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THE SATELLITE HOME VIEWER EXTENSION ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
DeWine, Hon. Mike, a U.S. Senator from the State of Ohio, prepared statement	70
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin, prepared statement	91
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	1
prepared statement	104
Kohl, Hon. Herbert, a U.S. Senator from the State of Wisconsin	4
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	3
prepared statement	110

WITNESSES

Attaway, Fritz, Executive Vice President and Washington General Counsel, Motion Picture Association of America, Washington, D.C.	13
Carson, David O., General Counsel, Library of Congress Copyright Office, Washington, D.C.	6
Ergen Charles W., Chairman and Chief Executive Officer, EchoStar Communications Corporation, Littlewood, Colorado	7
Hartenstein, Eddy, Vice Chairman, The DirecTV Group, Inc., El Segundo, California	11
King, John, President and Chief Executive Officer, Vermont Public Television, Colchester, Vermont	15
Reese, Bruce, President and Chief Executive Officer, Bonneville International Corporation on behalf of the National Association of Broadcasters, Salt Lake City, Utah	9

QUESTIONS AND ANSWERS

Responses of Fritz Attaway to questions submitted by Senators Durbin, Kohl, and Leahy	23
Responses of David Carson to questions submitted by Senators Leahy, Kohl, and Durbin	27
Responses of Charles Ergen to questions submitted by Senators Durbin, Kohl, and Leahy	29
Responses of Eddy Hartenstein to questions submitted by Senators Durbin, Kohl, and Leahy	35
Responses of John King to questions submitted by Senators Kohl and Leahy	41

SUBMISSIONS FOR THE RECORD

American Society of Composers, Authors and Publishers and Broadcast Music, Inc., Marilyn Bergman and Frances W. Preston, letter	44
Attaway, Fritz, Executive Vice President and Washington General Counsel, Motion Picture Association of America, Washington, D.C., prepared statement	47
Carson, David O., General Counsel, Library of Congress Copyright Office, Washington, D.C., prepared statement	58
Ergen Charles W., Chairman and Chief Executive Officer, EchoStar Communications Corporation, Littlewood, Colorado, prepared statement	72
Gottsch, Patrick, President on behalf of RFD-TV, prepared statement	93

Page

Hartenstein, Eddy, Vice Chairman, The DirecTV Group, Inc., El Segundo, California, prepared statement 98
King, John, President and Chief Executive Officer, Vermont Public Television, Colchester, Vermont, prepared statement and letter 106
Orlando, John, Executive Vice President, Government Relations, National Association of Broadcasters, Washington, D.C. 112

THE SATELLITE HOME VIEWER EXTENSION ACT

WEDNESDAY, MAY 12, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:35 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Leahy, and Kohl.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We apologize for being here late.

Good afternoon and welcome to today's hearing on the Satellite Home Viewer Extension Act. Today, we will be discussing some very important issues relating to the reauthorization of Section 119 of the Copyright Act which provides a statutory license for the retransmission of distant network signals.

The extension of Section 119 has far-reaching implications for the satellite and broadcast television industries, as well as for those who create video content, and I am sure that this tremendous panel of witnesses that we have here today will do their best to make this somewhat difficult subject matter accessible to all of us, while also providing us with some insight into the economics of providing direct broadcast satellite, or DBS, service.

Television has come a long way since it was invented by a Utah native, Philo T. Farnsworth, in 1927. The first television image was nothing more than a straight line that rotated 90 degrees from a vertical to a horizontal position on the screen. I think that most people would agree that television programming has, at the very least, become more interesting than Philo's rotating line, although based on all the letters I have received about the last Super Bowl halftime show, I am not sure that all of my constituents think that the taste in programming has improved all that much.

I would like the transcript to reflect that I used that same joke about television programming at the last hearing on the Satellite Home Viewer Act 5 years ago, and I am pretty sure I got a bigger laugh last time.

Senator LEAHY. Ha ha.

Chairman HATCH. That is typical. That is just typical, isn't it? [Laughter.]

Chairman HATCH. Luckily for all of you, if Congress passes the Satellite Home Viewer Extension Act, I will have another 5 years to perfect my delivery before you hear it again.

I will keep my remarks brief today and submit a longer statement for the record, but I do want to take some time to describe in a general way the approach that I believe Congress needs to take on this legislation. And before I do that, I want to emphasize that I have been impressed by the degree of bipartisan and bicameral cooperation that has been apparent thus far in our work on this legislation.

