



**Hearing on
“Satellite Video 101”**

**United States House of Representatives
Committee on Energy and Commerce**

***Subcommittee on Communications
and Technology***

February 13, 2013

Statement of Jane E. Mago

**On behalf of the
National Association of Broadcasters**

INTRODUCTION AND SUMMARY

Good morning, Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee. My name is Jane Mago. I am Executive Vice President and General Counsel of the National Association of Broadcasters (NAB) on whose behalf I appear today.

Thank you for the opportunity to talk with you about the reauthorization of the Satellite Television Extension and Localism Act of 2010 (STELA), which is set to expire at the end of 2014. In my testimony today, I will discuss the principles behind STELA, whether its reauthorization is needed in the current satellite television marketplace, and some issues that may arise as you consider reauthorization.

NAB looks forward to working with this Subcommittee as we again consider how the public interest can best be served through satellite carriage of local television signals. As I explain below, NAB is continuing to evaluate the current television market and taking a hard look at whether reauthorization of distant signal licenses for satellite carriers should be done at all. At most, Congress should limit any action to those narrow issues raised directly by STELA reauthorization. It should rebuff any efforts to address unrelated issues that would only prolong and complicate this reauthorization discussion.

I. Public Interest Principles

The starting point for considering this legislation must be localism – the bedrock principle rooted in the Communications Act of 1934 that has guided communications and related copyright policy for decades. Localism has been an integral part of policies governing satellite carriage of broadcast signals from the outset. Thus, it was not

surprising that Congress chose to include “localism” in the very title of the 2010 reauthorization. Localism is an equally important public policy today.

What does localism mean for the public served by local television broadcasters? Localism is coverage of matters of importance for local communities, such as local news, severe weather and emergency alerts, school closings, high school sports, local elections and public affairs. Localism is support for local charities, civic organizations and community events. Local broadcasters help create a sense of community. Locally based broadcast stations are also the means through which local businesses educate and inform the public about their goods and services and, in turn, create jobs and support local economies. They address the needs of the public, based on a familiarity with and commitment to the cities and towns where they do business.

A second important principle to consider in the context of this legislation is government respect for contractual relationships freely entered into by private parties. Especially with regard to local television service, respect for contractual rights fosters the very localism, diversity, competition and high quality service that policymakers expect from broadcasters. Promoting relationships, freely negotiated among parties, that create and distribute the diverse mix of broadcast television programming addressing the needs and interests of local viewers clearly serves the public interest.

With these principles in mind, let me briefly provide some background for the issues raised by STELA reauthorization.

II. Statutory Copyright Licenses

A statutory or compulsory copyright license is a mechanism whereby users of the license are permitted to use copyrighted works in exchange for compliance with certain

statutory conditions and payment of royalties at government regulated rates. Three statutory licenses in the Copyright Act govern the retransmission of distant and local over-the-air broadcast station signals:

- Section 111 permits a cable operator to retransmit both local and distant radio and television signals to subscribers.
- Section 119 permits a satellite carrier to retransmit distant television signals to subscribers for private home viewing and to commercial establishments for a per subscriber fee.
- Section 122 permits satellite carriers to retransmit the signals of each local television station into the station's local market and also outside the station's market where the station is "significantly viewed," on a royalty-free basis.

All of these licenses are contingent upon the users complying with certain conditions, including rules, regulations, and authorizations established by the Federal Communications Commission (FCC) governing the carriage of television broadcast signals. The Section 119 license sunsets at the end of 2014 and is the subject of this hearing. The Section 111 and 122 licenses are permanent.

III. The Section 119 License

In 1988, Congress, in the Satellite Home Viewer Act (SHVA), created the Section 119 statutory license enabling satellite carriers to retransmit the signals of distant television network stations and superstations to satellite dish owners for their private home viewing. The Section 119 license enabled satellite carriers to provide network programming to households unable to receive adequate over-the-air signals from their local network affiliates.

The conditions of Section 119 are key. Respecting the principle of localism, only those subscribers that live in unserved households are eligible to receive distant network station signals. SHVA defined an “unserved household” as a household that cannot receive, through the use of a “conventional, outdoor rooftop receiving antenna,” an over-the-air signal of a network station of Grade B intensity. This provision was intended to protect the local viewing public’s ability to receive locally oriented news, information and other programming by preserving the exclusivity local television stations have in their network and syndicated programs. That exclusivity, in turn, enables stations to generate revenue needed to provide local service.

