AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

OVERSIGHT OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

MARCH 10, 2004

Serial No. 108–75

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

92–540PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON ENERGY AND COMMERCE

JOE BARTON, Texas, Chairman

W.J. "BILLY" TAUZIN, Louisiana
RALPH M. HALL, Texas
MICHAEL BILIRAKIS, Florida
FRED UPTON, Michigan
CLIFF STEARNS, Florida
PAUL E. GILLMOR, Ohio
JAMES C. GREENWOOD, Pennsylvania
CHRISTOPHER COX, California
NATHAN DEAL, Georgia
RICHARD BURR, North Carolina
ED WHITFIELD, Kentucky
CHARLIE NORWOOD, Georgia
BARBARA CUBIN, Wyoming
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
JOHN B. SHADEGG, Arizona
CHARLES W. "CHIP" PICKERING, Mississippi, *Vice Chairman*
VITO FOSSELLA, New York
STEVE BUYER, Indiana
GEORGE RADANOVICH, California
CHARLES F. BASS, New Hampshire
JOSEPH R. PITTS, Pennsylvania
MARY BONO, California
GREG WALDEN, Oregon
LEE TERRY, Nebraska
MIKE FERGUSON, New Jersey
MIKE ROGERS, Michigan
DARRELL E. ISSA, California
C.L. "BUTCH" OTTER, Idaho
JOHN SULLIVAN, Oklahoma

JOHN D. DINGELL, Michigan *Ranking Member*
HENRY A. WAXMAN, California
EDWARD J. MARKEY, Massachusetts
RICK BOUCHER, Virginia
EDOLPHUS TOWNS, New York
FRANK PALLONE, Jr., New Jersey
SHERROD BROWN, Ohio
BART GORDON, Tennessee
PETER DEUTSCH, Florida
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
ALBERT R. WYNN, Maryland
GENE GREEN, Texas
KAREN McCARTHY, Missouri
TED STRICKLAND, Ohio
DIANA DeGETTE, Colorado
LOIS CAPPS, California
MICHAEL F. DOYLE, Pennsylvania
CHRISTOPHER JOHN, Louisiana
TOM ALLEN, Maine
JIM DAVIS, Florida
JANICE D. SCHAKOWSKY, Illinois
HILDA L. SOLIS, California
CHARLES A. GONZALEZ, Texas

BUD ALBRIGHT, *Staff Director*
JAMES D. BARNETTE, *General Counsel*
REID P.F. STUNTZ, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

FRED UPTON, Michigan, *Chairman*

MICHAEL BILIRAKIS, Florida
CLIFF STEARNS, Florida *Vice Chairman*
PAUL E. GILLMOR, Ohio
CHRISTOPHER COX, California
NATHAN DEAL, Georgia
ED WHITFIELD, Kentucky
BARBARA CUBIN, Wyoming
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
CHARLES W. "CHIP" PICKERING, Mississippi
VITO FOSSELLA, New York
STEVE BUYER, Indiana
CHARLES F. BASS, New Hampshire
MARY BONO, California
GREG WALDEN, Oregon
LEE TERRY, Nebraska
JOE BARTON, Texas, (Ex Officio)

EDWARD J. MARKEY, Massachusetts *Ranking Member*
ALBERT R. WYNN, Maryland
KAREN McCARTHY, Missouri
MICHAEL F. DOYLE, Pennsylvania
JIM DAVIS, Florida
CHARLES A. GONZALEZ, Texas
RICK BOUCHER, Virginia
EDOLPHUS TOWNS, New York
BART GORDON, Tennessee
PETER DEUTSCH, Florida
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
JOHN D. DINGELL, Michigan, (Ex Officio)

CONTENTS

	Page
Testimony of:	
Franks, Martin D., Executive Vice President, CBS Television	94
Hartenstein, Eddy W., Vice Chairman, Hughes Electronics Corporation	99
Kimmelman, Gene, Senior Director, Public Policy and Advocacy, Consumers Union	46
Lee, Robert G., President and General Manager, WDBJ-TV	18
Moskowitz, David K., Senior Vice President and General Counsel, Echostar Communications Corporation	12
Polka, Matthew M., President, American Cable Association	42
Material submitted for the record by:	
Association of Public Television Stations, prepared statement of	121

OVERSIGHT OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT

WEDNESDAY, MARCH 10, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Gillmor, Deal, Cubin, Shimkus, Wilson, Buyer, Bass, Markey, Wynn, McCarthy, Doyle, Boucher, Towns, Engel, and Dingell (ex officio).

Staff present: Howard Waltzman, majority counsel; Kelly Zerzan, majority counsel; Neil Fried, majority counsel; Jaylyn Jensen, majority professional staff; William Carty, legislative clerk; Gregg Rothschild, minority counsel; and Peter Filon, minority counsel.

Mr. UPTON. Good morning, a second time. Today, we're here to discuss the Satellite Home Viewer Improvement Act, also commonly known as SHVIA. My wife Amy says it's okay. The satellite industry has grown tremendously since Congress first became involved in 1988 and passed the SHVIA Act. All one has to do nowadays is to take a drive down the street, doesn't matter if you live in the country or the city, to view firsthand the growth of the satellite industry. Satellite dishes are now an everyday part of the landscape.

Satellite Home Viewer Act was a piece of equal opportunity legislation, so to speak, for those folks who lived in parts of the country where broadcast signals were either weak or nonexistent. Legislation was designed for consumers who lived in rural areas far from a local affiliate or who lived in areas that were blocked by surrounding terrain causing them trouble to receive broadcasts over the air.

To help remedy that situation, the Satellite Home Viewer Act of 1988 allowed satellite operators to deliver distant signals to consumers in such white areas. Anyone who has been to my District in Southwest Michigan knows that it is a prime example for the need of such legislation.

To facilitate that regime, SHVIA created a statutory copyright license for the retransmission of such distant signals and set a royalty rate rather than require the satellite operator to negotiate retransmission consent with the distant broadcaster. Consequently,

the statutory license is set to expire December 31 of this year. That's just one of the issues before us today.

In 1999, Congress adopted SHVIA to extend the Satellite Home Viewer Act which was due to expire as well as to expand it. But simply SHVIA was designed to promote competition among multichannel video program distributors such as satellite companies and cable TV operators, while at the same time increasing the programming choices available to consumers.

In SHVIA, Congress granted satellite operators for the first time a statutory copyright license to carry local stations into the stations' own markets and set the license fee at zero. The satellite operator chooses to carry a local station in that market. It generally must carry all of the local stations within that market, unlike with distant signals, satellite operators can provide local signals to consumers, regardless whether the consumers can receive those signals over the area and the statutory license has no sunset date.

As we've often seen in the world of telecommunications, it has been difficult for legislation to keep up with technological progress. Here we are today 5 years since the passage of SHVIA with several portions of it set to expire December 31. The purpose of this hearing is to consider whether to extend SHVIA and determine if Congress should make any other changes in the regime governing satellite delivery of broadcast TV.

Many issues that we have to take into account:

What should the satellite industry's role be in the transition to digital?

How should State subscribers and grandfathered subscribers be addressed?

What are the ramifications of distribution using two dishes?

Those are all important issues that will have extensive effects on satellite providers, local broadcasters and consumers. Today is the first step in reviewing the process of SHVIA. I hope that we will have a thought-provoking, constructive discussion on how to proceed with the important issues at hand. I recognize that March Madness is upon us. EchoStar and Viacom are currently involved in negotiations. I look forward to having a productive hearing on this issue and what steps should be taken next that are in the best interests of providers, broadcasters and the American public.

I yield to my friend, the ranking member of the subcommittee, the gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. I thank the Chairman very much and I thank you for this very, very important and it turns out timely hearing. I remember many years ago there was a football player at Notre Dame whose name was Joe Theisman and he was a very promising freshman. People felt that he could actually be the National Player of the Year and the Public Affairs Department approached him and said if you'd be willing to change your name from Theisman to Theisman we can rhyme it with Heisman and make a whole national campaign about Theisman for the Heisman. And so this law which started off as SHVIA has undergone a name pronunciation, it's spelled the same and now it wants to be called SHVIA. Same spelling.

So it's hard to know whether or not you're still talking about the old home town SHVIA or are you talking about this big new town

SHVIA, but nonetheless, it's the same law. And in 1999, in the aftermath of a series of service shutoffs and court decisions, we acted to fulfill one of the cornerstones of telecommunications policy, namely, universal service, by permitting consumers who could not receive an adequate signal from a local over-the-air broadcaster, to import by way of satellite to distant network TV signals from afar.

People who were not served by local broadcasters are said to reside in white areas. Yet, we were mindful in fulfilling the goal of getting network programming to people in white areas, not to trample on another important communications value, namely localism. Instead, in many respects, we enhance localism in that act. During subcommittee consideration of the bill back in 1999, I offered the so-called local to local amendment which for the first time granted to satellite operators the right to see carriage of local broadcast stations in local markets. And the reason I did that was certainly to enhance localism, but also to make it possible for my father and for Bill Tauzin's father at that time to be able to get their local television stations on a satellite system. As my father said, "it would be a pain to have to continue to get up and continue to flick some switch to go over to local broadcast." And so that's why we did it. There's nothing more local than your father asking you to change a law.

Yet, another key reason why I offered the local to local amendment was to enhance competition to cable. My father said it would make it possible for him to disconnect his relationship with his cable company. Testimony that we were receiving at the time was that the chief reason that consumes were giving retailers for not switching from cable to satellite service was the lack of a local broadcast station as part of a seamless satellite service package.

Now I am proud of the dramatic rise in satellite consumers due to the advent of local to local service in many of the largest across the country. It has helped satellite providers offer a more comparable service to cable operators and more effectively compete in the marketplace to the point where EchoStar and DirecTV combined now garner 20 percent of the market.

However, it is important to recognize that it will not be possible for satellite providers to bring every local channel to all local markets in the near future. It is also important to concede that while the local to local amendment succeeded in enhancing the ability of millions of consumers to have a choice alternative in the marketplace, satellite service has not proven to be an effective check or constraint on rising prices in the cable marketplace. Even as satellite providers utilize local to local service to make inroads against cable in the marketplace, cable rates continue to soar much faster than the rate of inflation.

It remains true even today that the only type of competitor with the ability to constrain lower prices is a second cable system in town, another system going down the same streets. The problem is that such cable competitors are few and far between. For this reason, I think we need to look at oversight of SHVIA with an eye toward competition in the marketplace and do our best to foster that competition because if we're not going to regulate cable rates to protect consumers, then it is incumbent upon us to do everything we can from a telecommunications policy standpoint to foster more

competition to cables so consumers have effective alternatives, not only for choice and quality, but also for price.

I am also examining how satellite operators can deliver digital programming to consumers, including digital local television signals and high definition TV programming from broadcasters and how satellite operators can assist us in spurring on the digital TV transition.

With respect to so-called unserved consumers, we are to address how FCC will determine if a consumer is unserved in the digital TV context as well. That's because an unserved analog consumer, an unserved digital consumer may not be the same consumer and we need a plan to address that as well. I also note, if I may, Mr. Chairman, very briefly, that yesterday 9 million satellite consumers in many major markets including Boston lost a number of channels including a major television network. That dispute highlights many of the issues that go to the heart of our examination of the satellite home viewer issues before us today, the relationship between retransmission consent and must carry, concentration in programming marketplace, universal service issues, localism issues and what this dispute may portend for how the subcommittee approaches digital must carry and digital carriage issues on satellite.

To the two parties who are in contention on this issue that involves CBS as well, I want to know that Boston College is likely to have an NCAA men's basketball team next week and so I urge EchoStar and Viacom to keep that in mind as they're negotiating over the next week. It will be a shame for Boston College fans to miss the opportunity to see that game.

Thank you, Mr. Chairman.

Mr. UPTON. Ms. Wilson.

Ms. WILSON. I'll waive my opening statement, Mr. Chairman.

Mr. BASS. Thank you, Mr. Chairman. It's a great hearing. SHVIA has been a very good law or act and it's been particularly important for those of us who represent districts that don't have ready cable access, aren't close enough either by terrain or some other reason to receive over-the-air broadcasting and on the whole, the act has worked pretty well. We have, however, encountered some issues that I hope will be resolved as a result of this reauthorization process.

One that is of particular interest to me has to do with the issue of out of State subscribers. Now my home State of New Hampshire has a unique condition in that it is covered by three designated market areas from other States: Boston, Ed Markey's area; Burlington, Vermont and Portland, Maine. In addition, in New Hampshire there is only one network affiliate, ABC, WMUR, and as a result of the rebroadcast rules, satellite subscribers who live in New Hampshire's most rural areas are precluded by law from the possibility of recovering the State's one network station over their satellite systems. Cable subscribers who live in these areas have access, but many households are not served by cable, including mine, actually, and they certainly are not in the range of an adequate over-the-air signal.

I understand that under retransmission and market protection rules, the people in the three northern counties in my State may fall within either Maine or Vermont's Nielsen's set DMA, but I as-

sure you that these people are actually more interested in what's going on in New Hampshire than they are what's going on in Vermont. I'm absolutely sure of that. And they need to know about emergency issues, weather, sports and so forth that are of more interest to them. I think this is a great time for this hearing, it's timely and I hope that this issue which may affect frankly as much as 50 percent of the markets in this country is resolved through this reauthorization process and I yield back to the Chairman.

Mr. UPTON. Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I appreciate your scheduling today's hearing on the expiring provisions of the Satellite Home Viewer Improvement Act and I want to join with you in welcoming this very distinguished panel of witnesses.

I'll say a particular word of welcome to Mr. Bob Lee, who is the General Manager of WDBJ Television in Roanoke, Virginia. He's testifying this morning on behalf of the National Association of Broadcasters. I would note that Mr. Lee's station is the leading provider of local news and commentary in the central and western portions of the State of Virginia and from that perspective he certainly has well informed views on the matters that this committee and the House Judiciary Committee will consider as we undertake the upcoming reauthorization legislation.

My primary interests are focused on four key issues. I'll mention these matters briefly and I would very much welcome the comments of our witnesses concerning these matters. First, echoing the eloquent statement of Mr. Bass, I perceive a need to resolve the irritating requirements of current law that relegate satellite viewers of one State to the reception of local television stations emanating from another State that have no focus on the local news occurring in the State in which the viewer resides. I have one county that is in that circumstance and numerous constituents have contacted me urging a change in the law to enable them to receive in-state stations that focus on their community, a very understandable concern.

I join with Mr. Bass and others who have this problem and urge that we work together and find an appropriate solution.

It appears to me that applying to satellite carriage the significantly viewed rules now applicable to cable carriage would solve the problem with respect to some in-state stations and adopting the cable rule allowing the Federal Communications Commission to modify the market on application of an in-state station would potentially resolve the issue with respect to other in-state stations and I hope that we can make this needed change, Mr. Chairman.

Second, I'm interested in exploring the possibility of achieving a little ground on the hotly debated question of creating a new digital white area license. On the one hand, I think the immediate availability of digital network signals by satellite would speed the digital transition, encouraging rural residents to purchase digital television sets. And it would provide a useful service to rural viewers who are beyond the reach of digital terrestrial broadcasts at the present time.

On the other hand, I think it's extremely important that we not act in such a manner as to discourage broadcasters from powering up their digital transmitters in the effort to serve these same rural

viewers and so a workable means needs to be found that would ensure satellite delivery of digital signals for a given viewer and then when that viewer has reliable access to a digital signal broadcast locally, there ought to be an enforceable means of assuring that a satellite transmission of that same signal would at that point terminate.

Third, on the analog side, I question why distant network signals should be imported under the Section 119 license when a given viewer has subscribed to a local into local service and is receiving local stations originating in his market. Perhaps a narrow restriction of the Section 119 license to accommodate that circumstance where a particular viewer is subscribing to a local into local service and getting the stations that originate within his market would also be appropriate.

Finally, progress is being made in providing local into local service to now more than 100 of our Nation's 210 local television markets. I would welcome suggestions from the witnesses with respect to steps that we might consider taking here in the Congress that would accelerate the provision of local into local service to the remaining 100 markets and any suggestion that could be made with regard to the schedule for deployment of local into local entities market should Congress do nothing would also be, I think, interesting and informative for us.

Mr. Chairman, I thank you for scheduling this very timely hearing and I look forward to hearing from our witnesses.

Mr. UPTON. Mr. Terry.

Mr. TERRY. Pass.

Mr. UPTON. Ms. Cubin.

Ms. CUBIN. Thank you, Mr. Chairman. I am pleased to have such a distinguished panel before us here today, representing a broad cross section of all the stakeholders who are concerned about reauthorization of this bill and I hope that we can tackle the issue that is here before us without reopening some of the old wounds that we have suffered in years past. I hope all of the parties assembled here today will not only consider their own well-being, but the well-being of our Nation's consumers. Representing the least populated State that is about 100,000 square miles, I have to think that my constituents might be affected disproportionately and I want you to know that I don't get any more communications about any other subject than what we're here talking about today. And so I am very, very serious about it. And I know that you are too.

There are a lot of benefits to living in Wyoming and I won't go into those because we don't want a lot of people moving in there, but unfortunately, because of the small markets, we do lag behind others in some programming and that is strange to me because rural America was actually an early adopter of satellite television. It's not clear what happened between then and now, but I can share with you, as I have, that my constituents want to get ABC, NBC, CBS and Fox. And not only do we not get our local affiliates over satellites, but even many of those unserved households can't even get a distant network signal because of some regulatory arbitrage that governs the situation.

I would like to work with all of the parties here to craft some common sense solutions that will empower my constituents and

your customers to have a choice in their programming and in the clarity which is another thing I hear about all the time, and what their rights are and what your obligations are.

It seems pretty simple to me. What's good for the consumer is good for the economy and that's good for you. So let's find a solution to this. Let's all work together and find a solution for your customers and my constituents.

Thank you.

Mr. UPTON. Mr. Dingell.

Mr. DINGELL. Thank you. And I thank you for calling this hearing today. Before we discuss the business at hand, I would like to note the existence of a serious business dispute between Viacom and EchoStar. This dispute is hurting consumers in my District and across the United States. I am making no judgments as to who is right or wrong. I hold no grief for either of the parties. I simply urge both of the companies to return to the negotiating table as quickly as possible to settle this dispute.

As the committee looks to authorize the Satellite Home Viewer Improvement Act it must pursue equally important and potentially conflicting policy goals. First, the committee must work to strengthen the ability of the satellite companies to compete with the cable industry which is deeply entrenched now in the video marketplace.

Second, it must empower consumers to receive the programming of their choice. And finally, in taking such actions, the committee must not unduly weaken Americans' local broadcasters nor disrupt their core revenue stream because after all, this legislation and the business of this committee is about seeing to it that the interests of the broad listening public is protected in matters of this kind.

Certainly, the Congress should use this opportunity to strengthen competition in the marketplace for video services. Although DBS satellite has a growing presence nationally, the cable industry still holds a commanding position in each local market. To their credit, the cable industry and its companies continue to roll popular new services such as Video on Demand and VOIP telephone service. Unlike satellite systems, the cable plant is capable of offering this bundle of digital services and the industry has smartly utilized its unique abilities to gain a commanding lead in the emerging digital marketplace.

As the only video distributors with a national platform, satellite may possess its own unique abilities to differentiate itself and/or attract consumers. For example, satellite may be able to spur the transition to digital by offering consumers a high definition network signal in instances where a consumer is unable to receive such a signal from a local broadcaster. In other instances, satellite may be able, for example, to provide a distant signal that would allow my friend Ed Markey to watch Red Sox games from his home in Maryland.

Clearly, both of these proposals may please consumers and also make satellite a more vibrant competitor to cable. That is important. At the same time, however, both of these proposals may have the effect of hurting local broadcasters. That should be a serious concern to this committee. The committee must closely examine such effects to ensure that local broadcasters are not unduly weak-

ened by the potential legislation. Ultimately, the committee must carefully balance these competing equities in a way which protects the local broadcaster and more important still protects the viewer who is dependent upon free, over-the-air communications.

I thank you, Mr. Chairman.

Mr. UPTON. Mr. Buyer.

Mr. BUYER. Pass.

Mr. UPTON. Mr. Deal.

Mr. DEAL. Thank you, Mr. Chairman. I would simply briefly echo the concerns that Mr. Bass and others have indicated with regard to areas that are served across State lines. My District is the northern district of Georgia and as you know, the city of Chattanooga and Tennessee is actually right up to the border of our State. I have the unusual situation that many of my constituents in that northwestern corner of the State would prefer the broadcasts from Atlanta local stations. Others, however, because they work in Chattanooga and simply live in the State of Georgia would prefer that they get their news from the Chattanooga stations. So mine is a diverse situation and I realize that doesn't fit any particular pattern, but it is an issue that I would at some point like to hear discussed if at all possible.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Doyle?

Mr. DOYLE. Mr. Chairman, I want to thank you for convening this hearing today so that we can begin to examine the reauthorization of this important legislation. I'm looking forward to hearing from the witnesses and hope they can help the committee reach a better understanding of the issues involved and how we should proceed.

While it seems that it's been a much shorter time, it's actually been nearly 5 years since the last reauthorization of SHVIA which was completed in 1999. And while I didn't serve on the committee at that time, I do recall it being quite a battle, even from my perspective. Frankly, that's understandable when you consider the multiple interests and the millions of dollars involved.

In cases like this, I think it's often best to give great weight to consumers, our constituents, and to strive to create the best deal for them. And it seems to me that consumers were the big winners in what came out of the last reauthorization, so we must not have done all that badly. I say that because those of you who know me well are aware I tend to favor increasing competition in all aspects of the media and telecommunication business and I think that the SHVIA in 1999 achieved that by helping the satellite industry grow which, in turn, increased competition.

It is this competition which in the long run benefits consumers and allowed the last reauthorization to be a success. I know that many of my constituents were happy that they were finally able to get their local broadcast stations from their DBS providers. At the same time, I think our local broadcasters were pleased in that more consumers once again had easy access to their signals. As I understand it, satellite providers are currently offering local to local services in 112 television markets nationwide which represents 87 percent of television households in the country, meaning that the transition went even faster than expected.

I'm hopeful that this committee, and eventually the Congress as a whole, will be able to work out a reauthorization that is fair, continues to encourage competition and allows all parties, including satellite, cable and broadcast interests to operate from a reasonably level playing field. I think it's important that we have begun our work in this committee since I have heard that the Judiciary Committee has already held a hearing and begun to work on their version and clearly, Mr. Chairman, our jurisdiction is something we need to exercise before they get too far out in front.

So I welcome the hearing today, and I look forward to working with other members of the committee as we move forward. Satellite service has grown a great deal and progressed a long way since the days of the huge C-band dishes when Congress wrote the first Satellite Viewers Act. These days, the DBS industry has eclipsed C-band by going far further than they ever did in terms of numbers of subscribers. It's an industry that has certainly matured and it seems that it might be worth considering making their compulsory license permanent in a manner similar to cable compulsory license.

I also want to mention today that I'm pleased to have a constituent of mine testifying before the committee. Matt Polka, who is head of the American Cable Association, hails from North Versailles, which I'm happy to report managed to remain in my District through the recent Pennsylvania redistricting. I've known Matt for many years and he's met regularly with our staff. He does a great job for ACA and I want to welcome him to the committee today and thank him for making the trip down.

And finally, Mr. Chairman, I'd like to echo what Mr. Markey and Mr. Dingell said. Coming from Pittsburgh where we have a basketball team that should be a No. 1 seed and is poised to win the national championship, many subscribers in my area are going to be very upset. March Madness is going to turn into March Anger if EchoStar and Viacom don't sit down at the bargaining table and get this worked out. So I'd encourage them both to do that.

Thank you.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. I'll pass, Mr. Chairman.

Mr. UPTON. Mr. Engel.

Mr. ENGEL. Thank you. Thank you, Mr. Chairman. When the Yankees and CableVision got into a fight over carriage of the Yes Network, quite frankly it felt pretty lonely up here in those days. But now there's a similar fight between Viacom and EchoStar. I now feel a certain sense of shared pain.

I welcome all my colleagues to this club. I hope you have your staff prepared to deal with angry constituents.

I'm pleased that we're now moving forward with the Satellite Home Viewer Improvement Act. Most of this process should be fairly painless for all who are involved, but I do want to highlight an important issue to my constituents as was mentioned by my colleagues.

It's the use of a second dish by EchoStar. Now I'm not against them using a second dish to provide more channels to their customers, that's fine. If EchoStar put all local channels on a second dish, I think we'd have no problem. But I'm concerned about two issues. First of all, most of their customers are paying for channels

they're not receiving and second, there seems to be a preference by EchoStar to put PBS and Spanish language stations on the second dish. For example, in New York, to receive WLIW, a PBS station on Long Island, a person needs to get a second dish. I have a copy of a New York local channels taken from the dish TV website and it does note that to receive these broadcast channels, a customer does need to have a second dish. But I find it rather strange that only independent, religious, Spanish and PBS stations are in this category. In fact, a person is charged $5.99 per month for all the local channels, yet 8 of the 15 local channels require the second dish. So I am led to believe that a large number of my constituents are paying $5.99 for only 7 channels. I don't believe this is fair at all.

I'm concerned about the future of free over-the-air broadcast television. In order for the 15 to 20 percent of Americans that don't have cable or satellite to be able to continue to have broadcast television, they must be mindful of what happens on cable and satellite. In the case of New York, the Telemundo station broadcast channel 47 needs to attract advertisers, just like any other broadcaster. But when computing the number of households the Telemundo signal actually reaches, advertisers may want to discount the number because of EchoStar's second dish requirement. If Telemundo can't garner the advertising dollars, an important source of news and entertainment for the Spanish speaking population of New York disappears, whether that person has cable, satellite or just plain rabbit ears. I'm very troubled by what on the fact looks like apparent discrimination between broadcasters.

Let me end by saying that I do want to be fair. I'm more than willing to work with the satellite industry on piracy issues, but I think the bottom line for all of us is what kind of products our constituents are getting. I look forward to the hearing today. These are very, very important issues and I thank you, Mr. Chairman, for calling this very important hearing and I yield back.

Mr. UPTON. Thank you. Mr. Wynn.

Mr. WYNN. I'll waive.

Mr. UPTON. That concludes the opening statements.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Congress passed the Satellite Home Viewer Improvement Act (SHVIA) in 1999, giving satellite operators for the first time a statutory license to carry local broadcast television signals into local markets, and extending their license to provide distant signals to unserved consumers. Now, half a decade later, it is time to review the impact of SHVIA, and to determine whether we should alter the statutory regime in light of marketplace and regulatory developments. Indeed, we anticipated such review, explicitly providing for various provisions of SHVIA to expire December 31, 2004, unless we renewed them.

Satellite has enjoyed considerable growth. The FCC's tenth annual video competition report reveals that while cable's share of the multichannel video programming market dropped from 76.5 percent to 74.9 percent, direct broadcast satellite's (DBS's) share rose from 20.3 percent to 21.6 percent. In fact, the DBS growth rate has exceeded the cable growth rate by double digits every year except for last, when its 11.6 percent growth rate exceeded cable's 2.5 percent by approximately 9 percentage points. Many attribute much of that to the introduction of local-into-local service.

The digital television transition is also progressing. We have seen significant Federal Communications Commission action on a DTV tuner mandate, DTV plug-and-

play compatibility, and the broadcast flag. Additional decisions are pending, including FCC proceedings on dual and multicast must-carry, as well as the periodic DTV review. We are still a ways from reaching our December 31, 2006, goal, however, for return of the analog spectrum, which is contingent upon meeting an 85-percent, market-by-market DTV penetration test.

Against this backdrop we must decide whether to extend satellite operators' compulsory license to provide distant analog broadcast television signals to unserved consumers, as well as the satellite operators' exemption from obtaining retransmission consent, both of which expire at the end of this year. Satellite operators are also asking to allow them to begin providing distant digital signals to consumers whose local broadcasters are not yet providing digital broadcasts of sufficient power to reach those consumers. The satellite operators argue that this will promote the DTV transition and expedite the return of the analog spectrum.

Local broadcasters respond that it is too early to allow satellite providers to provide distant digital signals. They point out that the FCC is still working out some of the details of the DTV transition, that broadcasters are spending billions of dollars to roll out digital television, and that they are making good progress. They argue that allowing satellite carriage of distant digital signals would erode the advertising revenue that broadcasters rely on to finance local news, sports, and community programming, especially in smaller markets. They also contend that if satellite providers truly want to promote the DTV transition, they should provide consumers in a market with the local digital signals of broadcasters in that market, not the signals of broadcasters in other markets.

These are not the only issues before us. Broadcasters also argue that two-dish mechanisms for the delivery of local broadcast signals are discriminatory. Many also wonder whether there is anything we can do to help consumers who—because of the vagaries of market boundaries, geographic topography, or cumbersome waiver procedures and signal strength tests—cannot receive programming they truly consider to be local, either over the air or via satellite.

The purpose of this hearing is to help us answer key questions. Is there a way to allow satellite operators to provide distant digital broadcasts that does not lessen their incentive to carry local digital broadcasts in smaller markets, and that does not threaten the advertising revenue that broadcasters rely on to fund local news, sports, and community programming? Should satellite be prohibited from carrying smaller stations on a second dish? Are there ways to help subscribers assigned to markets outside their states to receive truly "local" programming; to provide a full complement of network programming to subscribers in markets with "missing" affiliates; and to improve the waiver and signal-strength testing process? Should satellite operators be required to stop offering distant signals once they begin carrying local signals in a market? Should the distant-signal license be extended for another five years, or permanently? Should Congress extend the distant-signal retransmission consent exemption?

I go into this process with an open mind, and hope that we, along with industry and consumer representatives, can find answers to these formidable questions that benefit all concerned.

PREPARED STATEMENT OFHON. EDOLPHUS TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Let me begin by thanking you Mr. Chairman for holding this important hearing on reauthorizing the Satellite Home Viewer Improvement Act, known as SHVIA.

SHVIA by all accounts has been a great success. As the General Accounting Office noted, competition from direct broadcast satellite (DBS) operators, which did not exist a decade ago, has emerged and grown rapidly in recent years. With roughly 22 million customers, DBS providers serve nearly 25 percent of the total multi-video channel market. In fact, DBS accounts for two of the five largest providers.

A great deal of this success has been fueled by provisions in the 1999 reauthorization bill which permitted satellite companies to provide local broadcast stations into consumers' local markets. Satellite providers are now offering local-into-local service in 112 television markets nationwide, representing 87% of U.S. television households.

Consumers are happy to get their broadcast stations from their satellite providers. Local broadcasters are pleased that more households in their viewing area can receive their signal. And satellite providers are of course happy to offer existing and potentially new customers additional services. As such, policies that reinforce local-into-local service create a win-win situation for all parties, and thus should be our focus as well.

While the local-into-local license was made permanent by the last reauthorization, other provisions are set to expire. As we consider those expiring provisions, I think it is important to consider any possible changes through the lens that I just described. Competition is growing and as a result, consumers are beginning to reap the benefits through increased services and choice in the multi-video market. In this context, the committee should carefully consider proposals where we can strengthen competition by further leveling the playing field among competitors. However, we should be careful not to upset the current competitive balance that now exists.

I look forward to hearing from today's witnesses on how they believe SHVIA has worked and how a reauthorization bill can be best developed to serve consumers. Thank you Mr. Chairman, and I yield back the balance of my time.

Mr. UPTON. We are joined today by a very impressive panel. We will start with Mr. David Moskowitz, Senior V.P. and General Counsel for EchoStar; Mr. Robert Lee, President and General Manager of WDBJ in Roanoke on behalf of the National Association of Broadcasters; Mr. Matt Polka, President of the American Cable Association from Pittsburgh; Mr. Gene Kimmelman, Senior Director of Public Policy and Advocacy of the Consumers Union; Mr. Martin Franks, Executive VP of CBS; and Mr. Eddy Hartenstein, Vice Chairman of Hughes Electronics in California.

We appreciate very much that all of you sent your testimony in advance. I would note that as I looked through it last night, it is way more than the 5 minutes. We would be here until 2 or 3 o'clock, I think if we went through all of it. If you could limit your remarks to 5 minutes, knowing that your statements are made part of the record in its entirety that would be terrific.

Mr. Moskowitz, we'll start with you.

STATEMENTS OF DAVID K. MOSKOWITZ, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, ECHOSTAR COMMUNICATIONS CORPORATION; ROBERT G. LEE, PRESIDENT AND GENERAL MANAGER, WDBJ-TV; MATTHEW M. POLKA, PRESIDENT, AMERICAN CABLE ASSOCIATION; GENE KIMMELMAN, SENIOR DIRECTOR, PUBLIC POLICY AND ADVOCACY, CONSUMERS UNION; MARTIN D. FRANKS, EXECUTIVE VICE PRESIDENT, CBS TELEVISION; AND EDDY W. HARTENSTEIN, VICE CHAIRMAN, HUGHES ELECTRONICS CORPORATION

Mr. MOSKOWITZ. Thank you, Chairman Upton, Ranking Member Markey and distinguished members of the subcommittee for inviting EchoStar to testify at this hearing. I'm David Moskowitz, the Senior Vice President and General Counsel of EchoStar.

My remarks today will focus on the important issues surrounding reauthorization of SHVIA. I'm anxious also to clear the air of misconceptions concerning the competitive issues surrounding our unfortunate dispute with Viacom. Most importantly, let's get the channels back for consumers, including the Boston College and Pittsburgh games. But I'm aware there's an understanding that witnesses will focus on issues other than that dispute in their opening remarks. Consequently, I won't be addressing that issue, but welcome all of your questions on it.

When consumers are left behind by local network stations whose off-air signals don't reach a household, Section 119 of the Copyright Act allows satellite to offer other network channels. I urge the committee to allow these millions of under served consumers, most of whom live in rural America, to continue receiving distant network

channels and Super Stations through permanent extension of SHVIA.

Cable enjoys a permanent statutory license. A permanent satellite license is a matter of fundamental consistency and would allow satellite to plan and compete more effectively.

Consumers also rely on the congressionally provided grandfather clause of Section 119 to continue receiving the channels they have watched for over 5 years. It's been suggested that Congress take distant network channels away from grandfathered consumers. We urge continued protection of the rights of these consumers.

Turning to technology innovation, of the 1600 broadcasters in the U.S. today, currently less than 600 have fully complied with their digital obligations. Tens of billions of dollars in deficit reduction will result when the analog spectrum is reclaimed by the government for e911 and other valuable uses. The DBS industry is uniquely positioned to be a catalyst to Congress' goal that digital television become available to all Americans. We ask that you allow consumers who cannot receive digital signals from their local station to receive them by satellite. Satellite can make HD programming immediately available to every household in America.

A clear, unserved digital license would provide encouragement for these stations that the stations need to fulfill their promises to Congress and those are promises that are already 2 years late. Moreover, in Casper, Wyoming, for example, there is no Fox affiliate. Scores of other rural markets around the country don't have a local network affiliate for one or more of the big four networks. Those consumers will never watch HD networks that are missing in their communities unless Congress enacts a digital distant license.

In a hearing 2 weeks ago, broadcasters touted that they are on-air and digital in 203 markets serving 99.42 percent of all U.S. households. We all know statistics can be confusing. But with the professed coverage how can broadcasters object that they will be harmed by the availability of digital distant signals only where households can't receive the local HD signal off-air. And because digital does not experience the same fading issues as analog, the process to determine eligibility would be simple.

Addressing corrections to SHVIA, consumers are angry when told they can't purchase network channels by satellite if stations in neighboring markets are predicted by a computer to offer a channel off-air. We ask Congress to make clear that only stations in the consumer's home market can grant or deny a waiver.

Additionally, consumers should only be permitted to request a signal test at their home if they're predicted to receive a weak signal. Consumers living near the local station's tower are uniformly frustrated when they request a test and find that they clearly don't meet the standard. The answer for these millions of consumers to get the choice that they do deserve can only be found in revisions to the antiquated Grade B standard to take into account changes in technology and consumer expectations over the past 50 years and to take into account ghosting which causes poor reception even in areas that get a strong off-air signal. Please direct the FCC to revise the standard to meet today's consumer expectations.

Finally, some have criticized the two dish solution dish network uses to maximize the availability of local channels by satellite. While we continue to work toward providing all local channels on a single dish, we do not have enough satellite capacity today. With free hardware and free professional installation for everyone who wants it, we believe two dishes is the better alternative to terminating the availability of local channels in many markets around the U.S. Providing local channels and more effective competition to cable, in a maximum number of markets possible is a better solution.

Mr. Chairman, EchoStar appreciates the efforts of Congress to ensure that DBS is a more effective competitor. thank you for allowing me to testify and I look forward to your questions.

[The prepared statement of David K. Moskowitz follows:]

PREPARED STATEMENT OF DAVID K. MOSKOWITZ, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, ECHOSTAR COMMUNICATIONS CORPORATION

Thank you Chairman Upton, Representative Markey, and distinguished members of the Subcommittee, on behalf of EchoStar Communications Corporation, I want to thank you for inviting our company to discuss with you the Satellite Home Viewer Improvement Act. My name is David Moskowitz, and I am Senior Vice President and General Counsel of EchoStar Communications Corporation.

Let me begin by acknowledging the vision that members of this Subcommittee had early of the potential for satellites to provide consumers with an alternative source for news, information and entertainment programming. The committee's support of program access rules in 1992, which was intended to provide satellite TV companies with more comparable access to the same programming available on cable, was instrumental to the growth of the Satellite TV industry. Thus in 1996, when we launched our small dish satellite TV service called DISH Network, we were successfully able to provide competitive television services to consumers nationwide.

Since offering service 8 years ago, DISH Network has grown to become the most technologically advanced television provider in the multichannel video market today. We offer a variety of high-definition television networks with state-of-the-art set top box receivers with built in digital video recorders, as well as dozens of interactive services. Today we have more than 9 million subscribers and expect that number to continue growing. We offer local broadcast service in over 108 television markets nationwide, meaning that it is available to more than 85% of all households in the country. We credit our dedication to customer service and competitive pricing for our success as well as the availability of traditional cable channels and our ability to provide local service. We're proud to say that we have signed up more subscribers over the last three years than all other pay television providers combined. Indeed, twelve years ago it was thought that satellite TV could not compete with cable and it was wishful thinking to think that we could; today it's a reality.

Reauthorization of the Satellite Home Viewer Improvement Act provides Congress with an excellent opportunity to further improve the environment for the broad-based availability of advanced services to the consuming public, in addition to continuing many of the established and proven provisions of the Act, which are essential to promoting competition in the multichannel video programming distributors ("MVPD") market. In many critical respects, satellite carriers are saddled with regulatory provisions that are not imposed upon their competitors, and that makes satellite a less attractive option for many potential subscribers. One of EchoStar's principal objectives is to ensure that the satellite industry is able to compete more effectively with other MVPD providers.

I urge the Committee to reauthorize the Satellite Home Viewer Improvement Act (SHVIA) and extend the satellite distant network signal and superstation license permanently. I would also like the Committee to consider allowing consumers that otherwise cannot get digital service from their local broadcaster to receive network digital television signals from a satellite TV provider. Lastly, I believe a handful of modifications to the SHVA are needed to ensure satellite television providers can continue to meet consumer expectations and compete effectively with other multichannel video programming distributors.

Before I discuss the reauthorization of the Satellite Home Viewer Act, I would like to begin my remarks by expressing my disappointment with network broadcasters

who continue to make a mockery of the retransmission consent provisions of the 1999 Act. In exchange for permission to carry network broadcast programming, the broadcasters are increasingly leveraging their monopoly over this programming to force pay TV providers to carry the cable networks they own. Often, consumers are not interested in this other programming, and do not want to pay the higher monthly fees that come from tying these programs to broadcast retransmission. We urge Congress to take a closer look at the way retransmission consent is being implemented, and act accordingly in the interest of consumers and market competition.

Reauthorization of Section 119

Section 119 of the Copyright Act, which expires on December 31, 2004, allows satellite carriers to make distant network programming available to viewers unable to receive the over-the-air signals of their local network affiliates. Although this provision does not have an affect on many households in urban areas, the service is of critical importance to consumers in rural areas. There are millions of such "unserved households" throughout the nation and one of the reasons appears to be that the cost to the broadcasters of providing service to these additional households exceeds the advertising revenue that the broadcasters would hope to generate. Subsequently, the satellite TV industry sought to meet the consumer demand in the market-place and invested billions of dollars to build and launch satellites that could serve these rural households that broadcasters have long neglected. The broadcasters have still not made any significant investment to expand the reach of their over-the-air-signal. Therefore, satellite TV remains the only option for millions of rural subscribers to receive broadcast network programming. Without the distant network signal license, satellite TV providers could not continue making this service available, and these subscribers would lose their ability to watch broadcast network programming. We urge you to extend the license.

The broadcasters have argued that the availability of distant network service should be limited to only those markets where local-into-local service by satellite is now unavailable. We oppose this modification to the existing license based on basic market principle— consumers deserve choices. In the same way that a consumer in Kalamazoo, Michigan can purchase either the Kalamazoo Gazette or the Los Angeles Times, we believe that consumers who do not have adequate access to an over-the-air signal and must pay for their television service should have the option of watching their local broadcaster or a distant broadcaster on their satellite platform. Besides, it would be odd to penalize satellite carriers for the large investment that they have made to introduce local into local service. Taking away the satellite carrier's distant network license in areas for which they have made such an investment would be precisely such an unjust penalty. Furthermore, the deletion of distant network signals in markets where satellite provides local service would also be costly to the consumer. Many satellite TV subscribers have legacy dishes and set top box receivers that would require upgrading in order to switch from distant network service to local service.

The distant network signal provides a marketplace motivation for the broadcasters to continue improving their over-the-air reception and thereby making their signal available to as wide an audience as possible. Without the satellite carriers' ability to offer distant network signals, broadcasters would not have any incentive to make such improvements. The broadcasters realize that it is less costly to them for their signal to be delivered by satellite or cable TV rather than over the air. Simply put, broadcasters would save money on their power bills if they felt they did not need to bother about the quality of their over-the-air signal. The anxiety of vying for their audience with network signals would no longer exist. The result could be that the number of consumers who can receive over-the-air signals could diminish if the broadcasters lower their signal's strength and rely on satellite TV to deliver their signal. In conclusion, the proposal to limit the availability of distant network service to the markets unserved by local channels via satellite would create a disincentive for the broadcasters to continue offering free service of acceptable quality in rural areas, resulting in less choice for consumers and higher costs.