I want to thank Senators Leahy, Kohl and DeWine for their efforts on this bill, and I hope that we will continue to work together to pass legislation that appropriately balances the interests of the affected parties and industries, while advancing sound public policy and consumer choice.

With that in mind, I will outline some of the larger policy objectives that I believe should be important in guiding us to a resolution of a number of issues that have been raised in connection with this particular piece of legislation.

First, we need to bear in mind that compulsory licenses are strongly disfavored due to the market distortions they create and then perpetuate. Although I support extending the statutory license in Section 119 for another 5 years, Congress needs to think carefully about how to begin minimizing the overall distorting effect of this compulsory license on the market, while retaining its central purpose of providing broadcast network signals via satellite to households that cannot receive them over the air.

With local stations now available from DBS providers in over 110 markets, which I am told encompass roughly 85 percent of U.S. television households, one obvious approach is to create appropriate incentives that will further encourage a transition from the Section 119 distant signal license to the Section 122 local-into-local license.

Second, I believe that we need to have a reasonable adjustment of the copyright royalty rates that are paid under the Section 119 license. Once we depart from rates that are set at or near fair market value under a compulsory license, not only do we introduce substantial and potentially increasing market distortions, but Congress eventually finds itself without any clear guiding principle to apply in determining the proper rate.

For this reason, unless the affected parties can move toward some resolution on the rate issue, the Senate should consider an approach similar to the approach taken in the House Judiciary Committee in which a Copyright Arbitration Royalty Panel would determine the rate and it would then be subject to Congressionally-mandated discounts.

Third, Congress should carefully consider ways to increase parity between cable and DBS to ensure that consumers continue to benefit from competition and have increased programming choices. For example, I believe satellite providers should be allowed to provide significantly viewed stations to their subscribers in the same way that cable companies do.

Finally, I want to mention the two-dish issue. I believe that the Senate should prohibit the discriminatory placement of certain stations on a second satellite requiring subscribers to obtain a second

dish to receive them. I am particularly concerned that Spanish language, religious and public broadcast stations have been singled out for this treatment.

Now, with that, I am going to turn to Senator Leahy for his opening statement.

[The prepared statement of Chairman Hatch appears as a submission for the record.]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you very much.

My friend, Senator Hatch, and I have worked very closely together on satellite television issues for many years. Many of you have been here for some of these hearings and you know that in November of 1997 we joined together to find a way to avoid cutoffs of satellite TV service to millions of homes and to protect the local affiliate broadcast system.

In early 1998, working with members of this Committee, especially Senator Kohl and Senator DeWine, we forged a bipartisan alliance behind a strong satellite bill to permit local stations to be offered to viewers by satellite, increasing competition between cable and satellite providers.

We worked with the Public Broadcasting System so that they could offer a national feed as they transitioned to having their local programming beamed up to satellites and then beamed back down to much larger, new audiences. I am pleased that my friend, John King, of Vermont Public Television, will testify today about how local-into-local television benefits Vermonters, as well as residents of other States. He will talk about how VPT is now available in Bennington and Windham Counties through the EchoStar Dish Network.

I want all other Vermont broadcast stations to be available in those two counties. Those are the two southernmost counties, one on the eastern side of our State and one on the western side of our State. They haven't been able to receive television news about what is happening in Vermont. If you live in Vermont, if you hear about a school fire or a traffic jam or a flood in Framingham, Massachusetts, it is not the same if you hear about the same school fire, traffic jam or flood in Rutland, Vermont.

We have worked together in this Committee and we have made it possible for millions of viewers to receive all their local network broadcast stations over satellite. Millions of consumers now have a choice between cable service or satellite service, which is important because consumers then have competition.

We started working on this in 1997. Millions of viewers across America couldn't even receive signals from the four broadcast networks over the air. In my own State, a small State with a whole lot of mountains, we have many towns in the saddles of these mountains and they get no signals at all.

In that regard, Mr. Chairman, I want to thank Charlie Ergen, who is here. His Dish Network has been offering local-into-local service in Vermont since 2002. Vermont is also looking forward to DirecTV satellite service in the near future.

This Committee worked with other committees in the Senate and the House during the past 7 years on this. It is interesting in working with them that you find so many members of both parties who have common interests in this because they are the interests of their constituents. We have helped to create vast viewing options and alternatives for consumers, but we have also helped to expand a tremendous new industry.