Although it was originally set to expire at the end of 1994, Congress reauthorized Section 119 in 1994 and again in 1999 for additional five year periods. The 1999 renewal, called the Satellite Home Viewer Improvement Act of 1999 (SHVIA) also created a new royalty-free Section 122 license that allowed, but did not require, satellite carriers to retransmit local television signals into their own markets.

The Section 122 license, intended to make the satellite industry more competitive with cable, gave satellite companies statutory copyright parity. Satellite carriers have increasingly relied upon the license to provide local television signals to their subscribers. Currently, DISH provides local-into-local service in all television markets (referred to as Designated Market Areas (DMAs)), and DIRECTV reportedly offers local-into-local service to all but 15 DMAs.

The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) reauthorized Section 119 once again, but also set rules to further limit importation of distant network station signals into local television markets. For example,

SHVERA required the satellite carriers to phase out retransmission of distant signals in markets where they offered local-into-local service. Generally, a satellite carrier was required to terminate distant station service to any subscriber that elected to receive local-into-local service and was precluded from providing distant network station signals to new subscribers in markets where local-into-local service was available.

SHVERA additionally permitted satellite carriers to deliver television station signals from adjacent markets that were determined by the FCC to be “significantly viewed” in the local market so long as the satellite carrier provided local-into-local service to those subscribers. SHVERA also expanded the copyright license to make express provision for digital signals.

IV. STELA: Part Copyright Law, Part Communications Act

Sections 119 and 122 discussed above are part of the Copyright Act. These copyright sections work in tandem with parallel and closely inter-related provisions in the Communications Act. For example, Section 325 of the Communications Act requires satellite carriers to obtain retransmission consent for the carriage of local stations, but exempts carriers from obtaining such consent to retransmit distant network signals to unserved households.

Section 338 of the Communications Act contains provisions governing the carriage of local stations. These provisions include the “carry one carry all” requirement under which a carrier offering carriage of one local station in a market must offer carriage to all stations in the market.

Section 339 of the Communications Act governs the carriage of distant signals. Its provisions include: provisions relating to replacing distant signals with local signals;

carriage of distant digital signals; digital signal strength prediction testing; and program exclusivity rules for satellite.

Section 340 has provisions relating to the carriage of significantly viewed signals.

None of the Communications Act sections are scheduled to sunset, but some provisions within them do sunset in 2014. Specifically, the following provisions related to retransmission consent are set to expire: (1) the exemption satellite carriers enjoy from having to obtain retransmission consent from stations whose signals they provide to unserved households; (2) the prohibition against stations entering into an exclusive carriage agreement with only one cable or satellite provider; and (3) the requirement to negotiate retransmission agreements in good faith.

V. Distant Signals

Given the narrow scope of the Section 119 license, this Subcommittee may consider whether the time has come for its sunset. The distant signal license today is principally an artifact. While the satellite companies are in the best position to precisely identify the number of their subscribers currently receiving distant signals, in 2009 when the STELA was under consideration, only around two percent continued to receive a distant signal package, and that number was steadily declining.

Experience has shown that the Section 122 local-into-local compulsory license is the right way to address delivery of over-the-air television stations to satellite subscribers. Local-into-local has provided a boon for the satellite industry and greatly enhanced its ability to compete with cable. This license also has promoted localism. Thus, Congress's focus at this time should be to further these trends and promote local-into-local service in all markets.

To a great extent, Section 119 has outlived its usefulness. Unlike the local-into-local compulsory license, the distant-signal compulsory license as applied to distant network signals threatens localism.¹ As a result, its only defensible justification is as a “hardship” exception—to make network programming available to the small number of households that otherwise have no access to it. The 1999 SHVIA Conference Report states that principle eloquently: “the specific goal of the 119 license . . . is to allow for a *life-line network television service to those homes beyond the reach of their local television stations.*” SHVIA Conference Report, 145 Cong. Rec. at H11792-793 (emphasis added).²

Today, over 98 percent of all U.S. television viewers have the option of viewing their *local* network affiliates *by satellite*—and that number is growing all the time. As a real-world matter, with few exceptions, *there are no unserved viewers* in areas in which local-into-local satellite transmissions are available, because it is no more difficult for subscribers to obtain local stations from their satellite carriers than to obtain distant stations from those same carriers. Accordingly, no public policy justifies treating satellite subscribers in local-into-local markets as “unserved” and therefore eligible to receive distant network stations. Quite the contrary, there is every reason to close this loophole.