Section 119 also permits satellite carriers to retransmit non-network broadcast stations to satellite subscribers. These so-called "superstations," such as WGN, have been a staple of cable system lineups since cable first began making its service available to consumers in the 1970s, and helped drive the growth of the satellite television industry. They continue to be among the most popular program offerings. The statutory license ensures that satellite carriers have the same opportunity as cable to make this popular programming available to satellite subscribers.

Section 119 also allows certain eligible households to continue receiving distant network signals if they subscribed to these signals prior to October 31, 1999. EchoStar strongly supports extension of the distant network "grandfather" clause.

This group of satisfied, long-term customers numbering in several hundreds of thousands has come to rely upon this service for at least the last five years, and in some cases much longer. It makes no sense from a public policy standpoint to disenfranchise consumers by telling them that they can no longer receive this programming.

Finally, the current playing field is not level—as long as the cable industry continues to enjoy a permanent, statutorily granted license, the satellite industry remains at a competitive disadvantage. Therefore, in the interest of parity and Congress' role and oversight responsibilities in promoting competition in the MVPD marketplace, we urge the Committee to allow satellite carriers to avail themselves of a license under the same terms as cable.

Transition to Digital Television

The reauthorization of SHVIA also offers Congress an opportunity to broaden the existing "unserved household" definition so consumers who cannot otherwise receive a digital television (DTV) signal from their local broadcaster, will have the ability to receive it from their satellite TV provider.

Congress passed the Telecommunications Act of 1996 which gave the broadcasters for free $70 billion dollars worth of new spectrum for the broadcast of DTV signals beginning in 1998. In the ensuing 1997 Balanced Budget Act, Congress set deadlines for consumers to receive these digital signals, and for the analog spectrum to be returned once the transition was complete. By law, the commercial broadcasters were to be offering digital service in all 210 designated television markets (DMA) by May 1, 2002. Non-commercial broadcasters were to be transmitting by May of the following year. The broadcasters were then required to return the analog spectrum by December 31, 2006.

Despite the comprehensive transition framework created by Congress and the Federal Communication Commission's (FCC) many efforts to accelerate the transition, many broadcasters are still failing to provide digital service. Currently 1,057 TV stations out of 1,688, or nearly two-thirds, are not meeting Congress' expectations for available digital service in local markets according to the FCC. Of these stations, 303 are not broadcasting at all and 754 are broadcasting at a low power, serving an area smaller than their analog signal.[1] On a market-by-market basis, consumers in only 17 of 210 markets are able to receive a full complement of over-the-air network DTV service (NBC, ABC, CBS, FOX, and PBS) similar to analog service.

The broadcasters would like for you to believe that their DTV signal is more widely available. In fact, during recent testimony in front of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, the National Association of Broadcasters claimed that broadcasters have built—and are on-air with—digital television ("DTV") facilities in 203 markets that serve 99.42% of all U.S. TV households. If we are to believe these statistics, then it is hard to understand why broadcasters are so adamant about preventing the satellite TV industry from serving the remaining 0.58% of households who cannot now receive their service.

The Balanced Budget Act of 1997 provided only a limited number of rationales for extending the December 31, 2006 deadline for broadcasters to return the analog spectrum. The most significant is the so-called "15% rule." Under that rule, the FCC may grant an extension if at least 15% of households do not have a DTV set or a digital-to-analog converter enabling them to receive the DTV signals of local broadcast stations. Today, less than three years from the 2006 deadline, there is no evidence that the percentage of American homes with compliant sets exceeds even the single digits. The 15% loophole will ensure that broadcasters will squat on both the analog and digital spectrum for years, if not decades to come. New innovations that rely on the redeployment of the analog spectrum will be put on hold and taxpayers across the country will be denied the hundreds of billions of dollars that the auction of the analog spectrum would bring to the U.S. taxpayer.

There is an immediate and practical solution to help ensure that the digital transition does not continue to proceed at today's snail's pace. By allowing satellite TV providers to offer DTV programming to households that are not served with a local over the air signal, Congress would facilitate a demand for digital television sets among satellite TV subscribers. Although these households would be receiving distant network DTV signals rather than local broadcast signals, these consumers would count toward the local broadcaster's 85% take rate because the satellite TV industry's HDTV set top box receivers include over-the-air digital tuners. The network availability of HD service via satellite will also motivate the broadcasters to make their digital signal available to more households sooner, which will accelerate the time in which 85% of the country can receive DTV. Congress will need to direct

[1] FCC, "Summary of DTV Applications Filed and DTV Build Out Status," February 25, 2004.

the FCC to develop a propagation model to predict over-the-air digital reception on a household-by-household basis. The Copyright Office, in its testimony before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property on February 24 agreed by saying "Congress will have to reexamine how to determine what is an un-served household" in a digital world. This model should be based on an average consumer's reasonable expectation regarding the size and cost of an over-the-air digital antenna.

Lastly, the satellite TV industry's offering of distant digital signals would have no real impact on the roll out of analog local-into-local service to additional markets by DBS operators. Our industry continues to rollout of local markets. This proposal would simply afford consumers nationwide currently unavailable digital services.

Regulatory Parity

As I mentioned earlier in my testimony, one of our principal objectives in the SHVIA reauthorization process this year is to ensure that we can continue to compete on a level playing field with our competitors, which means establishing some degree of regulatory parity with cable when it comes to regulations governing carriage of broadcast channels. From an objective point of view, the SHVIA imposes upon the satellite industry a number of affirmative obligations and prohibitions that make it difficult for DBS providers to offer programming comparable to that offered by cable. For example, while the cable industry enjoys much broader leeway in providing broadcast signals—both network and non-network, and distant or local—to its subscribers, satellite providers face strict restrictions on the broadcast signals they can provide to subscribers. It is provisions such as these that must be reexamined to ensure that true competition is fostered and not inhibited by statutory barriers.

Carriage of Broadcast Signals

The first issue that I would like to address in connection with carriage of broadcast signals involves DBS providers' ability to offer a full complement of broadcast station programming. As DBS providers continue to offer more and more local-into-local services in the 210 DMAs, there are at least 50 markets that do not have a full complement of local affiliates of the major networks. Currently, the law does not allow DBS providers to make available to subscribers a broadcast station from a neighboring DMA in those circumstances to ensure that subscribers get the whole complement of broadcast stations. This is because the local-into-local license contained in Section 122 of the Copyright Act only allows DBS operators to retransmit local stations back into the DMA where they are broadcast. Cable, on the other hand, can fill in holes in local station affiliate offerings with neighboring stations and routinely adds network affiliates and other broadcast stations so that its subscribers have the full line-up of major network and other popular stations. The inability of DBS providers to offer subscribers a full complement of broadcast signals leaves them at a serious disadvantage vis-à-vis cable in competing for customers and is inconsistent with the FCC's policy objective of ensuring that consumers have access to all of the major broadcast networks.

Similarly, DBS operators are not permitted to tailor their local channel offerings to respond to local community needs or interests. Cable, on the other hand, is permitted to include broadcast channels that do not originate in their local markets if those signals are "significantly viewed" by the community. There is no such provision for DBS. As a result, DBS providers must adhere to DMA market designations that do not conform to a local community's viewing habits. For example, Comcast in New Haven, Connecticut, which is in the Hartford-New Haven DMA, offers CBS, NBC and FOX affiliates from both Hartford and New York City and ABC affiliates from both New Haven and New York City. By contrast, DBS providers cannot offer the New York City stations at all in New Haven, and are thus at a serious competitive disadvantage.

Analog Predictive Model

With respect to distant analog signals, the consumers' interests are paramount for EchoStar and it is this Committee that speaks for those consumers. It is important for all of us to work to ensure that each and every consumer without an adequate over-the-air network signal has access to a distant network signal by satellite. We believe Congress should give the FCC the authority to adopt a higher value for Grade B intensity, corresponding to modern consumer acceptance standards, specifically for SHVA purposes.

Waiver and Signal Strength Testing Process

We believe that SHVIA's current waiver and signal strength testing process for the receipt of distant network signals by those who are predicted to receive a Grade

B over-the-air signal, but who nonetheless do not receive a clear picture, needs to be revisited. That process is not functioning as Congress envisioned. After five years of experience, we can testify that the process often leads to a bad customer experience. In some cases the law is unclear; in other cases consumers have unrealistic expectations; still, in other cases DBS providers and their customers are subject to the whims of broadcasters. We recommend narrowing the waiver process to only permit consumers receiving a weak Grade B signal to request a signal strength test. We also recommend a prohibition on broadcasters from revoking waivers once given as long as the subscriber receives continuous service from their DBS provider. Further, the rules should be clarified to eliminate consumer confusion when a subscriber is predicted to receive the same network signal from two local affiliates of different DMAs by requiring a waiver only from the network station in the subscriber's DMA. This will eliminate the need for customers to get multiple waivers from affiliates of the same network.

Conclusion

Mr. Chairman, in closing I would like to reiterate that EchoStar appreciates the efforts of this subcommittee as well as the Congress to ensure that DBS is a true competitor in the MVPD marketplace. With a few exceptions, our experience under the SHVIA has been a positive one. While the DBS industry is growing, it is nowhere close to the size of cable operators. It is therefore essential for Congress to reauthorize the extension of the satellite statutory license, allow more regulatory parity with cable, which still enjoys preferential treatment under the copyright laws, and ensure that the DBS industry is able to compete on a level playing field. We at EchoStar look forward to working with members of this committee and this entire Congress to modernize SHIVA so that we are able to deliver the latest in technology to as many consumers, as quickly as possible.

Mr. UPTON. Mr. Lee.

STATEMENT OF ROBERT G. LEE

Mr. LEE. Thank you, Mr. Chairman and distinguished members of the subcommittee. Having been in the television business for almost 40 years, I can tell you our business is built on serving local viewers with free, over-the-air local programming. As SHVIA affects how we reach many of our local viewers, I'm pleased to comment today on its reauthorization. SHVIA, as we've heard, contains two compulsory licenses. The first, the local-into-local license has been a success for broadcasters, for the satellite industry and most importantly, for television viewers, your constituents.

Tens of millions of your constituents, in fact, now have an additional option they didn't have 5 years ago, receiving local television via satellite. And our hope is that soon local stations in all 210 markets will be delivered to local viewers by satellite. By year end, DirecTV has said it expects to serve 130 markets covering 92 percent of U.S. households. EchoStar also services 107, but as we've heard in many markets, subscribers must use a second dish to receive all their local stations.

Then the second compulsory license, the distant signal license has been plagued by satellite industry abuse. For 10 years, DBS ignored the standard that determines eligibility of a subscriber for distant signals. Instead, it simply signed up anyone willing to say they were unhappy with their free over-the-air picture. Well, when the courts correctly ordered this illegal service terminated, instead of complying the DBS industry raced to the FCC to argue that the existing standard we've heard about this morning was antiquated. And after reviewing those satellite industry claims, the FCC held that there's no basis for changing the standard.

Well, when DBS finally began shutting off these ill-gotten subscribers, there was a fire storm of consumer outrage and much of

it was unfairly directed at new members. And we didn't point them in your direction, the satellite industry did. Since that time, while DirecTV has complied with the law, EchoStar has continued to provide illegal service to hundreds of thousands of subscribers. A Federal District Court recently ruled that EchoStar broke a sworn promise to the Court by failing to disconnect those subscribers.

My written testimony includes a list of violations of existing statutes and regulations, as well as abuses of process in which EchoStar has willfully engaged. And today, DBS asks you to confer upon them a new benefit. Having failed to live up to the obligations in the existing law, they now ask you to expand the distant signal license by creating this so-called digital white area. This proposal is an absolute recipe for mischief and the committee must reject it. A digital white area would undercut what would otherwise be a market-driven race between my friends at EchoStar and DirecTV and our friends in the cable business to deliver digital signals on a local-to-local basis.

DBS suggests a digital white area will stimulate the DTV transition and since we're so close to St. Patrick's Day, I'll say it, that's malarkey. Television broadcasters have spent billions of dollars bringing DTV to consumers. To date, 1,155 digital stations are on the air and 92 percent of the households in this country with access to an over-the-air analog station also have access to local digital broadcast signals. In those instances where stations have not powered up, there are often tangible obstacles beyond their control. Many stations have not yet received FCC authorizations to go to full power. Some stations have experienced tower location delays. Many have not received their final channel assignment or their translator assignments and as stations increase power levels, we found that interference issues arrive and have to be resolved.

In testimony 2 weeks ago, Mr. Moskowitz conceded that local stations are not to blame for these delays in the transition saying, and I quote him, "I'm not saying broadcasters are at fault." Well, despite that statement, satellite would have you penalize those same viewers by siphoning off their local viewers.

Two weeks ago, Mr. Moskowitz also said that DBS should never have to discontinue delivery of distant digital network signals if it gets the right to carry them. So no matter what the local station did, it could buildup to 150 percent of power, it would never be able to get back its lost viewers. This would do nothing to accelerate the DTV transition and if DBS ever did discontinue distant digital signal delivery, then we'd have that consumer war we had 5 years ago.

In short, DBS proposes a huge loophole, big enough to drive a dish network installation truck through. At the end of the day Congress may elect to simply reauthorize SHVIA in its current form for another 5 years, but should you take a broad approach, we would urge two improvements to SHVIA. First, amend the definition of unserved households. If a household is in a market where the satellite companies offer local signals via satellite, there's no reason at all to bring in a distant signal. And second, outlaw EchoStar's two dish practice. I strongly urge Congress to reauthorize a SHVIA that preserves and advances localism in television and does not harm it.

Thank you, Mr. Chair.

[The prepared statement of Robert G. Lee follows:]

PREPARED STATEMENT OF ROBERT G. LEE, PRESIDENT AND GENERAL MANAGER, WDBJ-TV ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

INTRODUCTION AND SUMMARY

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

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

When Congress revisited this area in 1999, the world had changed: local-to-local satellite transmission had gone from pipe dream to technological reality. And in response, in the 1999 Satellite Home Viewer Improvement Act ("SHVIA"), Congress took an historic step, creating a new "local-to-local" compulsory license to encourage satellite carriers to deliver *local* television stations by satellite to their viewers. At the same time, Congress knew that allowing satellite carriers to use the new license to "cherry-pick" only certain stations would be very harmful to free, over-the-air broadcasting and to competition within local television markets. Congress therefore made the new "local-to-local" license available only to satellite carriers that deliver all qualified local stations.

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

Thanks to the wise decision by the FCC and the Department of Justice to block the proposed horizontal merger of DirecTV and EchoStar, the two DBS firms continue to compete vigorously against one another in expanding their delivery of local stations. While EchoStar predicted when it sought to acquire DirecTV that it would never be able to serve more than 70 markets without the merger, EchoStar now serves 107 Designated Local Markets ("DMA's") that collectively cover more than 83% of all U.S. TV households. Nor is there any sign that EchoStar's expansion of local-to-local service has stopped.

The story with DirecTV is even more dramatic. With the launch of a new satellite this spring, DirecTV expects to serve 100 DMAs covering 85% of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs covering 92% of all TV households. And as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in *all 210 DMAs." In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control,* ¶332, MB Docket No. 03-124 (released Jan. 14, 2004) (emphasis added).

The local-to-local compulsory license is the right way—and the distant-signal compulsory license is the wrong way—to address delivery of over-the-air television stations to satellite subscribers. If Congress wishes to do anything other than briefly extend the expiration date of Section 119, it should—as a matter of simple logic—limit the distant-signal compulsory license to markets in which the satellite carrier does not offer local-to-local service. It makes no sense, for example, to treat a satellite subscriber as "unserved" by its local CBS station when the subscriber's DBS firm offers that station as part of its satellite-delivered package, with what the satellite industry describes as "a 100 percent, crystal-clear digital audio and video signal."

Although the rapid rollout of DBS local-to-local service has vindicated the actions that Congress took in SHVIA in 1999, there is one major blemish on the success story: an outrageous form of discrimination that EchoStar has inflicted on some local stations. EchoStar's method of discrimination is simple, but devastating. While placing what it considers the most "popular" stations in a market on its main sat-

ellites, EchoStar relegates certain stations (particularly Hispanic and foreign-language stations) to a form of satellite Siberia—placing them on remote "wing satellites" far over the Atlantic or Pacific, which can be seen only if one obtains a second satellite dish. Very few subscribers actually do acquire a second dish, thereby rendering many local stations invisible to their own local viewers. As even DirecTV has acknowledged, this practice violates the "carry one, carry all" principle of the SHVIA. The FCC has thus far tolerated this grossly improper practice, imposing only minor restrictions on this form of discrimination. If the Commission fails to take prompt and decisive steps to halt this misconduct, Congress will need to step in to do so.

While the local-to-local compulsory license has (with the exception of EchoStar's two-dish abuse) generally worked well, the history of the distant-signal compulsory license (codified in Section 119 of the Copyright Act) has been just the opposite. For the first ten years after this law was enacted, satellite carriers systematically ignored the clear, objective definition of "unserved household" and instead delivered distant signals to anyone willing to say that they did not like their over-the-air picture quality. Only through costly litigation—culminating in a 1998 ruling against PrimeTime 24 and a 1999 ruling against DirecTV—were broadcasters able to bring a halt to most of this lawlessness. Even after those rulings, however, EchoStar has continued to serve hundreds of thousands of illegal subscribers, forcing broadcasters to spend years chasing it through the courts to obtain relief. Last June, a United States District Court found (after a ten-day trial) that EchoStar willfully or repeatedly violated the distant-signal provisions of the Copyright Act and, in the process, broke a sworn promise to the court to turn off large numbers of illegal subscribers. This finding was only the latest in what has been a long string of instances in which courts and the FCC have found EchoStar to have violated statutes and rules—and abused legal processes—for its own private benefit.

Startlingly, EchoStar, having engaged in this widespread pattern of misconduct, and having been content to violate the distant-signal license until ordered by a court to stop breaking the law, now urges Congress to radically *expand* the distant-signal compulsory license. In particular, the satellite industry now asks to be allowed to import ABC, CBS, Fox, and NBC programming from New York and Los Angeles stations to millions of households that can receive the same programming from their local stations over the air—and in most cases, can also get their local stations in superb quality, by satellite, from EchoStar and DirecTV as part of their local-to-local package. Although these homes are unquestionably "served" by their local stations, the DBS industry proposes to be allowed to deliver the same programming from New York or Los Angeles if the household is—in their view—"digitally unserved."

The DBS industry proposal—by an industry with a long track record of lawlessness—is a recipe for mischief. As this Committee has repeatedly recognized, the distant-signal compulsory license is a departure from marketplace principles that is appropriate only as a "lifeline" for households that otherwise cannot view network programming. It would make no sense to override normal copyright principles for households that can readily view their own local stations. It would give the DBS firms a government-provided crutch that would set back for years what would otherwise be a market-driven race between DirecTV and EchoStar—further spurred by competition with cable—to deliver digital signals on a local-to-local basis. And when local stations later sought to reclaim their own local viewers from the distant digital transmissions, there would be a consumer firestorm much like what occurred when two major satellite carriers were required to turn off (illegally-delivered) distant analog signals to millions of households in 1999.

Finally, given the rapid pace of technological and economic change, Congress should again specify that Section 119 will sunset after a limited, five-year period, so that Congress can decide then if there is any reason to continue this government intervention in the free market for copyrighted television programming.

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

As this Committee has consistently stressed—going back to 1988, when it played a leading role in crafting the rules governing satellite importation of distant broadcast stations—the principles of localism and of local station exclusivity have been pivotal to the success of American television.

A. The Principle of Localism is Critical To America's Extraordinary Television Broadcast System

Unlike many other countries that offer only national television channels, the United States has succeeded in creating a rich and varied mix of *local* television

outlets through which more than 200 communities—including towns as small as Glendive, Montana, which has fewer than 4,000 television households—can have their own local voices. But over-the-air local TV stations—particularly those in smaller markets such as Glendive—can survive only if they can generate advertising revenue based on local viewership. If satellite carriers can override the copyright interests of local stations by offering the same programs on stations imported from other markets, the viability of local TV stations—and their ability to serve their communities with the highest-quality programming—is put at risk.

The "unserved household" limitation is simply the latest way in which the Congress and the FCC have implemented the fundamental policy of localism, which has been embedded in federal law since the Radio Act of 1927.[1] In particular, the "unserved household" limitation in the SHVA implements a longstanding communications policy of ensuring that local network affiliates—which provide free television and local news to virtually all Americans—do not face importation of duplicative network programming.

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

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

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

Thanks to the vigilance of Congress and the Commission over the past 50 years in protecting the rights of local stations, over-the-air television stations today serve more than 200 local markets across the United States, including markets as small as Presque Isle, Maine (with only 28,000 television households), North Platte, Nebraska (with fewer than 15,000 television households), and Glendive, Montana (with fewer than 5,000 television households).

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

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

The local voices of America's local television broadcast stations make an enormous contribution to their communities. In Appendix A, we list just a few examples of television broadcasters' commitment to localism in the form of help to local citizens—

---

[1] First Report and Order, 14 FCC Rcd 2654, ¶ 11 (1999); *see* SHVA Notice of Proposed Rule Making, ¶ 3 ("The network station compulsory licenses created by the Satellite Home Viewer Act are limited because Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public interest by making available to local citizens information of interest to the local community (*e.g.,* local news, information on local weather, and information on community events). Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast network[s], might be jeopardized, thus undermining one important source of local information.")

and local charities—in need. It is through local broadcasters that local citizens and charities raise awareness and educate members of the community.

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

A variety of technologies have been developed or planned—including cable, satellite, open video systems, and the Internet—that, as a technological matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the network/affiliate system, Congress or the Commission (or both) have acted to ensure that the retransmission system does not import duplicative network programming from distant markets. A recent example is the threat of unauthorized Internet retransmissions of television stations, which was quickly halted by the courts (applying the Copyright Act) and condemned by Congress as outside the scope of any existing compulsory license.[2]

In the case of cable television, for example, the FCC has since the mid-1960's imposed "network nonduplication" rules on cable systems. 47 C.F.R. §§ 76.92-76.97 (1996). As the Commission explained when it strengthened the network nonduplication rules in 1988:

> [I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary.[3]

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

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

While Congress has determined that compulsory licenses are needed in certain circumstances, the courts have emphasized that such licenses must be construed narrowly, "lest the exception destroy, rather than prove, the rule." *Fame Publ'g Co. v. Alabama Custom Tape, Inc.,* 507 F.2d 667, 670 (5th Cir. 1975); *see also* Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590 (1991) (same). The principle of narrow application and construction of compulsory licenses is particularly important as applied to the distant-signal compulsory license, because that license not only interferes with free market copyright transactions but also threatens localism.

3. In Enacting the SHVA and the SHVIA, Congress Reaffirmed the Central Role of Localism and of Local Program Exclusivity

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

---

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

[3] *Report and Order, In Re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries,* 3 FCC Rcd 5299, 5319 (1988), *aff'd,* 890 F.2d 1173 (D.C. Cir. 1989); *see also Southwestern Cable Co.,* 392 U.S. at 165; *Wheeling Antenna Co. v. WTRF-TV, Inc.,* 391 F.2d 179, 183 (4th Cir. 1968).

of the Conference Committee (including every member of this Committee that served on the Conference) and all but one Senate member, says this:

> *"[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism*. . . . [T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of *local* television broadcast stations to subscribers who reside in the *local* markets of those stations."
>
> SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).

The SHVIA Conferees also stressed the need to interfere only minimally with marketplace arrangements—premised on protection of copyrights—in the distribution of television programming:

> "[T]he Conference Committee is aware that *in creating compulsory licenses*. . . [it] *needs to act as narrowly as possible to minimize the effects of the government's intrusion* on the broader market in which the affected property rights and industries operate. . . . *[A]llowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right—bought and paid for in market-negotiated arrangements—to show the works in question undermines those market arrangements.*"

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

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

II. PROPERLY IMPLEMENTED, THE LOCAL-TO-LOCAL COMPULSORY LICENSE IS A WIN-WIN-WIN FOR CONSUMERS, BROADCASTERS, AND SATELLITE COMPANIES

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

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

As the FCC recognized in its January 2004 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, the Direct Broadcast Satellite ("DBS") industry is thriving—and offering potent competition to cable. The DBS industry, which signed up its first customer only decade ago, grew to more than 20 million subscribers as of June 2003. Annual Assessment, MB Dkt. No. 03-172, ¶ 8 (released Jan. 28, 2004). The growth rate for DBS "exceeded the growth of cable by double digits" in every year between 1994 and 2002, and in 2003 exceeded the cable growth rate by 9.2%. *Id.* Just in the 12 months between June 2002 and June 2003, the DBS industry added 2.2 million net new subscribers, surging from 18.2 million to 20.4 million households. *Id.*

DirecTV is currently the second-largest multichannel video programming distributor ("MVPD"), behind only Comcast, while EchoStar is the fourth-largest MVPD. *Id.,* ¶ 67. The DBS firms take many subscribers away from cable: "according to [DirecTV] internal data, approximately 70% of its customers were cable subscribers at the time that they first subscribed to DirecTV." *Id.,* ¶ 65.

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

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

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

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

Contrary to these pessimistic predictions, the two DBS firms *already* offer local-to-local programming to the overwhelming majority of U.S. television households. Although the DBS firms claimed they would *never* be able to serve more than 70 markets unless they merged, EchoStar *already* serves 107 Designated Local Markets ("DMA's"), which collectively cover more than 83% of all U.S. TV households.[4] Nor is there any sign that EchoStar's expansion of local-to-local service has stopped.

DirecTV's plans are still more ambitious. As of November 2003, DirecTV offered local-to-local to 64 markets covering more than 72% of all U.S. television households. With the launch of a new satellite in the next few months, DirecTV expects to serve 100 DMAs covering 85% of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs that collectively include 92% of all U.S. TV households.[5] And as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in **all 210 DMAs**."[6] In other words, DirecTV alone will soon offer local-to-local service to virtually all American television households—even though DirecTV told Congress and the FCC just two years ago that this result was unthinkable unless it merged with EchoStar.

C. EchoStar And DirecTV Boast About The Excellent Technical Quality Of Their Current Local-To-Local Service—Which Retransmits "Digitized" Analog Signals

As discussed below, the satellite industry now demands that Congress expand the *distant-signal* compulsory license—which EchoStar has systematically abused over the past eight years—by creating a new category of households that are "digitally unserved." But any suggestion that EchoStar and DirecTV have difficulty attracting customers under the *current* law is belied by the following facts.

---

[4] EchoStar Press Release, www.dishnetwork.com, *DISH Network Satellite Television Brings Local TV Channels to Tri-Cities, Tenn.-Va.* (Feb. 19, 2004) (EchoStar now serving 107 DMAs); EchoStar Press Release, www.newstream.com/us/story_pub.shtml?story_id=11738 &user_ip=208.197.234.126, *DISH Network Celebrates Availability of Local Channels in 100 Markets* (Dec. 2003) (EchoStar serving more than 83% of U.S. television households through service to 100 markets).

[5] Press Release, *DIRECTV Names 18 New Local Channel Markets to Launch in 2004* (Jan. 8, 2004), www.directv.com/DTVAPP/aboutus/headline.dsp?id=01_08_2004B.

[6] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control,* ¶332, MB Docket No. 03-124 (released Jan. 14, 2004) (emphasis added).

First, both DirecTV and EchoStar can now—or will within a few months—each be able to deliver local television stations by satellite to nearly 90% of U.S. television households. *Second,* both DBS firms obtain excellent-quality analog signals from the stations, often working with the stations themselves to obtain a direct feed from the station's studios. *Third,* after receiving a high-quality analog signal, the DBS firms then "digitize" the signals and retransmit them in digital format to their customers. *See* www.dishnetwork.com/content/programming/index.shtml ("DISH Network now has *your digital local channels*.") <visited Feb. 16, 2004> (emphasis added). While these signals do not equal the quality of a signal originating from a digital broadcast, or particularly of a high-definition broadcast, the result, according to the DBS industry's trade association, is that DBS "*always delivers a 100 percent, crystal-clear digital audio and video signal*," even if the original source is an analog broadcast. SBCA Web site, www.sbca.com/mediaguide/faq.htm <visited Feb. 19, 2004> (emphasis added).

In other words, consumers who receive an excellent-quality "digitized" analog signal from a local station from a DBS firm—as opposed to an imported digital station—are scarcely in a "hardship" position. Of course, it has never been the case that "obtaining the best-quality signal" would justify abandoning the principles of localism and free market competition. The principle behind the long-standing "Grade B intensity" standard for determining which households are "unserved" is that Grade B intensity is an objective proxy for an *acceptable* signal, not for the *optimal* signal. If localism could be so easily sacrificed, Congress would not have adopted—and twice reaffirmed—the Grade B intensity standard.[7]

Finally, these local channel offerings have made DBS so attractive to consumers that it is gaining millions of new subscribers every year while the number of cable subscribers is actually *shrinking.* 2004 Annual Assessment, ¶ 8 ("In the last several years . . . cable subscribership has declined such that as of June 2003, there were approximately the same number of cable subscribers as there were at year-end 1999.") While delivery of *local* digital signals by DirecTV and EchoStar would be a highly desirable development, there is no basis for suggesting that DirecTV and EchoStar need to import *distant* digital signals to serve their customers.

D. DirecTV and EchoStar Have Many Options For Continuing To Expand Their Ability To Deliver Local Signals, Including Local Digital Signals

As discussed above, DirecTV and EchoStar have brilliant engineers who constantly find ways to deliver more programming in the same spectrum. Nevertheless, in policy debates in Washington, the two firms regularly assure Congress (and the FCC) that no further technological improvement can be achieved. To mention one other example: even as DirecTV was doubling its "compression ratio" between 1998 and 2001—enabling it to carry twice as many channels in the same amount of spectrum—it repeatedly told the FCC that it had hit a brick wall as far as any further progress in compression technology:

- July 31, 1998: "DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites. Therefore, the addition of more channels will necessitate expanding to additional satellites . . ."
- Aug. 6, 1999: "DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites."
- Sept. 8, 2000: "DIRECTV has *substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."
- Aug. 3, 2001: "DIRECTV has offered digitally compressed signals from its inception, and *has substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."[8]

---

[7] In the SHVIA, Congress directed the FCC to prepare a report about whether Grade B intensity—or instead some other standard—should be used for determining whether households are "unserved" by their local stations. In its report, the FCC recommended retaining the Grade B intensity standard. *See In Re 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).

[8] *See, e.g.,* Comments of DIRECTV, Inc., [1998] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98-102, at 5 (filed July 31, 1998); Comments of DIRECTV, Inc., [1999] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, at 9 (filed

This year, the Committee can expect to hear from the DBS firms yet again that they have no hope of significantly expanding their capacity. For example, we can expect to hear from DirecTV and EchoStar that they will never be able to carry the digital signals of local television stations, and that they should instead be given a crutch by Congress to help them compete with cable. In fact, the satellite firms have available to them a wide range of potential new techniques for massively expanding their capacity, including:

- spectrum-sharing between DirecTV and EchoStar;
- use of Ka-band as well as Ku-band spectrum;
- higher-order modulation and coding;
- closer spacing of Ku-band satellites;
- satellite dishes pointed at multiple orbital slots;
- use of a second dish to obtain all local stations;[9] and
- improved signal compression techniques.

If Congress allows the power of American technical ingenuity to continue to move forward, we can expect to see DirecTV and EchoStar continue to make tremendous progress in doing more with the same resources. Just as today's desktop computers are unimaginably more powerful than those available just a few years ago, we can expect similar quantum improvements from America's satellite engineers—if Congress leaves the free market to do its magic, and leaves necessity to continue to be the mother of invention.

E. If The FCC Does Not Act, Congress Will Need To Step In To Correct A Major Abuse Of Local-To-Local By Echostar

In crafting the SHVIA, Congress was well aware that if a DBS firm were permitting to select only some—but not all—local stations for retransmission, the stations left off the service would have little chance of reaching viewers who obtain their TV service from the satellite company. In the same spirit as the requirement in the 1992 Cable Act that cable systems carry all qualified local stations in each market in which they operate, the SHVIA specifies that if a satellite carrier chooses to use the local-to-local license to carry signals in a particular market, it must carry *all* qualified local stations. 47 U.S.C. § 338(a)(1). That requirement has been upheld against constitutional attack by EchoStar, DirecTV, and their trade association. *Satellite Broadcasting and Communications Ass'n v. FCC,* 275 F.3d 337 (4th Cir. 2001). The purpose of the "carry one, carry all" principle is, of course, to ensure the continued availability of a wide variety of different over-the-air channels, and to prevent the local-to-local compulsory license from interfering with existing vigorous competition among all of the broadcast stations in each local market.

Since late 2001, EchoStar has egregiously violated the requirement that it carry all stations in a nondiscriminatory manner: in many markets, EchoStar forces consumers to acquire a second satellite dish to receive some—but not all—local stations. Here in the Washington, D.C. area, for example, EchoStar enables its customers to see the ABC, CBS, Fox, and NBC stations (and a handful of other local stations) with a single satellite dish, pointed at EchoStar's main satellites. See EchoStar web site, www.dishnetwork.com/content/programming/ locals/index.shtml. On the other hand, viewers wishing to see Channel 14 (Univision), Channel 32 (WHUT—PBS), Channel 53 (WNVT—International), Channel 56 (WNVC—International), or WJAL (Channel 68—Independent) are forced to obtain a second satellite dish aimed at a satellite far over the Atlantic. *Id.* (In this and other markets, EchoStar targets public television, Hispanic, and other foreign-language stations for this discrimination.) Because few viewers will go to the time and trouble of obtaining a second dish—*e.g.,* a long wait at home for an installer the net result is that only a tiny percentage of EchoStar subscribers can actually view all of their local stations. To date, the FCC has taken only ineffective steps to address this egregious form of discrimination,[10] even though EchoStar's fellow DBS company, DirecTV, has

---

Aug. 6, 1999); Comments of DIRECTV, Inc. [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00-132, at 16 (filed Sept. 8, 2000); Comments of DIRECTV, Inc. [2001] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 16 (filed Aug. 3, 2001) (emphasis added in all cases).

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

[10] Declaratory Ruling & Order, *In re National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers,* Dkt. No. CSR-5865-Z (Media Bureau Apr. 4, 2002). The Commission has to date required only that EchoStar fully disclose its discriminatory treatment and that it pay

Continued

told the FCC that EchoStar's two-dish ploy "is inconsistent with the language of the Satellite Home Viewer Improvement Act. *See* Letter from Merrill S. Spiegel to Marlene H. Dortch, Dkt. No. 00-196 (Jan. 16, 2003).

The Commission has recently indicated that it plans to take action soon to address EchoStar's two-dish practices,.[11] but it remains uncertain when it will act on pending petitions for review. Should the Commission fail to take prompt action, Congress should step in to ensure that EchoStar can no longer thumb its nose at Congress' unmistakable directive that DBS firms that local-to-local means carriage of *all* local stations, without relegating many of the stations to an inaccessible electronic ghetto.

III. THE DISTANT-SIGNAL COMPULSORY LICENSE HAS BEEN EGREGIOUSLY ABUSED BY SATELLITE CARRIERS, AND THE NEED FOR IT IS RAPIDLY DIMINISHING WITH THE GROWTH OF LOCAL-TO-LOCAL

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

In 1999, Congress again extended the distant-signal license as part of the SHVIA, and statutorily mandated use of the FCC-endorsed computer model (called the "Individual Location Longley-Rice" model, or "ILLR") for predicting which households are able to receive signals of Grade B intensity from local network stations. 17 U.S.C. § 119(a)(2)(B)(ii). In the SHVIA, Congress also classified certain very limited new categories of viewers as "unserved," including (1) certain subscribers who had been illegally served by satellite carriers but whom Congress elected to "grandfather" temporarily, *see* 17 U.S.C. § 119(e), and (2) qualified owners of recreational vehicles and commercial trucks, *see id.,* § 119(a)(11).

By its terms, grandfathering will expire at the end of 2004. 17 U.S.C. § 119(e). Unlike in 1999, when Congress saw grandfathering as a way to reduce consumer complaints by allowing certain ineligible subscribers to continue receiving distant signals, the end of grandfathering will have little impact in the marketplace. This special exception should therefore be allowed to expire routinely.[12]

A. Delivery Of Distant Signals Is A Poor Substitute For Delivery Of Local Television Stations

From a policy perspective, there is no benefit—and many drawbacks—to satellite delivery of distant, as opposed to local, network stations. Unlike local stations, distant stations do not provide viewers with their *own* local news, weather, emergency, and public service programming. Nor does viewership of distant stations provide any

---

for the installation of the second dish. Not surprisingly, these requirements have not solved the fundamental problem that acquiring a second dish requires a major expenditure of time and effort on the part of the subscriber, with the result that—just as EchoStar hopes—few viewers ever actually acquire a second dish. And, as discussed in Appendix B, EchoStar has grossly violated even the minimal restrictions currently imposed by the Commission.

[11] *See* Separate Statement of Chairman Michael K. Powell, at 2 n.3, *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control,* MB Docket No. 03-124 (released Jan. 14, 2004).

[12] *First,* by the end of the year, DirecTV will offer local-to-local in no fewer than 130 DMAs, which collectively cover more than 90% of U.S. television households. EchoStar already offers local-to-local in 107 DMAs, and that figure is constantly growing. All of the subscribers in these markets (including subscribers claimed to be grandfathered) will be able to receive their local channels by satellite, making the availability of distant signals irrelevant. *Second,* a federal judge found in 2003 that EchoStar forfeited the right to rely on grandfathering by defaulting at trial in proving that any of its subscribers actually satisfy the requirements for grandfathering. *Third,* because of ordinary subscriber churn and relocation, many grandfathered subscribers are no longer DBS customers or are no longer grandfathered. *Fourth,* for the small number of subscribers in non-local-to-local markets that they might claim are currently grandfathered, DirecTV and EchoStar are free to seek (and may already have obtained) waivers from the affected stations. *Finally,* any grandfathered subscriber is (by definition) predicted to receive at least Grade B intensity signals over the air from their local network stations, and thus to be able to view their own stations even if they obtain no network stations by satellite.

financial benefit to *local* stations to help fund their free, over-the-air service. To the contrary, distant signals, when delivered to any household that can receive local over-the-air stations, simply siphon off audiences and diminish the revenues that would otherwise go to support free, over-the-air programming.

Members of Congress and other candidates for election are uniquely injured by distant signals: a viewer in Phoenix, for example, will never see political advertisements running on local Phoenix stations if he or she is watching New York or Los Angeles stations from EchoStar or DirecTV instead. Such viewers become virtually unreachable by political advertising, unless (for example) a candidate in Phoenix wishes to purchase advertising on stations in the costliest media markets in the United States—New York and Los Angeles.

B. Satellite Carriers Have Grievously Abused the Distant-Signal Compulsory License

Satellite carriers—most egregiously EchoStar—have systematically abused the distant-signal compulsory license since its creation. To the extent that satellite carriers have complied with the limitations placed by Congress on the distant-signal license, it is solely as a result of litigation that broadcasters were forced to undertake to halt satellite carrier lawbreaking.

From 1988 until 1998, satellite carriers simply ignored the objective "Grade B intensity" standard and instead signed up anyone willing to say that they were dissatisfied with their over-the-air picture. Starting in the mid-1990s, when the large "C-band" dishes began to be replaced by the hot-selling 18-inch dishes offered by DirecTV and EchoStar, the carriers' distant-signal lawbreaking quickly became a crisis.

When DirecTV went into business in 1994, and when EchoStar did so in 1996, they immediately began abusing the narrow distant-signal compulsory license to illegally deliver distant ABC, CBS, Fox, and NBC stations to ineligible subscribers. In essence, the DBS companies pretended that a narrow license that could legally be used only with remote rural viewers was in fact a blanket license to deliver distant network stations to viewers in cities and suburbs.[13]

As a result of EchoStar's and DirecTV's lawbreaking, viewers in markets such as Meridian, Mississippi, Lafayette, Louisiana, Traverse City, Michigan, Santa Barbara, California, Springfield, Massachusetts, Peoria, Illinois, and Lima, Ohio were watching their favorite network shows *not* from their local stations but from stations in distant cities such as New York. Since local viewers are the lifeblood of local stations, EchoStar's and DirecTV's copyright infringements were a direct assault on free, over-the-air local television.

When broadcasters complained about this flagrant lawbreaking, the satellite industry effectively said: if you want me to obey the law, *you're going to have to sue me.* Broadcasters were finally forced to do just that, starting in 1996, when they sued the distributor (PrimeTime 24) that both DirecTV and EchoStar used as their supplier of distant signals. But even a lawsuit for copyright infringement was not enough to get the DBS firms to obey the law: both EchoStar and DirecTV decided that they would continue delivering distant stations illegally *until the moment a court ordered them to stop.*

The courts recognized—and condemned—the satellite industry's lawbreaking. *See, e.g., CBS Broadcasting Inc. v. PrimeTime 24,* 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (entering preliminary injunction against DirecTV's and EchoStar's distributor, PrimeTime 24); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture,* 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc. v. DIRECTV, Inc.,* No. 99-0565-CIV-NESBITT (S.D. Fla. Sept. 17, 1999) (permanent injunction after entry of contested preliminary injunction); *ABC, Inc. v. PrimeTime 24,* 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction).

By the time the courts began putting a halt to this lawlessness, however, satellite carriers were delivering distant ABC, CBS, Fox, and NBC stations to millions and millions of subscribers, the vast majority of whom were ineligible urban and suburban households. *See CBS Broadcasting,* 9 F. Supp. 2d 1333.

By getting so many subscribers accustomed to an illegal service, DirecTV and EchoStar put both the courts and Congress in a terrible box: putting a complete stop to the DBS firms' lawbreaking meant irritating millions of consumers. Any member of Congress who was around in 1999 will remember the storm of protest that

[13] For the first few years, DirecTV and EchoStar hid behind a small, foreign-owned company called PrimeTime 24. *See CBS Broadcasting Inc. v. PrimeTime* 24, 48 F. Supp. 2d 1342, 1348 (S.D. Fla. 1998) ("PrimeTime 24 sells its service through distributors, such as DIRECTV and EchoStar . . . [M]ost of PrimeTime's growth is through customer sales to owners of small dishes who purchase programming from packagers such as DirecTV or EchoStar."). Starting in 1998 (for EchoStar) and 1999 (for DirecTV), the two companies fired PrimeTime 24 in an effort to dodge court orders to obey the Copyright Act.

