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ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
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MEMORANDUM

February 12, 2013

To: **Subcommittee on Communications and Technology Democratic Members and Staff**

Fr: **Committee on Energy and Commerce Democratic Staff**

Re: **Subcommittee Hearing on "Satellite Video 101"**

On Wednesday, February 13, 2013, at 10:30 a.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing titled "Satellite Video 101." This hearing is the beginning of the Committee's examination of issues that may arise as Congress considers reauthorizing and updating the Satellite Television Extension and Localism Act of 2010 (STELA).

I. BACKGROUND

According to the most recent data from the Federal Communications Commission (FCC), 90% of American households that watch television subscribe to a pay-television service.[1] The Communications Act refers to these pay-TV providers as Multichannel Video Programming Distributors (MVPDs), which includes cable companies such as Comcast, Direct Broadcast Satellite (DBS) providers such as DISH and DIRECTV, and traditional telephone companies with service offerings like Verizon's FiOS or AT&T's U-verse. DISH and DIRECTV had roughly one third of all MVPD subscribers in 2010.[2]

Both copyright and communications laws provide the framework under which satellite MVPDs may deliver broadcast programming to their subscribers. The Copyright Revision Act

[1] *In the Matter of* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (MB Docket 07-269), Fourteenth Report (July 20, 2012).

[2] *Id.*

of 1976 (Copyright Act) granted cable operators a statutory license to retransmit broadcast programming.[3] This compulsory license eliminates the need to negotiate with each individual copyright holder for the rights to air every broadcast TV show and sets the royalties paid to copyright holders.

In 1988, Congress extended a similar statutory license to satellite providers in the Satellite Home Viewer Act (SHVA). SHVA created a five year *distant signal* license that allows satellite carriers to provide an out of market station to consumers unserved by their local broadcaster.[4] In 1999, the Satellite Home Viewer Improvement Act (SHVIA) created a local statutory license, allowing satellite providers to deliver local broadcast stations to subscribers in the same market, known as *local into local* service.[5] Local into local service is credited with increasing competition between cable and satellite providers.[6] Unlike the distant signal license, the local compulsory license does not need to be reauthorized.

In addition to these changes to copyright law, SHVIA also made certain amendments to the Communications Act. In the 1992 Cable Act, Congress had amended the Communications Act to require MVPDs to obtain broadcaster consent before carrying stations and to require the parties to negotiate in good faith – a regime referred to as *retransmission consent*.[7] Cable operators have a related statutory obligation with respect to broadcast carriage known as *must carry.*[8] Instead of choosing to negotiate the terms of retransmission consent, broadcasters may alternatively elect to simply require cable operators to carry their channel. SHVIA exempted satellite carriers from the need to obtain retransmission consent for distant network signals, but required them to negotiate retransmission consent for local into local service.[9] Satellite operators also do not have to comply with must carry but have a similar requirement known as *carry one, carry all.*[10] Pursuant to the local compulsory license, if a satellite provider offers any local

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[3] 17 U.S.C. § 111.

[4] 17 U.S.C. § 119. The term market is used to refer to a TV station's Nielsen Designated Market Area (DMA). 17 U.S.C. § 122(j)(2). To determine whether a household is unserved, satellite carriers rely on a predictive model, the Individual Location Longley Rice model. If a consumer does not receive an over the air broadcast signal of sufficient strength, they are eligible to receive a distant signal. 47 U.S.C. § 339(c)(3)(A).

[5] 17 U.S.C. § 122.

[6] Congressional Research Service, *How the Satellite Television Extension and Localism Act (STELA) Updated Copyright and Carriage Rules for the Retransmission of Broadcast Signals* (Jan. 3, 2013) (R41274).

[7] 47 U.S.C. § 325(b)(3)(C).

[8] 47 C.F.R. § 76(d).

[9] 47 U.S.C. § 325(b)(2)(C).

[10] 47 U.S.C. § 338(a)(1).

broadcast programming in a market, it is required to carry all the local broadcast stations in that market.