¹ The portion of Section 119 enabling retransmission of “superstations” does not pose such a threat to localism.

² See, e.g., Satellite Home Viewer Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) (“The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today’s network-affiliate relationship”); *id.* at 26 (“The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely”); *id.* at 14 (1988) (“Moreover, the bill respects the network/affiliate relationship and promotes localism.”).

The Section 119 distant-signal compulsory license is *not* designed, and should not be allowed, to permit satellite carriers to undermine the locally-oriented contractual exclusivity of the network/affiliate relationship by delivering to viewers in *served* households—who can already watch their own local ABC, CBS, Fox, and NBC stations—network programming from another distant market. This importation of duplicative distant programming undermines the local network affiliated stations that offer the local news, weather and emergency information that viewers value.

VI. Retransmission Consent

As noted above, three narrow retransmission consent related provisions in the Communications Act are set to expire in 2014. Consideration of these narrow provisions should not be used to bring unnecessary arguments outside the scope of this legislation.

It is very important that the STELA reauthorization process not be used as a vehicle for re-opening retransmission consent generally or delving into extraneous issues that undermine localism. There is no need to change the present retransmission consent process.³ Congress should continue to rebuff the efforts of the satellite and cable industries to persuade the government to intervene in free-market retransmission

³ FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005) at ¶ 34 (*FCC Retransmission Report*) (recommending no revisions to statutory or regulatory provisions related to retransmission consent). See Navigant Economics, Jeffrey A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D., *Retransmission Consent and Economic Welfare* (April 2010) at Executive Summary (concluding that retransmission consent has achieved Congress' intended purpose in enacting it, and has "benefit[ed] consumers by enriching the quantity, diversity, and quality of available programming, including local broadcast programming").

negotiations, which the FCC has expressly found benefit cable/satellite operators, broadcasters and, “[m]ost importantly, consumers.” *FCC Retransmission Report* at ¶ 44.

CONCLUSION

With the perspective gained from 25 years of experience with STELA and its predecessors, Congress should be guided by the same principles it has consistently applied: that localism and free-market competition are the bedrocks of sound policy when addressing the copyright protections that support the public’s free, over-the-air local broadcast service.

The distant signal license, which dates back to the inception of satellite legislation in the 1980s, has outlived its usefulness. This Subcommittee may wish to consider whether that distant signal license should, to a large extent, expire. At the same time, Congress should promote the principle of localism by encouraging local-into-local satellite service for all Americans in each of the 210 television markets. Finally, Congress should resist any calls to revise the retransmission consent rights of local television stations in the context of this legislation.

Overview of NAB Testimony

- Two principles must guide this Subcommittee's discussion over whether to reauthorize the Satellite Television Extension and Localism Act of 2010.
 - The first must be localism – the bedrock principle rooted in the Communications Act of 1934 that has guided communications and related copyright policy for decades. For the public served by local television broadcasters, this includes coverage of matters of importance for communities large and small across the country, such as local news, severe weather and emergency alerts, school closings, high school sports, local elections and public affairs.
 - The second important principle is government respect for contractual relationships freely entered into by private parties for the retransmission of broadcast signals.
- Three statutory licenses in the Copyright Act govern the retransmission of local over-the-air broadcast signals. These Copyright Act licenses work in tandem with related provisions of the Communications Act. The Section 119 license, which is the subject of this reauthorization discussion, creates a statutory license that permits a satellite carrier to retransmit a distant television signal to a subscriber for a per-subscriber fee, subject to certain conditions. This license sunsets on December 31, 2014.
- The conditions of Section 119 are key. Respecting the principle of localism, only those subscribers that live in “unserved households,” i.e., households determined not to receive a local broadcast signal, are eligible for a distant network signal. This provision was intended to protect the local viewing public’s ability to receive locally oriented news, information and other programming by preserving the exclusivity local television stations have in their network and syndicated programs.
- This Subcommittee may choose to consider whether the time has come to allow the Section 119 license to sunset as Congress originally intended. While originally adopted to provide network programming to the large number of satellite viewers unable to receive it from their local station, today more than 98% of viewers have the option of viewing network programming from their local affiliate.
- None of the related Communications Act sections are scheduled to sunset; however three narrow provisions within those sections related to retransmission consent are set to expire. Consideration of these narrow provisions should not invite unnecessary arguments outside the scope of this legislation. Specifically, this reauthorization discussion should not be used as a vehicle for re-opening retransmission consent generally or delving into extraneous issues that undermine localism.