DirecTV and EchoStar stirred up from the subscribers they had illegally signed up for distant network stations.

Even when the courts ordered EchoStar and DirecTV to stop their massive violations of the Copyright Act, they took *further* evasive action to enable them to continue their lawbreaking. In particular, when their vendor (PrimeTime 24) was ordered to stop breaking the law, both DBS firms fired their supplier in an effort to continue their lawbreaking.

When DirecTV tried this in February 1999, a United States District Judge found that DirecTV's claims were "a little disingenuous" and promptly squelched its scheme. *CBS Broadcasting Inc. et al v. DirecTV,* No. 99-565-CIV-Nesbitt (S.D. Fla. Feb. 25, 1999); *see id.* (S.D. Fla. Sept. 17, 1999) (stipulated permanent injunction).

EchoStar has played the game of "catch me if you can" with greater success, thanks to a series of stalling tactics in court. But in 2003, a United States District Court judge for the Southern District of Florida held a 10-day trial in a copyright infringement case brought by broadcast television networks, and trade associations representing local network affiliates, originally filed against EchoStar in 1998.[14] In June 2003, the District Court issued a meticulously-documented 32-page final judgment, holding EchoStar liable for nationwide, willful or repeated copyright infringement by violating the distant-signal compulsory license. *CBS Broad., Inc. v. EchoStar Communications Corp.,* 276 F. Supp. 2d 1237 (S.D. Fla. 2003).

EchoStar had the burden of proving that each of its subscribers receiving distant ABC, CBS, Fox, and NBC stations is an "unserved household." 17 U.S.C. § 119(a)(5)(D). Yet the District Court found that EchoStar had failed to prove that *any* of its 1.2 million distant-signal subscribers is in fact "unserved." That is, EchoStar did not prove that any of its subscribers is unable to receive a Grade B signal, is grandfathered, or is eligible on any other basis. *Id.,* ¶ 82.

Worst of all, the District Court found that EchoStar had deliberately sought to mislead the court about what it did with the vast pool of illegal subscribers it accumulated between 1996 and 1999. Most important, EchoStar made—and then deliberately broke—a sworn pledge (in a declaration by its CEO, Charles Ergen) to turn off the many ineligible subscribers it signed up using the unlawful do-you-like-your-picture method. *Id.,* ¶ 46. Far from turning off its accumulated illegal subscribers, EchoStar knowingly continued delivering distant signals to many hundreds of thousands of customers that it knew—from a study EchoStar itself ordered to be ineligible. *Id,* ¶¶ 38-47.

EchoStar's decision to continue its highly profitable lawbreaking was the height of cynicism: as the District Court found, "EchoStar executives, including Ergen and [General Counsel] David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, **elected instead to break Mr. Ergen's promise to the Court.**" *Id.,* ¶ 46 (emphasis added).

Nor is EchoStar's abuse of the distant-signal compulsory license the only example of its flouting of laws and regulations and misuse of legal processes. Appendix B is a list of other violations by EchoStar of substantive legal rules, and of instances in which EchoStar has abused judicial and administrative procedures.[15] This is, of course, the same EchoStar that now asks Congress to *expand* the distant-signal compulsory license—and to do so in ways that would allow EchoStar to offer highly profitable programming packages to millions of subscribers, at virtually no cost to EchoStar, but at great cost to broadcasters, program suppliers, and the principle of localism.

C. With The Widespread Availability Of Local-To-Local Service, The Number Of Truly "Unserved" Households Is Minimal

Unlike the local-to-local compulsory license, the distant-signal compulsory license threatens localism and interferes with the free market copyright system. As a result, the only defensible justification for that compulsory license is as a "hardship" exception—to make network programming available to the small number of house-

---

[14] The trial was conducted by the Hon. William Dimitrouleas, who took over the case after the original District Court judge, the Hon. Lenore Nesbitt, passed away in 2002. While Judge Nesbitt also ruled that EchoStar was committing massive copyright infringements, EchoStar was able—by making false claims about its supposed compliance efforts—to obtain a delay in enforcement of that ruling.

EchoStar's appeal of this decision is set to be argued before the 11th Circuit in late February 2004.

[15] In concluding that the proposed takeover of DirecTV by EchoStar was not in the public interest, the FCC stated: "EchoStar's record with respect to compliance with SHVIA's must-carry provisions and our rules suggests a resistance to taking steps to serve the public interest that do not also serve the company's view of its own private economic interest." *In Re* Application of EchoStar Communications Corporation, CS Docket No. 01-348 (released Oct. 18, 2002).

holds 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 *lifeline network television service to those homes beyond the reach of their local television stations.*" 145 Cong. Rec. at H11792-793. (emphasis added).[16]

Today, more than 80% 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. Even satellite dish owners in local-to-local markets who cannot receive Grade B intensity signals over-the-air (*e.g.,* a household in a remote part of the Washington, D.C. DMA) are obviously not "unserved" by their local stations: they can receive them, with excellent technical quality, directly from their satellite carrier, just by picking up the phone. And they can do so without any need to obtain a waiver, and without regard to what the ILLR model predicts about the over-the-air signal strength at their home.

The widespread availability of local-to-local network affiliate retransmissions means that, as a real-world matter, *there are no unserved viewers* in areas in which local-to-local satellite transmissions of the relevant network are available, because it is no more difficult for viewers to obtain their local stations from their satellite carriers than to obtain distant stations. There is therefore no policy justification for treating satellite subscribers in local-to-local markets as "unserved" and therefore eligible to receive distant network stations.

The distant-signal compulsory license is *not* designed to permit satellite carriers to sabotage 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 source. Yet satellite carriers have aggressively advertised the benefits to served households of obtaining distant signal programming, including most notably:

- time-shifting (*e.g.,* Mountain and Pacific Time Zone viewers watching network programming two or three hours earlier from East Coast stations)
- out-of-town sports: because TV networks often show different sports events (such as NFL games) in different cities, a subscription to an out-of-town network station enables viewers to see sports events that are not televised locally.

These abuses of the compulsory license damage both the network/affiliate system and the free market copyright regime. Consider, for example, a network affiliate in Sacramento, California, a DMA in which there are today no DBS subscribers who are genuinely "unserved" because both DIRECTV and EchoStar offer the local Sacramento ABC, CBS, Fox, and NBC stations by satellite. Nevertheless, for any Sacramento-area viewer who is technically "unserved" under the Grade B intensity standard, DIRECTV and EchoStar can scoop the Sacramento stations with the stations' own programming by offering distant signals from East Coast stations. The Sacramento station—and every other station in the Mountain and Pacific Time Zones that has local-to-local service—therefore loses badly needed local viewers, even though the viewers have zero need to obtain a distant signal to watch network programming.

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

D. For the Small Number of Markets in Which The DBS Firms Do Not Now Offer Local-to-Local, The FCC Has Repeatedly and Recently Reaffirmed that the Grade B Standard and the ILLR Model Are the Best Tools for Determining Which Households are "Unserved"

For the ever-shrinking number of markets in which the DBS firms do not offer local-to-local (which will encompass no more than 8% of U.S. television households

[16] See, e.g., Copyright Office Report at 104 ("The legislative history of the 1988 Satellite Home Viewer Act is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection.") (emphasis added); 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") (emphasis added); 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") (emphasis added); H.R. Rep. No. 100-887, pt. 1, at 20 (1988) ("Moreover, the bill respects the network/affiliate relationship and promotes localism.") (emphasis added).

by the end of 2004 for DirecTV), the Grade B intensity standard, implemented via the FCC-endorsed Individual Location Longley-Rice ("ILLR") model, continues to be the logical method for predicting which households are unable to receive local stations over the air.

For years, the satellite industry simply ignored the objective signal intensity standard that Congress established in 1988, and instead used a meaningless subjective standard ("are you satisfied with your picture quality?") that was effectively no standard at all. As discussed above, in 1998, the courts found that the satellite industry had broken the law by signing up millions of subscribers using this illegal method. Rather than coming into compliance, the satellite industry raced to the FCC to demand that the Commission alter (in the satellite industry's favor) what the DBS firms characterized as an "antiquated," "1950's-era" Grade B standard.

The FCC carefully considered the engineering data and other evidence presented by the satellite industry, but concluded that, in fact, there was no basis for changing the Grade B standard. *In Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act,* ¶¶ 32-43, Dkt. No. 98-201 (released Feb. 2, 1999). Although the Grade B standard was originally established in the 1950's, the Commission pointed out that it had repeatedly re-evaluated the standard during the intervening decades and found it to be still sound. *Id.,* ¶ 42. As the Commission observed, many of the changes that have occurred since the 1950's have made it *easier* to obtain a picture of acceptable quality with the same strength signal: for example, the "low cost noisy tubes and . . . components" of the 1950s have been replaced by "modern solid state components that produce lower set noise." *Id.,* ¶ 41. Overall, the FCC found that the "environmental and technical changes that have taken place" since the Grade B standard was first established have moved "in opposite directions and tend to cancel each other out." *Id.,* ¶ 42.

Despite this exhaustive review by the Commission in 1998 and 1999, when Congress approved the SHVIA, it directed the Commission to conduct yet another proceeding to evaluate whether Grade B intensity is an appropriate standard. After carefully evaluating the submissions by all interested parties, including engineering data submitted by the satellite industry, the Commission recommended that the Grade B standard remain unchanged in virtually all respects. *In Re Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act,* ET Dkt. No. 00-90 (released Nov. 29, 2000).

Similarly, the FCC's ILLR predictive model, first announced in 1999, grew out of years of Commission experience with the Longley-Rice model in other contexts. *In Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act,* at ¶¶ 61-88. In response to Congress' directive in the SHVIA, and after reviewing all of the satellite industry's submissions, the Commission made further refinements to the ILLR model in May 2000 and reaffirmed that ILLR is an accurate and reliable model. *In Re 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). In doing so, the Commission considered how ILLR predictions fared when compared to actual signal intensity measurements at the same location, and found that in many cases ILLR actually *underpredicts* the actual signal strength available at particular households—precisely the opposite of the satellite industry's claims. *Id.*

IV. THE DBS INDUSTRY'S PROPOSAL TO EXPAND THE DISTANT-SIGNAL COMPULSORY LICENSE DEFIES LOGIC AND WOULD SET BACK LOCAL-TO-LOCAL CARRIAGE OF DIGITAL SIGNALS FOR YEARS

Having elected to deliberately violate the limits that Congress imposed on the existing compulsory license unless and until ordered by a federal court to obey them, EchoStar and DirecTV now demand that Congress radically *expand* the distant-signal license they have abused. The Committee should reject this irresponsible proposal out of hand.

In essence, the DBS firms ask the Committee to create a brand-new compulsory license to permit them to deliver the digital broadcasts of the New York and Los Angeles ABC, CBS, Fox, and NBC stations to millions of households nationwide, even though (a) the households can receive the *same programming* over the air from their local station's analog signal and (b) in the overwhelming majority of cases, EchoStar and DirecTV already deliver the *same programming* via what SBCA describes as "a 100 percent, crystal-clear digital audio and video signal" retransmitted from the local station's analog broadcasts.

The simple greed behind this DBS industry proposal is clear, and the tactic is familiar. In the 1990s, the DBS industry sought to offer network broadcast program-

ming "on the cheap" by delivering the analog broadcasts of New York and Los Angeles stations nationwide—completely bypassing the network/affiliate system that Congress and the FCC have worked so hard to foster. (Indeed, in the 1990's satellite companies urged Congress to eliminate the "unserved household" restriction entirely and to permit universal distribution of New York and Los Angeles stations in return for payment of a "surcharge.") This Committee, and Congress as a whole, blocked those maneuvers, instead insisting on localism and on marketplace solutions. By standing its ground against the "quick fix" urged by the DBS industry, Congress has fostered the win/win/win result described above: DirecTV and EchoStar (and their contractors) dug deep to find technical solutions to enable them to offer *local-to-local* broadcast programming to the overwhelming majority of U.S. television households—and soon to all of them. (They found these solutions, of course, only after repeatedly telling Congress and the FCC that the technical problems were unsolvable.)

The DBS industry's current proposal is equally self-serving. EchoStar and DirecTV would enjoy a tremendous financial benefit from being able—again "on the cheap'—to deliver the digital broadcasts of New York and Los Angeles ABC, CBS, Fox, and NBC stations to many millions of viewers nationwide. Instead of investing in delivering *local* digital broadcasts, as cable systems are gradually beginning to do, DirecTV and EchoStar could use a single, inexpensive *national* feed (*e.g.,* of WCBS in New York) to deliver digital programming of a particular network around the country. Although this gambit would cost the DBS firms virtually nothing, they would gain enormously, both in additional customers (at $40, $50 or more per month) and in selling additional network packages (at $6 per month) to both old and new customers.

While the "distant digital" proposal would be a tremendous windfall for DirecTV and EchoStar, it would be a disaster for Congress, the public, and broadcasters. As discussed in detail below, the supposed "factual" basis for this proposal—that the broadcast television industry has not been diligent in pushing the digital transition—is palpable nonsense. And as also described below, this gift to the DBS industry would come at a crippling cost in terms of Congress' public policy objectives.

A. The Broadcast Industry Has Spent Enormous Sums and Dedicated Extraordinary Efforts to Implementing the Transition to Digital Broadcasting—With Tremendous Success in Rolling Out Digital to the Vast Majority of American TV Households

Contrary to the satellite industry's ill-informed accusations, broadcasters have worked tirelessly to implement the transition to digital broadcasting. Thanks to the expenditure of billions of dollars and millions of person-hours, broadcasters have built—and are on-air with—digital television ("DTV") facilities in 203 markets that serve 99.42% of all U.S. TV households.[17] Midway through the transition, almost three-quarters—73.7%—of U.S. television households have access to *at least six* free, over-the-air digital television signals.[18] Nationwide, 1380 television stations in 203 markets are delivering free, over-the-air digital signals today.[19] More than 70 million households receive six or more DTV signals; 49 million households receive *nine* or more DTV signals; and a full 30 million households receive 12 or more DTV signals. More digital stations are resolving their obstacles and going on the air almost daily. The digital transition is working and moving ahead quickly, and the claims of the satellite industry to the contrary are empty rhetoric, not fact.

In the top ten markets, covering 30% of U.S. households, all top four network affiliates are on-air—38 with licensed full-power digital facilities and two New York city stations with Special Temporary Authority ("STA") currently covering a significant chunk of their service areas and with plans to expand even more. In markets 11-30 (representing another 24% of U.S. households), 77 of 79 top four affiliated stations are on-air—72 with full-power licensed digital facilities and five with STAs. Two other stations in that group have been stymied in their roll-out, but are reporting regularly to the Commission about their progress in overcoming the obstacles. Thus, virtually *all* ABC/CBS/Fox/NBC affiliates in the top 30 markets, representing 53.5% of all U.S. households, are on-air with DTV—110 stations with full power licensed digital facilities and seven with STAs.[20]

---

[17] National Association of Broadcasters, *DTV Stations in Operation,* http://www.nab.org/Newsroom/issues/digitaltv/DTVStations.asp (last checked Feb. 19, 2004).

[18] *See* Mark R. Fratrik, Ph.D, *Reaching the Audience: An Analysis of Digital Broadcast Power and Coverage* (BIA Financial Network, Oct. 17, 2003) (prepared for the Association for Maximum Service Television, Inc.) ("MSTV Study").

[19] *See* www.fcc.gov/mb/video/dtvstatus.html ("FCC statistics").

[20] *Id.*

Even as to smaller stations in these markets and stations in smaller markets—which have far fewer resources but equally high costs—1263 of 1569 stations are on air with digital,[21] having overcome enormous challenges and in many cases mortgaging their stations to do so, despite having no immediate prospect of revenues to offset these huge investments.

Those who do not understand the digital transition sometimes claim that DTV stations operating with STAs broadcast with very low power. That is simply wrong. Many stations, particularly those outside the largest stations in the largest markets, are "DTV maximizers," *i.e.,* are maximizing their power to greatly *exceed* their analog coverage. Many maximizers need only a fourth or less of their maximum (licensed) power to cover their entire analog service area. Maximizers operating at even much reduced power are still covering 70% or more of their analog service areas. Almost 19% of current DTV stations operating pursuant to STAs currently serve *more* than 100% of their analog service area with a digital signal.[22] This number will expand exponentially as the transition continues. This high percentage is particularly striking given that there are still no FCC rules for digital translators or booster stations, which will further expand digital signals in rural areas (at still further cost to local broadcasters). Free, over-the-air broadcasters take seriously the potential for expanding their service area and diminishing the very small number of households nationwide that cannot receive local signals, and the digital transition will provide an opportunity to increase nationwide broadcast service.

An authoritative study from last fall shows that on-air DTV facilities are serving 92.7% of the population served by the corresponding analog stations.[23] The small percentage of viewers who do not yet receive a fully replicated digital signal of their local television stations is shrinking by the day as broadcasters work hard, at great expense, to expand the coverage of their digital stations.

On the programming side, broadcasters, both networks and local stations, are providing an extraordinary amount of high-quality DTV and high-definition television ("HDTV") programming to entice viewers to join the digital television transition and purchase DTV sets to display the glory of dazzling HDTV programs and the multiple offerings of the growing DTV multicasts. Three networks offer virtually all their prime time programming in HDTV, as well as high-profile specials and sporting events, such as

- The Academy Awards
- The Grammys
- 11 National Hockey League playoff games
- The Kentucky Derby
- The Super Bowl
- The AFC Championship
- Masters' Golf
- US Open Tennis
- College football
- NCAA Tournament games
- The Stanley Cup
- The NBA Finals
- The primary NFL games of the week
- The entire schedule of Monday Night Football

PBS is launching its HD Channel, in addition to its multicast channels of educational fare. WB is doubling its amount of HD programming this fall to account for more than half of its program schedule. PAX is multicasting on its digital channels, including prime time fare. And now many special effects, like the first-down marker and graphics, are also going high definition, to enhance the viewer experience and move the transition along faster and faster.

While it is local stations that bring these national HDTV programs to the vast majority of viewers, these local stations also are doing more and more on the local level to supplement the network HDTV and multicast fare. Examples abound of local HDTV and multicast broadcasts (at an enormous cost for full local HD production facilities):

- WRAL-TV produces its local news in HDTV
- Post-Newsweek's Detroit station broadcast live America's Thanksgiving Day Parade in HD
- WRAZ-TV in Durham NC broadcast 10 Carolina Hurricanes hockey games in HD last winter

---

[21] *Id.*
[22] *See* MSTV Study, *supra,* at 16.
[23] MSTV Study, *supra,* at i.

- KTLA in LA broadcast last January's Rose Parade in HD in a commercial-free broadcast simulcast in Spanish and closed captioned and repeated it throughout the day and distributed it on many Tribune and other stations
- Last April, Belo's Seattle station KING-TV began producing its award-winning local programs Evening Magazine and Northwest Backroads in HDTV. Evening Magazine is daily. These programs are broadcast on Belo's other Seattle and Portland and Spokane stations
- KTLA last March broadcast live LA Clippers and the Lakers in HD. It was the third sports presentation by KTLA, which included two Dodgers games
- Many public TV stations are providing adult and children's education, foreign language programming and gavel-to-gavel coverage of state legislatures
- NBC and its affiliates are planning a local weather/news multicast service
- ABC is multicasting news/public affairs and weather channels at its KFSN station in Fresno, Calif. It plans to replicate this model at the nine other stations it owns.
- WKMG in Orlando plans to broadcast a Web-style screen with local news, weather maps, headlines and rotating live traffic views.

This ever-increasing variety of DTV and HDTV programming, being broadcast to the vast proportion of American households, will attract consumers to purchase DTV sets. Another major driver of the transition is the FCC's August 2002 Tuner Order, which requires all new television sets, on a phased-in basis and starting this summer with the half of the largest sets, to have a DTV tuner. As a result, DTV tuners will be available in an ever-increasing number of households, thereby further hastening the transition.

In short, the suggestion that broadcasters have somehow failed America in the transition to digital broadcasting is demonstrably false. Indeed, EchoStar's General Counsel, David Moskowitz, admitted as much in testimony before the Judiciary Committee in February: "I agree with you completely [that broadcasters can't be blamed for decisions by consumers not to invest in digital sets]. I'm not saying the NAB or the broadcasters are at fault."[24]

Moreover, the notion that new compulsory license for "digital white areas" would *improve* matters is sheer fantasy. In fact, allowing satellite carriers to deliver distant digital (or HD) signals to so-called "digital white areas" would set the stage for a consumer nightmare almost identical to what occurred in 1999, when hundreds of thousands of households had to switch from (illegally-delivered) distant signals to over-the-air reception of local stations.

The reason is simple: as Congress painfully experienced from mountains of letters, emails, and phone messages in 1999, viewers who are accustomed to receiving all of their TV programming (including network stations) by satellite are often enraged when told that they must switch to a hybrid system in which they combine satellite reception with an off-air antenna or cable service. The import of the "distant digital" proposal is therefore clear: after the DBS firms had "grabbed" customers with a distant digital signal, the costs to local broadcast stations of reclaiming those viewers would go sky-high, since stations would face not only the same financial costs they do now but *also* the high costs of confronting thousands of angry local viewers with the need to change their reception setup. The DBS firms know all of this, and they fully understand the implication: the "distant digital" plan would *not* encourage a smooth digital transition, and would *not* encourage stations to invest in the digital rollout, but would simply make it easy for EchoStar and DirecTV to hook customers on (distant) satellite-delivered digital signals and keep them forever.[25]

If there were any doubt about the DBS firms' tenacity in retaining distant-signal customers once they begin serving them—regardless of the legality of doing so—EchoStar's behavior with regard to analog distant signals would eliminate it. As a District Court found last year after a 10-day trial, EchoStar was so determined to retain its illegal distant-signal customers that, "when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers," the key "EchoStar executives, including [CEO Charles] Ergen and [General Counsel] David Moskowitz," choose instead "to break Mr. Ergen's promise to the Court" that

[24] Testimony of David Moskowitz before the Subcommittee on Courts, the Internet, And Intellectual Property of the House Judiciary Committee (Feb. 24, 2004).

[25] In his oral testimony in February before a subcommittee of the House Judiciary Committee, SBCA spokesman (and EchoStar General Counsel) David Moskowitz said that once DBS firms begin delivering a distant digital signal to a household, they should never have to turn off that signal. Far from encouraging stations to expand their digital service areas, this naked "land grab" would have the opposite effect: no matter what they did, stations would have forever lost many of their local customers to a distant signal.

it would turn them off. *CBS Broad., Inc. v. EchoStar Communications Corp.,* 276 F. Supp. 2d at 1246, ¶ 46.

B. The Radical New Compulsory License Demanded by EchoStar and DirecTV Is Unnecessary and Would Do Lasting Damage to Localism

At all times since 1988, the purpose of the distant-signal license has been to make over-the-air broadcast programming available by satellite solely as a "lifeline" to satellite subscribers that had no other options for viewing network programming.[26] The EchoStar/DirecTV proposal would do exactly the opposite: Congress would override normal copyright principles to permit DBS companies to transmit distant network stations to many millions of additional households, even though (1) the households get a strong signal from their local stations over the air and (2) in most cases, the DBS firm already offers the local analog broadcasts of the same programming, in crisp, digitized form, as part of a local-to-local package. The suggestion that Congress needs to step in to offer a "lifeline" under these circumstances is baffling.[27]

The consequences of this radical proposal, if adopted, would be likely to be grave. According to EchoStar and DirecTV, for example, if a station (through no fault of its own, *e.g.,* because of a local zoning obstacle) has been unable to go on-air with a digital signal, *every household in that station's market* would be considered "unserved"—and therefore eligible to receive a retransmitted signal from the New York or Los Angeles ABC, CBS, Fox, and NBC affiliates' digital broadcasts. In these markets, EchoStar and DirecTV would take us back to the dark days of the mid-1990s, when, before courts began to intervene, the DBS firms used national feeds to deliver ABC, CBS, Fox, and NBC network programming to any subscriber who asked for it.[28] And they would do so even though, in most cases, the DBS firms are themselves already delivering the same programming by satellite from the local stations. With DBS penetration already at more than 20 million households nationwide, and with the highest levels of DBS penetration in smaller markets, the impact on the viability of local broadcasters could be devastating. [29] Worse yet, based on the misconduct of EchoStar in their retransmission of distant analog signals, once EchoStar has begun delivering distant digital stations, it will take enormous efforts (and years of struggle) to get them to ever stop doing so, even if they have "promised" to do so, and even if the law squarely requires them to do so.

Granting this enormous government subsidy to the DBS industry, at the expense of local broadcasters (and ultimately at the expense of local over-the-air audiences), would also have profoundly negative long-term consequences for the continued progress of the satellite industry. Over-the-air broadcasting is a *local* phenomenon, and the right way to deliver local stations is on a local-to-local basis. In their drive to compete with cable, and with each other, DirecTV and EchoStar are likely to devise ingenious technical solutions to enable them to carry digital broadcasts on a local-to-local basis, just as they have—despite their gloomy predictions—found a way to do so for analog broadcasts. But rewriting the laws to give EchoStar and DirecTV a cheap, short-term, government-mandated "fix" will take away much of the incentive that would otherwise exist to continue to find creative technological solutions. Congress wisely refused to abandon the bedrock principles of localism and free market competition in the 1990s, when the satellite industry made similar proposals, and Congress should do the same now.[30]

---

[26] *E.g.,* SHVIA Conference Report, 145 Cong. Rec. H11792 ("the specific goal of the 119 license, which is to allow for *a life-line network television service to those homes beyond the reach of their local television stations,* must be met by *only* allowing distant network service to those homes which cannot receive the local network television stations. Hence, the 'unserved household' limitation that has been in the license since its inception." *Id.* (emphasis added).

[27] The Committee should be aware that, in the guise of a letter seeking advice about how to fill out a Copyright Office form, EchoStar sought last year to obtain from the Copyright Office a statement that the Copyright Act *as now in force* already recognizes the "distant digital" concept. *See* Letter from David Goodfriend, EchoStar Communications Corp. to David O. Carson, General Counsel, Copyright Office (June 18, 2003). The Office swiftly, and properly, rebuffed that back-door effort. Letter from William J. Roberts to David Goodfriend (Aug. 19, 2003).

[28] In other markets, while stations have gone on-air with their digital signals, their coverage area is temporarily reduced for reasons entirely beyond their control—such as the destruction by terrorists of the World Trade Center and its broadcasting facilities.

[29] Of course, the tiny number of *genuinely unserved* households (*e.g.,* those unable to receive Grade B intensity analog signals over the air) can receive either an analog or a digital signal from a distant affiliate of the same network. *See* Letter from William J. Roberts, U.S. Copyright Office, to David Goodfriend (Aug. 19, 2003).

[30] When analog broadcasting ceases several years from now, there may—but may not—be a need for a distant-signal compulsory license. If the DBS firms are then providing local-to-local broadcasts of local TV stations in a digital (or HD) format, for example, there may be no need for a distant-signal license at all, or a need only for an extremely limited license.

The DBS proposal would also sabotage another key objective of the SHVIA, namely minimizing unnecessary regulatory differences between cable and satellite. If DirecTV and EchoStar could deliver an out-of-town digital broadcast to anyone who does not receive a digital broadcast over the air, they would have a huge (and wholly unjustifiable) leg up on their cable competitors, which are virtually always barred by the FCC's network non-duplication rules from any such conduct. *See* 47 C.F.R. §§ 76.92-76.97 (1996).

Finally, it would be particularly inappropriate to grant EchoStar and DirecTV a vastly expanded compulsory license *when they have shown no respect for the rules of the road that Congress placed on the existing license.* If Congress were to adopt this ill-conceived proposal, it can expect more years of controversy, litigation, and—ultimately—millions of angry consumers complaining to Congress when their "distant digital" service is eventually terminated. This Committee should rebuff the invitation to participate in such a reckless folly.

V. WHAT CONGRESS SHOULD DO THIS YEAR

As the Committee is aware, the local-to-local compulsory license is permanent, but Congress has wisely extended the distant-signal license (in Section 119 of the Copyright Act) only for five-year increments. Given the short legislative calendar and the press of other urgent business, Congress may wish simply to extend Section 119, as now in force, for another five years.

If Congress wishes to do anything other than a simple extension of the existing distant-signal compulsory license, NAB urges:

• **No distant signals where local-to-local is available.** For the reasons discussed above, Congress should amend the definition of "unserved household" to exclude any household whose satellite carrier offers the household's own network stations on a local-to-local basis. There is no logic to interfering with localism—and with basic copyright principles—under these circumstances. It makes no sense, for example, to give satellite carriers the right to "scoop" local stations on the West Coast (and in the mountain West) by delivering *8 Simple Rules, Everybody Loves Raymond, 24, or The Tonight Show* two or three hours early, or to permit EchoStar to evade normal copyright restrictions by delivering out-of-town NFL games to local-to-local households without ever negotiating for the rights to do so.

• **No expansion of the distant-signal compulsory license.** Congress should flatly reject any proposal to *expand* the distant-signal compulsory license, such as the irresponsible "distant digital" proposal discussed above. Since the compulsory license is intended only to address "hardship" situations in which viewers have no other means of viewing network programming, there is no policy basis for *expanding* the compulsory license to cover households that receive can view their local station's analog signals over the air. Still less would it make any sense to declare a household to be "unserved" when it already receives (or can receive with a phone call) a crisp, high-quality digitized retransmission of their local station's analog broadcasts from DirecTV or EchoStar.

The Committee not take seriously the DBS firms' predictable claims that they lack the technological capacity over time to offer local digital signals, since—as discussed above—EchoStar and DirecTV are notorious for "underpredicting" their ability to solve technological challenges. Moreover, it would be wholly inappropriate to reward companies such as EchoStar, which have knowingly violated the existing law and broken sworn promises to courts about compliance, by *broadening* the compulsory license they have abused.

• **Five-year sunset.** Congress should again provide that Section 119 will sunset after a five-year period, to permit it to evaluate at the end of that period whether there is any continuing need for a government "override" of this type in the free market for copyrighted television programming.

• **Stopping the "two-dish" scam.** As discussed above, Congress should—if the FCC does not do so first—bring a halt to EchoStar's two-dish gambit, which is thwarting Congress' intent to make all stations in each local-to-local market equally available to local viewers.

CONCLUSION

With the perspective available after 16 years of experience with the Act, Congress should adhere to the same principles it has consistently applied: that localism and free-market competition are the bedrocks of sound policy concerning any proposal to limit the copyright protection enjoyed by free, over-the-air local broadcast stations.

If Congress makes any change to the existing distant-signal license, it should amend the Act to specify that a household that can receive its own local stations

by satellite from the satellite carrier is not "unserved." The Committee should flatly reject reckless bids by companies like EchoStar—which have scoffed at the law for years—to expand the distant-signal license.

Far from rewarding EchoStar for its indifference to congressional mandates, Congress should—if the FCC does not—make clear that EchoStar's flouting of "carry one, carry all" through its two-dish gambit must come to an end. And as it has done in the past, Congress should limit any extension of the distant-signal license to a five-year period, to enable a fresh review of the appropriateness of continuing this major governmental intervention in the free marketplace.

APPENDIX A

RECENT EXAMPLES OF LOCAL TV STATION PUBLIC SERVICE

Helping People In Need

WXYZ "Can Do" Raises 500,000 Pounds of Food for Food Banks

WXYZ-TV Detroit (E.W. Scripps-owned ABC affiliate) undertook its 22nd annual "Operation Can-Do" campaign this winter, bringing in more than 500 thousand pounds of canned and non-perishable food to help feed families and individuals through soup kitchens and food banks in the tri-county area. Since it began the program, WXYZ has collected more than six million pounds of food, providing more than 20 million meals to the hungry of Metropolitan Detroit. (Jan/Feb 2004)

WHSV-TV Builds a Habitat House

WHSV-TV Harrisonburg, VA (Gray Television-owned ABC affiliate) decided the best possible way to celebrate its October 2003 50th Anniversary would be to partner with Habitat for Humanity to raise $50 thousand over the summer to build a house for a needy family. January 2003 marked the first time that the Staunton-Augusta-Waynesboro Habitat affiliate partnered with a television station to build a house and show the public the Habitat miracle. WHSV had several fundraisers, including production and distribution of a Shenandoah Valley cookbook commemorating the station's 50 years of service and the Habitat chapter's 10 years of service. In August, WHSV hosted a special benefit screening of "From Here to Eternity," which won the Academy Award in the same year WSVA-TV (now WHSV) sent out its first broadcast. Community members who supported the screening were driven by limousine to the theater and entered on a red carpet. WHSV sent out calls for and coordinated volunteers throughout the fundraising and building process. The station met its goal, the house was built and a grateful family of four moved in. (Jan/Feb 2004)

Children

WFAA-TV Collects 82,000 Toys in Four-Week Campaign

WFAA-TV Dallas/Fort Worth (Belo-owned ABC affiliate) in 2003 ran its most successful Santa's Helpers campaign in the 34-year history of this program. WFAA was able to collect more than 82,000 toys over the course of the four-week campaign, allowing the station to help more than 50,000 children in the North Texas area. In 2002 the station collected 76,000 toys. Santa's Helpers is promoted on air through numerous promos and PSAs, and also by WFAA's chief weathercaster, Troy Dungan, who has served as Santa's Helpers spokesman for 28 years. Each year, the highlight of the campaign is a "drive-thru" event that is held in front of the station, where WFAA anchors and reporters greet viewers as they drop off toys. After all of the toys have been collected, they are distributed to needy children by more than 40 nonprofit organizations in the Dallas/Fort Worth area. (Jan/Feb 2004)

Healthy Communities

KTTC-TV: 50 Years On-Air, 50 Years Fighting Cancer

KTTC-TV Rochester, MN (QNI Broadcasting-owned, NBC) celebrated its 50th anniversary in July and nearly 50 years of partnership with the local Eagles Lodge producing and airing a 20-hour telethon to raise money for cancer research. Fifty years ago young Rochester television sportscaster Bernie Lusk was searching for a way to use the powerful new medium of television to make a difference. At a time when the battle with polio garnered much attention, Bernie wanted to tackle another disease that claimed many lives—cancer. Bernie shared his idea with fellow Eagles Lodge members, and the now 50-year-old, totally local telethon was born.

In its first year, the 1954 KTTC/Eagles Cancer Telethon raised $3,777. In 2003, $702,900 was raised for the Mayo Clinic, the University of Minnesota, and the

Hormel Institute of Research. To date the telethon has raised more than $9 million dollars. (Nov/Dec 2003)

KLAS-TV Promotes Breast Cancer Awareness

KLAS-TV Las Vegas (Landmark Broadcasting, CBS) runs the Buddy Check 8 program asking viewers to call a buddy on the 8th day of the month to remind her to do a breast self-examination. KBLR-TV (Telemundo) also produces the same messages in Spanish. (September 2003)

Helping Animals

KEYE Raises $172,000 for Humane Society

KEYE-TV Austin, TX (Viacom, CBS) hosted the Austin Humane Society's 6th Annual Pet Telethon June 20 and 22, raising $172,000 and resulting in the adoption of 104 animals. The society runs a no-kill shelter, where animals accepted into the adoption program are kept for as long as it takes to find them a loving home. The society has saved approximately 2,700 animals in the past year alone. (July 2003)

Drug Prevention

Hawaii TV Stations Forego New Network Shows to Blanket Islands with Drug Documentary

Television stations in the Hawaiian Islands simultaneously aired an unprecedented, commercial-free drug documentary at 7 p.m. on September 24, with network affiliates pre-empting the first hour of primetime during the networks' debut of their new fall shows. The stations were honoring their commitment to help battle Hawaii's biggest drug problem. "Ice: Hawaii's Crystal Meth Epidemic," produced by Edgy Lee's FilmWorks Pacific, details the epic proportions of crystal meth abuse, with grassroots reaction and views. Originally conceived as a 30-minute show, it was expanded to an hour because of the magnitude of the epidemic and originally was to air in August to avoid the fall network season. The commercial-free airing agreement did not come without a cost. It meant thousands of dollars in lost ad revenues for the stations and the canceling or delayed airing of the season premieres of "Ed," "60 Minutes II," "My Wife and Kids" and "Performing As." KITV-TV (Hearst Argyle, ABC) general manager Mike Rosenberg estimated the loss was as much as $10 thousand per station. Stations that simulcast the program included: Honolulu stations KITV-TV (Hearst Argyle, ABC), KBFD (Independent), Raycom Media stations KHNL (NBC) and KFVE (WB), KIKU (International Media Group, Independent), Emmis Communications stations KHON (Fox) and KGMB (CBS) and KWHE (Independent). Some stations even added additional ice programming to follow Lee's film. Among them were KHON, which showed an hour-long panel including Governor Linda Lingle and Lt. Governor James Aiona; and KFVE, which aired a half-hour program focusing on teen drug usage. (October 2003)

Broadcasters Without Borders

Roanoke Station's Viewers Come Through for Troops

A six-day promotion at WDBJ-TV Roanoke, VA (Schurz Communications, CBS) to gather items such as toiletries and snack foods for American troops serving in the Iraq war resulted in more than two tons of welcome supplies. Viewers overwhelmed the station and collection points at several Roanoke area automobile dealerships with more than 4,000 pounds of Packages from Home to be sent overseas. The American Red Cross local chapter helped get the goods to the Middle East. "Thursday and Friday afternoons, the cars were bumper to bumper at our front door," said WDBJ President and General Manager Bob Lee. "We filled up the lobby, and then the packages started to spill over into other areas of the building." Red Cross and station volunteers sorted the DOD-approved personal items. Said Lee, "Who would have thought we would end up with more than two tons of merchandise! We were beginning to think we'd need our own C-130 for the delivery." (April 2003)

Education

KTLA Student Scholarships

KTLA-TV Los Angeles (Tribune-owned WB affiliate) is launching its sixth Annual Stan Chambers Journalism Awards competition—a partnership with area county departments of education and member school districts. The station has invited more than 300 high schools to have their seniors submit essays on "What Matters Most," for the opportunity to receive scholarships to further their education. Five winners will receive $1,000 and a chance to experience work in the KTLA Newsroom. Winners will produce videos of their entries, with guidance from KTLA News writers,

producers and reporters. The program honors KTLA's veteran reporter and journalist Stan Chambers for his contributions to the community. (Jan/Feb 2004)

KRON-TV's "Beating the Odds"

KRON-TV San Francisco's "Beating the Odds" is a series of news stories and specials reported by anchorwoman Wendy Tokuda and other KRON News reporters. Tokuda's "Beating the Odds" series features extraordinary high school students who are rising above tough circumstances. Some are growing up without parents, others are homeless and some are raising siblings. All of them want to go to college. The stories are tied to a scholarship fund established by KRON and the Peninsula Community Foundation to help low-income, high-risk Bay Area high school students pay for college. Following each "Beating the Odds" report, viewers are encouraged to donate to the fund. Since 1997, the fund has raised more than $1.5 million for students profiled in the series. The Foundation waives all its fees, so 100% of the tax-deductible donations go to the students. KRON is an independent station owned by Young Broadcasting. (March 2003)

Belo/Phoenix Launches Statewide Education Initiative

Belo Broadcasting/Phoenix has launched a six-month, statewide initiative on education to address major issues affecting students and schools. Running through March, "Educating Arizona's Families" involves monthly topics ranging from early brain development and learning readiness to literacy, accountability, dropout, post-secondary education, the teaching profession and the economic impact of education on the state. The stations focus on each initiative for one month, producing two dozen stories per topic. Weekly public affairs programming is directed toward the specific issues being covered each month and guests on mid-day newscasts, three times weekly, offer insight to parents, caregivers and other viewers. KTVK-TV Phoenix (Independent) is driving the initiative through news and daily promotional announcements that also air in Tucson on Belo's KMSB-TV (Fox) and KTTU-TV (UPN). Promotion spots change monthly and individual 30-second sponsor announcements address education interests of each sponsor. (Nov/Dec 2003)

Protecting the Environment/Endangered Species

Emmis Makes $90,000 Grant to Indianapolis Zoo For Endangered Species

Radio and television station owner Emmis Communications will donate $90,000 to the Indianapolis Zoo for a multi-year conservation research project aimed at saving one of the planet's most endangered species, the ring-tailed lemur. A portion of the donation will be used to research potential problems that could occur from the re-introduction of the animals into the wild from zoos around the world, paving the way for future reintroduction of the species into their native range. (January 2002)

APPENDIX B

RECENT EXAMPLES OF MISCONDUCT BY ECHOSTAR

1. The owners of the ABC, CBS, Fox, and NBC television networks, along with the ABC, CBS, Fox, and NBC Affiliate Associations, sued EchoStar in 1998 in the Southern District of Florida for violations of the Copyright Act relating to delivery of distant network stations. The case was tried to the Hon. William Dimitrouleas for ten days in April 2002. The Court's Findings of Fact and Conclusions of Law are reported at *CBS Broadcasting Inc. v. EchoStar Communications Corporation,* 276 F. Supp. 2d 1247 (S.D. Fla. 2003). The Court found that EchoStar had failed to meet its burden of proving that any of its 1.2 million subscribers to distant network stations met the statutory standard. *Id.* ¶82. Rejecting testimony provided by EchoStar CEO Charles Ergen, U.S. District Court William Dimitrouleas found that "[n]o credible evidence was presented to the Court to support the contention that EchoStar turned off distant signals for compliance reasons . . . " *Id.* ¶45.

2. The Court also found that EchoStar had knowingly broken a sworn promise to the Court to turn off ineligible subscribers. The Court stated:

> It appears that EchoStar executives, including Mr. Ergen and David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, elected instead to break Mr. Ergen's promise to the Court.

Id. ¶46.

The Court also found that "when Mr. Moskowitz, an EchoStar executive who worked closely on SHVA compliance, was questioned during his deposition about the 1999 Decisionmark ILLR analysis, he paused for an unusually long period of time and then answered the questions concerning the ILLR analysis in a vague manner,

unable or unwilling to give any details on the results of the analysis or EchoStar's actions following the analysis." *Id.,* ¶47.