I will work with Chairman Hatch and all members of this Committee to go the next step forward as we reauthorize the Satellite Home Viewer Act, our original legislation, which I think both the Chairman and I would agree was a homerun. Now, I want to build on that.

Mr. Chairman, I am happy to see that our bill, S. 2013, that we introduced with Senators Kohl and DeWine is on the agenda for tomorrow's markup. I understand, as we often do with something that significant, we will put it over until the next meeting, which I totally agree with. It will help us draft a necessary consensus substitute bill, but it also forces everybody on the Committee to step up to the plate and decide just what we want.

So I just wanted to mention that and thank you for setting up that procedure.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

We will turn to Senator Kohl, and if Senator DeWine comes, we will be glad to hear his statement because both of them have worked extensively in this area as well.

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman.

Today, we revisit the Satellite Home Viewer Improvement Act, a law we passed just a little less than 5 years ago. Having participated in that conference, we appreciate how complicated this issue can be.

The simple goal of this law was to level the playing field between satellite and cable companies to give consumers greater choice and better value. We must bear that principle in mind when working on the reauthorization of the legislation this year.

Most importantly, by permitting local-into-local service, we made satellite an even better competitor to cable. A 2002 GAO study requested by Senator DeWine and myself concludes that satellite subscribership was 32 percent higher in markets where satellite companies offered local broadcast signals. Moreover, satellite subscribers have more than doubled since the passage of the Satellite Home Viewer Improvement Act.

It is therefore essential that we reauthorize the parts of the law that are set to expire at the end of this year, and where necessary we should tweak the law to further spur competition between cable and satellite. One section that will soon expire involves distant network signals. Until local-into-local service is introduced in all 210 media markets, we should continue to permit distant signals for those consumers who are legally entitled to them, and consider extending this privilege to those who were grandfathered in 1999.

We hope that as local-into-local rolls into more markets, this issue will become obsolete. After all, local-into-local has been very successful in Wisconsin, with local channels being offered in Milwaukee, Green Bay, Madison, and with other markets on the way.

To further level the playing field for cable and satellite competition and to bring more benefits to consumers, we should let satellite companies retransmit significantly viewed stations into local markets on a royalty-free basis. Cable companies have enjoyed this privilege for years and it is time to extend this right to the satellite industry. By doing so, satellite companies will be able to craft a local channel lineup more similar to what cable currently offers.

We must pass this legislation this year. Indeed, it would benefit consumers and satellite companies alike if we acted quickly to reauthorize and improve the Satellite Home Viewer Improvement Act. It has worked well, and only a minor tune-up is needed at this time. We look forward to working hard to get this bill passed before we adjourn.

I thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We are first going to hear testimony from David Carson, general counsel of the Copyright Office. We look forward to hearing your perspective as an authority on copyright policy matters.

Next, we will listen to Charlie Ergen. We welcome you, Mr. Ergen, again, founder and CEO of EchoStar Communications Corporation, one of the pioneering forces in satellite-delivered television, a person we have a great deal of respect for.

Third, we will hear from Bruce Reese, president and CEO of Bonneville International Corporation. Mr. Reese is from my home State of Utah, the same State that Philo T. Farnsworth came from, and we expect you to be just as important as Philo T. Farnsworth has been to all of us.

Senator LEAHY. But with a better picture.

Chairman HATCH. Yes, a better picture.

Bruce, we are happy to have you here. We know it is a long trip for you, but we also know that this testimony you are about to give is important.

Next, we have Eddy Hartenstein, vice Chairman and board member of the DirecTV Group, from El Segundo, California, the State where Philo T. Farnsworth lived when he invented television. So we have got to give you credit, Eddy, too. We are glad to have you here and appreciate the expertise that you bring to this Committee year after year.

After Mr. Hartenstein, we have Fritz Attaway, executive vice president and Washington general counsel of the Motion Picture Association of America. I was at Jack's reception last night, which was really good, and appreciate all you folks do down there.

Fritz now lives in D.C., but he is actually from the State of Idaho which, according to some historians, is the State in which Philo T. Farnsworth first came up with the idea of inventing television while working in a potato field, of all places.

Senator LEAHY. I have heard you really stretch for some of these, Orrin, but my God.

[Laughter.]

Chairman HATCH. Look, it isn't just Vermont that is permitted to stretch.