The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) extended the distant network signal license and the exemption for retransmission consent for distant network signals for another five years, among other provisions.[11] SHVERA also created a new provision of the Communications Act that allows satellite carriers to retransmit a distant signal to a local market if the signal is *"significantly viewed"* in that market.[12] This provision created legal parity between satellite and cable operators, who have similar authority to carry significantly viewed out of market stations, although this authority has been exercised less frequently by satellite providers. In addition, SHVERA restricted satellite operators from offering a distant network signal to a new customer in a market where they are also offering the local affiliate of the same network, known as the *no distant where local* rule.[13]

II. IMPLEMENTATION OF THE SATELLITE TELEVISION EXTENSION AND LOCALISM ACT OF 2010 (STELA)

Prior to the enactment of STELA, Congress needed to update certain aspects of copyright and communications law to reflect the nation's transition from analog to digital television. As in previous reauthorizations, STELA extended relevant expiring provisions and made additional modifications to the law.[14] For example, it included provisions to improve access to broadcast programming in *short markets* – where a DMA lacks one of the four major network affiliates. In these short markets, consumers are classified as "unserved" with respect to the missing network stations, allowing satellite providers to import distant signals. STELA prevents satellite providers from offering new subscribers a distant network signal if the missing network affiliate is being offered as a multicast stream.[15] Separately, STELA also addressed the expiring significantly viewed provision from SHVERA by moving it to the local signal license in Section 122 of the Copyright Act, which does not expire.[16]

In addition, STELA provided DISH with the opportunity to regain the use of the distant signal compulsory license, which the courts had taken away because the company was found to

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[11] P.L. No. 108-447.

[12] 47 U.S.C. § 340.

[13] 17 U.S.C. § 119(a)(3); 47 U.S.C. § 339(a)(2). There are some exemptions to this rule for subscribers who were historically receiving distant signals.

[14] P.L. No. 111-175.

[15] As a result of the spectrum efficiencies enabled by the digital television transition, broadcasters are able to offer programming streams in addition to their primary channel, known as "multicasting."

[16] 17 U.S.C. § 122(a)(2)

have repeatedly engaged in copyright infringement.[17] In exchange for lifting the injunction, DISH must offer local into local in all 210 DMAs in the country, which it began doing on June 3, 2010.[18]

STELA also addressed certain concerns related to the carriage of public broadcasting. STELA essentially extended the carry one, carry all requirement, which the FCC had previously updated to require satellite operators to carry all broadcasters in high definition (HD) where it had chosen to carry any station in the market in HD, [19] to cover non-commercial stations broadcasting in HD, subject to certain conditions.[20] In July 2010, DISH sought an injunction to delay implementation of that requirement; the court did not provide the requested relief.[21] However, DISH subsequently reached agreement for HD carriage with 30 non-commercial stations, thereby averting the more aggressive mandates for HD public television carriage in STELA.[22] Further, STELA included modifications to improve the situation of many statewide public television stations that were not receiving satellite carriage because of DMA boundary issues.[23]

STELA also directed the Copyright Office and the Government Accountability Office (GAO) to issue two reports that contemplate significant changes to essential elements of the current regulatory regime. The Copyright Office produced a report that discussed how to phase out and repeal the current statutory license system.[24] GAO analyzed the modifications to the Communications Act and FCC rules that would be required if Congress eliminated statutory

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[17] *CBS Broad. Inc. v. EchoStar Communications Corp*., Docket No. 03-13671 (11th Cir. 2006).

[18] 17 U.S.C. § 119(g); *In the Matter of* Application of DISH Network, LLC for Qualified Carrier Certification (MB Docket 10-124) (Sept. 1, 2010).

[19] 47 C.F.R. § 76.66(k)(2).

[20] 47 U.S.C § 338(a)(5)(a)-(b).

[21] *DISH: Court Denies Injunction of Noncom HD Mandate*, Multichannel News (Jul. 22, 2010).

[22] Congressional Research Service, *How the Satellite Television Extension and Localism Act (STELA) Updated Copyright and Carriage Rules for the Retransmission of Broadcast Signals* (Jan. 3, 2013) (R41274).

[23] 17 U.S.C. § 122(a)(4)(E).

[24] United States Copyright Office, *Satellite Television Extension and Localism Act §302 Report* (Aug. 29, 2011).

licenses.[25] The report raised some concerns that if statutory licenses were phased out, consumers could see higher pay-TV prices and programming disruptions might become more prevalent.[26]

III. WITNESSES

Ms. Eloise Gore
Associate Bureau Chief, Enforcement Bureau
Federal Communications Commission

Mr. R. Stanton Dodge
Executive Vice President and General Counsel
DISH Network LLC

Ms. Jane Mago
Executive Vice President and General Counsel, Legal and Regulatory Affairs
National Association of Broadcasters

Ms. Lonna Thompson
Executive Vice President, Chief Operating Officer and General Counsel
Association of Public Television Stations

Michael O'Leary
Senior Executive Vice President, Global Policy and External Affairs
Motion Picture Association of America

[25] Government Accountability Office, *Implications of a Phaseout on Access to Television Programming and Consumer Prices Are Unlcear* (Nov. 2011) (GA0-12-75).

[26] *Id.*