3. In a lawsuit filed by EchoStar claiming antitrust violations for alleged conspiracy and boycott by an insurance company, a United States District Judge imposed a $30,000 sanction on EchoStar under the Court's inherent authority to punish discovery misconduct. Order, *EchoStar Satellite Corp. v. Brockbank Ins. Servs., Inc.,* No. 00-N-1513 (D. Colo. Feb. 5, 2004). The Court found that EchoStar's action "rose to the level of conscious wrongdoing." *Id.* at 23. With respect to testimony by EchoStar's General Counsel, David Moskowitz, who was required to present knowledgeable testimony as EchoStar's designated spokesperson, the Court found that "either Mr. Moskowitz was not knowledgeable or he was not candid." *Id.* at 22. The Court also found that Mr. Moskowitz' testimony was "evasive[]." *Id.* at 22 n.16.

4. In a 2002 proceeding, the FCC's Media Bureau found that EchoStar had, in numerous respects, violated the SHVIA through its practices relating to delivery of certain local television stations in a manner requiring subscribers to obtain a second satellite dish. Declaratory Ruling & Order, *In re National Ass'n of Broadcasters and Ass'n of Local Television Stations: Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers,* Docket No. CSR-5865-Z, 17 FCC Rcd 6065 (2002). *See id.* ¶12 ("EchoStar's "two-dish" plan, as implemented, violates both the Act and the Commission's rules."); id. ¶25 ("EchoStar's "two-dish" plan violates the contiguous channel placement requirement of the statute . . ."); *id.* ¶34 ("We cannot consider or grant a waiver insofar as EchoStar's actions directly violate the statute."); *id.* ¶35 ("Given our concerns about EchoStar's violations, and the severe impact they have on certain local stations and subscribers, EchoStar is required to submit a Compliance Report and Plan within 30 days after release of this Order.")

5. Since the Commission's 2002 ruling, EchoStar has, on many occasions, violated even the minimal requirements imposed by the FCC for carriage of some (but not all) local stations through use of a second dish. Among other things, EchoStar has discouraged subscribers from obtaining a second dish, falsely told subscribers they would have to pay for a second dish, and falsely stated that customers could not have a second dish installed at the time of their original installation. *In re University Broadcasting, Inc. v. EchoStar Communications Corp.,* Mem. Op. & Order, Dkt. No CSR-6007-M (Feb. 20, 2003); *In Re Entravision Holdings, LLC,* Mem. Order & Op., Dkt. No. CSC-389 (April 15, 2002); *In Re Tri-State Christian, Inc.,* Mem. Op. & Order, Dkt. No. CSR-5751 (Feb. 5, 2004).

6. In its April 2002 Declaratory Ruling & Order, the FCC Media Bureau provided the following summary of earlier instances in which the Commission had sanctioned EchoStar for illegal or improper conduct:

> "EchoStar has previously been fined by the Commission for rule violations and admonished for its 'disingenuous' behavior and lack of candor. In June 1998, the Commission fined EchoStar, and its subsidiary Directsat, the maximum forfeiture amount permitted under the Commission's rules for operating satellites from non-authorized locations. . . . The FCC justified the forfeiture amount based on EchoStar's degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules. In November 1999, EchoStar tried to disregard its public interest programming requirements by placing all of its public interest programming on secondary satellites in violation of the Commission's DBS rules. *See American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint,* Declaratory Ruling and Order, 14 FCC Rcd 19976 (1999). In this instance, the Commission assessed a forfeiture against EchoStar, finding that it had willfully violated the Communications Act and the Commission's rules, that it had been 'disingenuous' in its legal interpretations, and that none of the circumstances EchoStar presented supported mitigation of the forfeiture. *In the Matter of EchoStar Satellite Corporation, Notice of Apparent Liability for Forfeiture,* 15 FCC Rcd 5557, 5558-59 (EB 2000). In August 2001, the Commission found that "EchoStar failed in its duty of candor" by withholding information from the Commission. *See EchoStar Satellite Corporation v. Young Broadcasting, Inc.,* Memorandum Opinion and Order, 16 FCC Rcd 15070, 15075 (CSB 2001)."

Id. ¶37, n.116.

7. In 2001, EchoStar Satellite Corporation filed a complaint at the FCC alleging that Young Broadcasting has "breached its obligation to negotiate in good faith terms for EchoStar's local retransmission" of Young's ABC and NBC affiliates. In a decision in that proceeding, the Commission found that:

> "EchoStar failed in its duty of candor to the Commission. EchoStar began publicly disclosing on March 19, 2001, portions of the documents for which it sought confidentiality in their entirety, yet failed to apprise the Commission of this fact for 23 days until it filed its request for modification."

EchoStar Satellite Corp. v. Young Broadcasting, Inc., 16 FCC Rcd. 15070 (Cable Services Bureau 2001).

The Commission also found that EchoStar's conduct "constituted an abuse of the Commission's processes." *Id.*

8. In March 1999, the United States District Court for the District of Colorado (Nottingham, J.) granted a request by broadcaster parties to transfer to Florida a lawsuit that EchoStar had filed in Colorado, finding that EchoStar had engaged in "flagrant forum-shopping." Hearing Transcript, *EchoStar Communications Corp. v. CBS Broadcasting Inc.,* No. 98-2285 at 21 (D. Colo. Mar. 24, 1999).

Mr. UPTON. Mr. Polka.

STATEMENT OF MATTHEW M. POLKA

Mr. POLKA. Thank you, Mr. Chairman. My name is Matt Polka and I am the President of the American Cable Association which represents more than 1,000 independent cable companies. Collectively, ACA members serve more than 8 million customers, mostly in smaller markets and rural areas. ACA's constituency is truly national. Our members serve customers in every State and in nearly every congressional district, particularly those of this committee.

Each of the 1,000 small businesses in ACA competes daily for their livelihood. Who are their principal competitors? the two national DBS companies, EchoStar and DirecTV. But today, DBS interests are advocating changes to SHVIA. That concerns us and we think it should concern this committee. You see, ACA members are fundamentally different than the major media and communications companies you often hear from. ACA members do not rule vast media empires, rather, ACA members focus on serving modest customer bases in smaller markets.

The average ACA company in your State serves 8,000 customers. One half of all ACA members serve less than 1,000 customers. These are truly, truly small businesses. But compare this to our main competitive, DirecTV with more than 12 million customers or EchoStar with about 10 million customers. This is why we are very concerned about SHVIA.

When you hear that DBS needs changes to the law to better compete, you need to ask two questions. First, why does DBS need more competitive advantages in smaller markets? And second, what would the consequences truly be for competition and consumers?

ACA and its members would not object to the reauthorization of SHVIA in its present form. Reauthorization would maintain the status quo and it would avoid skewing the law further in the direction of DBS. But if Congress considers changing SHVIA, we ask that you proceed with great care and include the adjustments to the statute we are suggesting today in our written and in our panel testimony.

As I have stated, the average ACA member company in your State serves 8,000 customers. Compared to DirecTV with 12 million subscribers and EchoStar with 10 million subscribers, it is self-evident that these companies benefit from far greater economies of scale, access to capital and bargaining power over programming and other suppliers. As a result, DirecTV and EchoStar cannot seriously maintain that they need the government to further help them compete.

As the FCC has observed, multi-channel video competition is local. DBS and ACA members compete head to head in Bloomingdale, Michigan; Braintree, Massachusetts; Parkdale, Oregon; Ramsey, Illinois and many other towns represented by this committee. As a result, any changes to SHVIA here in Washington will have the potential of skewing that competition in smaller markets and all across the country.

For these reasons, a simple SHVIA reauthorization will avoid unintended consequences and we have no objection to that. To us, DBS already enjoys a major competitive advantage through favored regulatory treatment. On the other hand, small cable businesses with far more limited resources bear a much greater regulatory load. Our written testimony contains a number of specifics in this regard. So before tinkering with SHVIA to help DBS compete, Congress should examine the existing regulatory disparity.

As DBS continues to mature and gains even greater market share against cable, this regulatory disparity threatens to grow and threatens our members' ability to continue to provide high-speed data and other advanced services in their rural areas where their customers are relying on them. The consequences of competition for consumers in smaller markets should concern us all.

However, if the committee decides that changes to SHVIA are appropriate, we have some suggestions that will advance competition and localism in smaller markets and let me briefly discuss two. First, access for rural cable systems to local-into-local signals. Some rural cable systems cannot receive good quality broadcast signals off-air. In local-into-local markets, these systems can receive good quality signals from DBS and our members are willing to pay reasonable rates for this service. The DBS providers have refused. To ensure the widest possible distribution of good quality local broadcast television signals in rural markets, Congress should require DBS to provide smaller cable systems with local-into-local television signals on nondiscriminatory rates and terms and conditions.

Second, retransmission can send good faith negotiation and exclusivity. SHVIA obligates broadcasters to negotiate retransmission consent in good faith and prohibits exclusive retransmission consent agreements. These provisions have helped smaller cable companies maintain access to local broadcast signals. These provisions are scheduled to sunset under SHVIA as of January 1, 2006. This will eliminate what little protections smaller cable businesses have in negotiating fair retransmission consent agreements. Congress should make these provisions permanent or at least extend them along with the reauthorization of SHVIA.

In conclusion, SHVIA has provided a framework for DBS carriage of local broadcast signals. It is not perfect, but all of the players know the current rules. As a result, Congress should maintain the status quo with the straight reauthorization. However, if the law is changed, then the impact on consumers and competition, particularly in smaller markets and rural areas must be considered and balanced.

Thank you.

[The prepared statement of Matthew M. Polka follows:]

PREPARED STATEMENT OF MATTHEW M. POLKA, PRESIDENT, AMERICAN CABLE ASSOCIATION

I. INTRODUCTION

Thank you, Mr. Chairman. My name is Matt Polka, and I am president of the American Cable Association. ACA represents more than 1,000 independent cable businesses. Collectively, ACA members serve more than 8 million customers, mostly in smaller markets and rural areas. ACA's constituency is truly national; our members serve customers in every state and in nearly every congressional district, particularly those of this Committee.

Our members are keenly interested in SHVIA. Each of the 1,000 small businesses in ACA competes daily for their livelihood. Their principal competitors: the two national DBS companies—EchoStar and DirecTV. DBS interests are advocating changes to SHVIA. That concerns us, and we think it should concern the Committee.

ACA members are fundamentally different than the major media and communications companies you often hear from. Foremost, ACA members do not rule vast media empires, and do not aspire to. ACA members focus on serving modest customer bases in smaller markets. And our companies are doing a great job. ACA members are leading the industry in delivering advanced services like digital cable and broadband Internet access. Our members have launched DTV and HDTV programming, and they are doing their part to advance the DTV transition. ACA members are actively exploring VOD, VOIP and other advanced services. Because we live and work in these rural communities, we know how important it is to have advanced communications services available, and our members are working hard to deliver the promise of broadband to smaller markets.

As a result, when the Committee is concerned about mergers, media consolidation, indecency and other important policy matters, ACA members are not part of the problem. When the Committee is concerned about localism, broadband deployment and the economic health of rural America, ACA members are an important part of the solution.

These companies are great examples of what entrepreneurial spirit and hard work can accomplish.

At the same time, our members increasingly compete in markets dominated by vastly larger players. The average ACA company in your state serves 8,000 customers. One-half of all ACA members serve less than 1,000 customers. These are truly small businesses. Compare this to our main competitor DirecTV, with more than 12 million customers. Or EchoStar, with about 10 million customers.

This is why we are very concerned about SHVIA. When you hear that DBS needs changes to the law to better compete, you need to ask two questions: Why does DBS need more competitive advantages in smaller markets? And what would the consequences truly be for competition and consumers in smaller markets?

I hope my testimony today will help you answer these questions.

II. ACA DOES NOT OBJECT TO REAUTHORIZATION OF SHVIA.

The Satellite Home Viewer Improvement Act granted the DBS industry in 1999 the right to retransmit local broadcast signals on carriage and copyright terms similar to those of cable operators.

One purpose of the law was to promote localism—a key tenet of this country's communications policy. Localism ensures that customers in local markets receive local programming and messages from diverse voices. Historically, local broadcasters have been a key source of local programming. In our view, media consolidation has fundamentally changed this, but we will save that for another hearing.

SHVIA also aimed to help a young DBS industry better compete against cable. For instance, concerning broadcast signal carriage SHVIA gave DBS substantial regulatory advantages over cable.

Despite the regulatory advantages given to DBS, ACA and its members would not object to the reauthorization of SHVIA in its present form. Reauthorization would maintain the status quo and avoid skewing the law further in the direction of DBS.

But if Congress considers changing SHVIA, we ask that you proceed with great care, especially considering the potential impact on competition and consumers in smaller markets.

III. DBS SHOULD NOT BE ALLOWED TO LIGHTEN ITS REGULATORY LOAD UNDER SHVIA.

First, the Committee should be skeptical of those advocating reduced regulatory obligations for DBS. DBS has already achieved substantial market power, especially

in smaller markets. The DBS industry has long outgrown the need for a legislated competitive boost.

In five years since SHVIA was passed, the DBS industry has become a maturing, successful business and a powerful competitor to cable. This is especially true in smaller markets and rural areas where DBS has gained substantial market share. In some smaller markets, DBS has become the dominant provider. And when you consider competition at the local level, it is not hard to see why.

The average ACA member company in your state serves 8,000 customers. DirecTV serves almost 12 million more customers than the average ACA member. Similarly, EchoStar serves almost 10 million more subscribers than the average ACA member. It is self-evident that these companies benefit from far greater economies of scale, access to capital and bargaining power over programmers and other suppliers. As the FCC found, the acquisition of DirecTV by News Corp. enhances those competitive advantages. As a result, DirecTV and EchoStar cannot seriously maintain that they need the government to help them compete in smaller markets.

As the FCC has observed, multichannel video competition is local. DBS and ACA members compete head-to-head in Bloomingdale, MI, Braintree, MA, Parkdale, OR, Ramsey, IL, and many other towns represented by this Committee. Compounding this challenge is the fact that for our members each new customer and mile of cable must be financed by a loan from the local bank signed by the local owner, while our mega-competitors are financed by Wall Street.

As a result, any changes to SHVIA here in Washington will have the potential of skewing that competition in smaller markets all across America. For these reasons, a simple SHVIA reauthorization will avoid unintended consequences in smaller markets. We have no objection to that.

IV. DBS ENJOYS SIGNIFICANT REGULATORY ADVANTAGES OVER CABLE, PARTICULARLY OVER INDEPENDENT CABLE IN SMALLER MARKETS AND RURAL AREAS.

We become very concerned when DBS calls for changes to SHVIA. These changes are advocated to "help DBS compete." For a smaller market cable company squaring off against DirecTV or EchoStar, to say the least, these claims are audacious. To us, DBS already enjoys a major competitive advantage through favored regulatory treatment. On the other hand, small cable businesses with far more limited resources bear a much greater regulatory load. Consider the following comparison:

REGULATORY BURDENS

INDEPENDENT CABLE (Avg. 8,000 Subscribers)	DBS (DirecTV—12 mil.; EchoStar—10 mil.)
• Mandatory Carriage of Broadcast on Basic	* Must-Carry in selected markets
• Must-Carry in all Markets	* Limited Public Interest Obligations
• Full Public Interest Obligations	* Retransmission Consent
• Retransmission Consent.	
• Emergency Alert Requirements.	
• Tier Buy-Through.	
• Franchise Fees.	
• Local Taxes.	
• Signal Leakage/CLI.	
• Rate Regulation.	
• Privacy Obligations.	
• Customer Service Obligations.	
• Service Notice Provisions.	
• Closed Captioning.	
• Billing Requirements.	
• Pole Attachment Fees.	
• Public File Requirements.	

Before tinkering with SHVIA to help DBS compete, Congress should examine the existing regulatory disparity. With vibrant competition as the goal, why should the heavy hand of government weigh on smaller cable companies? To ensure that local communications businesses continue to deliver advanced services in smaller markets, Congress should consider reducing, or at least equalizing, the regulatory burdens on smaller cable.

As DBS continues to mature and gains even greater market share against cable, this regulatory DIS-parity threatens to grow. The consequences for competition and consumers should concern us all.

V. IF SHVIA IS REOPENED, THEN SIGNIFICANT MODIFICATIONS ARE NEEDED TO ENSURE MEANINGFUL COMPETITION IN THE LOCAL MARKETPLACE.

ACA and its members do not advocate the modification of SHVIA. We understand, however, that DBS interests are calling for changes to the statute. The Committee should dismiss these calls to protect consumers in smaller markets and rural areas and to preserve competition by independent cable businesses with the giant satellite duopoly.

Still, if the Committee decides that changes to SHVIA are appropriate, we have some suggestions that will advance competition and localism in smaller markets.

• *Access to Local-into-Local Signals*—Some rural cable systems cannot receive good quality broadcast signals off-air. In local-into-local markets, these systems can receive good quality signals from DBS, and our members are willing to pay reasonable rates for this service. The DBS providers have refused. To ensure the widest possible distribution of good quality local broadcast television signals in rural markets, Congress should require DBS to provide smaller cable systems with local-into-local television signals on non-discriminatory rates, terms and conditions.

• *Broadcast Basic*—To encourage wider carriage of local broadcast signals and achieve greater regulatory balance between DBS and CATV, particularly in smaller and rural areas, Congress should require DBS to provide a broadcast basic level of service to all customers where DBS provides local broadcast signals.

• *Cable Standing*—Grant cable operators standing to file notices or complaints against DBS for violations of SHVIA's broadcast carriage requirements.

• *Good Faith Negotiation Rules*—SHVIA contains the retransmission consent good faith negotiation requirement. This portion of the statute sunsets on January 1, 2006. To ensure fair retransmission consent agreements that benefit consumers and to encourage carriage of local broadcast signals, Congress should extend the good faith negotiation requirement.

• *Retransmission Consent Exclusivity*—SHVIA prohibits exclusive retransmission consent agreements. This provision sunsets on January 1, 2006. To prevent the loss of important broadcast signals in local markets, Congress should make this provision permanent.

VI. CONCLUSION

SHVIA has provided a framework for DBS carriage of local broadcast signals. It is not perfect, but all players know the current rules. Congress should maintain the status quo with a straight reauthorization. However, if the law is changed, then the impact on consumers and competition—particularly in smaller markets and rural areas—must be considered and balanced.

The American Cable Association and its members are committed to working with the Committee to solve these important issues.

I would like to sincerely thank the Committee again for allowing me to speak before you today.

Mr. UPTON. Mr. Kimmelman.

STATEMENT OF GENE KIMMELMAN

Mr. KIMMELMAN. Thank you, Mr. Chairman. On behalf of Consumers Union, the print and on-line publisher of Consumer Reports, we appreciate the opportunity to present a consumer viewpoint on the satellite law. From our perspective, this law needs to be updated and extended and it's very simple. We need to make sure that there are no differentials, competitive advantages between cable and satellite in the price of programming, in the availability of programming, so that consumers everywhere have as much choice as possible at the lowest possible price. It's really that simple.

We need to also ensure that special concerns across borders and local communities that cannot receive their local signals that Congress go out of its way as it did in creating universal telephone service to make sure that we have universality of local important media to serve citizens' needs.

But we have a bigger problem as well when you look at the broad landscape of competition and localism. Your Federal agency responsible for promoting these worthy goals, I think, has been asleep at the switch. We're losing localism. We're losing our opportunities for competition because the Federal Communications Commission has really not been doing its job.

We have in most communities one cable company, two satellite services available and yet cable rates are up 54 percent since you passed the law allowing for deregulation of cable pricing. We have two satellite companies. They haven't been able to really get in and price compete. And with lax oversight and consolidation, we now have one of the satellite companies, DirecTV owned by a national television network with more than 20 regional sports channels under its ownership circle, cable channels, and the CEO of that company, after his deal was closed buying DirecTV stated he has no interest in pricing wars with his competitor, cable. No interest in pricing wars. What signal does that send to the consumer about what will happen to prices? And it's not just that company. We now have Comcast, the largest cable company wanting to buy Disney, an owner of ABC, Disney Channel, ESPN. In today's Wall Street Journal, Mr. Franks' company, how in the world are we going to get price competition in this environment? How are we going to get better choices and lower prices for consumers if a few companies keep buying up all the most popular channels and control the distribution to consumers?

In the few communities, according to the General Accounting Office where there's real competition to cable companies, consumers are saving 15 to 41 percent on their bills. I suggest that the Congress think about how to get that for everyone.

The other principle we care passionately about is localism. What is localism? I want to define it to you because it means so much to so many people. For me it means diversely owned media outlets, sources of information to reflect the whole panoply of views, tastes in a community to make the whole robust sense of community come out through media.

Local broadcasters often play an enormous role in that. But in a world where the FCC has relaxed its oversight of ownership not every broadcaster reflects this vantage point of localism. We have companies like Tribune, Sinclair, Gannett, who talk about owning two, three local broadcast stations, multiple radio stations, the one local newspaper in town and being a dominant source of news and information. That doesn't get you diversity of local views and opinions, attitudes. There's no doubt a need to protect the ability to produce, gather, provide local news and information in a community, but it shouldn't be dominated by one or two companies.

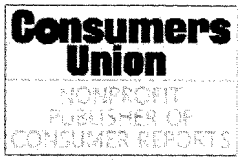
So I would suggest that as you review this law and look beyond it at ownership of media in this country that you consider whether it would be so bad to have a distant signal, a distant voice, another voice, if we're going to allow one or two companies to dominate a local media market. Maybe it wouldn't be so bad.

In conclusion, equalizing treatments under the satellite law is important. Taking care of unique rural concerns is important, but most importantly, we urge you to go back, review all of the laws here and do one thing we've never done for consumers, make sure

they have the right to choose any channel, every channel they want and pay for that particular channel, not a whole package, pay for what they want, pick what they can get and I think then we might start opening the market to better choices and lower prices for consumers.

Thank you.

[The prepared statement of Gene Kimmelman follows:]



Testimony of
GENE KIMMELMAN

Senior Director of Advocacy and Public Policy
Consumers Union

Before the
Subcommittee on Telecommunications and the Internet
of the
House Committee on Energy and Commerce

On
Oversight of the Satellite Home Viewer Improvement Act

March 10, 2004

Introduction

Consumers Union[1] has traditionally viewed the Satellite Home Viewer Improvement Act (SHVIA) as an important, but small piece in the overall goal of promoting more competition to cable monopolies. We had hoped that by putting satellite on equal footing with cable -- paying the same prices for the same programming -- satellite would start creating downward pressure on cable rates and promote improved quality programming, including digital and High Definition Television.

In 1999 we testified before this and other committees describing the importance of treating Direct Broadcast Satellite (DBS) providers fairly and equitably with cable and other Multichannel Video Programming Distributors (MVPD), including allowing DBS to carry and distribute local channels in order to better compete with the local cable monopolies.[2] Now that SHVIA nears expiration, it is time to assess how the Satellite Home Viewer Extension Act can work to benefit consumers.

Unfortunately, inadequate competitive forces, industry consolidation, relaxed ownership rules, and lax regulatory oversight plague a market in which satellite has yet to become -- and may never become -- a full alternative to cable.

Ineffective Competition and Market Domination

While satellite has made significant inroads in rural and upscale markets (e.g., where consumers demand substantial sports, movie, or other specialty programming beyond the basic tiers), cable's only effective price competition is a second cable system. But these second cable systems, also known as "overbuilders" or Broadband Service Providers (BSPs), are only available to 2 percent of America's households. This is a shame because the Government Accounting Office (GAO) found last month that a second cable company's "entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services. Incumbent cable operators often responded to BSP entry by lowering prices, enhancing the services that they provide, and improving customer service."[3]

The GAO goes on to say that, "The combined effect of BSP entry and incumbent companies' response provides significant benefits for consumers. The rates for telecommunications services were generally lower...(f)or example, expanded basic cable

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 4 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.
[2] Testimony of Gene Kimmelman, Consumers Union, on Important Competitive Issues Involving Satellite Television, Subcommittee on Telecommunications, Trade and Consumer Protection, House Committee on Commerce, February 24, 1999.
[3] Government Accounting Office, "Wire-Based Competition Benefited Consumers in Selected Markets": GAO-04-241, February, 2004, pg. 4.

television rates were 15 to 41 percent lower in 5 of the 6 markets with a BSP when compared with their matched market."[4] If cable companies, when confronted with a competitor, can lower rates by 15-41 percent, enhance services and improve customer service, then surely there is room to lower prices and improve service across America.

The problem is that very few Americans live in areas where they can take advantage of the fruits of head-to-head competition. In the rest of the country, satellite is the only competitor to monopoly cable.[5] And satellite has failed to offer effective competition for several important reasons, as described in the attached report (see Appendix A). In fact, satellite's major impact on cable involves local channels -- something has only done in larger markets-- and even then, it only pressures cable to offer more channels, not lower prices.[6]

During the period when satellite subscription increased to cover about 20 percent of the multichannel TV market, cable rates soared almost three-times faster than inflation -- up about 53 percent -- since Congress launched rate deregulation in the 1996 Telecommunications Act. Today, if consumers nationwide had a second cable wire serving their community, instead of one cable company and two satellite providers, they could be saving as much as $4.5 billion a year (see Appendix A).[7]

Monopoly cable companies have attempted to block or slow-roll efforts to promote competition. The largest cable operators never compete with one another, and instead grow through mergers and swapping systems amongst themselves to create regional clusters that undermine the growth of head-to-head competition head-to-head with cable. Without competition, large operators and regionally clustered systems have more muscle to impose price increases.[8]

Industry Consolidation

Recent consolidation involving a national broadcast network that owns cable programming, and a satellite distributor, only makes the competitive landscape worse for consumers. News Corp's recent purchase of DirecTV, the largest satellite provider, brings the Fox TV network and numerous cable channels into a company that was supposed to compete against cable. News Corp's Chairman and CEO Rupert Murdoch said after he purchased DirecTV that "we're not going into a price war with anyone."[9]

If competition in the multichannel video market had performed up to its hope and hype, the News Corp./DirecTV merger might not have been so threatening. But in light of the failure of deregulation, it presents a problem for public policy that cannot be ignored. There are two points

---

[4] Id.
[5] Id., pg. 26.
[6] Attachment A – Consumer Federation of America and Consumers Union, "The Continuing Abuse Of Market Power By The Cable Industry: Rising Prices, Denial Of Consumer Choice, And Discriminatory Access To Content," February, 2004, pg. 7.
[7] Id.
[8] Id.
[9] Ronald Grover, "Direct Talk about DirecTV." Business Week, January 19, 2004, pg. 61.

of power in the marketplace--distribution and program production. The problem with a merger of News Corp. and DirecTV is that it combines the two.

The reach of News Corp's media empire is truly staggering. The following are highlights of some News Corp properties in the U.S.:

- **Broadcast Television Stations** - 35 stations, including two broadcast stations in New York, Los Angeles, Dallas, Washington DC, Houston, Minneapolis, Phoenix and Orlando;

- **Filmed Entertainment** - 20th Century Fox Film Corp., Fox 2000 Pictures, Fox Searchlight Pictures, Fox Music, 20th Century Fox Home Entertainment, Fox Interactive, 20th Century Fox Television, Fox Television Studios, 20th Television, Regency Television and Blue Sky Studios;

- **Cable Network Programming** - Fox News Channel-the most watched cable news channel, Fox Kids Channel, FX, Fox Movie Channel, Fox Sports Networks, almost two dozen Fox Regional Sports Networks, Fox Sports World, Speed Channel, Golf Channel, Fox Pan American Sports, National Geographic Channel, and the Health Network;

- **Publishing** - New York Post, the Weekly Standard, HarperCollins Publishers, Regan Books, Amistad Press, William Morrow & Co., Avon Books, and Gemstar-TV Guide International;

- **Sports Teams and Stadiums** - Los Angeles Dodgers, and partial ownership in the New York Knicks, New York Rangers, LA Kings, LA Lakers, Dodger Stadium, Staples Center, and Madison Square Garden;

News Corp's merger with DirecTV adds a new, nationwide television distribution system to News Corp's programming/production arsenal. DirecTV is the nation's largest satellite television distribution system, with more than 11 million customers and the ability to serve all communities in the United States.

To News Corp, the sum is greater than its parts combined. With the most prominent sports teams in their league, content creation and production, network and cable programming, and now their satellite distributor, News Corp has even greater market power than before. Thanks to reduced regulatory oversight, the resulting company is a many-headed monster able to wreck severe damage to the market.

While DirecTV has News Corp's content arm to use as leverage against its competition, the other satellite provider, Echostar's Dish Network, must buy much of its programming from its competitors, including cable companies, broadcasters or DirecTV's parent if it wants to sell the most popular programs. When one satellite provider is given broad market power to raise programming prices, and the other is hamstrung by its competitors' incentives to keep

programming prices up, it doesn't inspire much confidence that satellite will become an effective competitor to cable any time in the near future.

Although the Federal Communications Commission (FCC) imposed a number of conditions on this merger, preventing discriminatory treatment against cable and other satellite distributors, the Commission did nothing to prevent News Corp. from raising the prices on all of its programming to everyone in the market--including itself (DirecTV). This drives up prices for all consumers without officially "discriminating" against any other multichannel video service providers. Clearly, these conditions give consumers little hope that cable or satellite prices will fall in the future.

Relaxed Media Ownership Rules

In this environment, the FCC's decision to relax media ownership rules -- allowing the most popular local TV broadcast stations to buy more stations in the same market, control the biggest local newspaper and numerous radio stations -- could enable giant national media companies to dominate individual local markets, exerting undue influence over what local political, social and cultural ideas receive the most attention.

On June 2, 2003 the FCC made some of the most sweeping changes to this nation's media ownership rules. For instance, the FCC:

- **Repealed the Newspaper/Broadcast Television Cross-Ownership rule**, allowing the biggest local TV station to buy the dominant or only newspaper in over 190 of America's 210 media markets, serving 98% of the U.S. population. Most Americans - 80 percent - still get their news from local TV and newspapers. Allowing consolidation between those main sources of local news on the premise that the Internet and cable television have become the primary source of local information is not market reality. Cable TV is primarily a distributor of national news, not local news. News content on the Internet is almost entirely regurgitated from local TV and newspapers - it is another distribution channel, not a unique source of original reporting.

- **Raised the national audience cap** that limited the percentage of households one company could reach through their local television stations. While the FCC raised the percentage from 35 to 45, through the appropriations process last year, Congress settled on 39 percent.

- **Enabled media companies to own local TV "duopolies" and "triopolies,"** and allowed mergers between powerful TV stations in over 160 media markets representing 90 percent of the American viewing public, reducing competition and hindering diversity.

- **Eliminated consideration of any other public interest factors** when reviewing mergers involving the properties described above.

Lax Enforcement

As Appendix A shows, the FCC is in no position to act as an effective regulator. Before even looking at the problem of escalating cable rates, "the FCC cannot even figure out how many cable subscribers there are."[10] Appendix A also describes how cable's bundling television packages with high-speed Internet data services is anti-competitive and hurts satellite's ability to compete for consumers.[11] The FCC's failure to analyze, much less prove cable's claim that bundling television with Internet is good for consumers, is proof that they simply have not addressed the fundamental competitive issues in the real world.

Future Mergers: Things Could Get Worse

The broadcast networks that dominate prime-time and the integrated cable operators that dominate non-prime time have become thoroughly integrated into a tight cabal that controls the video dial. A handful of companies dominate the programming side of the multichannel video market. Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems - either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

Four entities -- ABC/Disney, Time Warner, Liberty Media (with significant investments in News Corp) and Viacom -- have ownership rights in 20 of the top 25 programming networks based on subscribers and prime time ratings (see Appendix B).[12] They account for over 60 percent of subscribers to cable networks, rendering this market a tight oligopoly. Other entities with ownership or carriage rights account for four of the five remaining most popular networks. Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

Now that the country's largest cable company, Comcast, is trying to buy Disney, a merged ComcastDisney could have the ability to drive up programming costs across the entire market, even higher than before.

With ownership of the ABC network, numerous local broadcast stations, ESPN, and more, Comcast could have the same incentives and power in the market as News Corp possesses: both maximize their profits by raising programming prices and charging everyone in the market these inflated prices. And the two companies would have undue power to decide which channels -- beyond what they two of them own -- are carried on their systems and therefore reach enough households to survive in the market.

In light of these market conditions, allowing content producers to merge with content distributors leads to fewer voices, decreased competition, homogenized viewpoints and higher costs for consumers.

---

[10] Appendix A, pg. 1
[11] Appendix A, pg. 2-3
[12] Appendix B, Consumer Federation of America and Consumers Union, "Concentration of Marquis Programming."

The Future of SHVIA

There are a number of policy changes proposed to SHVIA's renewal that Congress must consider. We believe that while some issues will hardly impact rising cable rates, a few are directly linked with enabling satellite to be a more effective competitor to the local cable monopolies. This requires Congress to:

- **Extend SHVIA and equalize communications laws and copyright fees that cable and satellite companies pay local affiliates for carriage of their programming.** It's unfair that satellite pays twice as much as cable does per subscriber to carry the same programming over the same local channel being offered to the same subscribers;

- **Harmonize the compulsory license between cable and satellite.** If cable is granted a permanent compulsory license then satellite carriers should be treated equally to give them the regulatory certainty they need to compete with cable;

- **Expand previous laws designed to hold down cable rates** and make popular TV channels available to cable's potential competitors;

- **Implement aggressive regulatory oversight of competitor's potential access to cable-owned programming**, cable equipment, or programming that cable companies exert monopolistic influence over; and

- **Ensure consumers' access to valuable spectrum.** As satellite tries to distribute high definition signals from other markets to customers unserved by local high definition broadcast stations, broadcasters claim that importing these distant signals undermines localism. Our record on localism is clear--we're strong believers in its importance to shape a community's debate over public policy. But localism is not some absolute value that trumps all other policy concerns. If one or two companies dominate local markets, that is no better for consumers than if national companies dominate local markets and reduce the number of local media voices.

The Future of Consumer Protections Beyond SHVIA

As it considers SHVIA and in light of the broader policy concerns we outline above, protecting consumers outside of limited legislation like SHVIA is essential. Toward that goal, Congress should:

- **Reinstate the media ownership rules that the FCC rewrote on June 2, 2003** to protect the diversity, competition and localism of our news and information sources. Ownership of programming should be independent of ownership of distribution.

- **Give consumers the ability to lower their cable costs by paying for only the channels they watch**--and avoid paying for content they find offensive, distasteful,

or just unappealing. This would hold programmers accountable for their price increases. *A la carte* programming would finally provide a balance to the market that's currently tilted toward those who own programming, and especially those who combine that with distribution.

- **Ensure that consumers have open and unfettered access to the analog television spectrum once broadcasters swiftly complete the transition to digital programming.** Returning that spectrum back to the people is one of the best chances we have to stimulate new growth and fresh innovation that can finally take on the multi-headed media giants.

The evidence clearly demonstrates that it is important for Congress to take a broader look at the problems in the multichannel market and intervene far beyond SHVIA to promote market forces that result in greater competition and more diversity of independently owned media outlets.

Consumers Union believes that the goal of promoting localism must be balanced by the goal of promoting diverse viewpoints in local and cultural matters, social issues and local news and information as generated by independent ownership of major local media outlets. Localism is not just about protecting an incumbent broadcaster who can dominate a local news and information market.

The important issue at stake here is how long will the digital transition take, and how long broadcasters will get to sit on the redundant analog spectrum? The faster broadcasters complete the transition they so confidently demanded, the faster they can return unused spectrum licensees that can be, in turn, used to facilitate the successor to the wildly successful WiFi, potentially creating true competition to cable and telephone monopolies via the Internet.

Conclusion

Consumers Union therefore believes that, as policy makers reopen the debate about how satellite and cable competition will look, it should reauthorize SHVIA with changes and investigate the multichannel market as a whole. It's clear that what is needed is to improve competition so that the market can work *for* consumers not *against* them.

APPPENDIX A

Consumer Federation of America

THE CONTINUING ABUSE OF MARKET POWER BY THE CABLE INDUSTRY:

RISING PRICES, DENIAL OF CONSUMER CHOICE, AND DISCRIMINATORY ACCESS TO CONTENT

February 2004

APPPENDIX A

TABLE OF CONTENTS

Contents

IV. EXECUTIVE SUMMARY i

I. INTRODUCTION 1

A. PURPOSE 1
B. THE FCC'S FAILURE TO ASK THE HARD QUESTIONS 1

II. THE SUPPLY SIDE 3

A. MARKET POWER 101 5
B. GAO'S VIDEO MARKET STRUCTURE ANALYSIS 5
1. Horizontal Market Power 5
2. Vertical Market Power 5
C. HIGH-SPEED INTERNET 8
D. CASH FLOW ANALYSIS 10
1. All Revenues, All Costs 11
2. Cash Flow for Traditional Video Services 14

III. THE DEMAND-SIDE 18

A. ESTIMATION OF QUANTITY ADJUSTED PRICE CHANGES 18
B. BUNDLING, THE DEMAND CURVE AND CONSUMER SURPLUS 20

IV. LONG-TERM TRENDS 22

A. PRICE 22
B. QUANTITY 25

V. CONCLUSION 25

ENDNOTES 27

Consumer Federation of America

THE CONTINUING ABUSE OF MARKET POWER BY THE CABLE INDUSTRY:

RISING PRICES, DENIAL OF CONSUMER CHOICE, AND DISCRIMINATION IN ACCESS

EXECUTIVE SUMMARY

Eight years after the passage of the Telecommunications Act of 1996, which deregulated cable prices, this study shows that cable operators still possess market power in the multichannel video market. The result is price increases that far exceed the rate of inflation – almost three times faster than inflation in recent years –and the continued restriction of consumer choice to a small number of ever larger, ever more expensive bundles. The cost imposed on consumers by this abuse of market power is between $4.5 and $6 billion per year, compared to what prices would be in a competitive market.

Cable operators attempt to obscure the existence and abuse of market power with two arguments. First they claim that programming costs explain the massive increase in the price of basic and expanded basic service. Second, they claim that consumers are getting much greater value for their dollar; so that quality adjusted prices have declined. Neither claim stands up to close scrutiny.

EXERCISE OF MARKET POWER ON THE SUPPLY SIDE

Prices

Econometric studies by the General Accounting Office and the Federal Communications Commission show that where cable faces direct head-to-head overbuilder competition the price of cable service is much lower.

- A recent GAO report found that in situations where cable faces competition overbuilders, prices are 15% lower. Econometric analyses have consistently found this result of a decade. Unfortunately, less than two percent of cable customers enjoy the benefits of that competition.
- A recent GAO analysis found that a cable system owned by a large national operator has prices that are over 5 percent higher than if it is not. FCC econometric models show even larger effects.
- When the FCC models add in a specific variable for regional clustering, a dramatic trend in the industry, they find that clustering has an added effect of further raising price.
- The vast majority of cable subscribers are now served by one of a handful of huge-multiple system operators that have expanded their grip on the industry through mergers and clustering, who adds as much as an additional 8 percent to the consumers bill.

Market Structure

Cable's market power stems from a lack of effective competition. Even at the national level, the multichannel video market has become concentrated; the problem is much greater at the local level.

- In markets where 98 percent of Americans live, a single cable operator dominates multichannel video distribution with a market share that exceeds 80 percent.

The largest cable operators never compete with one another. Instead they have grown to huge national firms through mergers using swaps of systems to create regional clusters that undermine the ability of overbuilders to launch competition. Large operators and clustered systems have more muscle to thwart competition and impose price increases.

- They can distribute programming terrestrially and refuse to make it available to competing distribution systems. This is becoming increasingly important as vertically integrated companies dominate "must have" regional sports programming.

- They can extract exclusivity deals from independent programmers, thereby denying programming to competing distribution media.

- They have more leverage over local governments to obstruct the entry of overbuilders

Direct Broadcast Satellite does not have a significant or substantial ability to discipline cable pricing abuse. Satellite is a niche product that has had its greatest success in areas where cable was unavailable or among customers who wanted high quality digital services with large numbers of channels (before cable could offer such a package).

- Cable has surpasses satellite in the number of subscribers to digital video service.

- It is bundling high-speed Internet and basic cable service to further erode the ability of satellite to compete.

Discrimination in Access

Cable operators discriminate against unaffiliated service providers in both the video and the high-speed Internet product space. Cable operators are 64 percent more likely to carry networks that they own, than the networks provided by others. Broadcasters have used their retransmission rights to also gain preferential carriage deals for their shows. As a result, independent programmers are placed at a severe disadvantage.

Cable operators dominate the residential market for advanced high-speed Internet access, with an 83 percent market share. By refusing to allow unaffiliated Internet Service Providers to compete for Internet access customers over the cable modem platform, cable operators have foreclosed a critical high-end market, which dramatically reduces competition for Internet service. Virtually no voluntary carriage agreements have been signed by cable operators.

Cash Flow

A close look at cable's financial operations shows that rising costs cannot explain the rising price of traditional video services.

- In the aggregate, price increases far exceed the increase in programming costs.

- An allocation of non-programming operating costs based on historical patterns shows that operating cash flow from traditional video services has increased by approximately 70 percent on a per subscriber basis since the passage of the Telecommunications Act.

Sale of advanced services, digital tiers and high speed Internet, which were the motivation behind the recent system upgrades, has skyrocketed. The upgrades are paying for themselves.

- High-speed Internet is now the second largest income stream and digital tiers are the third largest streams of income for the cable operators, bringing in a combined $10 billion per year.

The Shape of Market Power on the Demand Side

Cable operators claim that adding more channels to their bundles increases the value of he package. Unfortunately, consumers are not given a choice of which channels to purchase. They must take nothing, almost nothing (basic) or almost everything (expanded basic). With the addition of the digital tier, they have another option, but cable operators have been moving popular channels (like HBO) to the digital tier to drive consumer bills up even farther.

Because the cable operators restrict consumer choice to this small set of bundles, it is impossible to know how consumer welfare has changed and wrong to claim that every show adds equally to consumer value.

- The average consumer watches about 17 channels regularly, but the bundles have four times that number.
- The top twenty shows account for approximately three quarters of all viewing.
- Almost nobody watches the bottom 30 channels in the bundle. Only about one out of every 250 households where these shows are available watches them on any given day.