Last but not least, we have John King, president and CEO of Vermont Public Television. Now, as far as I can tell, Vermont has no connection to Philo T. Farnsworth, although my staff did try to come up with one. But we know that Vermont has a beauty all its own that doesn't need television. At least that is what Senator Leahy tells me anyway.

With that, we will go to our first witness, Mr. Carson.

STATEMENT OF DAVID O. CARSON, GENERAL COUNSEL, U.S. LIBRARY OF CONGRESS COPYRIGHT OFFICE, WASHINGTON, D.C.

Mr. CARSON. Thank you, Mr. Chairman, Senator Leahy, Senator Kohl. I am pleased to appear before you to present the views of the Copyright Office on the extension of the satellite carrier Section 119 statutory license.

Statutory licenses represent a complex, detailed area of the law. In my written testimony, I have laid out the history and operation of the Section 122 and Section 119 statutory licenses covering the retransmission of local and distant over-the-air broadcast signals by satellite carriers, as well as the Section 111 statutory license dealing with retransmission of broadcast signals by cable operators.

In a nutshell, Mr. Chairman, our message is that if there is one piece of copyright legislation that must be enacted this year, this is it. Section 119 of the copyright law will expire at the end of this year unless it is extended. Failure to extend it would mean that millions of subscribers to satellite TV services will lose their access to broadcasts of network stations and superstations. While there are many differences of opinion as to what the terms and conditions of the statutory license should be, virtually everyone agrees that the license should continue.

Congress and the Copyright Office have had to face the issue of extension of this license on two previous occasions in 1994 and again in 1999. Our position remains the same. In principle, the Copyright Office disfavors statutory licenses. A statutory license should be a last resort. The Office strongly favors marketplace solutions.

On the other hand, the cable compulsory license has been a part of the law since 1978 and is permanent. Believing in parity among providers, the Office supports reauthorization of the Section 119 license for satellite carriers. While we believe that, in principle, the satellite license should continue for as long as the cable license is in place, we also believe that we are in a period of transition.

Issues such as the transition from analog to digital broadcasts and the projected expansion of local-into-local service to virtually all households mean that only a few years from now it may be necessary to reexamine the terms and conditions of the satellite license again. Therefore, at this point we favor a 5-year extension of the Section 119 license.

During those 5 years, consideration should be given to whether the two statutory licensing regimes for cable and satellite should continue in existence, and if so, whether they should be harmonized as much as possible, as recommended in the 1997 report

of the Register of Copyrights that at your request, Mr. Chairman, reviewed the copyright licensing regimes covering retransmission of broadcast signals.

Although the legislation that you have introduced, Mr. Chairman, is a simple 5-year extension that amends Section 119 only by extending its sunset date, we understand that it is likely that the legislation that is ultimately enacted will amend Section 119 in a number of respects, and we agree that several amendments are advisable.

We note that the House Subcommittee on Courts, the Internet and Intellectual Property has marked up a bill that contains several such amendments, and we anticipate that this Committee will consider such amendments as well. Therefore, I would like to spend a moment addressing some of these amendments.

First, we agree that the royalty rates paid by satellite carriers need to be adjusted. At a minimum, the royalty fees, which have not changed since 1999, should be increased to take into account the rise in the cost of living over the past 5 years and should continue to receive an annual cost of living adjustment. It is hard to argue against this provision.

We note, however, that the current royalty fees represent a significant discount—30 percent for superstations and 45 percent for network stations—from the marketplace rates determined by a Copyright Arbitration Royalty Panel in 1997. Because we strongly believe that royalties for the statutory licenses should reflect marketplace rates, we recommend that the royalties be brought back to fair market value either by reinstating the CARP determination with a cost of living increase or by conducting a new rate-setting proceeding based on fair market value.

There has also been discussion about harmonizing the satellite license with the cable license by permitting a satellite carrier to transmit a television station's signal outside the station's local market and into a locality in which the signal is significantly viewed over the air, typically in certain adjacent localities. The FCC maintains a list of significantly viewed stations for each locality.

The amendment proposed in the House would permit transmission of a significantly viewed signal only to households that also receive the signal of the local network affiliate under Section 122's local-into-local license. We think this is a reasonable proposal.

As always, Mr. Chairman, the Copyright Office stands ready to assist you in any way as you craft legislation that will reauthorize the satellite license.

Thank you.

[The prepared statement of Mr. Carson appears as a submission for the record.]

Chairman HATCH. Well, thank you.

Charlie Ergen, we will turn to you at this point.

