more than \$2 billion after 2012 with mobile DTV (digital television). I believe, the revenue upside is probably greater than we can even imagine."

In sum, there appear to be several opportunities for local broadcasters to reduce costs and expand their revenues as new technologies become available to them. Policy-makers should consider encouraging local broadcasters to pursue these new opportunities rather than shielding them from competition.

**F. Preventing the importation of distant signals to consumers is inconsistent with the free flow of information and raises significant constitutional issues.**

From our nation’s inception, the Founding Fathers considered the free flow of information to be one of the most cherished values of democracy. The printing press, the telegraph and telephone, the delivery of mail, and other forms of mass communications have all been accorded respect as essential tools of an informed electorate and a protection against tyranny. Any limitations on the free flow of information must overcome an especially high burden to pass constitutional muster.

The Supreme Court has articulated the test for determining whether or not a regulation unnecessarily burdens commercial speech in the seminal case of *Central Hudson*.<sup>82</sup> Under the test laid out in the *Central Hudson* case, the government must make two showings, first that any regulation of commercial speech must directly advance an important interest and second, that the restriction is no more restrictive of speech than necessary. It is highly doubtful that the ban on providing distant network signals, except to certain unserved customers, would satisfy either prong of this test. As discussed above, there are numerous ways that consumers can obtain distant network signals over the Internet or from their cable provider. Thus the restriction on satellite television providers would not “advance” the important interest in preserving local broadcasting. Furthermore, it is equally unlikely that the distant network signal restriction is no more restrictive of speech than necessary. There are many other ways

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<http://www.lasvegassun.com/news/2009/apr/22/ad-revenue-decline-puts-pressure-broadcast-confere/>.

<sup>81</sup> See, “Traffic Operations in the Centralcasting Environment,” published by VCI, (“[U]nlike HDTV, centralcasting has the potential to offer real and immediate benefits including a positive impact on profitability. The centralcasting discussion most often revolves around master control operations and technology including automation, spot insertion, program playback, and networking. This is due to the fact that the consolidation of engineering operations offers the greatest opportunities for controlling expenses and achieving economies of scale”) Available at <http://www.broadcastpapers.com/whitepapers/VCItraffic.pdf?CFID=35099502&CFTOKEN=b4470868867044d5-0981337F-F3CC-2D08-FD0D8EFFAC066D6A>.

1. <sup>82</sup> *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

of promoting the interests of local broadcasting (some of which Congress has already taken, such as the network non-duplication rule, the retransmission consent rules, and the award of digital television spectrum) that can help preserve local television that do not infringe on the first amendment rights of satellite providers.

## **VI. Conclusion**

The distant signal restriction has outlived whatever rationale may have justified its initial adoption 20 years ago. Cable prices are rising faster than inflation. The two largest telephone behemoths – AT&T and Verizon – are providing video programming services in more and more local markets. Internet-based video services are proliferating, bypassing the traditional means of providing television service with virtually no regulation. Yet, the distant network signal restriction effectively bars the Direct-to-Home satellite from providing the television programming that consumers desire. It is time for Congress to put an end to the competitive disparity between cable and satellite providers and, as both the FCC and Copyright Office have suggested, eliminate the distant network signal restriction in the upcoming satellite re-authorization legislation.

### About the Author

**John Windhausen, Jr.** provides legal, legislative, and regulatory consulting services to a variety of nonprofit and corporate clients through his firm, Telepoly Consulting. He served as a staff attorney at the Federal Communications Commission, and for nine years served as communications counsel for the U.S. Senate Committee on Commerce, Science and Transportation. His work included the Cable Act of 1992, the Spectrum Auction Act of 1993, and the landmark Telecommunications Act of 1996. In 1996, he became general counsel of a consumer advocacy organization called the Competition Policy Institute. From 1999 to 2004, he was President of the Association for Local Telecommunications Services (ALTS), the leading trade association representing the facilities-based competitive local exchange carrier industry. He formed Telepoly Consulting in October 2004. He is the author of “Good Fences Make Bad Broadband: Preserving an Open Internet through Net Neutrality” (Public Knowledge, 2006), “A Blueprint for Big Broadband” (EDUCAUSE, 2008), and “A Plan to Extend Super-Fast Broadband Connections to All Americans” (The Century Foundation, 2009). He is a graduate of Yale University and the UCLA School of Law. He can be reached at [jwindhausen@telepoly.com](mailto:jwindhausen@telepoly.com) or at (202) 256-9616.