The economics literature has long recognized that bundling by firms possessing market power can be anti-consumer and anticompetitive. When different consumers have strong preferences for different channels, putting them into bundles forces each consumer to pay for many channels he or she does not want in order to get the channels he or she does want.

A detailed analysis of one of the most popular and expensive channels, ESPN, which has been a focal point of controversy, shows that approximately four-fifths of cable subscribers would not pay the price of ESPN if they were given a choice. By forcing consumers to pay for the show in a bundle, wealth is transferred from consumers to cable operators (and the programmer).

A recent analysis that claims that the BLS over states price increase and that prices have fallen on a quality adjusted basis is riddled with analytic and measurement errors. The analysis double counts the quantity of programming and vastly overvalues the shift from viewing over the air to viewing cable. Watching an hour rerun of the same show on cable, instead of a broadcast station is assumed to increase consumer value by one hour, even though the exact same show is watched. Correcting these errors shows that the BLS cable price index yields, at best a lower limit on the quality adjusted price increases.

- In contrast to the 15 percent real decline that the NCTA analysis claims, the BLS shows a 27 percent increase. The actual quality adjusted price increase could be as high as 40 percent.

The embedded base of excess prices and the entrenched market power of the cable operators, reinforced against satellite and extending into the high-speed Internet, confront policy makers with a critical problem. After two decades of abuse, and eight years after the Telecom Act of 1996, it is clear that policymakers made a mistake in deregulating cable. It is time for policymakers to take steps to promote real competition and protect consumers from further abuse.

APPPENDIX A

I. INTRODUCTION

A. PURPOSE

Proceedings at the Federal Communications Commission (FCC),[i] a series of General Accounting Office (GAO) reports[ii] and contract negotiations between cable operators and programmers[iii] have stimulated an unprecedented round of finger pointing and release of data about the cable television industry. The goal is to justify and/or place blame for the dramatically increasing price of cable service.[iv] Cable operators claim the programmers made them do it. Programmers have fired back, suggesting that basic rates have been increasing to support the rollout of advanced video and new, non-video services. The finger pointing drives home a simple point: consumers are paying a dramatically higher price for their monthly cable service. Or, are they?

Several of the existing industry studies are framed as responses to consumer analyses that have documented the abuse of market power by cable operators. Comcast[v] and the National Cable Telecommunications Association (NCTA)[vi] assert that when consumer advocates complain about the total price of cable service, they are failing to take into account that the monthly bill includes more networks and are confusing real prices with nominal prices. NCTA goes so far as to offer a new approach to indexing cable prices as an alternative to the Bureau of Labor Statistics (BLS) cable Consumer Price Index (CPI). The FCC's *Tenth Annual Report (In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)* cites this analysis as further support for its conclusion that competition in the multichannel video market is robust and repeats the industry arguments.[vii]

This paper shows that the most frequent complaint voiced by consumer advocates – that cable "rates have risen and continue to rise almost three-times faster than inflation,"[viii] – is correct. The consumer advocate comparison of cable rates to inflation states the numerator and the denominator of the real fraction in a fashion that is more meaningful to consumers and policymakers because it gives the reference points. Moreover, the paper argues that, if anything, the BLS cable price index is more likely to be understating price increases than overstating them.

The bottom line is that the market power-based abuse of consumers by cable operators has been growing since the passage of the Telecommunications Act of 1996. After two decades of blatant abusive pricing, cable operators have begun to encounter some resistance, so increases may slow, but that does not mean the abuse will be reduced or eliminated. In response to criticism, the cable operators have simply launched new bundling strategies that shift the focal point of price increases and anticompetitive harm to other areas.

B. THE FCC'S FAILURE TO ASK THE HARD QUESTIONS

The FCC's Annual Reports have steadfastly refused to address the serious questions raised about the cable market in a rigorous manner, but the *Tenth Annual Report* sinks to new lows. The FCC cannot even figure out how many cable subscribers there are. The two sources on which it relies for data (it never generates its own independent data) disagree by almost five million subscribers. In response, the FCC takes a most remarkable approach – it uses both sets of numbers – the lower figure for its financial analysis and the higher figure for its assessment of

competing technologies (contrast Tables 1 and 4 to Table B-1). The *Ninth Annual Report* used the higher figure for both the financial and the competitive assessment analyses.

As with most analyses at the Commission these days, slipping the lower figure into this report may be strategically motivated. If the FCC uses the higher figure and growth persists at the rate implicit in those figures, by this time next year cable will be well above 70 percent of the TV market. This is a threshold that would trigger petitions to the FCC to regulate cable. If the FCC shifts to the lower figure, or claims the conflict between the two creates uncertainty, the regulation trigger would be put off several years. Here, as elsewhere, the failure of the FCC to develop solid independent data may harm consumers substantially.

The FCC recognizes the dramatic increase in cable prices, but, like the industry, it emphasizes that "concurrently with these rate increases, however, the number of video and non-video services increased, including a substantial increase in the number of video channels, increased use of cable (as measured by a substantial increase in cable viewership), and the addition of advanced service offerings which, of course, are paid for separately by consumers."[ix] Unfortunately, the FCC admits that its approach to measuring prices cannot address the fundamental issue, since it is based on an assumption that this paper shows to be doubtful – "Per channel rates, however, value all additional channels the same even if consumers do not want new channels that are added to cable systems."[x] This paper shows that such an assumption is contradicted by consumer behavior. The cable video industry's bundling harms consumers.

The FCC regurgitates the industry claim that rising programming costs have driven basic rate increases, but does not examine the contradictory evidence embedded in its own numbers. For example, it notes that programming costs went from $7.5 billion in 1998 and will exceed $9 billion in 2003. [xi] It later cites a figure of $9.2 billion for 2002.[xii] Over the 1998-2003 period, revenues for basic and expanded basic services increased by $7.3 billion. Thus, three quarters of the price increases cannot be explained by rising programming costs. Price increases exceeded programming cost increases by more than $5 billion.

The challenge of explaining away the excessive rate increase for basic and expanded basic service is made all the more difficult in light of the dramatic increase in revenues from advanced services. The FCC notes that dramatic rise of advanced service revenues citing "Kagan World Media reports it was high-margin, high-speed-data services that drove operating cash flow growth in 2002."[xiii] Moreover, it notes that Kagan sees this trend growing in 2003, since "they expect high-speed data service 'to contribute 12.4% to total residential revenue, the largest piece of the revenue pie after basic service."[xiv] Digital tier services are the third largest revenue stream for cable operators, having surpassed local advertising for the first time in 2003.[xv] The fact that these two advanced services now bring in $10 billion in revenue should force the Commission to challenge the claim that basic and expanded basic prices had to rise to pay for the upgrade of the system. This issue, which the Commission has never addressed, is a central theme of this report.

The FCC's report goes on to claim that the bundling of advanced services with basic service "may provide some discount on basic or expanded basic,"[xvi] a proposition it does not even attempt to analyze, let alone prove. This paper shows that this bundling is anti-competitive.

The FCC notes several cable industry milestones in this report, but fails to follow up on them. For example, it notes that the national Multichannel Video Programming Distribution (MVPD) market exceeds the threshold for a moderately concentrated market as defined by the Department of Justice/Federal Trade Commission *Merger Guidelines*. The FCC hastens to add that "it is unclear whether this is a potential competitive problem, because the delivery market is local, not national and because the main competitors to cable in both the upstream and downstream markets continue to grow in size."[xvii] This observation is not comforting for several reasons.

As has traditionally been the case, the FCC makes no effort to assess the level of concentration in the local market. If it did so, it would find that local MVPD markets are generally six times as concentrated as the national market on which it focuses.[xviii] Here the FCC encounters another contradiction. It continues to maintain that the clustering strategies of large multiple system operators might benefit consumers,[xix] even though the Commission's own analysis has consistently shown that clustering results in higher prices.[xx]

While it is true that the MVPD market is expanding, the FCC fails to note that its competitive assessment analysis shows that cable operators added more subscribers than all the other MVPD competitors combined.[xxi] (Of course, the FCC may erase this observation by switching the numbers next year.) Moreover, the FCC fails to note that cable surpassed satellite in the number of digital subscribers for the first time in 2003.[xxii] Thus, the competitive threat from satellite that the FCC claims should ease our concern about concentration in the cable market may be subsiding, if it ever existed. In fact, this paper reviews the evidence that satellite has failed to discipline cable's pricing abuse.

The FCC's simplistic parroting of the industry arguments and failure to conduct rigorous, independent analysis continues to disserve consumers. As cable prices mount and the industry extends its market power into new areas, "congress and American consumers deserve a better effort from the FCC."[xxiii]

II. THE SUPPLY SIDE

A. MARKET POWER 101

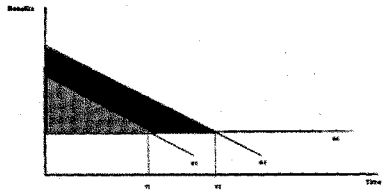
All of the industry studies, as well as the FCC report, ignore the fundamental public policy issues raised by the consumer analysis. Simply put, every dog has his day and every monopolist has his profit-maximizing price. Unlike the hapless canine, however, who goes back to a dog's life when his day is done, when the monopolist hits his profit-maximizing price, he goes on collecting excess profits. The abuse of consumers persists. What the cable industry economists have done in their recent papers defending cable industry prices is to focus on the scraps of consumer surplus left on the table by cable operators and ignore the submerged danger, the transfer of wealth and deadweight efficiency loss that result from the abuse of market power.[xxiv]

Launching from the simple observation that every monopolist leaves a little surplus in consumers' pockets, the cable industry analyzes the tip of the market power iceberg (see Exhibit

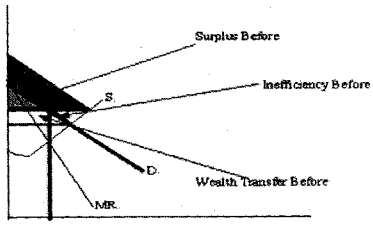
1a).[xxv] The shaded area in Exhibit 1a is the focal point of the NCTA paper. Consumer surplus (or

EXHIBIT 1:
Consumer Surplus

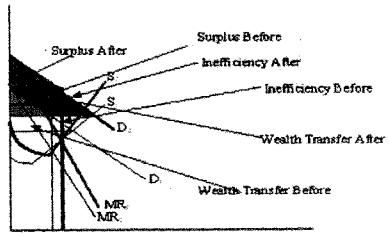
a) NCTA'S Simplistic Analysis



b) Consumer surplus is the tip of the market power iceberg



c) Change in supply and demand with market power persisting



consumer benefits as the paper calls them) is measured as the difference between the value of a service to the consumer (as indicated by the demand curve) and the price the consumer pays for the service. If the value exceeds the price, the consumer buys the product.

Exhibit 1b places the consumer surplus analysis in the framework of the complete picture of cable pricing[xxvi] as a classic diagram of the exercise of market power over price.[xxvii] It is well known in economics that the monopolist sets his price at the point where marginal revenue equals marginal cost. Even at that price there are consumers who are willing to pay the price because the value of the service exceeds the price for them, but consumers are still paying too high a price for the service. The monopolists have captured part of the consumer surplus and transferred it to their pockets (wealth transfers). Also, there are some consumers who give up cable or do not take it, when they would have if the price had been at a competitive level. Their loss is a deadweight efficiency loss. Because the elasticity of demand for cable service is low, wealth transfers are large relative to efficiency losses.

The monopolist can do various things to increase his profits when he hits the profit-maximizing price (see Exhibit 1c).[xxviii] He can stimulate demand by adding value or by bundling. He can shift the supply curve by lowering his cost or changing his cost structure (and pocket an extra share of the cost savings because he does not face competition). Either or both of these may appear to be welfare enhancing because the quantity consumed increases, but the abuse actually may be increasing on a relative basis because more consumer surplus is being extracted.[xxix] The relative size of the effects depends on the specific supply and demand curves. This is an empirical question. As depicted in Exhibit 1c, this paper demonstrates that both the total profit and the rate of profit on traditional video services have increased since the passage of the 1996 Act.

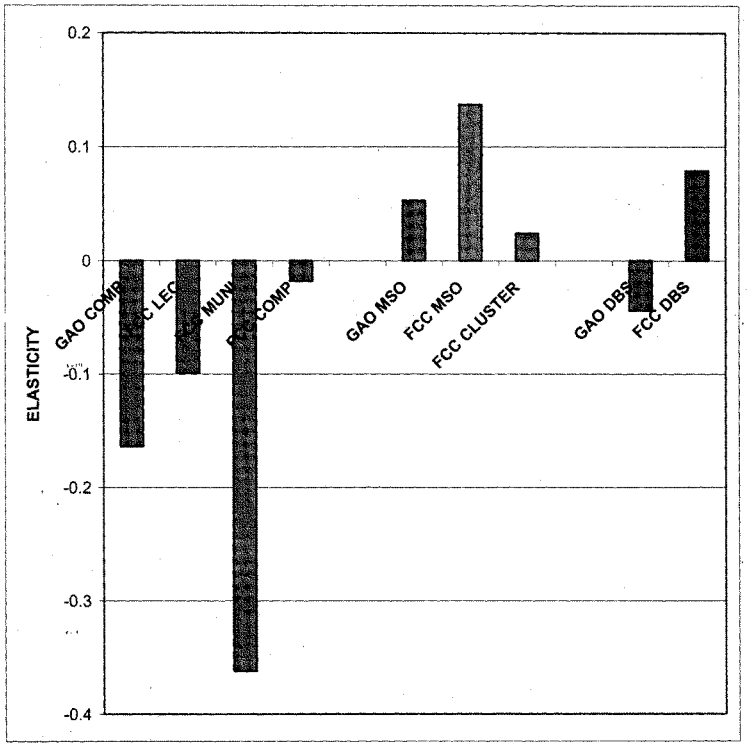
B. GAO'S VIDEO MARKET STRUCTURE ANALYSIS

The critical first question that must be answered is simple – is there evidence that market power is being exercised on the supply side? The GAO provides an affirmative answer. The GAO report affirms each of the supply-side problems of the multichannel video market that has afflicted the American public since the industry was prematurely deregulated in 1984 and further deregulated in 1996. Exhibit 2 shows the elasticities for dummy variables measuring various structural characteristics that affect the extent of competition, which were included in the regression analyses conducted by the GAO and the FCC.

1. Horizontal Market Power

Head-to-head, wireline competition is the only market structure feature that significantly disciplines monopolistic pricing. In its most recent report, the GAO finds that head-to-head, wireline competition between cable operators lowers prices by 15 percent for basic and expanded basic service.[xxx] Its earlier report had found a 17 percent difference.[xxxi] Ironically, the *Tenth Annual Report* notes that the first report on cable competition found that head-to-head competition lowered prices by 16 percent.[xxxii] Recent FCC econometric models, which identified three types of head-to-head competitors (local exchange carriers (LECs), publicly owned systems (munis) and other private overbuilders (comp)), have consistently found large price effects from head-to-head, wireline competition.[xxxiii] Unfortunately, less than two percent of American

EXHIBIT 2:
Impact Of Market Structure Characteristics On Monthly Rates
(Regression Coefficients, dummy variables)



Sources: Federal Communications Commission, *Report on Cable Prices,* April 4, 2002, Attachment D-1; General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* October 2003, Appendix IV, Table 3.

households enjoy the benefit of head-to-head, wireline competition.[xxxiv] The result is an abuse of market power that costs the American public about $4.5 billion per year in cable rates alone.[xxxv]

Bigger monopolies are worse when it comes to consumer prices. In the GAO analysis, if a cable system is part of a large national operator, its prices are 5.4 percent higher than if it is not.[xxxvi] The GAO called this horizontal concentration. FCC econometric models have been finding this to be the case for several years, with even larger effects of being part of a multiple system operator (MSO).[xxxvii] When the FCC models add in a specific variable for regional clustering, a dramatic trend in the industry, they find that clustering has an added effect of further raising price.[xxxviii] Being served by one of the mega-multiple system operators, who have been expanding their grip on the industry through mergers and clustering, drives prices higher by more than 5 percent and perhaps as much as 8 percent. Thus, there could be as much as an additional $1.5 billion in consumer savings that could be wrung out of the cable market if it were deconcentrated.

The important implication is that the theory used to allow large cable operators to become larger is not supported by the empirical evidence.[xxxix] That theory claimed that the combination of larger, clustered systems would create efficiency-based cost savings that would be passed on to the public because one big monopolist is no worse that two, contiguous smaller ones. Since large incumbents never overbuild one-another and compete, this theory claimed there was little to be lost. The econometric evidence suggests that there is considerable harm. It turns out that large operators and clustered systems have more muscle to thwart competition and impose price increases. They can distribute programming terrestrially and extract exclusivity deals from independent programmers, thereby denying programming to competing distribution media (overbuilders and satellite). They have more leverage over local governments to obstruct the entry of overbuilders.

The large incumbent cable operators never competed by overbuilding a neighbor, they grow by merger. Policymakers surrendered to the cable urge to merge too easily. If cable operators knew they could not grow through mergers and really cared about size, they might compete by overbuilding one another.[xl]

Intermodal competition – between cable and satellite – does not effectively discipline cable's pricing power. In contrast to head-to-head, wireline competition, which lowers cable bills by $5 per month, competition from satellite lowers bills by a mere $.15, according to the GAO.[xli] In other words, head-to-head, wireline competition is almost 40 times as effective as intermodal competition when it comes to price. In fact, in the GAO report, even satellite's very modest pricing effect is not statistically significant by traditional standards. It fails at the 5 percent level of significance. The FCC's econometric analysis does not find even this small price effect. It finds a statistically significant effect in the opposite direction.[xlii]

To the extent that satellite has any competitive effect, it drives cable operators to offer more channels, but this effect stems from the decision of satellite to offer local programming. Where satellite offers local programming, cable operators offer about 5.4 percent more cable channels. Thus, satellite appears as a niche product that cannot discipline cable pricing abuse for the vast majority of cable subscribers who take only basic and expanded basic.[xliii]

Exhibit 3 explores the implications of the most recent econometric findings on horizontal market power. Using the traditional measure of market power and the standard measure of the pricing abuse that results – the Lerner Index – it explores the relationship between the number and size of firms in cable markets and the mark-up of price over cost. A more advanced approach uses the level of concentration in the market (as measured by the HHI) in the Lerner Index instead of the simple number of firms. The mark-up of price above cost is inversely related to the extent of competition and the market elasticity of demand. The more competitive the market and the more elastic the demand, the less the ability to increase price. The analysis uses the econometric estimate of the elasticity of demand and the implicit levels of concentration The econometric estimate of a 20 percent mark-up from a lack of head-to-head competition and horizontal concentration is consistent with, even a conservative estimate of, the pricing power suggested by the market structural conditions (demand elasticity and market shares) implicit in both the GAO and the FCC analyses.

2. Vertical Market Power

Vertical relationships are exploited by cable operators. GAO finds that cable operators are majority owners of one-fifth of the top 90 national networks. The GAO does not find price discrimination but it does find discrimination in carriage. That is, cable operators do not pay themselves more for their own shows, but they are much more likely to air them. The effect is quite large. Cable operators are 64 percent more likely to carry the programming in which they have a majority ownership stake. Cable operators who have a stake in programming also carry fewer channels overall. This result is consistent with prior academic studies.[xliv]

A one-fifth share of the most popular programs is a very substantial stake in the programming market and it blunts cable operators' incentive to resist price increases. Cable operators own minority stakes in other networks. With their market power at the point-of-sale, cable operators know that they can pass costs through to consumers and they can assure that their own programs are carried much more frequently than those of others, thereby gaining a disproportionate share of the overall increase in programming costs.

While no cable operator had pricing power in the programming market until recently, Comcast appears to have gained pricing power as a large purchaser of programming. Having achieved a large enough market share, it now has monopsony power over sellers of programming. Comcast is squeezing programmers to lower their fees at the same time it is announcing price increases for basic and expanded basic. It is both reallocating rents from programmers to itself[xlv] and increasing the rents collected from consumers.[xlvi]

Rights of carriage matter a great deal in the cable industry. The decision of Congress to give broadcasters must carry/retransmission rights has enabled the broadcasters to gain a significant advantage for their programming, in terms of carriage. Programs owned by broadcasters are 41 percent more likely to be carried by cable operators. Clearly, independent programmers are at a severe disadvantage, as has been demonstrated time and again. Although the GAO report concludes that 38% of the cable networks are majority owned by non-cable, non-broadcast firms, a much smaller percentage, less than 20 percent, do not have a least some minority ownership of broadcasters or cable operators.

EXHIBIT 3:
Comparison of Empirical Estimates of Mark-Up
Using Alternative Measures of Concentration and Dummy Variables

SOURCE	CONCENTRATION MEASURES			
	Non-competitive	Competitive		
FCC ($E_d = 2.2$)	HHI = 6800	HHI = 3912		ΔL
	45.1	17.8		-27.3
DIRECT ESTIMATE				
Head-To-Head			- 9.1	
Concentration			-25.6	
Total				-34.1
GAO ($E_d = 1.54$)	HHI = 7312	HHI = 3418		
	47.4	22.2		-27.3
DIRECT ESTIMATE				
Head-To-Head			-15.1	
Concentration			- 5.4 to -8.0	
Total				-20.5 to 23.5

Sources: Federal Communications Commission, *Report on Cable Prices,* April 4, 2002, Attachment D-1; U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* October 2003, Appendix IV, Table 3. Viscusi, W. Kip, John M. Vernon and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* (Cambridge, MA: MIT Press, 2001), pp. 102-108, 147-149, 258-259. Lerner Index:

$$L = S_i \frac{(P_m - MC)}{P_m} = \frac{HHI}{10000} * \frac{1}{E_d} \text{ (Nash Equilibrium)}$$

While discrimination in carriage has implications for the pricing issue that is the central concern of this paper, it has much broader implications for public policy in the multichannel video market. Public policy has expressed a concern about promoting independent production and ensuring a diversity of content for decades. Two pending proceedings at the FCC directly involve the question of how concentration of ownership and the exercise of market power in the form of discriminatory access to distribution affect the content available to the public. In the horizontal limits proceeding, the FCC is charged with setting a limit on the market reach of a single cable operator.[xlvii] Similarly, in several of the media ownership proceedings the market reach of broadcasters (and the availability of cable as a distribution technology) is a central concern. The conclusion is overwhelmingly clear. Those who have Congressionally mandated rights of carriage are able to have their shows aired, those who do not have almost no chance of success.

C. HIGH-SPEED INTERNET

Although high-speed Internet raises many important issues, from the point of view of video services pricing, it plays two important roles.

First, it is cited by the industry and analyses as one of the causes for the increase in cable prices. Since the plant upgrade supports other streams of revenue, the GAO cautions, "[f]irst, depreciation expenses (and therefore infrastructure investment) represent a joint (or common) expense for both video-based and Internet-based services. Because these expenses are associated with more than one service, it is unclear how much of this cost should be attributed to video-based services. Second, cable operators are enjoying increased revenues from these non-video sources."[xlviii] The same is true for operating expenses. A large part of the increased expense is associated with the selling and servicing of advanced video, Internet and telephone service that "have been spread across the entire revenue base – i.e. they are reflected in the prices paid by basic cable subscribers."[xlix]

Looking at a short period, 1999 to 2002, the GAO finds that revenues from Internet services alone are already almost equal to the increased depreciation expense of the cable plant upgrade. The GAO estimates that capital costs (depreciation expenses) have increased by $80 per subscriber, while Internet-only revenues increased by $74.[l]

Second, cable operators have rapidly achieved positive cash flow from high-speed Internet services because of weak competitive forces. Cable operators are aggressively bundling high-speed Internet with video services to gain competitive leverage. Their market power over high-speed Internet access gives them an important anticompetitive tool. Cable has foreclosed competition for Internet access service over its platform.[li] Controlling the platform diminishes the potential competition from video streaming over the Internet[lii] and becomes a lever against competition from other distribution technologies. Cable has an 83 percent market share of the residential advanced high-speed Internet market.[liii] Moreover, cable provides overwhelmingly (87 percent) advanced service, while DSL is overwhelmingly (67 percent) not advanced.

Discrimination was even more brutal in the Internet space as cable operators applied their business model to high-speed Internet access. Only a consent decree forced Time Warner to allow modest access, and intense scrutiny forced AT&T to make some minor concessions, but

the recent AOL/AT&T carriage agreement is thoroughly anticompetitive.[liv] AOL has been unable to actually execute any carriage agreements with cable companies.[lv] Cable operators do not sell ISP services outside of their service territories where they have the leverage of their market power over cable facilities.

With intramodal competition foreclosed, cable faces only weak intermodal competition. Cable has scoffed at the modest discounting efforts of the telecommunications-based DSL service providers.[lvi] In fact, Comcast raised the price of stand-alone high-speed Internet on its newly acquired AT&T systems. The reason cable can ignore intermodal competition is simple; those discounted services are substantially more expensive on a megabit basis (see Exhibit 4). The cable operators ignore DSL pricing moves and harp on speed superiority in their advertising. Exhibit 4 also shows why dial up is not a substitute for high-speed access. It is far more expensive on a megabit basis. Moreover, dial-up lacks the other key feature of high-speed service -- it is not always on. This distinction led the Justice Department to declare early on that high-speed Internet is a separate product from dial-up.[lvii]

Satellite lacks the ability to offer a bundle of video and high-speed Internet to compete effectively with cable. Cable recognizes this and is aggressively bundling high-speed Internet with basic cable service – offering a 25 percent discount on a bundle of basic cable and Internet compared to stand alone Internet service.[lviii]

Looking carefully at specific product and geographic markets reveals little competitive overlap of different facilities (see Exhibit 5).[lix] Intermodal competition is weak at best. Technological differences give different facilities an edge in different customer and geographic markets.[lx] Cable dominates the advanced residential high-speed Internet market, with a 75 percent market share for residential market of speeds of greater than 200kbps in both directions.[lxi] DSL, as deployed, is ill suited to multimedia video applications,[lxii] but DSL dominates the non-residential market with a 95 percent market share because businesses are disinclined to use cable.[lxiii] For the next generation telephone network technologies, "most experts agree that the VDSL business case isn't for everyone and won't[lxiv] realize its full revenue potential for decades."[lxv]

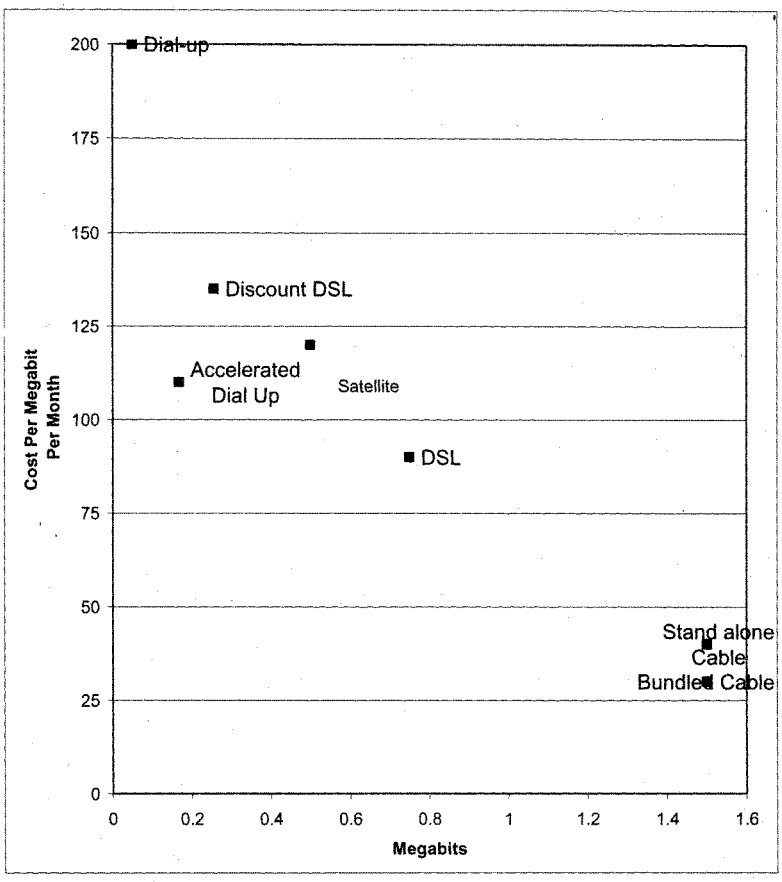
However, cable operators devote less than two percent of the capacity of their systems to cable modem service. They could easily expand that if they so desired. This gives them an immense advantage over telephone companies.[lxvi]

D. Cash Flow Analysis

1. All Revenues, All Costs

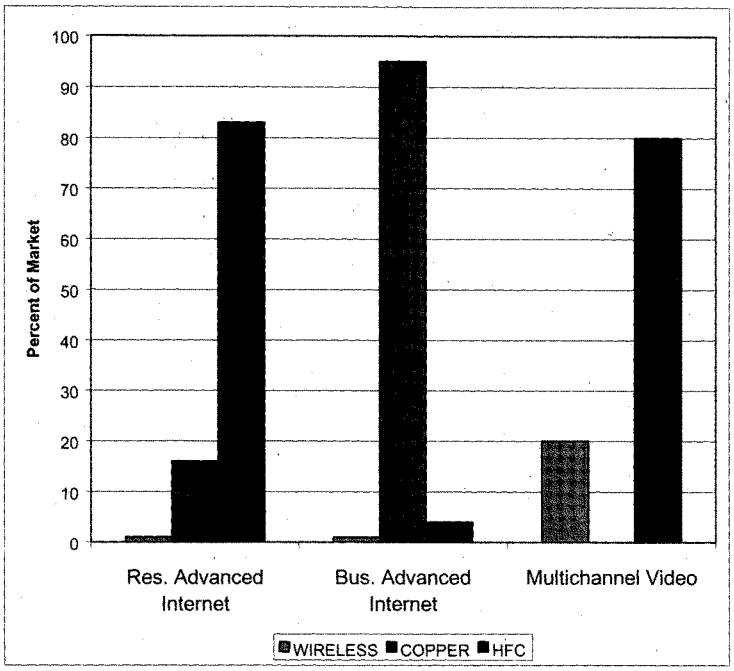
To assess whether the rate increases of recent years have been abusive, I analyze cash flow. I use 1995 as the base year, since the Telecommunications Act of 1996 was signed in early February. For several reasons, it is important to capture this whole period. Industry analyses, including that of the GAO, choose a very short time frame, 1999 to 2002, and miss critical factors.[lxvii]

EXHIBIT 4:
The Price of High-Speed Internet Service



Source: Calculated by author from web site visits.

EXHIBIT 5:
Market Segmentation Of Services Between Technologies



Source: Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, December 23, 1998, Table B-7; Ninth Annual Report, December 2002, Table Appendix B. *High-Speed Services for Internet Access,* December 2003, Table 1, 2 and 4; *Local Telephone Competition: Status as of December 31, 2002*, June 2003, Tables 1, 13; NCTA, Overview 2003: Mid-Year, p. 1.

First, the upgrade of the cable plant began well before 1999, as did the post-1996 Act rate increases. By 1999, the cable industry had already upgraded one-third of its plant. Rates for basic + expanded service had already increased by 50 percent and net operating income (operating revenue minus operating costs) had increased by over 25 percent. In fact, just one year after the passage of the Telecommunications Act of 1996 the issue of cable rate increases had already arisen. The FCC's January 1997 cable price report noted that "the Cable CPI

increased at a 3.7% compound annual rate from January 1995 to December 1995, and at a 8.5% compound annual rate for the eleven months from January 1996 to November 1996."[lxviii] The song and dance about the causes of the increases had already begun, when the Commission declared:

> we note from anecdotal evidence reported in both the trade press and the general news media that cable operators have attributed the recent increases in cable rates to higher programming costs, system upgrades which provide additional channels, and the pass through of the effects of general inflation on operators' costs.[lxix]

Second, the GAO report does not examine all of the revenues and costs consistently, since it never factors in advertising revenue. It appears to underestimate an important source of revenue, digital tier revenue, and an important cost stream, non-programming operating expenses. The GAO did not break out the revenues from advanced video services that are also made possible by the upgrade.

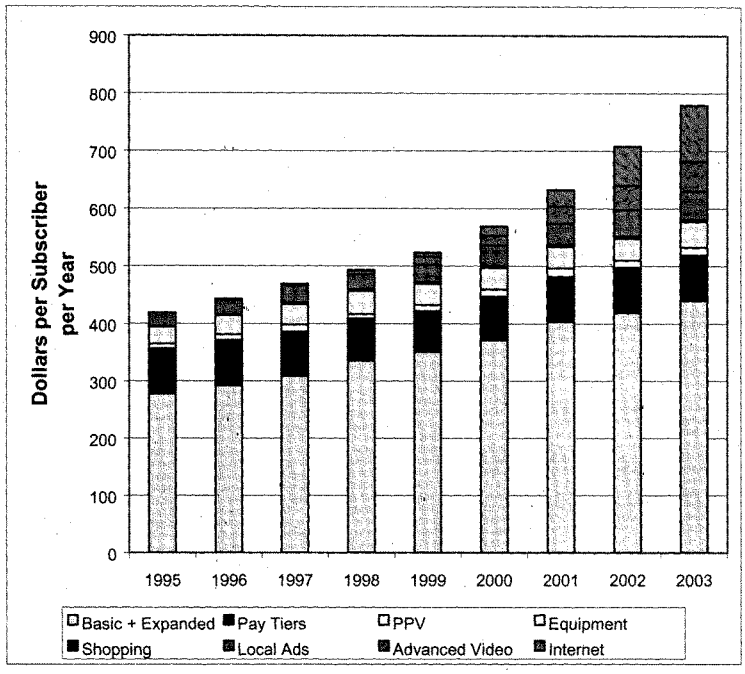
Third, the upgrade of the physical plant was largely (80 percent) complete by year-end 2002 and capital outlays dropped off dramatically in 2003.[lxx] Since penetration of high speed Internet is in its early stages, and advanced video services have not yet fully penetrated, cable operators are set to reap huge profits as advanced digital video and Internet services penetrate the market. In other words, capital costs are set to decline sharply, while revenues from the services that are supported by those capital costs are increasing sharply.

For the eight-year period (1995-2003), there has been a $360 increase in revenues per subscriber per year (see Exhibit 6).[lxxi] Revenues per subscriber per year have almost doubled, while the number of subscribers has increased by 10 percent. There for total revenues in absolute value have more than doubled. [lxxii] The new services (advanced video and Internet and to a much lesser extent cable telephony) have come to play a large role in total revenue, projected to make up about one-fifth of the total in 2003. Operating cash flow per subscriber (operating revenues minus operating costs) increased by $140 from 1995 to 2003. This is an increase of 77 percent per subscriber and 90 percent in absolute terms. This is cash flow that is available for capital service and excess profits.

2. Cash Flow for Traditional Video Services

The GAO cautions that it is difficult to apportion capital costs between the traditional video business and the new lines of business. The same is true with operating expenses. An expert for Cox recognizes the problem, but conveniently punts:

EXHIBIT 6:
Increasing Revenues Per Subscriber



Source: Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, December 23, 1998, Table B-7; Ninth Annual Report, December 2002, Table 4; Tenth Annual Report, Table 4.

> In particular, it seems likely that a relatively large share of increased capital costs and perhaps also operating costs may have been incurred in order to permit firms to offer more advanced products than expanded basic service, such as digital tiers of service (including pay per view and video on demand), broadband internet connections and telephony.
>
> In my opinion, any attempt to allocate a portion of those cost increases to basic analog service (in order to determine if prices for expanded basic service have risen by more than would have been sufficient to cover all cost increases of expanded basic service) would require a long list of assumptions which would be open to question and controversy.[lxxiii]

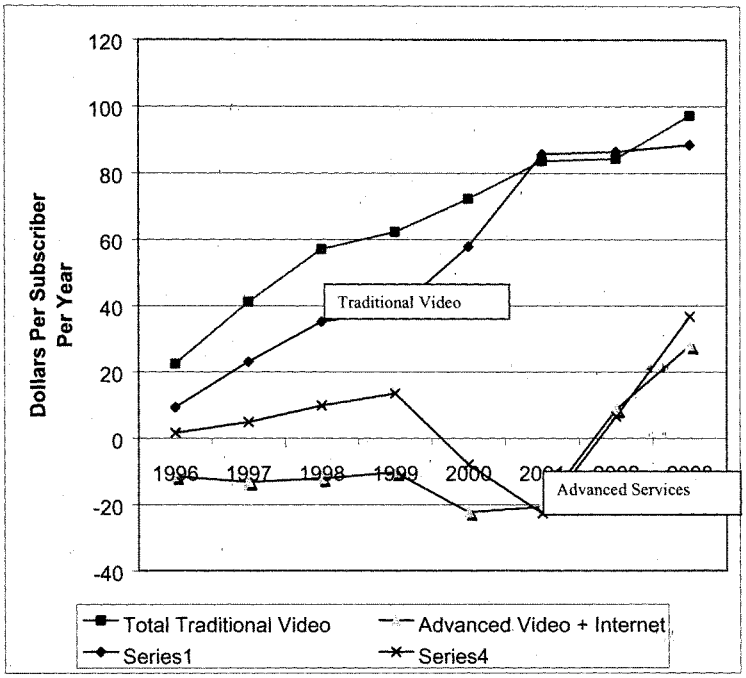
Considering a plausible scenario to assess the run-up in cash flow from traditional video businesses shows why the cable industry chooses not to show how much the cost of basic and expanded basic service have increased.[lxxiv] Between 1995 and 1998, before advanced video and Internet were being widely sold to the public, operating expenses increased by about 4.5 percent per year.[lxxv] Between 1998 and 2002, operating costs increased by over 14 percent per year, more than three times the rate prior to the aggressive marketing of advanced and Internet services. There is good reason to believe that the increase in operating expenses was not due to traditional video services.

From 1995 to 1998, cable operators added 3.3 million basic subscribers, just about as many as they added from 1998 to 2002.[lxxvi] From 1995 to 1998, cable operators added 117 new advertiser supported cable networks, over 50 percent more such networks than they added from 1998 to 2002.[lxxvii] Thus a substantial expansion of subscribers and traditional video services occurred with modest increases in operating costs.

There is no doubt that after 1998, operating costs to support advanced video and Internet services increased sharply. One can argue that there was some increase in non-programming operating costs attributable to basic and expanded basic, but little of the capacity added to cable systems was devoted to that purpose. Full upgrades add the equivalent of 70 or more 6-megahertz channels, only 10 of which have been dedicated to basic and expanded basic tiers of service. A cautious approach shows the impact.

Exhibit 7 splits the cash flow into two streams. One stream is made up of traditional video (basic+expanded+pay tiers+pay per view+equipment+shopping+local advertising). The other stream is made up of advanced video and Internet. Operating cost increases have been apportioned under the following two sets of assumptions. All of the pre-1999 operating cost increases are attributed to traditional video. In one scenario, forty percent of the post-1999 operating cost increases is attributed to traditional video. This figure is suggested by an analysis prepared for ESPN, which estimates that the increase in programming costs in 1999 to 2002 was equal to 32 percent of the total increase in operating costs.[lxxviii] In the second scenario, the post-1999 increase is assumed to be 4.5 percent (the pre-1999 rate) plus $1 additional each year for 2000-2003, which is the average annual increase in programming costs per subscriber in the 1999 to 2002 period. In both cases, the results are similar.

EXHIBIT 7:
Cumulative Increases in Cash Flow Per Subscriber
From Traditional and Advanced Cable Services



Source: Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, December 23, 1998, Table B-7; Ninth Annual Report, December 2002, Table 4; Seventh Annual Report, p. 102. Tenth Annual Report, Table 4. See text for assumptions.

Cash flow grew sharply from traditional video service through 2001 and then leveled out at a very high level. The leveling is due to a combination of increasing programming costs and continually mounting non-programming operating costs attributed to traditional video. Non-programming operating expenses for traditional video are not likely to continue to rise at the assumed rate, certainly not for traditional video services. Therefore, the increase in the cash flow is likely to be permanent. Cash flow from traditional services increased as a percentage of revenue from those services. Cash flow from advanced video and Internet services was slightly positive early. It became negative with the major roll out of Internet services, but became sharply positive in 2003.

The market structure and financial analysis in this section present a strong case that the conceptualization of the supply-side of the market in Exhibit 1 is correct. There is a continuing exercise of market power over traditional video services. Both the absolute size and the rate of profits on traditional video services appear to have increased over the period. In this sense, the consumer complaint about rising cable rates is fully justified.

III. THE DEMAND-SIDE

If consumer surplus is also growing rapidly, however, then that might blunt the public policy concern. NCTA seeks to demonstrate that there was a substantial increase in consumer surplus by claiming that the real price of quality-adjusted service has declined. Thomas Hazlett makes a similar claim, based primarily on the growth of subscribers and channels.[lxxix] In this section, I demonstrate that this basic claim is incorrect and the whole welfare improvement argument overstated.