STATEMENT OF CHARLES W. ERGEN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, ECHOSTAR COMMUNICATIONS CORPORATION, LITTLEWOOD, COLORADO

Mr. ERGEN. Thank you, Chairman Hatch, Senator Leahy, Senator Kohl. On behalf of EchoStar Communications, I want to thank

you for inviting me to testify on the Satellite Home Viewer Improvement Act.

The reauthorization of SHVIA offers Congress an excellent opportunity to preserve and extend the pro-competitive measures in the current Act, as well as to improve the regulatory parity between cable and satellite TV providers. While SHVIA has been a good first step in addressing the huge disparities between DBS and dominant cable operators, it has not gone far enough. Congress should take steps to eliminate those differences and ensure that satellite carriers can better compete with cable.

At the same time, it is important that you not impose new requirements on satellite carriers that might further disadvantage our industry relative to the dominant cable providers. I would like to suggest a few ways to improve the law.

The lack of parity in royalty rates and the mechanism for establishing those rates between satellite and cable is a major problem for our industry and our customers. First, cable enjoys a permanent compulsory license that includes a permanent copyright structure, but the royalty rates that satellite pays are subject to review by Congress every few years, along with the temporary licenses that Congress has been enacting since 1988. The lack of permanence fosters great uncertainty.

Second, the royalty rates under the cable compulsory license are calculated according to a statutory formula and may be adjusted for inflation only once every 5 years. Satellite carriers, on the other hand, have been subject to a process of rate adjustments by Copyright Arbitration Royalty Panel, or CARP. In 1997, this process led to excessively high rates that Congress had to step in and reduce.

Third, while it is difficult to compare the rates that cable and satellite carriers pay because of complexities in the cable formula, the net effect has been that satellite carriers pay much more than cable systems in the majority of cases. There is a simple way to resolve this problem. Whatever rates you decide to impose on satellite carriers, impose the same rates on cable systems as well. A regime of uniform rates and a uniform method for adjusting them would automatically achieve parity between satellite and cable.

I strongly urge you not to relegate rate-setting to the new CARP process. CARP proceedings are cumbersome and protracted. The outcome is uncertain. They hamper business decisions and planning. In addition, the last CARP implemented the statutory standards in a misguided way. It derived excessive rates mainly by looking at the rates paid by cable systems not for the same distant broadcast networks, but rather from the most popular cable networks such as CNN and ESPN.

Among other factors, cable networks give distributors valuable ad avails and free time in exchange for the fees they receive. By contrast, in the case of distant broadcast networks, satellite carriers are prohibited by the terms of Section 119 licenses from deleting any content. By relegating the rate-setting function to the CARP process, you could be paving the path for another unreasonable result where you might have to step in again and try to rectify it, as you did in 1999. I urge you not to go down this path.

As you look forward to renewing SHVIA, I would like the opportunity to talk about a fundamental part of the law that has not

worked well—retransmission consent. The law directed the FCC to establish good-faith obligations for retransmission consent bargaining arrangements, but it has not been enough to adequately police the unreasonable behavior of several powerful media conglomerates.

Companies with multiple video programming properties now control many local broadcast stations. In our experience, the retransmission consent negotiations provide those companies with the opportunity every three or 4 years as a condition for retransmission to force us to pay for channels that we do not want and our customers do not want to pay for. The good-faith requirement has not been effective in preventing such practices and it should be strengthened. We do believe that it has some influence on bargaining behavior and, at a minimum, should be preserved.

Looking to the future, we believe that reauthorization of SHVIA offers Congress a unique opportunity to speed up the stalled transition to digital television. Today, 2 years before the transition deadline, we still have a Satellite Home Viewer Act that addresses only analog unserved households. Consumers who cannot receive an over-the-air HD signal either because a local broadcaster has only built a low-power facility or because he has not built any facility should be allowed to receive HD via satellite.

We are now more than 2 years past the May 1, 2002, deadline Congress established for local TV broadcasters to convert digital signals, and still more than half of the 1,600 broadcasters are not providing full-power digital signals. But Congress can stimulate local broadcasters to speed up digital transmission by allowing TV providers to offer digital high-definition programming to households that are not served with a local over-the-air signal.

In conclusion, while SHVIA has helped create a more level playing field between cable and satellite, there are many significant differences in the regulatory treatment that affect DBS' value to consumers. In reauthorizing and revising SHVIA, Congress should eliminate those differences so that satellite can compete more vigorously, and impose no new requirements that would further disadvantage us relative to cable competitors.