A. Estimation of Quantity Adjusted Price Changes

The cable industry estimates involve a series of analytic errors of commission and omission and the general claims of increases in consumer welfare have several fundamental flaws. First, there is a misspecification of the units of analysis. Referring to Exhibit 1, the quantity of cable consumed (measured on the X-axis) is counted by NCTA as the total number of viewing hours. Since the X-axis is the total amount of consumption, the amount paid (measured on the Y-axis) should be the total amount paid for the products consumed. However, for the Y-axis in their welfare calculation, NCTA uses the BLS consumer price index for services. NCTA recognizes, however, **that the BLS index has already been adjusted downward for increases in the quantity of channels available and other factors**. Therefore, the NCTA double counts quantity changes. In the analysis below, I use the actual price paid for the total bundle of programs.[lxxx]

Second, NCTA chooses to start its analysis eighteen months after the passage of the Telecommunications Act of 1996, conveniently excluding eighteen months of the most rapid rate increases in the history of the industry. Third, there would also appear to be a mismatch between the estimate of increased viewing and the estimate of declining prices. Since viewing numbers are seasonal and January is roughly the mid-point of the season, I use January prices.[lxxxi]

The cable industry estimates that in the 1995/1996 season, the average cable household watched 23.4 hours of advertiser supported cable networks per week (see Exhibit 8). I estimate

EXHIBIT 8:
Cost of Viewing, 1996 & 2003

Market Condition	Viewing Hours	Monthly Cost/ Cost	Cost/ Viewing Hour Nominal	Cost/ Viewing Hour Real	% Increase in Viewing Cost Nominal
1/1/96 Noncompetitive	23.4	$22.60	$.966	$.966	
1/1/03 Noncompetitive switching has full value	34.7	41.60	1.198	1.019	
1/1/96 Noncompetitive	23.4	$22.60	$.966		} 48.2
1/1/03 Noncompetitive switching valued ½ at the margin	29.05	41.60	1.432		
1/1/96 Noncompetitive	23.4	$22.60	$.966		} 1.66
1/1/03 Noncompetitive switching valued ¼ at the margin	26.0	41.60	1.60		
BLS INCREASE (1/1/96 to 1/1/03)				48.5	

Source: For hours of viewing, Cable TV Advertising, Weekly Viewing of Ad-Supported Cable per Cable Household, and Source: NCTA, Steven S., *Assessing Quality Adjusted Changes in the Real Price of Basic Cable Service,* attached to Comments of the National Cable Telecommunications Association, in Federal Communications Commission, *In Re: The Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, September 11, 2003, p. 12. Cable prices for noncompetitive systems from Federal Communications Commission, *Report on Cable Prices,* January 2, 1997, p. 12, May 7, 1999, p. 9; June 15, 2000, p. 9; Feb 14, 2001; 9; April 4, 2002, *p. 8;* July 8, 2003, p. 10; General Price increases from Bureau of Labor Statistics, Consumer Price Index.

that in January 1996, which coincidentally is the month before the 1996 Telecommunications Act was signed, the average monthly bill was $22.60. The average cost per weekly viewing hour to the consumer was $.966. The cable industry estimates that in the 2002/2003 season, the average cable household watched 34.7 hours of advertiser supported cable networks per week. I estimate the average price in January 2003 to be $41.60 per month. The average cost per weekly viewing hour was $1.199. That is a nominal increase of 24 percent. Inflation over the period was 17.7 percent, so the real increase was 5.5 percent. This is a very different picture than the 15 percent decline that NCTA claims by double counting quality improvements.

B. BUNDLING, THE DEMAND CURVE AND CONSUMER SURPLUS

These simple math problems are compounded by conceptual issues. Bundling is the central character in the current drama surrounding cable prices and this wreaks havoc with the NCTA estimate of consumer welfare. The failure of cable operators to offer cable channels on an unbundled basis makes it difficult to divine the demand curve for individual channels. NCTA mentions, in passing, that viewing is not evenly distributed, but that does not influence its calculation. NCTA assumes (or at least uses in every example and hypothetical case) that demand is linear and that elasticity does not change over time. Both of these assumptions are dubious at best. Cox assumes demand is linear, equal and uncorrelated across individual channels to work its example of consumer benefit from bundling.[lxxxii] This, too, is dubious, at best.

At least Cox recognizes that there are conditions under which bundling results in consumer harm. The conditions are:

> related to a firm's motivation to try to charge different consumers different prices for the same product depending upon what they are willing to pay for it. The essential idea is that when there is some negative correlation between individual consumers' valuation of different products, that firm can sometimes charge higher prices to everyone by bundling goods together.[lxxxiii]

Although Cox notes that: "it is easy to create examples where bundling can make consumers worse off but equally easy to create examples where bundling makes consumers better off," it ignores the problem.[lxxxiv] Bundling demands greater attention.

Comcast's approach provides a useful starting point. It presents cable bundling as a greengrocer who sells tomatoes for $2 per pound, but who might also sell five pounds for $7.50. The tomatoes are cheaper on a per unit basis in the bundle (a volume discount) although the total bill is greater. The fundamental problem is that greengrocers invariably give the consumer a wide range of choices. The consumer can buy half a pound of tomatoes, or three pounds, or take the five-pound discount, as his or her needs may dictate. Cable operators do not give consumers that much choice.

In fact, cable operators give consumers almost no choice. Essentially cable consumers have three choices – take nothing, take almost nothing (basic), or take almost everything (expanded basic). If I really need two pounds of tomatoes for my spaghetti sauce, I have to take all five pounds and most of the other fruits and vegetables, even though the rest of it is of little

value to me.[lxxxv] My next door neighbor, who really needs two pounds of apples for her pie, is forced to buy five pounds of apples and the tomatoes and all the other fruits and vegetables, too. We both end up paying a higher price and, given the nature of the commodity, we cannot recapture the surplus through trade. It is conceivable that we could split the cost, but then I have to have my neighbors in my house all the time. If we buy one subscription and try to run a wire (or a wireless network) between our houses, the cable operators have us arrested for stealing their signal.

NCTA's welfare analysis assumes a full hour of increased welfare when a consumer shifts from watching a broadcast show to watching a cable show. That is, if a consumer watches a rerun of "Law and Order" on USA, instead of NBC, NCTA claims the full hour as an increase in the consumer's welfare. There may be little welfare gain. If the consumer had shifted from watching "West Wing" to watching "Law and Order," one could argue that there is a welfare gain, but it is only the marginal difference between the two. Because the shows are all forced into the bundle, we cannot tell what consumers would pay for them on a stand-alone basis.

If total hours of viewing had increased as much as cable viewing, the assumption that every hour watched on cable represents a full hour of gained consumer welfare would be more plausible, but that is not the case. The increase in total viewing is considerably less than the increase in cable viewing. In contrast to the 5.7 percent per year increase claimed by cable operators for viewing of advertiser supported cable networks, the FCC cites estimates of less than a 1.5 percent per year increase in viewing over a similar period,[lxxxvi] while others show less than a one percent per year increase. A well respected industry source that estimates both total TV viewing hours and basic/expanded cable network viewing hours puts the total increase at 25 percent of the cable switching increase.[lxxxvii] Even if we assume that the entirety of increased TV viewing occurred in cable households, we would still conclude that the net increase in viewing was equal to slightly over one-third of the total increase in cable network viewing.

If we assume that the actual increase in consumer welfare is equal to half the total increase in cable viewing (leaving some room for a marginal increase due to switching), the quality-adjusted cost would be $1.432 (see Exhibit 8). The increase in the price over the 1996 – 2003 period would be 48 percent. Interestingly, the quantity and quality adjusted price as reported by the BLS increased by 49 percent over this period. If the increase in value in viewing were equal only to the increase in total viewing (i.e. valued ¼ at the margin), the effective price increase would be 66 percent over this period, almost fifty percent higher.

The case against the BLS price index is not convincing. In fact, the BLS may be over-adjusting for quantity and quality because many channels are forced into the bundle that few people are watching. The top 10 cable programs account for 50 percent of all viewing that is significant enough to be registered by Nielsen. The top 20 shows account for 75 percent of all such viewing. The GAO reports that the typical household watches only 17 channels. People are being forced to buy a lot of shows they don't watch to get the ones they want. Although the bottom 30 shows that register on the Nielsen scale pass an average of just under 70 million homes, only about a quarter of a million households watch them during any given day. For every one household watching, approximately 250 who are forced to pay for it in the bundle are not. For the bottom two shows, the ratio is 1 to 800. Over 250 additional cable networks do not capture enough viewers to even register on the Nielsen scale.[lxxxviii]

A recent study by Deutsche Bank of the Cox – ESPN controversy reinforces the conclusion that bundling leads NCTA to overestimate the welfare gains (see Exhibit 9).[lxxxix] ESPN is one of the most popular and the most expensive cable networks, yet seventy-eight percent of respondents said that they would not pay $2 per month for it if they were given the choice. Cox confirms this estimate, noting that less than a quarter of its subscribers are "avid sports fans."

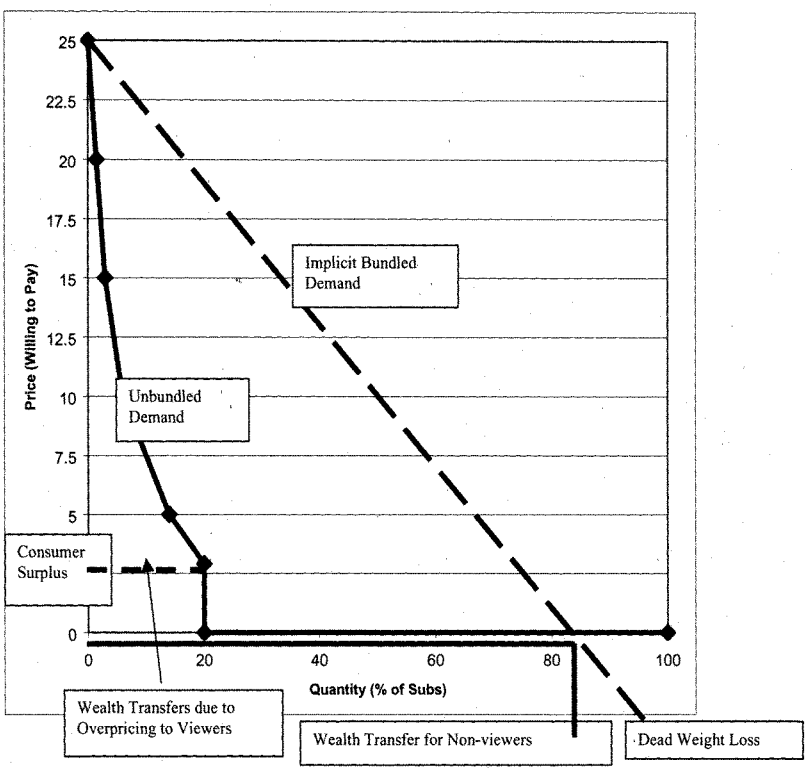
There is good reason to believe that the elasticity of demand for ESPN alone is a lot higher than for the bundle and that the bundling of sports programming into the most popular package is harming consumers. The three-quarters of cable viewers who say they would not pay $2 dollars for ESPN, likely the three-quarters who are less than avid sports fans, are paying over $1.5 billion for it in the bundle (at Cox's cost).[xc] Exhibit 9 shows the wealth transfers and efficiency losses associated with ESPN. For every one dollar of consumer surplus, there is at least one dollar of wealth transfer. This does not include the wealth transfers associated with the overpricing of ESPN to those who would take it, which may equal another quarter of the consumer surplus. The deadweight efficiency losses are an additional cost associated with this anti-consumer bundling.

IV. LONG-TERM TRENDS

A. PRICE

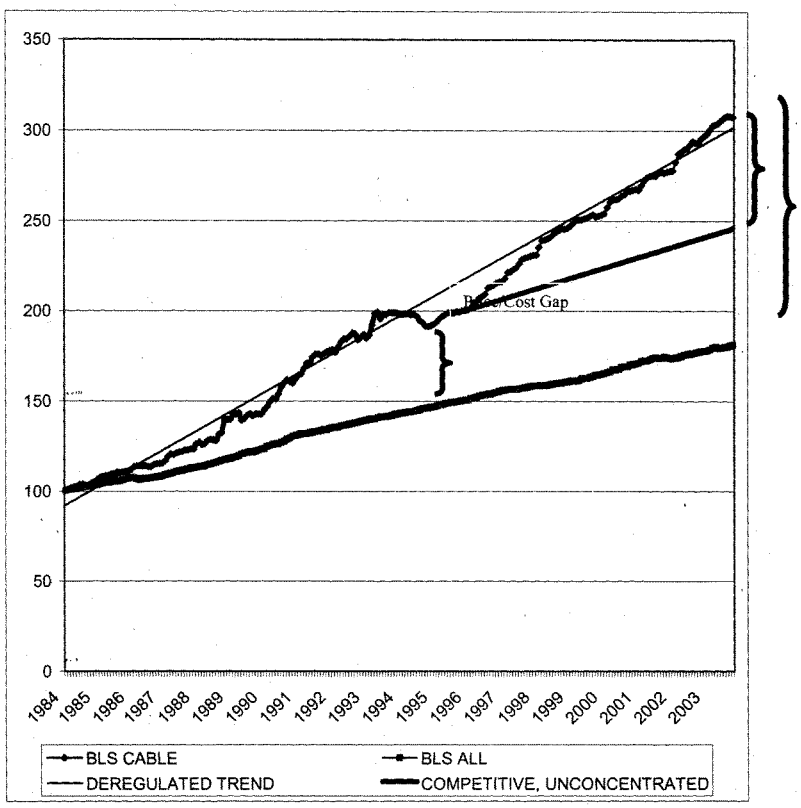
NCTA's hours of viewing approach to consumer welfare analysis vastly overstates the gain in welfare and the BLS number of channels approach may well be overstating the quality adjustment. Given this conclusion, it is instructive to note the long-term trends of cable pricing. I have pointed out that the FCC was already being challenged to explain dramatic rate increases in the January 1997 report on cable pricing. In that report, the Commission reproduced a graph it had used to show that rate regulation in the 1993-1995 period had shielded consumers from price increases (see Exhibit 10). The trend line and the price line, extended through September 2003, show that the Commission had squeezed out a small part of the excess profits during the short period of rate regulation, but the 1996 Act launched the industry on a trajectory that not only recaptured what had been lost during the short period of partial regulation, but has gone beyond what it had been extracting in the past. This reaffirms the depiction in Exhibit 1.

EXHIBIT 9:
Wealth Transfer and Consumer Surplus For ESPN



Source: Deutsche Bank, *Walt Disney Company*, October 27, 2003, p. 16.

EXHIBIT 10:
Long Term Price Trends



Source: Bureau of Labor Statistics, CPI. Deregulated trend is a linear projections of January 1983- April 1993, Competitive, unconcentrated from Exhibit 15.

B. QUANTITY

The aggressive bundling of cable programming, across video tiers and now between video and non-video services, complicates the consumer welfare analysis enormously. The claim that regulation hurt consumers is simply wrong. The number of subscribers has grown virtually every year since the inception of the industry (see Exhibit 11).

A model that uses the long-term trend in income growth and price changes to predict cable subscribers explains 96 percent of the variance in cable growth. It suggests that cable subscription performed somewhat better than expected in the early-mid 1990, when rates were regulated momentarily, but somewhat worse than expected since rates were fully deregulated. Adding in competitive satellite (i.e. the number of satellite subscribers who live in areas where cable is available)[xci] fills the gap somewhat, but at the end of the period, there are fewer households subscribing than projected. This is the deadweight inefficiency we would expect to see as a result of the aggressive price increases and bundling of recent years. It is exactly the opposite of what the cable industry experts claim.

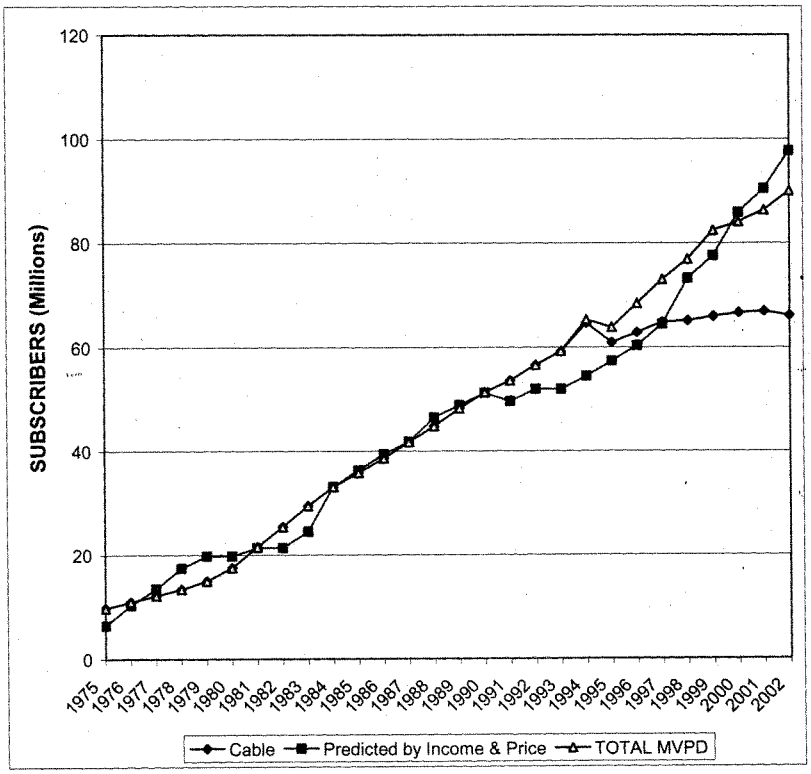
V. CONCLUSION

The basic comparison that consumer advocates have made to reflect the pain inflicted by cable operators – that cable prices have been rising at almost three times the rate of inflation – is a solid and proper way to state the problem. The complaint that prices are rising too fast is valid – reflected in the increasing cash flow thrown off from traditional video services. There is no doubt that consumers are being harmed by a lack of effective competition for cable. That cable operators have ridden the wave of rising incomes and changing technologies does not demonstrate the positive quality of their pricing/bundling strategy. The claim that deregulation helps consumers because consumer welfare has increased begs the question of whether abuse of consumers has increased even more rapidly.

The possibility of anti-consumer bundling has long been recognized in the economics literature. The data suggests that cable operators have pushed prices into the range where there is price resistance (i.e., the more elastic portion of the demand curve). That does not mean the abuse has stopped, it simply means it may not grow as quickly as in the past, but cable operators are aggressively finding ways to keep their producer surplus growing, like rebundling (retiering) programming to drive penetration of digital tiers.[xcii] The recognition of the possibility of anticompetitive bundling in a dynamic or strategic sense is more recent, but no less important, especially as cable market power is "swung" into the high-speed Internet.[xciii]

Bundling is one of the strategies that monopolists use to extract consumer surplus and the evidence is consistent with such an interpretation in this case. Public policy might attack bundling, but policy that controlled the rents directly would be preferable. Of course, real competition would be better still, but after two decades of failure of competition to develop and with the cable operators extending the anticompetitive, anti-consumer business model to the Internet, the need for action is critical.

EXHIBIT 11:
Income Growth as a Predictor of Cable Subscription



Sources: Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Tenth Annual Report, January 5, 2004, Table 1; Ninth Annual Report, December 2002, Table B-1; Sixth Annual Report, Table C-1; for 1995 through 2002; Paul Kagan Associates, *History of Cable TV Subscribers and Revenues*, 1997, for pre-1995; Income is real, per capita disposable income from *Economic Report of the President* (February 2003), p. 313.

ENDNOTES

[i] Federal Communications Commission, In Re: The Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03-172.

[ii] U.S. General Accounting Office (U.S. GAO), Issues Related to Competition and Subscriber Rates in the Cable Television Industry, October 2003; Telecommunications: Issues in Providing Cable and Satellite Television Service, October 15, 2003.

[iii] Fabrikant, Geraldine and Bill Carter, "Cable's New Giant Flexes His Muscles," *New York Times*, October 20, 2003; "Testimony of James O. Robbins," *Senate Commerce Committee*, May 6, 2003.

[iv] Eisenach, Jeffrey A. and Douglas A. Truehart, *Rising Cable Rates: Are Programming Costs the Villain?*, supported by ESPN, Inc., October 23, 2003 (hereafter ESPN); Economists Inc., *Consumer, Operator, and Programmer Benefits from Bundling Cable Networks*, July 2002; Rogerson, William P., *Cable Program Tiering: A Decision Best and Properly Made by Cable System Operators, Not Government Regulators*, November 10, 2003, funded by Cox (hereafter Cox); *Correcting the Errors in the ESPN/CAP Analysis Study on Programming Cost Increases*, November 11, 2003, prepared for Cox Communications (Cox II).

[v] Katz, Michael, *An Economic Analysis of the Claims made by Dr. Mark Cooper in "Cable Mergers, Monopoly Power and Price Increases,"* Commissioned by Comcast Corporation, July 28, 2003 (hereafter Comcast). The target of the Comcast paper is a short study prepared in January 2003 entitled *Cable Mergers, Monopoly Power and Price Increases* (Washington, DC: Consumer Federation of America and Consumers Union, January 2003). This critique ignores several much longer documents including Consumer Federation of America, "Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy, The Office of Communications of the United Church of Christ, Inc., National Association of Telecommunications Officers and Advisors, Association for Independent Video Filmmakers, National Alliance for Media Arts and Culture, and the Alliance for Community Media," 2002; and "Reply Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy, and Media Access Project," 2003; Federal Communications Commission, *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154; and Cooper, Mark, *Cable Mergers and Monopolies: Market Power in Digital Communications Networks* (Economic Policy Institute, 2002).

[vi] Wildman, Steven S., *Assessing Quality Adjusted Changes in the Real Price of Basic Cable Service*, attached to Comments of the National Cable Telecommunications Association, in Federal Communications Commission, *In Re: The Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, September 11, 2003 (hereafter NCTA).

[vii] Federal Communications Commission, *Tenth Annual Report (In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)* Washington, DC, January 28, 2004 (hereafter Tenth Annual Report).

[viii] "Testimony of Gene Kimmelman," *Senate Commerce Committee*, May 6, 2003, cited in ESPN, p. 4.

[ix] *Tenth Annual Report*, para. 10.

[x] *Tenth Annual Report*, para 139.

[xi] *Tenth Annual Report*, para 30.

[xii] *Tenth Annual Report*, para 31.

[xiii] *Tenth Annual Report*, note 73.

[xiv] *Tenth Annual Report, note 203.*

[xv] *Tenth Annual Report*, Table 4.

[xvi] *Tenth Annual Report,* footnote 11.

[xvii] *Tenth Annual Report*, para. 140.

[xviii] Cooper, Mark, *Media Ownership Democracy in the Digital Information Age* (Stanford: Center for Internet and Society, 2003), Chapter 6.

[xix] *Tenth Annual Report*, para. 136.

[xx] *Tenth Annual Report,* para 130-132.

[xxi] See *Tenth Annual Report*, Table B-1.

[xxii] Compare *Tenth Annual Report*, para 41 and 65.

[xxiii] *Joint Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Concurring"* January 28, 2004.

[xxiv] The only evidence that the industry paper gives on market power is provided by Comcast, which points to one indicator of market power, Tobin's q (the system sales price in comparison to the reproduction cost). Citing numbers from the Federal Communications Commission, *Ninth Annual Report, In the Matter of Annual Assessment, of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 92-145, December 31, 2002, p. 16), Comcast points out that (p. 19): the "National Average Dollar Value Per Subscriber *declined* dramatically, falling from a peak of $5755 in 2000 to $2196 in January through June 2002." This statement fails to take into account the dramatic difference in the nature of the systems being transacted. The average number of subscribers transacted in the peak year Comcast cited was over 250,000 per system in 45 transactions for a total of over $66 billion. The average number of subscribers in the first half of 2002 was only 32,000 in 12 transactions for a total of less than $1 billion. If we compare small systems transacted in 2000 to the small systems transacted in 2002, we get a very different picture; see Federal Communications Commission, *Seventh Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, January 8, 2001, Table C-5. For example, there were 39 transactions in 2000 for systems with fewer than 100,000 subscribers. The average system price was approximately $2,666 per subscriber. Thus, the system price has declined by about 18 percent, which is modest compared to the stock market declines (see Couper, Elise A, John P. Hejkal, and Alexander L. Wolman, "Boom and Bust In Telecommunications," *Economic Quarterly,* Fall 2003. The analysis also does not account for a decline in the reproduction costs, was also evident.

[xxv] Comcast, p. 14, states the proposition as follows: "As long as the increase in the monthly fee is less than the amount by which consumers value the new programming, they will be better off at the new 'higher' price coupled with the additional programs."

[xxvi] Scherer, F. M. and David Ross, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin, 1990), pp. 21 – 29.

[xxvii] Comcast, pp. 12-13; Cox, Appendix, uses this model as well.

[xxviii] Industry defenders frequently claim that rising prices cannot be caused by market power, since in frictionless theory the monopolist would immediately ascertain his profit-maximizing price and charge it (Comcast p. 14, Hazlett, Thomas, *Cable TV: Has Deregulation Failed?*, Manhattan Institute for Policy Research, November 21, 2003). Reality, of course is more complicated than that. Monopolists price politically, searching for what they can get away with before they evoke a reaction, especially in an industry whose rapacious behavior caused it to be reregulated once.

[xxix] Cox, Appendix, argues that allowing the monopolist to reallocate rents from programmers will increase its rate of profit as well as consumer welfare under some circumstances.

[xxx] U.S. GAO, 2003, Appendix IV.

[xxxi] U.S. GAO, 2002.

[xxxii] *Tenth Annual Report,* para. 83, citing *First Annual Report,* para. 57.

[xxxiii] Federal Communications Commission, *Report on Cable Prices,* April 4, 2002, Attachment D-1; February 14, 2001, Attachment D-1; June 2000, Attachment D-1; May 7, 1999, C-1.

[xxxiv] *Tenth annual Report,* para. 16.

[xxxv] I assume that 98 percent of cable subscribers lack head-to-head competition (Federal Communications Commission, *In the Matter of the Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming: Ninth Annual Report,* MB Docket No. 02-145, December 31, 2002, para. 115) and 90 percent of those take expanded basic service (ESPN, p. 2). Therefore, 62 million cable households are the victims of abuse of market power. Their bills could be reduced by $8 per month as a result of genuine head-to-head competition and deconcentration of the industry.

[xxxvi] U.S. GAO, 2003, Appendix IV.

[xxxvii] FCC, *Report on Cable Prices,* April 4, 2002, Attachment D-1; February 14, 2001, Attachment D-1; June 2000, Attachment D-1; May 7, 1999, C-1.

[xxxviii] FCC, *Report on Cable Prices,* February 14, 2001, Attachment D-1; June 2000, Attachment D-1.

[xxxix] *Tent Annual Report,* para 132. Comcast once again has failed to notice the consistent empirical evidence that finds size and clustering increase prices, contradicting their claim that (pp. 18-19) "there is no reason to think that consolidation of cable ownership at the national level will affect actual competition among cable system operators. Ironically, cable industry experts find that mergers of some monopolists matter (John B. Hayes, Jith Jayaratne, and Michael L. Katz, *An Empirical Analysis of the Footprint Effects of Mergers Between Large ILECS,* April 1, 1999, p. 1; citing "Declaration of Michael L. Katz and Steven C. Salop," submitted as an attachment to *Petition to Deny of Spring Communications Company L.P,* in *Ameritech Corp. and SBC Communications, Inc., for Consent to Transfer of Control,* CC Dkt. No. 98-141 (filed Oct. 15, 1998) and *Petition to Deny of Spring Communications Company L.P,* in *GTE Corporation and Bell Atlantic Corporation for Consent to Transfer of Control,* CC Docket. No. 98-184 (filed Nov. 23, 1998)) and that size and alternative distribution opportunities affect bargaining (see Rogerson, William P. "A Further Economic Analysis of the News Corp. Takeover of DirecTV," *In the Matter of General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Limited Application to Transfer Control of FCC Authorizations and Licenses Held by Hughes Electronics Corporation to the News Corporation Limited,* MB Docket NO. 03-124, August 4, 2003).

[xl] Cooper, 2002, Chapter 7.

[xli] U.S. GAO, 2003, Appendix IV.

[xlii] FCC, *Report on Cable Prices,* April 4, 2002, Attachment D-1.

[xliii] Cooper, 2002, pp. 21-32.

[xliv] See Cooper, 2002, pp. 44-47.

[xlv] Fabricant and Carter.

[xlvi] Cox, Appendix A shows cable profits rising as programming costs fall.

[xlvii] , "Comments of the Consumer Federation of America, et. al , *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy,* CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154

[xlviii] U.S. GAO, 2003, p. 27.

[xlix] ESPN, p. 9.

[l] Cox critics ESPN for comparing current revenues to total capital, a criticism that applies to Comcast even more forcefully, since ESPN at least reports annualized increases in debt costs, whereas Comcast provides no similar calculation. ESPN/s reporting of debt service misses the point, however, since part of the debt was incurred to fund acquisitions, not capital expenditures.

[li] Only a consent decree forced Time Warner to allow modest access, and intense scrutiny forced AT&T to make some minor concessions, but the recent AOL/AT&T carriage agreement is thoroughly anticompetitive. "A New Model for AOL May Influence Cable's Future," *New York Times,* August 26, 2002, p. C1; Gilmore, Dan, "AOL Capitulates, Gives Up Struggle for 'Open Access'," *San Jose Mercury News,* September 1, 2002.

[lii] Cooper, Mark, "Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks," 71 *University of Colorado Law Review*, 71: 2000;

[liii] Federal Communications Commission, *High-Sped Service for Internet Access: Status as of June 30, 2003,* December 2003, Table 4.

[liv] "A New Model for AOL May Influence Cable's Future," *New York Times,* August 26, 2002, p. C.1; Gilmore, Dan, "AOL Capitulates, Gives Up Struggle for 'Open Access'," *San Jose Mercury News,* September 1, 2002.

[lv] Hu, Jim, "AOL's Unrequited Cable Love," *CNET News.com,* January 26, 2004.

[lvi] Latour, Almar and Peter Grant, "Verizon May Set Off Price War," *Wall Street Journal,* May 5, 2003.

[lvii] *U.S. Department of Justice v. AT&T Corp and MediaOne Group, Inc.,* May 26, 2000.

[lviii] Conquering the high-speed Internet access as a neighbor market of video has additional advantages in preserving market power in the primary market (see for example, Carlton, Dennis W. and Michael Waldman, "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industry," *Rand Journal of Economics,* Summer, 2002; Rubinfield, Daniel L. and Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 Berkeley Tech. L.J. 631, 2001; Ordover, Lansuz A. and Robert D. Willig, "Access and Bundling in High Technology Markets," in Jeffrey A. Eisenach and Thomas M. Lenard (eds.), *Competition, Innovation And The Microsoft Monopoly: Antitrust And The Digital Marketplace* (Washington, D.C.: Progress and Freedom Foundation, 1999); Salop, Steven C., "Using Leverage to Preserve Monopoly," in Jeffrey A. Eisenach and Thomas M. Lenard (eds.), *Competition, Innovation And The Microsoft Monopoly: Antitrust And The Digital Marketplace* (Washington, D.C.: Progress and Freedom Foundation, 1999). Bundling basic video with Internet access has the effect of undermining competition for video services (by driving basic into households and reducing the value of satellite). Bundling video content with Internet access reduces competition for video services, (See, e.g., Comments of the Competitive Broadband Coalition, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Cable Services Bureau Dkt. No. 01-290, at 10-11 [Dec. 3, 2001]). Bundling also raises barriers to entry by forcing competitors to build larger packages to compete: "AT&T is refusing to sell HITS to any company using DSL technology to deliver video services over existing phone lines because such companies would directly compete with AT&T's entry into the local telephone market using both its own cable systems and the cable plant of unaffiliated cable operators. AT&T simply does not want any terrestrial based competition by other broadband networks capable of providing bundled video, voice and data services." (Comments of the American Cable Association In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, CS Docket No. 01-290 [filed Dec. 3, 2001]).

[lix] "Initial Comments of the California ISP Association, Inc.," *Further Notice of Proposed Rulemaking in the Matter of the Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer II and ONA Safeguards and Requirements*, Federal Communications Commission, CC Docket No. 95-20, 98-10, DA 01-620, April 16, 2001 (hereafter CISPA, 2001a), p. 7; "Comments of DirecTV Broadband, Inc," *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer II and ONA Safeguards and Requirements*, Federal Communications Commission, CC Docket No. 02-33, 95-20, 98-10, May 3, 2002, p. 5; "Comments of Cbeyond, et al.," *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer II and ONA Safeguards and Requirements*, Federal Communications Commission, CC Docket No. 02-33, 95-20, 98-10, May 3, 2002 (Hereafter Cbeyond, et al., 2002), pp. 27-28.

[lx] National Research Council report entitled *Broadband: Bringing Home the Bits*, (Washington, D.C.: National Academy Press, 2002), pp. 21, 152-154.

[lxi] Federal Communications Commission, High-Speed Services for Internet Access, June 2003, Tables 1, 2; Local Telephone Competition: Status as of December 31, 2002, June 2003, Tables 1, 13; NCTA, Overview 2003: Mid-Year, p. 1.

[lxii] Young, Shawn and Peter Grant, "How Phone Firms Lost to Cable in Consumer Broadband Battle," *Wall Street Journal,* March 13, 2003.

[lxiii] "Comments of Ad Hoc Telecommunications Users Committee," *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Federal Communications Commission, CC Docket No. 01-337, March 1, 2002, pp. 18-19.

> Cable modem service presents serious security and reliability issues that, while present for residential users, are of far greater concern when used to support business applications... In addition, service quality for cable modem service not equivalent to ILEC standards... Additionally cable modem transmission speeds are not consistent, due to the "shared platform" architecture... Finally, cable modem platforms do not offer business customers a sufficient level of security

[lxiv] Cable modem service presents serious security and reliability issues that, while present for residential users, are of far greater concern when used to support business applications... In addition, service quality for cable modem service is not equivalent to ILEC standards... Additionally cable modem transmission speeds are not consistent, due to the "shared platform" architecture... Finally, cable modem platforms do not offer business customers a sufficient level of security.

[lxv] Kuhl, Craig, "Writing the Business Case for VDSL," *CED,* April 2000. Extensive documentation of the technology difference is provided in Cooper, Mark, *Transforming the Information Superhighway into a Private Toll Road* (Washington, DC: Consumer Federation of America, October 1999).

[lxvi] Hazlett, Thomas W. and George Bittlingmayer. *The Political Economy of Cable "Open Access."* Joint Center, Working Paper 01-06, May, argue that there is a strategic under allocation of capacity to high-speed Internet.

[lxvii] Cox, Comcast and ESPN also focus on a short time frame.

[lxviii] Federal Communications Commission, *Report on Cable Prices*, In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment, MM Docket No. 92-226, January 2, 1997, p. 7.

[lxix] Id., p. 7.

[lxx] U.S. GAO, 2003, p. 26.

[lxxi] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, December 23, 1998, Table B-7; Ninth Annual Report, December 2002, Table 4.

[lxxii] I report both revenue per subscriber and the total revenue because some costs are not incurred on a per subscriber basis.

[lxxiii] Cox II, p. 8.

[lxxiv] The GAO cautions that it is difficult to apportion capital costs between the traditional video business and the new lines of business. The same is true with operating expenses. The expert for Cox, recognizes the problem, but conveniently punts. Cox II, p. 8,

> In particular, it seems likely that a relatively large share of increased capital costs and perhaps also operating costs may have been incurred in order to permit firms to offer more advanced products than expanded basic service, such as digital tiers of service (including pay per view and video on demand), broadband internet connections and telephony.
> In my opinion, any attempt to allocate a portion of those costs increases to basic analog service (in order to determine if prices for expanded basic service have risen by more than would have been

sufficient to cover all cost increases of expanded basic service) would require a long list of assumptions which would be open to question and controversy.

[lxxv] Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Ninth Annual Report, p. 15; Seventh Annual Report; NCTA, *Cable Pricing: Value and Cost*, May 2003.

[lxxvi] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, December 23, 1998, Table C-1; Ninth Annual Report, December 2002, Table B-1.

[lxxvii] NCTA, Overview 2003: Mid-Year, p. 12.

[lxxviii] ESPN, p. 12.

[lxxix] Hazlett.

[lxxx] Thinking about the cost of viewing to the public leads to another conceptual problem in the NCTA and Comcast analyses, one that has been recently highlighted by the ESPN analysis. ESPN points out they improve quality and increase audiences to increase their ability to sell advertising, as well as get more subscription revenues Cox II, p. 6, nets advertising out from the cost of programming cable operators incur. That may make sense from the cable operator point of view, but not necessarily from the consumer point of view. Consumers have to watch the commercials and, ultimately, the cost turns up in the goods and services they buy. From a total social welfare analysis, the cost of advertising needs to be attributed to the cost of the total viewing time. The advertising revenue can be handled in a variety of ways, but it cannot be ignored.

[lxxxi] Unfortunately, in 1996 the FCC shifted from a January cable price to a June cable price in its annual reports on cable prices. However, we can use the CPI to interpolate from June to January and only slightly underestimate the actual price increase (since quality adjustments over any short six month period are relatively minor). To the extent the industry was adding channels, this approach underestimates the price increase.

[lxxxii] Cox, Appendix.

[lxxxiii] Cox, p. 13

[lxxxiv] Cox, p. 13,

since regulation is costly and can create other distortions, the fact that this type of bundling cannot be shown to be systematically harmful to consumers is sufficient reason for most economists to conclude that there is no reason to regulate this type of bundling

[lxxxv] The example offered by Cox assumes that all fruits and vegetables are equally valuable to consumers in exactly the same quantities.

[lxxxvi] Levy, Jonathan, Marcelino Ford-Levine and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition* (Federal Communications Commission, OPP Working Paper, September 2002), p. 62; Albararan, Alan and Angel Arrese, "Time and Media Markets: An Introduction," in Albararan and Arrese (Eds.), *Time and Media Markets* (Mahwah, NJ: Lawrence Earlbaum Associates, 2003), p. 2.

[lxxxvii] Veronis Suchler Stevenson, *Communications Industry Report: Forecast Summary, 2003*, p. 48.

[lxxxviii] The explanations that cable industry executives gave the GAO for the social welfare superiority of bundling assume that advertisers irrationally pay for homes passed, rather than eyeballs watching, and that consumers maximize their welfare by subsidizing their neighbor's viewing habits. Those claims are inconsistent with the data in this paper (U.S. GAO, 2003, pp. 34-37).

[lxxxix] Deutsche Bank, *Walt Disney Company*, October 27, 2003.

[xc] This assumes that the non-avid sports fans would pay nothing for it, given the choice.

[xci] Cooper, 2002, pp. 26-32.

[xcii] USPIRG, *The Failure of Cable Deregulation: A Blueprint for Creating a Competitive, Pro-consumer Cable Television Marketplace* (August 2003), pp. 18-19.

[xciii] Carlton and Waldman.

APPPENDIX B

APPENDIX B: CONCENTRATION OF MARQUIS PROGRAMMING

NETWORK	1993		2000		OWNERSHIP
SUBSCRI-	**PRIME**		**SUBSCRI-**	**PRIME**	
	BERS RANK	TIME RANK	BERS RANK	TIME RANK	
ESPN	1	4	4	12	ABC/DISNEY
CNN	2	12	11		AOLTW
USA	3	1	5	2	LIBERTY
NICK	4	6	10	6	CBS/VIACOM
DISCOVERY	5	10	2	8	LIBERTY
TBS	6	2	1	5	AOLTW
TNT	7	3	3	3	AOLTW
CSPAN	8		12		CABLE CONSORTIUM
MTV	9	13	15	14	CBS/VIACOM
LIFETIME	10	7	9	1	ABC/DISNEY
TNN	11	11	13	10	CBS/VIACOM
FAMILY	12	8	6		FOX/ABC/DISNEY
A&E	13	9	7	7	ABC/DISNEY
WEATHER	14		13		LANDMARK
HEADLINE NEWS	15		17	17	AOLTW
CNBC	16		18		NBC
VH-1	17		20		CBS/VIACOM
QVC	18		16		COMCAST
AMC	19		19		CABLEVISION
BET	20	14	19		CBS/VIACOM
WGN	21		9		TRIBUNE
CARTOON		5		4	AOLTW
SCI-FI	1	5		16	LIBERTY
TLC			14	13	LIBERTY
HISTORY				11	ABC/DISNEY
FX				15	FOX

Sources: FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, First and Eighth Reports.

Mr. UPTON. Mr. Franks.

STATEMENT OF MARTIN D. FRANKS

Mr. FRANKS. Thank you, Mr. Chairman. My name is Martin Franks. I am the Executive Vice President of CBS. I joined CBS in 1988 and one of my very first assignments was working on the initial Satellite Home Viewer Act with Mr. Boucher and in one way or the other, I have been involved in each renewal of the Act, as well as working on its impact upon the CBS television network, our own stations and our affiliates.

Allow me a few brief observations, then I will be happy to answer any questions you may have.

When the Act was first passed in 1988, it was sold to us as a lifeline service for residents of rural areas who had no access to broadcast network signals. At the time, we wondered how such a limited potential populace could possibly become a viable business. Unfortunately, upon enactment, Prime Time 24, the satellite company that was the driving force behind the Act, showed its real business plan by embarking on a decade-long spree of signing up thousands and thousands of illegal subscribers. Now, 16 years and several reauthorizations later, broadcasters are still trying to shut off that explosion of signal piracy that began at conception and has continued for the life of the Act.

While noble in purpose, the record of the distant signal provision of the Act is replete with gross and repeated violations and only now with our victory over EchoStar in the Miami case last year, are we close to getting the scofflaw behavior under control. Sixteen years and millions of dollars in legal fees is a long road to have to travel for one's day in Court.

On the other hand, local-into-local has been a great success. The only down side has been that its benefits for consumers and broadcasters alike have still not reached the entire country despite greater progress than I once thought possible. Embedded into the local-into-local success story, however, is a paradox that never ceases to amaze me. On virtually every communications policy issue to come before this committee, a key yardstick is that issues impact on localism. Why then when local-into-local is activated in a market do you allow those distant signal lifelines to remain active? CBS owns the stations in New York and Los Angeles that provide the distant signal service. I am very proud of their performance as broadcasters in covering their markets' news and public affairs, but by definition, they do not even attempt to address local news and public affairs issues in Michigan or Massachusetts or Virginia. Why then allow them to continue to invade your home towns and undermine your local stations?

Finally, a word about the proposals for the creation of digital white areas. CBS is the unquestioned leader in HD programming. We air more original HD programming each week than any other network, broadcast, cable or satellite. I negotiated our distant HD deals, distant signal HD deals with EchoStar and DirecTV. Nothing in those free market contractual arrangements should be construed as support for the current proposals for digital white areas. In fact, both agreements expressly defines subscriber eligibility in analog, not digital terms. We did so because while we know a great

deal about analog signal propagation, the gaps in our knowledge of digital signal propagation are enormous. To try to define digital white areas any time soon would, I believe, seriously undermine the digital broadcast transition and reopen all of the mischief that is the unhappy Pandora's box history of distant signals piracy.

Thank you, Mr. Chairman.

[The prepared statement of Martin D. Franks follows:]

PREPARED STATEMENT OF MARTIN D. FRANKS, PRESIDENT, CBS TELEVISION

CBS appreciates the invitation to present to the Subcommittee its views about the implementation of the Satellite Home Viewer Improvement Act and about possible amendments to that Act.

LOCALISM AND THE NETWORK/AFFFILIATE RELATIONSHIP

The United States boasts a large number of purely national program services, such as ESPN, USA Network, Fox News Channel, as well as the nonbroadcast channels offered by Viacom, including Nickelodeon, TV Land, BET, Showtime and others. But a vital part of our national television system is the presence, in 210 different communities across the United States, of free, over-the-air *local* television broadcast stations. Thanks to Congress' (and the FCC's) strong commitment to localism over the past 55 years, towns as small as Twin Falls, Idaho (with fewer than 59,000 television households) and Alpena, Michigan (with fewer than 20,000 television households) enjoy the benefits of a *local* television outlet offering local news, weather, public affairs, and emergency programming.

The network/affiliate relationship has long played, and continues to play, a vital role in making the policy objective of localism work in markets both large (such as Detroit) and small (such as Mankato, Minnesota). The reason is simple: by serving as the local outlet for popular network programming (such as the primetime offerings of the CBS Television Network), local network affiliates are able to obtain advertising dollars that enable them to stay afloat—and to supplement the network offerings with local news and weather and with syndicated programs (such as Oprah Winfrey) obtained from third parties. As this Committee aptly observed when it reported out the original Satellite Home Viewer Act in 1988, "historically and currently the network-affiliate partnership serves the broad public interest." H.R. Rep. 100-887, pt. 2, at 19-20 (1988).

Both Congress and the FCC have consistently recognized that if cable systems and satellite carriers were allowed to import duplicative network programming from other markets, that importation would weaken, if not destroy, the economic underpinnings of local broadcasting. Since the 1960s, therefore, the Commission has imposed "network nonduplication" rules on cable systems that generally bar importation of distant network stations. The "unserved household" limitation in Section 119, which has been part of the Satellite Home Viewer Act since it was created in 1988, plays the same role with regard to satellite carriers.

THE SORRY SAGA OF DISTANT SIGNAL RETRANSMISSION

Back in 1988, when this Subcommittee first addressed the issue of retransmission of broadcast TV stations by satellite carriers, no one discussed "local-to-local" retransmissions because the technology to do so was so far away. Instead, the Subcommittee (and this Committee as a whole), working in cooperation with the Judiciary Committee, helped to craft—in the Satellite Home Viewer Act of 1988—a set of rules about retransmission of *distant* broadcast television stations. The same was true in 1994, when Congress extended the Satellite Home Viewer Act for five additional years.

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. Making distant ABC, CBS, Fox, and NBC stations available by satellite to the very small number of households that have no other method of receiving network programming, for example, is sound public policy. But when 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

Unfortunately, the experience with implementation of the distant-signal compulsory license by satellite carriers has been a dismal one. For the first ten years after the compulsory license went into effect, satellite carriers treated the "unserved

household" limitation as a joke: they illegally signed up anyone who was willing to answer "no" to the question "are you satisfied with your over-the-air reception?" The result was that satellite carriers signed up millions of urban and suburban customers who were ineligible to receive distant signals.

Only by pursuing costly litigation have broadcasters, including CBS, been able to obtain any relief from this lawbreaking. Starting in 1998, the courts have consistently condemned the satellite industry's misuse of the distant-signal license.[1] EchoStar has been the most abusive of all: thanks to a variety of stalling tactics, EchoStar continues today to deliver distant stations (including CBS stations) illegally to large numbers of ineligible subscribers. As a federal District Court in Florida found after a 10-day trial last year, EchoStar has continuously broken the law since it started delivering distant network stations in 1998. *CBS Broadcasting Inc. v. EchoStar Communications Corp.,* 276 F. Supp. 2d 1237 (S.D. Fla. 2003). Most shockingly of all, EchoStar's CEO made—and then broke—a solemn, sworn promise to the Court to turn off large numbers of EchoStar's illegal distant signal customers. As the Court found, "EchoStar executives . . . when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, *elected instead to break [EchoStar's] promise to the Court*." *Id.,* ¶46 (emphasis added).

LOCAL-TO-LOCAL: A SUCCESS BEYOND ALL PREDICTIONS

Unlike delivery of distant signals, delivery of *local* signals by satellite carriers has been a tremendous success story.

In the 1999 Satellite Home Viewer Improvement Act, this Subcommittee helped craft a completely new compulsory license—for local, not distant retransmissions—along with a variety of new Communications Act provisions to govern those retransmissions. Unlike retransmission of distant signals, local-to-local retransmission has benefited everyone involved: satellite carriers, broadcasters, and most importantly, consumers.

Consider, for example, how customers here in the Washington, D.C. area got CBS network programming a few years ago, and how they get it now. From 1994 through 1998, satellite carriers illegally offered *distant* CBS stations by satellite to large numbers of its customers in this area, thereby interfering with the ability of local stations, such as WUSA-TV in Washington (owned by Gannett), to reach their local viewers and to sell those viewers to advertisers. The distant stations imported by satellite carriers, of course, provided Washington-area subscribers with no local news, no local weather, no local public affairs programs, and no information about local emergencies such as hurricanes.

Today, by contrast, thanks to Congress' leadership in crafting the SHVIA, local customers can receive their *local* CBS station (WUSA-TV)—in excellent quality—by satellite. And what is happening here is happening all over the country. Thanks to vigorous competition between DirecTV and EchoStar—and between those firms and their cable rivals—more than 85% of U.S. television households can today receive their local channels by satellite from DirecTV, EchoStar, or both. By the end of this year, that figure will be 92%. And in just a few years, it will be 100%.

The race to offer local-to-local has far outstripped the DBS industry's pessimistic predictions. Less than two years ago, EchoStar predicted that it would never be able to serve more than 70 markets on its own. Yet today, EchoStar already serves 107 Designated Local Markets ("DMA's") that collectively cover more than 85% of all U.S. TV households. And there is no indication that EchoStar has lost its appetite to continue this expansion, which makes EchoStar an even tougher competitor against local cable systems.

DirecTV's plans are even more robust. With the launch of its D7S satellite this spring, DirecTV plans to serve 100 DMAs covering 85% of all U.S. TV households. By year's end, DirecTV has pledged that it will offer local-to-local in an additional 30 markets, for a total of at least 130 DMAs covering 92% of all TV households. And as soon as 2006 and no later than 2008, DirecTV has committed to offering "a seamless, integrated local channel package in *all 210 DMAs*."[2]

---

[1] *CBS Broadcasting Inc. v. PrimeTime 24,* 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (preliminary injunction against company that provided distant signals to DirecTV and EchoStar); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture,* 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc. v. DIRECTV, Inc.,* No. 99-0565-CIV-NESBITT (S.D. Fla. Sept. 17, 1999) (permanent injunction after entry of contested preliminary injunction); *ABC, Inc. v. PrimeTime 24,* 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction).

[2] *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control,* ¶332, MB Docket No. 03-124 (released Jan. 14, 2004) (emphasis added).

Offering local-to-local to satellite subscribers is just good business. As the satellite industry admits, local-to-local has been critical to DBS' growth from 10 million subscribers in 1999 to more than 20 million subscribers today: "[t]he expansion of local-into-local service by DBS providers *continues to be a principal reason that customers subscribe to DBS*."[3]

The retransmission consent provisions of the SHVIA have also worked well. As the FCC recently pointed out in connection with News Corporation's acquisition of an interest in DirecTV, there is a "balance of terror" between broadcasters and MVPDs that has ensured that public spats over retransmission consent (such as the Disney/Time Warner and Fox/Cox disputes) are few and brief. Retransmission consent has also helped ensure that broadcasters can share at least some small portion of the enormous benefits that DBS firms enjoy from the ability to offer local-to-local service.

As the Subcommittee is aware, Viacom and EchoStar are currently at odds over the terms of retransmission consent for CBS owned-and-operated systems. History teaches us, however, that even if a broadcaster and an MVPD are briefly at an impasse, a deal eventually will be struck that will benefit all concerned, most importantly, American viewers. We have every hope that the same will occur here.

SBCA'S OUTRAGEOUS PROPOSAL TO EXPAND THE DISTANT SIGNAL LICENSE THAT ECHOSTAR AND OTHER SATELLITE FIRMS HAVE EGREGIOUSLY ABUSED

Now that one of the DBS firms (DirecTV) has devised ways to deliver the signals of local analog stations in all 210 markets, there is little doubt that DirecTV and EchoStar will soon tackle the challenge of delivering digital, and high definition, signals on a local-to-local basis. The DBS firms have many potential tools for doing so, including sharing of spectrum between the two companies, satellite dishes that receive signals from multiple orbital spots, use of Ka-band (in addition to Ku-band) spectrum, improved compression techniques, more sophisticated methods of modulation and coding, and closer spacing of Ku-band satellites.)

Ignoring all of this, the SBCA instead demands a massive new government intervention: that Congress should expand the distant-signal license to declare households to be "digitally unserved" by a network (such as CBS) if the household cannot receive a digital (or HD) signal over the air from a local station. In other words, the SBCA asks for an enormous, and wholly unnecessary, expansion of the very license that EchoStar and other satellite carriers have illegally abused for years.

The Subcommittee should summarily reject the SBCA's demand. The reason that the SBCA makes this demand is simple enough: DBS firms like EchoStar could save a large amount of money if they could uplink a single digital or HD station and retransmit that station to many millions of subscribers across the country, rather than developing the capability to offer digital and HD signals on a local-to-local basis.[4] But the public interest would be grievously disserved by this proposal. Consider these facts about the SBCA's proposal:

- The SBCA would treat a household as "unserved" by the CBS network even though a *satellite carrier itself* delivers by satellite a high-quality digitized signal from the *local CBS station's* analog broadcasts, which contains all of the programming (such as *CSI, Survivor,* and *Everybody Loves Raymond*) that EchoStar proposes to import from a distant station that broadcasts in a digital format.
- A CBS affiliate in a small market that—for reasons entirely beyond its control—is not yet broadcasting in digital, would see its *entire coverage area* treated as a "white area" that the DBS firms could invade with a distant CBS station. Experience teaches us that stations that lose substantial numbers of viewers to the identical programming imported from out of town face devastating economic

[3] Satellite Broadcasting & Communication Ass'n Comments at 4, Dkt. No. 03-172 (filed Sept. 11, 2003) (emphasis added).

[4] CBS has made short-term deals with EchoStar and DirecTV in which the DBS firms may deliver a digital signal from a distant CBS station to certain subscribers in areas served by other CBS *owned-and-operated* stations. CBS voluntarily made the decision to allow this importation as a way to encourage the digital transition, even though the importation is harmful to its owned stations whose subscribers switch to viewing distant signals. The deal is carefully structured to ensure that the rights of other CBS affiliates—which are owned by third parties—are fully protected. EchoStar's proposal to have the government override the rights of hundreds of stations nationwide by authorizing the importation of digital feeds of distant network stations bears no relationship to this modest, and entirely voluntary, undertaking of limited duration.

consequences.[5] But the SBCA does not care, because DBS firms would make more money even if it has to destroy local TV stations to do so.

- If DBS firms began delivering a distant digital station into a so-called "digitally unserved" area, there would be only two possible approaches—both of which would yield public policy disasters—when a local station began delivering a digital signal over the air to that area:
  - **Disastrous option # 1:** DBS firms would be allowed to *continue* delivering distant digital signals to the household indefinitely. (This is what Mr. Moskowitz of EchoStar testified last week is their preference.) Far from creating any incentive for the station to expand its digital coverage, the SBCA proposal would sabotage those incentives by making it impossible for the station ever to reclaim the "lost" local audiences. The station would suffer crushing, permanent losses of viewers—and hence permanent, large-scale financial losses—which would inevitably translate into lower-quality programming for local viewers.
  - **Disastrous option # 2:** The DBS firms would be required to turn off their "distant digital" subscribers after the subscribers had become accustomed to that service. Congress has gone down precisely this road before—in 1999, when Congress heard from hundreds of thousands of angry consumers who had grown accustomed to receiving distant signals (illegally) by satellite, and who were unhappy about having to install an over-the-air antenna to view their local stations instead. In other words, SBCA asks Congress deliberately to spawn a massive consumer disaster virtually identical to the chaos that arose (through no fault of Congress) when the DBS industry was required by the courts to turn off millions of illegal analog distant-signal customers.

In other words, the SBCA's "distant digital" plan is a trap, pure and simple. This Subcommittee should squarely reject it.

A HOUSEHOLD THAT CAN RECEIVE LOCAL SIGNALS FROM ITS SATELLITE COMPANY IS NOT "UNSERVED"

Instead of following the SBCA's advice and engaging in a radical—and foolhardy—expansion of the distant-signal compulsory license, Congress should update the rules relating to delivery of distant signals to reflect the new realities of the DBS business.

Current law provides that a household is "unserved" if it cannot receive a Grade B intensity signal over the air from a local affiliate of the relevant network. But that definition fails to reflect the reality that by the time Section 119 expires at the end of 2004, at least 85% of EchoStar's customers will be able to receive their local stations by satellite, and at least 92% of DirecTV customers will be able to do the same. It makes no sense to say that a satellite subscriber that can receive its own local CBS station from its own satellite carrier is somehow "unserved" by that station: a subscriber can obtain its local stations by satellite simply by picking up the phone. Section 119 should therefore be amended to provide that a household is not "unserved" with respect to a particular network if its satellite carrier offers an affiliate of that network on a local-to-local basis.

CONCLUSION

Viacom congratulates the Subcommittee on the tremendous success of local-to-local retransmission of television stations by satellite carriers, under the statutory scheme wisely devised by this Subcommittee and the rest of Congress in the SHVIA in 1999. Congress should encourage the continued expansion of local-to-local, and the future delivery of digital and HD signals on a local-to-local basis, by allowing competition and technological progress to do their magic. Congress should reject the SBCA's demand for a new government subsidy permitting it to deliver distant digital stations to areas that it deems "unserved," a demand that would wreak havoc if granted by Congress. Instead, Congress should amend the Act to recognize that households to which local-to-local is available are, as a matter of common sense, "served" by their local stations. Finally, any extension of the distant-signal license should again be subject to a five-year sunset.

Thank you.

---

[5] Report and Order, *In Re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries,* 3 FCC Rcd 5299, 5319 (1988) ("In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience."), *aff'd,* 890 F.2d 1173 (D.C. Cir. 1989).

Mr. UPTON. Mr. Hartenstein.

STATEMENT OF EDDY W. HARTENSTEIN

Mr. HARTENSTEIN. Chairman Upton, Mr. Markey and members of the subcommittee. My name is Eddy Hartenstein and I'm the Vice Chairman of DirecTV's parent company, Hughes Electronics. It is my great honor and pleasure to be here today and I thank you for allowing me to testify on behalf of DirecTV regarding the reauthorization of the Satellite Home Viewer Improvement Act, SHVIA.

The members of this subcommittee and the full committee deserve a great deal of credit for their role in the success of the DBS industry. SHVIA's creation of a local-into-local compulsory comprehens ive copyright license combined with improved DBS technology has allowed satellite operators to offer a complete programming service more comparable to that offered by cable. The results for the DBS industry and for competition in this subscription television market have been extraordinary. When SHVIA was enacted in 1999, the DBS industry collectively had 10 million subscribers. In the last 5 years, that number has more than doubled, reaching 22 million subscribers today which DirecTV serves 12 million. Consequently, DBS has been able to help limit somewhat cable price increases, and as far as cable companies to provide better service. And it will only get better.

With the successful launch of our next spot beam satellite just weeks away, and with other applications pending approval before the FCC, we should be able to offer local broadcast channels in markets serving 92 percent of the American television households as early as this summer. In other words, we believe SHVIA has been an extraordinary success and we hope Congress will build on this success.

First, Congress should reauthorize the core provisions of SHVIA that expire on December 31 of this year.

Second, Congress should give DBS operators the ability to provide subscribers with the same complement of local broadcast stations offered by their cable operators.

I'll discuss each of these matters in turn. The first provisions of SHVIA that need to be reauthorized are the Section 119 compulsory copyright licenses that permit DBS operators to provide distant network signals to unserved households and to retransmit so-called superstations. The distant signal compulsory license allows consumers who cannot receive over-the-air signals from local affiliates to enjoy broadcast network programming. While an ever smaller percentage of our customers subscribe to distant network signals, this service is still critical to many subscribers particularly those in rural areas.

Each of these compulsory licenses for DBS operators lasts only 5 years. By contrast, cable operators have a permanent compulsory license for both distant network signals and superstations. As a matter of parity, we ask that when Congress reauthorizes the DBS compulsory license for distant network signals and superstations, it do so on a permanent basis.

The second provision of SHVIA that needs to be reauthorized is a provision allowing the retransmission of distant network signals to satellite subscribers who as of October 31, 1999, could not re-

ceive a high-grade intensity A signal from a local network affiliate, even if they are otherwise not considered unserved and thus, otherwise ineligible for distant network signals. While the number of grandfathered subscribers is dwindling, these subscribers grandfathered status should be extended to preserve their network service, their preferences and their expectations. By and large, as I've indicated, SHVIA's local-into-local provisions have worked extraordinarily well. There are though some cases in which satellite television customers are unable to receive the same local broadcast signals as their neighbors who subscribe to cable. This, in part, is because SHVIA prohibits the retransmission of stations that most of us would think of as local to the so-called served households. Not 30 miles from here in Columbia, Maryland, for example, a Comcast subscriber can receive both Baltimore and Washington, D.C. network affiliates. This, in part,is because while Columbia is in the Baltimore DMA, the Washington stations are considered to be significantly viewed by Columbia's residents. But if that resident switches from Comcast to DirecTV, he or she can no longer receive the Washington stations. This is because even though that subscriber thinks of the Washington stations as local, SHVIA defines them otherwise. This is not fair to consumers and it provides cable with a significant advantage for no good reason.

If a station is considered local by a particular community and especially if it's retransmitted by the local cable operator, satellite television operators should be allowed to retransmit as a local station as well. This would advance all of SHVIA's original goals. It would preserve local television service. It would fulfill consumer expectations and it would enhance competition in the MBPD market.

In conclusion, Mr. Chairman, I would like to thank you all, this committee, this subcommittee for what Congress has done to nurture the satellite television industry as a vibrant competitor to cable and the MBPD market. With the reauthorization of the key provisions of SHVIA, along with the minor adjustments I've just discussed, we will continue to provide the highest quality, best priced competitive service to consumers. I thank you.

[The prepared statement of Eddy W. Hartenstein follows:]

PREPARED STATEMENT OF EDDY W. HARTENSTEIN, VICE CHAIRMAN, HUGHES ELECTRONICS CORPORATION

Chairman Upton, Mr. Markey and members of the Subcommittee, my name is Eddy Hartenstein and I am the Vice Chairman of Hughes Electronics Corporation. It is my great honor and pleasure to be here today and I thank you for allowing me to testify on behalf of DIRECTV regarding the reauthorization of the Satellite Home Viewer Improvement Act ("SHVIA").

This is a return visit for me, as I testified in front of the full Committee a few years ago. I am pleased to return to report on the progress that the Direct Broadcast Satellite ("DBS") industry has made as a competitor to cable.

The members of this Subcommittee and the full Committee deserve a great deal of credit for their role in the success of the DBS industry. SHVIA, which you played such an important role in enacting, extended a compulsory copyright license to the retransmission of local television signals within each station's local market (known as "local-into-local"). This, combined with improved technology such as high power DBS satellites, digital signal compression and small receive dishes, has allowed satellite operators to offer a programming service more comparable to that offered by cable, unleashing for the first time real competition in the Multichannel Video Programming Distribution ("MVPD") market. SHVIA capped a string of Congressional actions that helped create and nurture the satellite television industry, including passage of the original Satellite Home Viewer Act in 1988 (before which our cus-

tomers could not receive broadcast station signals at all), and the reauthorization of that Act in 1994.

SHVIA identified several important objectives:

- Create robust competition to the cable industry;
- Establish a more level playing field for satellite operators by removing some of the significant advantages that cable has as the dominant MVPD; and
- Provide consumers with greater choices and the benefits of competition.

And it has largely succeeded in reaching these goals. When SHVIA was enacted in 1999, the DBS industry had 10 million subscribers. In the last five years, that number has more than doubled, reaching 22 million subscribers, of which DIRECTV serves 12 million. The result is that, while cable still has about 66 million subscribers, DBS has played at least some small part in limiting cable price increases and forcing cable companies to provide better customer service, improved content, and digital services. We believe that none of this would have been possible without more robust DBS competition, and that DBS competition in turn would not have been possible without SHVIA.

In other words, we believe that SHVIA has been an extraordinary success. And we hope Congress will build on its success:

- *First,* Congress should *reauthorize the core provisions of SHVIA* that expire on December 31 of this year. These provisions include the Section 119 compulsory copyright license for distant network signals and superstations, which we believe should be made permanent, and the so-called "Grade B Grandfather."
- *Second,* based on our experiences with SHVIA over the last five years, we believe that Congress could improve the statute and promote competition still further by *giving DBS operators the ability to provide subscribers with the same complement of local broadcast stations offered by their cable operators.*

I will discuss each of these matters in turn. But first, I would like to talk briefly about what has worked particularly well—SHVIA's authorization of local-into-local service.

LOCAL-INTO-LOCAL COMPULSORY COPYRIGHT LICENSE

Again, the biggest success of SHVIA by far has been the authorization by Congress of local-into-local service and the provision of such service by DBS providers. As you know, SHVIA added a new Section 122 to the Copyright Act that provides a permanent, royalty-free compulsory license for satellite retransmission of local broadcast signals within their Designated Market Areas ("DMAs"), or home markets.

The ability to offer local-into-local service has been critical to DIRECTV's growth, because it has enabled us to offer a full slate of quality programming comparable to cable offerings. With the successful launch of our DIRECTV 7S spot beam satellite, which is scheduled for next month, we will provide local-into-local service in just over 100 DMAs nationwide. We also have pending before the FCC other proposals that will give us the capacity to reach at least 30 additional DMAs by the end of this year—and maybe even as soon as this summer. At that time we will be offering local broadcast channels in markets serving 92% of American television households. In coming years, we plan to continue rolling out local-into-local service in as many markets as we possibly can.

REAUTHORIZATION OF DISTANT NETWORK SIGNAL AND SUPERSTATION COMPULSORY COPYRIGHT LICENSES

The first provisions of SHVIA that need to be reauthorized are the Section 119 compulsory copyright licenses that permit DBS operators to provide distant network signals to "unserved households" and to retransmit so-called superstations.

The retransmission of distant network signals to unserved households allows consumers who cannot receive an over-the-air signal from local affiliates to enjoy broadcast network programming. Of course, the percentage of our customer base subscribing to distant network signals has steadily decreased with the rollout of local-into-local programming. But this service is still critical to many subscribers, particularly those in rural areas.

Section 119 also permits satellite operators to retransmit certain non-network broadcast "superstations" for a statutorily determined copyright royalty. These stations, such as WPIX in New York, WGN in Chicago, and KTLA in Los Angeles, have been offered by cable systems around the country since the 1970s.

Each of these compulsory licenses for DBS operators lasts only five years—indeed, it is because they expire in December that we are here today. By contrast, cable operators have a *permanent* compulsory license that allows them to provide both distant network signals and superstations to their subscribers. In order to promote

parity between competitors in the MVPD market, we ask that, when Congress reauthorizes the DBS compulsory license for distant network signals and superstations, it do so on a permanent basis.

REAUTHORIZATION OF GRANDFATHER CLAUSE

The second provision of SHVIA that needs to be reauthorized is a provision allowing the retransmission of distant network signals to satellite subscribers who, as of October 31, 1999, could not receive a high intensity Grade A signal from a local network affiliate, even if they are otherwise not considered "unserved" (and thus otherwise ineligible to receive distant network signals). In 1998, Congress decided to allow the "grandfathered" subscribers to receive distant network signals until the end of this year. While their numbers are dwindling, these subscribers' grandfathered status should be extended to preserve their network service, their preferences and their expectations.

NEIGHBORING LOCAL STATIONS

By and large, as I have indicated, SHVIA's local-into-local provisions have worked extraordinarily well. There are, though, some cases in which satellite television customers are unable to receive the same local broadcast signals as their neighbors who subscribe to cable. This, in part, is because SHVIA prohibits the retransmission of stations that most of us would think of as "local" to so-called "served households."

You don't have to search far and wide for an example of this. Not thirty miles from here in Columbia, Maryland, for example, a Comcast subscriber can receive *both* Baltimore and Washington, DC network affiliates. This, in part, is because, while Columbia is in the Baltimore DMA, the Washington stations are considered to be "significantly viewed" by Columbia's residents. But if that resident switches from Comcast to DIRECTV, he or she can no longer receive the Washington stations. This is because, even though that subscriber thinks of the Washington stations as "local," SHVIA defines them otherwise. In Columbia, this means that the DBS customer (unlike the cable customer) gets only one set of network affiliates. Yet in some markets, SHVIA can operate such that a DBS customer (unlike a neighboring cable customer) cannot receive *any* signals from a particular network, because the DMA in which the customer resides does not have an affiliate of that network, but the customer is ineligible to receive a distant network signal. This is not fair to consumers. And it provides cable with a significant advantage for no good reason.

If a station is considered "local" by a particular community, and particularly if it is retransmitted by the local cable operator, satellite television operators should be allowed to retransmit it as a local station, as well. This would advance all of SHVIA's original goals: It would preserve local television service, would fulfill consumer expectations, and would enhance competition in the MVPD market. We hope to work with this Committee in the coming weeks to help make this happen.

CONCLUSION

In conclusion, Mr. Chairman, I would like to thank you for all that Congress has done to nurture the satellite television industry as a vibrant competitor in the MVPD market. With the reauthorization of the key provisions of SHVIA along with the minor adjustment I have discussed, we will continue to provide the highest quality, best-priced competitive service to consumers.

I am happy to take your questions.

Mr. UPTON. Well, thank you all and at this point we will proceed with questions from the members that are here. I would also note for the record that any member that was not here when the gavel fell that their statement can be included as part of the record.

Let me just cut to the chase here for a moment. As one who actually reads and signs all my legislative mail, I can remember a number of years ago my No. 1 issue for the year, in fact, was the issue of SHVIA and the reauthorization and particularly a number of the issues as it related to local broadcast, local-into-local and black and white areas that were there. And I'll put an offer on the table, particularly Mr. Franks and Mr. Moskowitz, that I'll provide a friendly setting, pizza, Pepsi, champagne for the end. I would also note that I have a balcony that would be a severe fall if anybody goes out

the door and just down the hallway here. But let's cut to the chase and see if we can't see any agreement, particularly as we are going to hear from many of our satellite subscribers in our home districts, particularly as March Madness begins. We've all got our teams. I don't know whether the Wolverines are going to make it to the dance and I don't know how far they'll go, if they get in, but we've all got our favorite teams and we all are going to be watching very closely beginning Sunday night when those teams are picked, also the tournaments that are going on this weekend.

Is it really a matter of the number of stations that EchoStar is being forced to put on their satellite or is it the cost and if so, how much is that cost? I'd like Mr. Moskowitz, perhaps, to go first and then Mr. Franks. What is the rub?

Mr. MOSKOWITZ. Thank you, Mr. Chairman. I think that really the fundamental rub here is that Viacom is a huge media empire and they have, as a result of the existing SHVIA legislation, enormous power to tie their CBS retransmission to the transmission of other stations that consumers don't want and to require exorbitant payments in exchange for——

Mr. UPTON. How much is exorbitant? As I look at the papers, I see such great sums as 6 cents. Is that right?

Mr. MOSKOWITZ. If Viacom is willing to agree our increase will be 6 cents a year, we'll sign up right now for as many years as Viacom wants to offer.

Mr. FRANKS. The good news, Mr. Chairman, is I think that EchoStar is fairly close to signing on to that offer. We are making progress. We are talking. We have a great interest in March Madness occurring on its schedule date, not 10 days early. And I think I can give great assurance to the committee that we are making progress and I think we will have a resolution in a very timely fashion.

Mr. UPTON. So the quicker this hearing ends?

Mr. FRANKS. One thought——

Mr. UPTON. I noticed you didn't take your full 5 minutes on your opening statement.

Mr. FRANKS. I am anxious to be talking to David, once again, in a different setting.

Mr. UPTON. Okay. Let me ask this, Mr. Franks, I have great sympathy with your comment as part of your testimony with regard to local-into-local. If you get a local-into-local, I'll use my District, if I get Kalamazoo or South Bend or Chicago, all stations that I can get over-the-air, maybe Grand Rapids, and I have a satellite system that I don't need the L.A. Dodgers—apologies to Mr. Engel, and New York on there. I frankly think that that makes a lot of sense. And I have great sympathy for that and maybe Mr. Moskowitz, I'd like you to respond to that challenge.

What's your sense?

Mr. MOSKOWITZ. Certainly, Mr. Chairman. I think there are really two points to be made there. The first is that consumers who receive distant network channels by satellite receive them because they can't get them off air and they therefore have to pay for them. If a consumer has to pay to get a network channel, we think he ought to have a choice as to what channel he gets to watch. Further, if we say that once it's available by satellite, then he can't get

a distant channel, then we remove any incentive for the local broadcaster to continue to improve his plant and serve more customers in his market with free off-air programming. So I think there are a couple of reasons why it should still be available, even if we do locals by satellite.

And third and finally, the satellite signal doesn't pay attention to DMA boundaries, so while we and DirecTV attempt to shape our beams to cover entire DMAs, there are instances where the local channel we provide by satellite can't reach every corner of the DMA, so distance would still be necessary there as well.

Mr. UPTON. My time has expired. I just note for the record I've got a markup with votes going on right now. I'm going to pass the gavel to Mr. Bass. And then we'll go to Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. Mr. Moskowitz, let me begin with you and give you an opportunity to respond to the question that some have raised and I think Mr. Lee actually raised in his testimony concerning the two dish solution that EchoStar has with respect to the delivery of local-into-local in some markets, tell me why the second dish is necessary? My perception is that you could not serve as many local markets if you didn't have the ability to use that second dish. Is that correct?

And then second, illuminate, if you would, any potential cost that might be imposed on the customer who has to have the second dish in order to get all of the local stations. Is there any cost to the customer? Is there any disadvantage to that particular customers as compared with the customer who only has one dish?

Mr. MOSKOWITZ. Thank you, Congressman Boucher. And the answer is that if we were required to provide all of the local channels in a particular market on a single dish, we could not provide local channels in the 108 markets we do today. It would be down by something, by a very significant number of markets. I don't know whether it would be 30 or 40, but it would be a lot fewer markets we could serve. And it's the characteristics of how the satellites are configured and we can go into more detail either at this hearing if people are interested or in private conversations with members.

As to cost to the customer, I think it's very important to understand that we take care of the customer completely. We give them the equipment they need for the second dish for free. We provide the professional installation of the second dish for free and we make it seamless to the consumer so that when he calls up his programming guide, the channel on one dish is immediately adjacent to the channel on the second dish and he push the button and receive one or the other, completely transparent to him a second dish being there.

So we've done everything we think we can and by the way, we also inform all the consumers in two-dish markets of the availability of that free equipment if they want it. So we thought the tradeoff was better to serve more markets and provide more choice for consumers in as many markets as possible.

Mr. BOUCHER. Well, thank you very much. I think that's a perfectly satisfactory answer and from my perspective your practice should be applauded. I think by serving more markets, you're providing a broader service and helping more people get local signals than if you had to be restricted just to one dish.

Let me ask you, Mr. Hartenstein, if you have any estimate of the number of subscribers who are taking advantage today of the grandfather that you referred to in your testimony? In other words, how many subscribers who are currently getting distant network signals would not be able to get those signals in the event that the grandfather provision is not renewed?

Mr. HARTENSTEIN. Mr. Boucher, in for DirecTV, there are in the approximate range of about 100,000 households, however many people in those households that are still for us, for DirecTV, in that category.

Mr. BOUCHER. Mr. Moskowitz, is there a similar number for EchoStar?

Mr. MOSKOWITZ. The number is about 100,000 for EchoStar as well.

Mr. BOUCHER. So in the event that the grandfather is not renewed, there are going to be 200,000 quite angry people across the United States writing to their Members of Congress and complaining. I think we all understand the implications of that.

Let me turn now to another question and I would welcome the views, at least of Mr. Lee, Mr. Moskowitz, Mr. Hartenstein on this question. It occurs to me that two possible changes in the Section 119 license would be in the interest of viewers. One of these changes would advance a major goal of the television broadcasters. The other change would advance a goal announced by the satellite industry. Perhaps both of these changes could be considered together. And I would like to have the benefit of your views with regard to both of them.

First of all, with regard to the Section 119 license, why should there be any continuation of eligibility to receive distant network signals at a time when a particular subscriber is in fact subscribing to local-into-local service from either of the satellite providers and is receiving local stations that emanate from the market in which he resides? I have difficulty perceiving any real need to bring in distant network signals in that circumstance where the viewer is already getting local stations delivered by a satellite. That's question No. 1.

No. 2, why should we not allow a digital signal to be delivered by a satellite in those instances where the local broadcaster has not powered up his digital transmitter sufficient to reach identified viewers. Those viewers who simply cannot get a digital signal delivered terrestrially over-the-air in my view would be well served if they could get the digital signal of that network delivered by a satellite. Now I understand the concerns that Mr. Lee has put forth, that there would have to be some assurance that at such point in time as the broadcaster locally powers up and delivers that digital signal across his entire dominant market that the viewers who can then get the signal terrestrially would henceforth be disqualified from getting that signal delivered by satellite. Suppose that assurance were built into the provision, at that point would the broadcast industry be interested in considering allowing the digital signal to be delivered by satellite to the viewers who simply cannot get it terrestrially with the ability of that viewer to get the digital signal by satellite being terminated when he can get it from the local station?

So those are the two questions that I would welcome the views of witnesses with regard to both and Mr. Chairman, I ask unanimous consent for 2 additional minutes in order to give witnesses time to respond.

Mr. UPTON. Without objection, the gentleman will be recognized for another 2 minutes.

Mr. BOUCHER. Mr. Moskowitz, would you like to begin?

Mr. MOSKOWITZ. Certainly, Congressman. We certainly agree that there should be a distant HD digital signal. We think that it encourages broadcasters to begin to improve their service area. We think it's a good, competitive tool to get broadcasters to do this as quickly as possible. I certainly do agree that it's not always the broadcasters' fault that they're not broadcasting full power today. But in many cases, it is and we can do something about it. And even when it's not their fault, we can do something about it.

I think it's also important to know that EchoStar and I believe DirecTV as well, already incorporates an HD off-air tuner in every HD receiver we sell so that if there is a time, if the time comes when it does indeed provide a terrestrial HD signal, they will get it automatically from the same box that gives them the distant HD signal today, so we're really doing more for the broadcaster than they can possibly do for themselves in that regard.

Mr. BOUCHER. Very quickly, would you agree that if we amend the license in this fashion that at such point that the viewer can get the signal from the local broadcaster and good digital quality that the eligibility to get it by satellite should end?

Mr. MOSKOWITZ. I think that when the broadcasters give their analog spectrum back, I think it makes sense to probably end it.

Mr. BOUCHER. Well, we're talking about a time a little bit before that.

Mr. MOSKOWITZ. Well, I think that we ought to be encouraging them to get to the point where they do that.

Mr. BOUCHER. Mr. Lee?

Mr. LEE. If I may, I want to circle back for just a minute, Mr. Boucher, and in 10 seconds say that while I'm sympathetic with EchoStar's need to use multiple satellite locations and thus multiple dishes, America's local broadcasters think it makes perfect sense to eliminate this satellite Siberia thing. Just put all the stations in any given market on one satellite or the other. We don't, as Mr. Moskowitz said, it's transparent to the subscriber on the program guide which channel it's—or which satellite it's coming off of.

Now, as to your question specifically, the shareholders in my company pay a great deal of money for the right to be the CBS affiliate in our community. And the affiliation agreement, the contract I have with CBS, if you will, says I have exclusivity for CBS programming in that market. Now, the copyright exemption says if I can't reach them, then it's okay to import a distant signal, but both services now offer local-into-local service in my market. What's the point, as Marty said, of subjecting your constituents to news conferences by the gentleman from New York rather than the gentleman from Virginia? It's an idea whose time has come and gone.

As to the digital white space question, I really see this as a real Trojan Horse. I was interested in hearing Mr. Hartenstein say that they have about 100,000 grandfathered subscribers and Mr. Moskowitz responded that EchoStar has about 100,000. There was a Bear Stearns piece in the last couple of weeks that estimates the dish network has 850,000 distant network subscribers and that when the Federal Court appeals process finally concludes and they are required to shut down those illegal subscribers, there will be 425,000 subject to turnoff. That's a far cry from the 100,000 we just heard about.

Well, what's the point? Four hundred and twenty-five thousand illegal subscribers paying $6 a month results in $2.5 million, a $30 million annual revenue stream. That funds a lot of litigation. Broadcasters across this country have sued these people for 10 years now. We're finally about to get relief and this is a Trojan Horse to let them introduce this.

Mr. BOUCHER. Thank you very much, Mr. Moskowitz and Mr. Lee so much for the spirit of compromise here today.

We shall continue to discuss these matters at another place and time. Thank you very much, Mr. Chairman.

Mr. UPTON. Mr. Bass.

Mr. BASS. Thank you, Mr. Chairman. During my opening statement I raised and I believe three other members echoed a problem that is unique to States with several DMAs where the DMAs are centered outside of that particular State or sphere of influence of the viewers in that State.

Does anybody before us this morning believe that the viewers in the three northern counties of New Hampshire should continue to be precluded by law from having access to the State's sole network station?

[No response.]

Good. Silence can be interpreted as a favorable answer.

I have a question for the satellite operators and the NAB. Is it technically possible either at the satellite transmission or at the set top box to allow a consumer access to one or two stations from an adjacent DMA just to fill out the missing station?

Mr. Moskowitz?

Mr. MOSKOWITZ. The answer is yes. It can be done virtually immediately from the satellite perspective.

Mr. HARTENSTEIN. From DirecTV's perspective, that's also an affirmative. It's a combination of where the spot beams that we have are located and the technology in the set top box, but yes, it can be done.

Mr. BASS. Even if it's a distant signal?

Mr. HARTENSTEIN. If it's a distant signal we, and I believe EchoStar, transmits our distant network signals across the entire United States. That is not true for all of our local markets. We make use technologically through spot beams of the very precious spectrum we have for most all other local markets.

Mr. BASS. Mr. Polka?

Mr. POLKA. Once again I would say it's just nice to be the David among Goliaths which is typically the case for our members who are oftentimes forced to deal with and I sympathize with my friends from EchoStar on their negotiations with Viacom, but imag-

ine what it's like for a company of a thousand to be negotiating with those entities.

The issue that you raise is one of parity. And the issue that you raise is one of imbalance that exists under SHVIA. And our view, we're all about parity. I think it's one example that you point out in the law where there is a disparity in relation to application of DMA market principles to the satellite companies. And frankly, that probably should be addressed, as well as the other numerous aspects of disparity that now favor the DBS industry over competition with cable and the smaller markets.

Where I'm from and we have a number of members in your State as well, who have less than a thousand subscribers. You have that one small company with less than a thousand subscribers competing against two national entities with millions of subscribers and that is an area of competition and balance that has to be considered in the local market, if we're going to ensure because there's a direct relation here. If we're going to ensure that the promise of broadband, of digital, high definition television, internet is provided to those rural areas, our members as cable operators are the competitor in those communities, not the giant entrenched cable monopoly that we oftentimes hear commented on by both in the DBS industry. So it's a parity question that should be addressed, but if we're going to address one parity question then we need to address all of them.

Mr. BASS. Mr. Kimmelman, you were nodding. Do you have any observation?

Mr. KIMMELMAN. I definitely think that the parity concept is a fundamental consumer principle. We want to make sure that you can get on satellite everything that you can get on cable. There's no question about that. And I think that it's critical to make sure that local channels are available everywhere possible. I think it would be very helpful for this committee in the reauthorization to look to every change in law necessary, every direction of the FCC to make sure that you're helping get local channels into communities across the country.

Mr. BASS. Thank you, Mr. Chairman. I hope that as we address this reauthorization that we can come up with a solution that will allow at least in my instance and with my other colleagues, the ability of our constituents to see and hear news, weather, emergency notifications that are germane to their communities and their State and not have to depend upon neighboring States for this information.

Mr. Lee, did you have one other thing to add?

Mr. LEE. If I may respond to that quickly. As you consider that parity, please consider both sides of it. I wish Congressman Boucher were still here. Nielsen surveys viewing in every county in America four times a year. And at the end of the year takes a look at where the predominance of viewing occurs and assigns that particular county to a television DMA. Then once a year the pot gets stirred and counties get moved out of one DMA into another and then 2 or 3 years later they may come back. But constant in all that is a requirement for local stations, exclusivity to be honored.

There is a cable system in Marion, Virginia which is in Congressman Boucher's District just inside the Tri-Cities DMA, just outside

ours. Because the Johnson City station has exclusivity for CBS programming, the cable system there cannot carry our CBS network programming, but it can carry our local news and other locally originated broadcasts and does. If the satellite people want to be able to carry the local newscasts or local programming from an adjacent market, I don't think you'd find many broadcasters who would quarrel with that. Let the people decide what they're going to watch.

Mr. UPTON. Mr. Markey?

Mr. MARKEY. Thank you, Mr. Chairman, very much. Our ability to foster price constraints or price dropping, unfortunately is limited. Cable competition just doesn't seem to work in the SHVIA context. Satellite has become a choice and a quality competitor, but it does not drive down prices the way cable over builds would going head to head in a community.

What, Mr. Kimmelman, can we do in the SHVIA context to foster a consumer price competition agenda?

Mr. KIMMELMAN. Well, Mr. Markey, I think you have to take the broadest view of the satellite law and think about overall video policy, how to promote competition. The dispute you have before you today, in this case, it is CBS and EchoStar, is a dispute about a distributor and a company that owns a whole swath of very popular channels. It could be Disney, ABC with their channels. It could be NewsCorp which owns DirecTV or their channels. It could be any of these, but it's only a handful of companies that dominate in this space.

The problem is the companies that own the programming want to sell them in a bundle and get the highest price for them and on the other end, the cable company, the satellite wants to bundle the programming and sell it at the highest price to consumers.

We can't solve this problem over night, but I urge you to No. 1, go back and look at the ownership rules and make sure that companies can't own too much. No. 2——

Mr. MARKEY. That would help price?

Mr. KIMMELMAN. Absolutely, absolutely.

Mr. MARKEY. How would that help price?

Mr. KIMMELMAN. Because what happens now is one of the best potential competitors, DirecTV to cable companies, now has its profit center in programming. It makes the most money by getting the highest price for NewsCorp. This company now makes its money by selling programming. The Fox Network, Fox Regional Sports, Fox Cable Channels and it has no interest as we've seen from Mr. Murdoch's own statement in having price wars with cable. This is one of the two satellite competitors who are hoping to drive down price against cable. That's untenable. So it's the ownership that's a problem.

The second thing you can do is you can require companies to sell their channels on an individual basis to satellite and cable and do anything else they want. They can bundle it also, but sell on an individual basis and comparably you can require the satellite companies and the cable companies to sell on an individual basis to consumers. The average consuming household only watches 12 to 18 channels a month. It's great to get 50, 75, 100, but what if they only want to buy 15 or 20? What if they find some to be objection-

able programming and some just want sports and some just want news? Why not let them pick what they want?

Mr. MARKEY. Let me move on to the DTV agenda. On the one hand we want to move the digital transition along and fast. On the other hand we don't know yet given the propagation qualities of a digital signal as opposed to an analog signal who may be served or unserved.

Shouldn't we be tasking the FCC with the job of ascertaining the appropriate model to determine digital signal eligibility? After all, DBS now has a 20 percent market share which is not insignificant. And so it's at the core of this issue of moving the DTV transition along.

Mr. Kimmelman or anyone else, I'd appreciate hearing your views.

Mr. KIMMELMAN. Mr. Markey, I would just say briefly from the consumers' perspective, they can't get a signal, they can't get a signal and they want a signal. They want to be able to watch a channel. And so I think it's absolutely critical that the agency that's responsible for protecting consumers finds out where they can get them and where they can't get them, whatever model they use and make sure that they are fully served.

Mr. MARKEY. Anyone else want to comment on the DTV transition in the satellite context?

Mr. FRANKS. I would just say that I think the transition is actually finally beginning to gain steam, partly through the efforts of the leadership of this subcommittee. I would just urge that anything that be done in this regard be done with extreme caution. There's still an enormous amount that we don't know about digital signal propagation and we're not going to know it for some period of time and I would hate to see the Commission take their snapshot and make their judgment when we are still at a fairly early stage in that part of the digital broadcast transition.

We are—the pace is accelerating and I think it is frankly a question that might be better put to the Commission in the not terribly distant future, but I'm not sure it makes sense to do it today.

Mr. MARKEY. Yes, Mr. Polka?

Mr. POLKA. I would just agree. I think that changes regarding the digital white area would fundamentally change the concept of localism and broadcast carriage rules that now both parties accept and are working under, so I would agree that any change to that aspect of the law that would fundamentally change broadcast signal carriage requirements must be taken very, very lightly.

I would just also——

Mr. MARKEY. Mr. Polka, aren't the laws of physics and signal propagation known? How long can this take? They've been experimenting—they took me out to experiments like 12 years ago. How much time is needed to figure out what the digital propagation capacity is?

They told me they were near to solving it then. I'm sorry.

Mr. POLKA. Sure. The transition is occurring. And you're right, there are some technical questions which remain to be developed and answered. My point goes specifically to changing, making points of change under SHVIA that would fundamentally change

how the rules of broadcast carriage, allowing distant signals to be carried in market, whether digital or otherwise.

Right now, the rule is is that local signals are to be carried locally, in market and that is a fundamental balance, principle of competition in our market places that we hope to see further under SHVIA and not changed.

Mr. MARKEY. Yes, Mr. Moskowitz?

Mr. MOSKOWITZ. I think the neat thing about the digital over-the-air signal is while, you know, there are all kinds of issues that people can throw up and raise up, the fact is that satellite can deliver it today and the really interesting thing about it is that for the most part you do either get it or you don't. And so while a predicted model can be useful, we can also just go to the consumer's house. It's not like the analog world where there are gradations of how good you get it.

In the digital world, you get it or you don't. So we can find out pretty quickly whether the broadcaster is delivering the signal in the market or not. And if he's not, let's not make him wait for the digital transition. Let's accelerate that transition.

Mr. MARKEY. Mr. Franks?

Mr. FRANKS. Mr. Markey, we own 16 television stations across the country. They're all up at full power. I don't know, I cannot tell you today what channel they are going to be broadcasting on digitally in 2 or 3 years, because when this transition gets to the next phase, we're going to have to scramble the whole channel map again. I'm not a physicist. I have no idea what that will do to the propagation. I don't know whether we will go from being on channel 42 where we are in New York City on the Empire State Building when we get back to the World Trade Center site are we going to be back on Channel 2 or are we going to be on a different channel? That's true of every one of our 16 stations.

I think it might take Einstein to figure out that propagation and with all due respect to the current FCC, I think it might be better to wait.

Mr. LEE. If I may, Mr. Markey?

Mr. MARKEY. Please.

Mr. UPTON. Last comment.

Mr. LEE. The FCC had no choice but to design this digital transition in computer models and it was only when stations started going on the air that we began to see the propagation characteristics didn't match the computer models. We're on at full power and have been from day one and people pick us up in places they really shouldn't be able to get us. We throw the signal more than a hundred miles in mountainous terrain. It shouldn't be that way.

Well, as more stations have come on the air, you've had instances in which I can't say this in a congressional hearing, the "oh shit" factor sets in.

Mr. MARKEY. Not this committee.

Mr. LEE. Okay.

The public station in Norfolk and the CBS affiliate way up the road in Salsbury, Maryland are on the same channel and they interfere with each other. So the FCC has had to go there, pull the power back and try to have both parties find a solution. We're still learning this stuff, really.

Mr. UPTON. I do have a mute button up here.

Mr. MARKEY. Cable is not covered by the House Indecency Bill. It's in the Senate, but not in the House bill.

Mr. UPTON. I thought that was your amendment before the Rules Committee.

Ms. Cubin.

Ms. CUBIN. Thank you, Mr. Chairman. I come from a family of seven children. We had six within 3½ years of age and now I finally know how my mother felt when she was trying to listen to all of us and all of our problems and come up with a fair solution.

Wyoming's markets are small. We have 197 and 200 out of 210 and so we don't have any local-into-local service in Wyoming. So that's where we are. And I understand the satellite companies are expecting that that service will be available by 2006. Is that right? Is that correct?

Mr. HARTENSTEIN. At DirecTV we did make a promise that we would get as quickly as we could to all 210 markets. That would include Cheyenne, 197; Casper-Riverton, 200, by no later than 2008 with a goal to get there by 2006. We have some announcements that we should be making in the next couple of weeks, along with the satellite that I indicated before that we will be launching with some approvals, requests in at the FCC that we hope to get approved by them that can take us a good way there. Unfortunately, not yet, by this summer, to Wyoming, but certainly we feel that we'll be able, with everything working properly, to get there closer to 2006 than 2008.

Ms. CUBIN. Thank you. I wanted to ask a question. Mr. Lee, you talked about broadcasters not powering up and I want to know when I talked to one of the local television stations they told me that the cost to do that was prohibitive to them.

What is the cost to these small local stations that have to power up?

Mr. LEE. It depends on the channel assignment the station has. The higher up in the UHF band, the more power it takes to replicate a station's coverage. Our analog station is on Channel 7 and our digital is on 18. Our power bill alone for the new transmitter is about $72,000 a year.

Ms. CUBIN. And how much did the new transmitter cost?

Mr. LEE. A million and a half. We've invested at our station about $12 to $14 million in the transition and trust me, we're as eager as anybody else to shut off the old analog transmitter and get back into a single channel.

Ms. CUBIN. But that really does explain why some smaller broadcasters haven't been able to power up as you said.

Mr. LEE. In areas of low population density such as yours, it takes a lot of power to cover the entire State as you well know and I can only imagine what they're faced with in power bills there.

Ms. CUBIN. Mr. Moskowitz, can you explain the assumptions that are used to define a Grade B signal?

Mr. MOSKOWITZ. Yes, Congresswoman, I can. What happened is back in the 1950's, literally, focus groups were created and they were shown pictures of television signals and asked to rate their acceptability. And then when a consumer said it was a good enough signal, they said okay, now how many DB, how many physical DB

do we need to get to the house in order to create that quality signal? This is really the ugly family secret and people are still in denial. The fact is that what those people, those focus groups did in 1950's is not relevant today. It's not relevant because people's expectations have changed in a digital world and in a world where cable is available and satellite is available and that's why we have these problems.

Ms. CUBIN. One other question for Mr. Lee. Do you think the current system of waivers and signal strength tests, are adequate to determine who is eligible to receive a distant signal?

Mr. LEE. If you're familiar with that system, if I'm a DirecTV subscriber and I request a subscription for distant network signals, DirecTV or likewise EchoStar, transmits that request through an independent third party called Decision Mark. There is an ILLR predictive software that takes a look on the first pass and says you either meet this signal standard or you don't and if it's marginal, then the request comes through to the station, the station responds either positively or negatively and in all fairness, I can tell you more about our station's pattern and practices than anybody else's. I know it best.

Prior to the beginning of local-into-local service in our market, we had granted waivers to 30,000 households in a market of 450,000 households, so a relatively high percentage. And most of those were accomplished through this Decision Mark electronic process.

Ms. CUBIN. Do you think that consumers understand what their rights are under the law and how to go about getting distant broadcasting?

Mr. LEE. I believe so. I'm a DBS customer myself and the rules are pretty well spelled out on the websites of both companies.

Ms. CUBIN. Thank you.

Mr. SHIMKUS [presiding]. Thank you. Now I'd like to recognize Mr. Buyer from Indiana. You have 8 minutes.

Mr. BUYER. Thank you. This has been a good hearing. It's also been informative to sit here and listen to all of you, not only your testimony, but also in the question and answer phase.

I would say to the gentleman from EchoStar that I've worked hard to be a very good listener, while at the same time I've struggled from within because of that your testimony to me comes tainted because of the actions by a Federal Judge and so when you come here to Congress and you ask us to do certain things and you could not even uphold an agreement in a Federal Court and the Judge comes down on you, I just want you to know I'm struggling with that, okay? I'm just being very open and honest with you. And that's why I said I'm going to be a good listener, but it does affect the credibility of your testimony today which makes it hard for you. I just—I think it does. But that's just Steve Buyer opinion, but I want to be open and honest with you.

Second, this creation of a digital white area, I have to go back to the origins of the Act and so when I go back there, I was on the Judiciary Committee at the time and was a conferee on the Act. And so when we layout a game plan here and we say yes, we want government to get out of the way. We want to deregulate, but we also want to have this transition in our society, and we say yes,

there's a value of the over-the-air networks. And then when we lay out this plan and there's an expectancy and people commit money for you to now come in and say well, I can really speed us up to transition. I don't know, I don't believe this is going to meet the equitable test and what is fair and what Congress laid out in a plan and in the end is it really going to be pro consumer? That's how I'm looking at this.

So I just wanted to share with you my feelings, having listened to your testimony and having some history with the Act.

Last, what I would like for you to do, if anyone would please testify to this, what has been bothersome to me over the years is as we were going, in the early 1990's, the Congress set the time, passed the Cable Act. I wasn't here in Congress at the time. I came in 1993, but they passed the Cable Act. That's a heck of an answer. Price controls, right? So they passed the price controls and said we're going to do that. That's pro consumer. We're going to keep these prices down. And we get to the Telecommunications Act and we say you know what, in order to get government out of the way and to bring all this straight technology and choices of the people we're going to repeal the Cable Act. And at the time the biggest complaint about the cost of programming was out of Hollywood.

One of the interesting things about the Cable Act and what it had done though it had kept the lid on sports salaries. So when we then passed the Telecommunications Act, we popped the lid off of sports salaries and how sports is an unbelievable driver of costs. And every time—I don't think you people in America realize. They pick up a newspaper and they see that they've just paid $90 million for somebody for this or $200 million for a baseball player. And people don't even realize that they're paying that. They think the sports owners are paying it.

So what I would—I don't want to violate any of your proprietary interests, but if any of you have—the gentleman from the Consumer Union, you mentioned about the 54 percent increase in prices. If you know how much of that is attributed to sports programming I would love to hear that testimony.

Second, I would love to hear any of you talk about for the record how a sports owner takes those salaries and how they're passed to programmers and programmers pass it to subscribers, how do you deal with this issue? I'm really curious how you can actually deal with the issue.

Mr. POLKA. I'd like to start. The answer is you can't deal with it because the terms are dictated to providers and also to consumers.

You mentioned the 1992 Cable Act and the 1996 Act. What has occurred since 1992 is a panoply of mergers that have consolidated content into the hands of about four very large companies that control numerous, probably 70 to 80 percent of the programming that consumers see today and because of the use of rules that extend back to 1992 and also to the Network Nonduplication Rules of 1970's, these major media conglomerates are allowed to use these rules to their advantage, retransmission consent, retransmission consent abuse in many markets, to tie and bundle programming that are forced to consumers to take and pay for, whether they like it or not. And that includes sports. That includes sports.

And the other factor is is why that occurs is because there's no transparency in that transaction between the media giant and the provider because the contracts that are dictated to by these entities contain very strict nondisclosure provisions in them prohibiting an operator such as myself or any of our thousand members to come to this committee or to anyone else or our local franchising officials or to our customers to even tell them the types of price increases and the tying and bundling that takes place in our contracts.

So the answer is is right now, there is no market check on that transaction at all and the reason why everybody across the country is paying for Alex Rodriquez' salary is because these entities can do it and they can get away with it. They tie it and bundle it to marquis programming that we have to have that we have to have to be competitive and they know that by tying all of it together they can get the prices they want for those sports prices.

It's out of control. There is no market check on it and unless there is some transparency in the market place at some point, there's nothing that's going to happen that's going to change it.

Mr. FRANKS. Mr. Buyer, if I may, I would disagree with Mr. Polka, if I could figure out what he just said. Let me take that out of the pro leagues for a moment. We're about to do March Madness, so I mean the kids are getting a scholarship, but they're not A-Rod. I don't know if there's a solution when this is immensely popular programming and it is put up by the rights holder for a competitive bid.

We are paying billions for their rights to the basketball tournament and many of our competitors would like to have those rights.

I don't know how to put a price cap on that and from the standpoint of free over-the-air television, it is a struggle. Before we bought it it was a shared enterprise between broadcast and cable and so there were many, many, in a different era of cable, there were many places, many households that couldn't see the early rounds of the tournament. We paid a price to have that exclusivity so that we could broadcast it for free to everyone in America. And does that then put pressure on our business and does that put pressure on what we seek from Mr. Polka and his colleagues in terms of a retransmission consent transaction? Absolutely.

But I guess I don't understand what the alternative would be short of not giving the public this incredibly popular programming.

Mr. BUYER. Does anybody know of the 54 percent increase in cable rates can be attributed to this explosion of sports salaries?

Mr. KIMMELMAN. Sir, the General Accounting Office has looked at this and it's one of the bigger driving forces, but it's only in about 8 or 10 percent of that. It is unique, largest segment, but it is not the overwhelming majority of what drives the rate increases. What there is, I mean, Mr. Franks is right. It's extremely popular. When Cox Cable complained about the prices, they were paying for ESPN. I'm sure they've been in here. They were saying only 20 percent of our customers want to watch this and everybody has to pay for it.

Well, those 20 percent probably are willing to pay the couple dollars a month for ESPN that it costs, but what about the other 80 percent and this happens across the dial with every channel. So if

you could just get the companies to let people buy what they want, it wouldn't solve all the problems, but we would start getting at some transparency. Unfortunately, you've walked in a hornet's nest here because Major League Baseball has an antitrust exemption, so it doesn't follow the competition laws of our country. And leagues are pretty peculiar and so this is a problematic area, but at least let's let the people who love sports and really want it pay, but not make everybody else and do the same for every other kind of programming.

Mr. MOSKOWITZ. Congressman, might I respond to your statement about EchoStar for a moment? I do appreciate your honesty very much and certainly the Court decision in Miami is a dark day for EchoStar, just as the prior Court decisions finding the other satellite broadcasters had violated the law. It was a dark day for everyone in the satellite industry. And we shoulder our responsibility for that, but I ask you to keep a couple of things in mind.

First of all, the law, the SHVIA law places the burden of proof on the satellite provider to prove that every one of its customers is legal. That's a burden which—broadcasters, the NAB did a great job. But that's a burden that's incredibly difficult to meet 5 years after you just sign a subscriber up. On the other hand, the same Court that made those findings also made the following finding. The current qualification system employed by EchoStar and applied to every potential distant network subscriber is a reasonable system to prevent ineligible households from receiving distant network programming. Such efforts by EchoStar to comply with the law support the conclusion that no pattern or practice of willful or repeated violations exist. And this is part of the Court record. Even Robert Lee of the CBS Affiliates Association noted that today EchoStar is making legitimate efforts to qualify subscribers. Do we have a past that I wish things were different in? Yes.

Finally, it was actually EchoStar that started that case. EchoStar wanted to know whether its procedures for qualifying customers were legitimate and you can go look it up. It was EchoStar who brought the suit and asked a Court to determine whether its procedures were appropriate or not. Now it turned out that the Judge said no, the procedures we've used today and that we've used for the past several years are different and have found to comply. Not to just brush under the rug the fact of the findings that are disappointing to us.

Mr. BUYER. I appreciate your rehabilitation.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. I remember going back to the passage of SHVIA or whatever you want to call it, it was one of the few issues in that people would yell at an elected Member of Congress on a parade route that they wanted network broadcast. It was really an amazing time to go through with all of the issues that's always around us nationally.

This was—this really had hit a chord. So it's neat that we continue to move down and we are seeing local stations being broadcast. I have a radio personality in the St. Louis media market that every time I see him, he thanks me, so he can get local stations. I made a good friend with the passage of that bill.

I want to take this time and you all know how these hearings work and I agree with Steve that this has been a wonderful hearing and obviously there's a lot of work that needs to be done and I'm sure other actions will occur from this.

I want to again just put in my plug for any ways in which you can through your entities whether it is the Consumers Union or whether it's an affiliate to look inwardly to help us fully employ the dot kids us website. We're going to have the indecency vote on the floor tomorrow. When I mentioned it at the last hearing I had staffers scrambling to figure out what in heck I was talking about, which is good, because I'm going to take it upon myself, along with the chairman, the ranking member of this committee, to help us focus on the need to deploy and employ the dot kids site. So if you've got programming, you want kids to have access to good information that's protected, there's no hyperlinks. There's no chat rooms. It's information-based only. The President signed the bill into law over a year ago that sets up the site and now we're—it's the chicken and the egg. We want providers out there so that we can encourage kids to go on and if you would look at that I would appreciate it.

Now for another question and I'd just like to go Mr. Moskowitz first and I'm going to try to go to everyone who it's appropriate to, you all hold a license, do you not?

Mr. MOSKOWITZ. We hold many licenses, yes.

Mr. SHIMKUS. And who is the primary grantor of the license?

Mr. MOSKOWITZ. The Federal Communications Commission.

Mr. SHIMKUS. And would you say that in use of that license you use the public airways?

Mr. MOSKOWITZ. I think it's different than the broadcast airways in that satellite pays for them and they're not considered to be—I don't know the ins and outs, the nuances of it, but we're not considered a public carrier or common carrier. But certainly public spectrum that has been purchased by satellite carriers.

Mr. SHIMKUS. Great. Let's go to Mr. Lee. You do hold a license?

Mr. LEE. From the Federal Communications Commission.

Mr. SHIMKUS. And you operate over the public airways?

Mr. LEE. Yes sir.

Mr. SHIMKUS. How about Mr. Polka with American Cable Association? Do you have a license?

Mr. POLKA. Yes sir, we do obtain a number of authorizations from the Federal Communications Commission.

Mr. SHIMKUS. Okay, and do you use the public airways?

Mr. POLKA. Yes, we certainly use airways that are licensed by the public if we have something from the FCC and we need authorization, then that is the public approval.

Mr. SHIMKUS. Thank you. Mr. Kimmelman. We'll skip you.

Mr. Franks, you do have—by the FCC and you use the public airways?

Mr. FRANKS. Yes sir, absolutely, yes sir.

Mr. SHIMKUS. I guess you all know where I'm going. And I know the parent company here from Hughes, Mr. Hartenstein, how could you—can you respond to this question?

Mr. HARTENSTEIN. Absolutely. Our different subsidiaries including DirecTV have broadcast satellite and fixed satellite service li-

censes and as such those are administered by the FCC, albeit with a different set of rules than for example, over-the-air broadcasters.

Mr. SHIMKUS. Thank you for leading me into the question and we'll start with Mr. Moskowitz. Should there be separate rules? If we're going to police the airways on indecent standards, should there be different standards for use of the public airways by FCC license grantors?

Mr. MOSKOWITZ. Congressman, I believe that there should be some difference in that the broadcast airways are available without subscription, free over-the-air, anybody can view them. The satellites that we use, the programming is all encrypted and you have to pay to receive the channels. We also include in all of our receivers V-chips that let parents block inappropriate programming, not only on a ratings basis, but also going a level beyond that for sexually explicit matters, language, and so we try to be very cognizant of that and we at DirecTV actually led the way for the adoption of that technology.

Mr. SHIMKUS. Let's go to Mr. Lee. We'll try to get through on time.

Mr. LEE. In all honesty, I haven't considered that and I can give you a knee jerk reaction that we all should be subject to the same regulation, but I could be argued with about that.

Mr. SHIMKUS. I am sure you will be, but——

Mr. UPTON. Do I need to have my finger on this mute button?

Mr. LEE. I've cleaned it up.

Mr. SHIMKUS. Mr. Polka.

Mr. POLKA. Yes sir. There are differences clearly in the types and methods of delivery which I think have led to the different regulatory regimes for both. And I do agree that there is a fundamental difference between broadcast and satellite and cable because they are subscription based.

However, the implication concerning indecency and control of indecent programming is, of course, something that our members in smaller markets and communities are very, very keen to and in fact, I would just comment on something that Mr. Kimmelman said. We have wanted to have the choice to control programming and to create tiers of programming that would put some of this other indecent programming on tiers that would not be widely available to all of our customers.

However, and I'm sorry for being passionate about this because it affects small businesses, but the reason why we cannot control that indecent programming is because the programming and the tying and the bundling is controlled by Viacom, Fox, Disney and General Electric who tie and bundle these services and make consumers take it whether they want it or not.

Mr. SHIMKUS. And I understand that. And we're really talking about use of the public airways, capital investments, both on the transmitter and the receiver, really—even free over-the-air, someone has to invest in receipt of that and that's the consumer when they buy a TV.

So let me move on to—I'll let you finish, Mr. Kimmelman, but Mr. Franks.

Mr. FRANKS. I share your intellectual curiosity for why there is such completely disparate treatment. I realize there may be grada-

tions as David suggested in terms of scrambling, but why it is so completely disparate is something I've never understood.

Mr. SHIMKUS. And Mr. Hartenstein?

Mr. HARTENSTEIN. We really are the pioneers in this. We are an MVPD, a distributor like cable is. Not producing programming when we started 10 years ago and still today, we nevertheless viewed what comes into one's home as a family matter by the parents in control there. All DirecTV systems from Day One, the very first serial number have absolutely free, very simple to use locks and limits so that you can take any programming service off of the system. It won't even show up on the Guide if you don't want it. Also, we get information from our program providers as to what the rating is of every single program. So a parent can set a level of control that they want in that.

In our entire 10 years, and I was the first president and chairman of DirecTV, and still heavily involved, we have not had a single consumer complaint about what it is that we have done.

Mr. SHIMKUS. Thank you. And Mr. Chairman, since I allowed everyone but Mr. Kimmelman to respond to all of these questions, can he finish this? He may have a comment or two.

Mr. KIMMELMAN. Thank you, Mr. Chairman. Thank you, Mr. Shimkus. Eighty-five percent of consumers receive their broadcast stations over cable or satellite. They all use the public airways as everyone has admitted. We believe they should all be subject to the exact same decency standards and we think that there is a very simple way for all of them to offer consumers a choice to pay for something individually and to be subject to a different standard and that should be the model that should be followed regardless of the technology.

Mr. SHIMKUS. Thank you. And Mr. Chairman, a great hearing and I don't have any time, but I'll yield back.

Mr. UPTON. You can't yield back used time. You owe me 1½ minutes.

Mr. Engel.

Mr. ENGEL. Thank you, Mr. Chairman. Mr. Franks, I'm—years ago there was a commercial "I want my MTV" and that's what I think a lot of my constituents are saying. I know you mentioned the on-going fight with EchoStar that you expected it to be resolved soon. I'm happy to hear that and I wonder if you could add anything about that?

Mr. FRANKS. We very much want to be on EchoStar. I know EchoStar very much wants our programming services. This has long been a market place negotiation. The market place is well on its way to resolving the dispute.

Mr. ENGEL. I'm happy to hear that. Let me ask Mr. Moskowitz, in my opening testimony I was very critical of the second dish and I really want to give you your chance to really answer that.

What percentage of customers, in fact, have a second dish and what methodology do you decide on which TV stations go on the second dish and how many Spanish language broadcast stations over all does EchoStar deliver through a second dish?

Mr. MOSKOWITZ. Congressman, I don't know how many Spanish language speaking stations overall we have on second dish. I do know that we have a lot of them on the primary dish, for example,

in New York. We do have of the seven stations we have on the primary dish one of them Univision is Hispanic. Of the eight on the secondary dish I believe one, perhaps two of them are Hispanic. The criteria we utilized to determine which ones we put on the second dish are what's the most popular programming?

The more popular the programming, the more likely it will be on the primary dish. What we try to do though to eliminate any discrimination is provide all of the equipment, tell all the customers that if they want a second dish to get these other channels, it's available absolutely free of charge, that we will give them a professional installation absolutely free of charge and that we make it ubiquitous so that when the consumer pulls up his program guide that station on the second dish looks just like it was on the first dish.

We do everything we can. The alternative would be fewer markets where we can provide local channels by satellite.

Mr. ENGEL. So in any of the markets the second dish service I can assume by that that none of the big four, ABC, NBC, CBS or Fox are on a second dish in any of the markets?

Mr. MOSKOWITZ. I don't know with certainty. There may be a few exceptions where that is the case, but certainly in the vast majority of the cases, it wouldn't be the case.

Mr. ENGEL. Mr. Lee in his testimony has said that all broadcast stations should be on one dish, primary or secondary. What's wrong with that? Why not put all the signals together?

Mr. MOSKOWITZ. It's the way that the satellites are configured. Let's take an example that I was taking a look at yesterday. In Tennessee, we carry—the Tennessee, Kentucky area, we have three local markets all on the same spot beam. And that spot beam on the satellite lets us provide about 20 total channels. If we were to put all of the channels in each of those markets on the spot beam, we could only do two markets instead of three and Paducah, Kentucky would not receive local network channels by satellite.

Why couldn't we take all the Paducah channels and put them on the secondary satellite? Because there are no spot beams on the secondary satellite. So you quickly run out of the spectrum that you would otherwise use. So it's not linear where you could just take it off of one and put it on the other because of the configuration, the design of these satellites.

Mr. ENGEL. Mr. Lee, since I quoted you, I'd like to give you a chance to expand on what you said and would you support an FCC rules requiring all broadcast stations to be on a single dish?

Mr. LEE. Yes. Yes, I would, Mr. Engel. This is a very micro example, but a number of my employees subscribe for dish network local-into-local service in our market and I can think of three right away who just haven't bothered to get the second dish installed because it involves going home in the middle of the day to meet an installer and the primary dish is already there. In my estimation, just some inequity in treating certain stations as second class citizens.

Mr. ENGEL. Mr. Hartenstein, does DirecTV today require any customers to use a second dish to obtain some, but not all local-into-local stations?

Mr. HARTENSTEIN. No.

Mr. ENGEL. Let me ask you the same question I just asked Mr. Lee. Would you support an FCC rule requiring all broadcast stations to be on a single dish?

Mr. HARTENSTEIN. We are waiting and we understand the FCC has this matter on review. There has been a bureau order and we understand the full Commission is waiting to go by it.

Mr. Moskowitz is absolutely right. The example he gave and the example, there are many other examples that could provide the tradeoff of serving all local channels from one in a market on one dish versus serving multiple markets.

We are anxious for the FCC to give a final ruling on that and we will abide with it as how it comes down.

Ultimately, we would all like to have enough spectrum to do it, to not have to use multiple antennas, but we simply can't defy the laws of physics in terms of the spectrum available and are forced to make the kinds of choices in terms of do you serve more markets or do you split up the locals? Our practice today, as I said before, is not to have done that and it is a practice we have adhered to because of the nonfinal determinacy by the FCC on this rule.

So we look forward to them ruling on it.

Mr. ENGEL. Well, thank you, Mr. Chairman. I'm going to yield back, but obviously I just want to make the point that I think a second dish is not consumer-friendly. I think it places a burden on consumers and I believe that everything ought to be on a single dish. I would agree with Mr. Lee.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you again, Mr. Engel. I'd just like to say, know that the Judiciary has already held a hearing on this topic and would announce that we'll be getting together soon with the Judiciary Committee. We will have yet another hearing on that legislative proposal and we'll make the announcements on a timely basis, just in an effort to make sure that no finger is pointed toward this panel, Republicans or Democrats, as it relates to the current crisis with Midnight Madness starting soon, we'll adjourn so that the parties can get together and whether it's beer or champagne, it is available when that handshake comes. I wish you all good luck.

Thank you.

[Whereupon, at 1:15 p.m., the hearing was concluded.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS

The Association of Public Television Stations ("APTS") hereby submits testimony before the House of Representatives Subcommittee on Telecommunications and the Internet on the extension of the distant signal license under the Satellite Home Viewer Improvement Act of 1999 (SHVIA).[1]

As the Subcommittee considers legislation to extend SHVIA's satellite carrier distant signal license from its current expiration date of December 31, 2004 to a later date, it should be aware of two related issues of critical importance to the nation's public television stations that can be resolved through appropriate legislation.

- First, EchoStar continues to violate the spirit, if not the letter, of SHVIA by placing some public television stations and Spanish-language television stations on

[1] APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 357 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members

"wing satellites" that require the installation of a second dish on customer premises, thus illegally discriminating against those "disfavored" broadcasters—a practice that has been continuing for over two years.

- Second, while SHVIA's local carriage provisions address carriage of local analog stations on satellite, it is silent with regard to digital signals. As the nation's broadcast infrastructure migrates to digital distribution, it is vitally important that some degree of digital carriage be mandated on satellite pursuant to SHVIA.

A. FIXING THE WING SATELLITE PROBLEM: ENHANCING ACCESS TO NONCOMMERCIAL AND SPANISH-LANGUAGE PROGRAMMING

Shortly after SHVIA's local-into-local mandatory carriage provisions came into effect in January of 2002, it became apparent that EchoStar had been placing some, but not all, local programming—including some local public television stations and Spanish-language stations—on "wing" satellites that were accessible by consumers only through the installation of an additional receiving dish. However, while EchoStar did not charge for the additional equipment and installation, it actively refused to promote the availability of such an option, and in many circumstances provided misleading information to consumers who requested the necessary equipment. The intent of this action was clear: to cherry-pick the most popular broadcast programming while providing restricted access to other programming in order to circumvent SHVIA's "carry one-carry-all" mandate.

On January 8, 2002, after an emergency petition was filed by the National Association of Broadcasters and others, the FCC's Media Bureau requested public comment on EchoStar's practice. Public Television and other broadcasters filed comments on January 23, 2002 objecting to EchoStar's practice requiring consumers to obtain a second dish to receive some local programming and argued that it violated the intent and spirit of SHVIA, which required nondiscriminatory carriage of all local stations if one local station is carried on satellite.

On April 4, 2002, the FCC's Media Bureau ruled that EchoStar's practice constituted illegal price discrimination, essentially imposing greater opportunity costs on consumers who wished to access certain kinds of programming. It also held that EchoStar unlawfully failed to provide all local broadcast stations on contiguous channels and to provide nondiscriminatory access to all local broadcast stations on its electronic program guide. However, the Bureau emphasized that requiring installation of an additional dish to access some but not all stations was not inherently discriminatory. Rather, it only objected to EchoStar's particular implementation of its policy. The Bureau therefore required EchoStar to immediately remedy the discriminatory effects of its use of secondary dishes and report to the FCC at regular intervals concerning its compliance. The Bureau set forth a number of suggested remedies, the most prominent of which required EchoStar to better publicize and implement its free second dish offer. In a separate statement, Commissioners Copps and Martin objected that this remedy did not cut to the heart of the matter and suggested that the Bureau had acted beyond its authority, because the decision allowed EchoStar to remedy its discriminatory conduct merely through better publicity.

Public Television and other broadcasters subsequently petitioned the Commission to review this ill-founded decision. However, it has been nearly two years since the petitions were filed with no action from the FCC. On May 7, 2003 APTS and PBS urged the Commission to speedily resolve this issue and opposed the DIRECTV's most recent request to allow it to use wing satellites to carry local stations. On January 9, 2004, shortly after the approval of its merger with NewsCorp, DIRECTV announced that it would expand local service into 17 additional markets by placing local broadcasters on a second dish.[2]

Public television is significantly disadvantaged by this continuing, and discriminatory practice. In light of FCC inaction, the time for legislative intervention is now. Presently, 30 public television stations in markets throughout America are placed on wing satellites. A list of affected stations is attached to this testimony. Although EchoStar has been required to report on improvements in its outreach efforts regarding its free second dish offer, it has been impossible for either the FCC or the public to fully determine the success of its actions, because EchoStar refuses to publicly release the number of local subscribers who ask for a second dish and receive successful installation in comparison to the total number of local subscribers.

[2] www.skyreport.com (January 9, 2004). Although DIRECTV plans on placing all local broadcasters on a second dish, thus potentially ameliorating any discriminatory effect, it does require local subscribers to purchase the additional dish.

Public television urges the Subcommittee to consider legislation to ensure that satellite carriers providing local service to consumers should not discriminate against public broadcaster or Spanish-language broadcasters by placing these stations on hard-to-access wing satellites.

B. DIGITAL CARRIAGE ON SATELLITE

Public Television is an enthusiastic proponent of digital television. With its higher quality images and sound, and its inherent flexibility to broadcast either a high-definition or multiple standard definition streams, along with additional streams of data, digital television gives public television stations new innovative tools to expand their educational mission in ways that were not possible in the analog world. For instance, public television stations are regularly producing new *high-definition digital programming* for national, regional and local distribution. In addition, *multicasting* will enable an expanded distribution of formal educational services, workforce development services, children's programming, locally-oriented public affairs programming, and programming addressed to traditionally unserved or underserved communities. Lastly, public television stations also have plans to provide innovative, educational and public safety data services through "*datacasting*."[3]

In light of the significant public interest benefits of noncommercial educational digital services, public television respectfully requests that satellite companies such as DIRECTV and EchoStar be required to carry all free, over-the-air digital signals where local television stations are being carried pursuant to SHVIA. Carriage should include but not be limited to both high-definition programming and the value-added multicast digital programming currently being broadcast by the 234 public television stations now on the air with a digital signal.

First, digital carriage on satellite will aid in further speeding up the digital transition in this country. Analog broadcast television service is scheduled to be turned off at the end of 2006 unless 15% or more households cannot receive digital broadcast signals either over the air or through cable or satellite. Cable accounts for 67% of all households; satellite accounts for over 20% with significantly higher percentages in some markets. Over half of all satellite subscribers purchase a local package, and at least one satellite provider, DIRECTV, reports that 75% of its residential customers subscribe to the local package.[4] In light of these figures, it is vitally important that satellite subscribers have access to digital broadcast signals in order for the digital transition to be a success within a reasonable period of time. In this regard, shortening the digital transition is especially important to public broadcasters, which must shoulder the substantial cost of dual analog-digital operations for an unknown period of time during the transition to digital.

Second, Congress has established the consistent federal policy that public television stations should have access to all telecommunications technologies, including satellite-delivered services.[5] Within the cable context, Congress explicitly concluded that "the Federal Government has a substantial interest in making all nonduplicative local public television services available" (a) because public television provides educational and informational programming to the nation's citizens, thereby advancing the Government's compelling interest in educating its citizens; (b) because public television stations are intimately tied to their communities through substantial investments of local tax dollars and voluntary citizen contributions; (c) because the Federal government has invested substantially in the public broadcasting system; and (d) because without carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.[6] The reasons for this policy apply with equal force, regardless of whether the public television station is broadcasting in either analog or digital format.

Lastly, satellite carriage of digital public television signals would help to preserve one of few remaining locally owned and operated media outlets in the digital age. In an era of media consolidation, public television stations may represent the last

[3] Datacasting involves the distribution of data files (e.g. maps, text, video or animation) over the air and can be directed either to the public at large or to a select portion of the public through subscription or other restricted technological means (e.g. encryption).

[4] Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 04-5, note 297 (rel,. January 28, 2004).

[5] Congress has stated, for instance, that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. § 396(a)(9).

[6] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Section 2(a)(8).

true bedrock of locally controlled free, over-the-air media. The overarching purpose of public television stations is to serve the public interest by providing educational and informational services to their local communities. To that end, the 357 local public television stations that comprise the decentralized system of public broadcasting in this country are operated by local community foundations, colleges, universities, school districts and state commissions. In addition, many public television stations possess community advisory boards that provide direct feedback from the community regarding stations' performance of and adherence to public television's mission. Moreover, stations' daily business operations are directly funded by donations from local viewers, thereby ensuring community responsiveness in a very concrete financial way.[7] Local carriage of digital public television stations on satellite will promote localism and diversity in the media, will expand the reach of noncommercial educational services available to the public, and will also provide a further incentive for individual donations to public television stations.

The Subcommittee may hear from satellite carriers that they lack the capacity to rebroadcast the digital signals of each local station in each of the 210 local markets. However, DIRECTV itself has recently claimed that it will increase the amount of high definition television programming available to the public.[8] And recent technical submissions to the FCC have demonstrated that there are technologically feasible means to deliver digital signals via satellite despite any apparent capacity constraints.[9] Nevertheless, if mandated digital carriage on satellite systems pursuant to an amended version of SHVIA's carry-one-carry-all provision is not immediately possible, Congress may mandate as an interim measure that all satellite set-top boxes come equipped with integrated digital off-air tuners until the end of the DTV transition, after which full digital carriage would be required on all satellite systems providing local service. This approach would impose little or no burden on satellite carriers themselves, as some industry leaders—notably DIRECTV and Cablevision's Voom satellite service—are already providing this technology to their customers.

For the above reasons, the Association of Public Television Stations urges the Committee to abolish the practice of segregating public television and other programmers to remote "wing" satellites and urges amendments to federal law to require local carriage of digital signals on satellite.

APPENDIX A

PUBLIC TELEVISION STATIONS THAT ARE BEING CARRIED BY ECHOSTAR ON A WING SATELLITE, February 19, 2004

Call	Station City	Station State	DMA Rank	DMA Name
WNYE	New York	NY	1	New York
WNJB	Warren	NJ	1	New York
WLIW	Plainview	NY	1	New York
KLCS	Los Angeles	CA	2	Los Angeles
KOCE	Huntington Beach	CA	2	Los Angeles
KVCR	San Bernardino	CA	2	Los Angeles
WYCC	Chicago	IL	3	Chicago
WYBE	Philadelphia	PA	4	Philadelphia
WNJS	Waterford	NJ	4	Philadelphia
KCSM	San Mateo	CA	5	San Francisco-Oak-San Jose
KRCB	Rohnert	CA	5	San Francisco-Oak-San Jose
WGBX	Boston	MA	6	Boston (Manchester)
WENH	Deerfield	NH	6	Boston (Manchester)
WHUT	Washington	DC	8	Washington, DC (Hagrstwn)

[7] In fact, one-quarter of Public Television's funding comes from individual donations, while only about 15 percent of funding comes from the Federal government. The balance is funded by local businesses, state and local governments, local colleges and universities, and foundations. See www.cpb.org/about/funding/whopays.html.

[8] *See General Motors Corp, Hughes Electronics Corp and New Corp Ltd Seek Approval to Transfer Control of FCC Authorizations and Licenses Held by Hughes Electronics Corp to the News Corp Ltd,* Public Notice, DA 03-1725 (May 16, 2003), p. 3. See also http://www.directv.com/DTVAPP/imagine/HDTV.jsp, and Communications Daily, Satellite (June 5, 2003) (DIRECTV to add Discovery HD Theater, ESPN HD, HDNet and HDNet Movies).

[9] See Reply Comments of the National Association of Broadcasters, Federal Communications Commission, MB Docket No. 03-172 (Sept. 26, 2003); and Letter from Dianne Smith, Capitol Broadcasting Company to Marlene Dortch, Federal Communications Commission, CS Docket 98-120 and MB Docket 03-15 (January 22, 2004).

PUBLIC TELEVISION STATIONS THAT ARE BEING CARRIED BY ECHOSTAR ON A WING SATELLITE, February 19, 2004—Continued

Call	Station City	Station State	DMA Rank	DMA Name
WNVC	Fairfax	VA	8	Washington, DC (Hagrstwn)
WPBA	Atlanta	GA	9	Atlanta
KBTC	Tacoma	WA	12	Seattle-Tacoma
WUSF	Tampa	FL	13	Tampa-St. Pete (Sarasota)
WEAO	Akron	OH	16	Cleveland-Akron (Canton)
WLRN	Miami	FL	17	Miami-Ft. Lauderdale
KBDI	Denver	CO	18	Denver
WBCC	Cocoa	FL	20	Orlando-Daytona Bch-Melbrn
WTBU	Indianapolis	IN	25	Indianapolis
WCVN	Covington	KY	32	Cincinnati
WNTV	Greenville	SC	35	GreenvII-Spart-AshevII-And
WNED	Buffalo	NY	44	Buffalo
WKMJ	Floyd's Knob	IN	50	Louisville
KYNE	Omaha	NE	77	Omaha
KWBU	Waco	TX	92	Waco-Temple-Bryan
KRMJ	Grand Junction	CO	190	Grand Junction-Montrose

◯