We believe you have a unique opportunity with SHVIA to further the transition to digital. We hope you will seize it in order to achieve the transition policies you have already enacted to benefit consumers who are being ill-served by the currently digital delay.

Thank you.

[The prepared statement of Mr. Ergen appears as a submission for the record.]

Chairman HATCH. Thank you.

Mr. Reese, we will turn to you now.

STATEMENT OF BRUCE REESE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BONNEVILLE INTERNATIONAL CORPORATION, SALT LAKE CITY, UTAH, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. REESE. Thank you, Mr. Chairman.

As the legislation process on SHVIA reauthorization has begun, in keeping the interests of consumers foremost NAB has attempted to work with all affected parties to find reasonable compromises on

a number of thorny issues. In that vein, we endorse the common ground we have found to date with DirecTV. We will continue seeking accord as the Senate approaches SHVIA reauthorization.

As you know, SHVIA contains two compulsory licenses. The first, the local-to-local license, allows satellite to deliver local stations to local viewers. It has been a tremendous success, allowing many of your constituents to receive local news, weather and sports via satellite. DirecTV should be commended for its pledge to provide local-to-local in all 210 markets no later than 2008.

While DirecTV's aggressive expansion has forced EchoStar to move forward with local-to-local carriage, unfortunately in many markets EchoStar requires consumers to obtain a second satellite dish in order to receive some stations, most often Spanish-language, religious and public stations. We hope Congress ends this discriminatory two-dish practice.

The second license, the distant signal license, has been a recipe for abuse. For decades, satellite ignored the rules governing eligibility for distant signals, signing up anyone and everyone willing to say they were unhappy with their over-the-air reception. Even after broadcasters filed a series of lawsuit—and won, I would add—EchoStar continues providing illegal service to hundreds of thousands of subscribers.

A Federal judge recently found EchoStar broke a sworn promise to the court by failing to disconnect those illegal subscribers. With this sordid record, EchoStar now asks that you expand the distant signal license by creating a digital white area. The Committee must reject this proposal.

Let's dispel some myths being spread about the status of the DTV transition. According to the FCC, 1,411 television stations are on air in digital today in 203 markets that serve over 99 percent of U.S. households. Broadcasters are close to replicating their analog coverage areas, already reaching 92 percent of the populations they will be required to serve.

EchoStar's assertion that the 771 stations operating at special temporary authority power levels are not serving their full market area in digital is false and misleading. Many of these digital stations are not only serving their market area, but exceeding their analog coverage areas, even at lower authorized power levels. While digital white areas would do nothing to stimulate the DTV transition, it would have a severe consequence in the few remaining markets where broadcasters are struggling with bureaucratic and technical obstacles.

A couple of examples. Our market, Salt Lake City, covers not only the entire State of Utah, but also counties in Wyoming, Nevada and Idaho. To serve viewers in this enormous DMA, Salt Lake City stations use 622 translators, more than 90 percent of which are licensed to local governments and civic organizations, not to the stations.

Moreover, the FCC has not yet authorized upgrading the translators to digital. Salt Lake City stations have been on the forefront of the DTV transition. Our station, KSL, went digital in 1999, broadcasting, I would add, Senator Hatch, from Farnsworth Peak, continuing your theme, and has been a leader in local digital widescreen news. Utah stations have been active in working with the

industry and the FCC to find a solution to the translator issue. Under a digital white area regime, EchoStar would steal our viewers, your constituents, by bringing Los Angeles stations to San Juan, Kane and other rural Utah counties.

The five Vermont television stations spent 7 years working with State authorities and other parties to place their DTV facilities at a common site atop Mount Mansfield. The stations have also negotiated a new lease with the site owner. These preparations, now close to completion, have been further complicated by the difficulties of obtaining the necessary Canadian clearances. If digital white area becomes law, EchoStar will siphon off these stations' viewers as well.

And make no mistake, EchoStar has no intention of returning these viewers to their Salt Lake, Burlington, or any other local broadcast service. EchoStar's digital white area scheme would do nothing to accelerate the transition. If EchoStar really wishes to be a partner in the DTV transition, it should bring local HD signals to local television markets.

Mr. Chairman, since the first Satellite Home Viewer Act was enacted in 1988, Congress has repeatedly affirmed two goals. First, the preferred method to provide network programming is through local affiliate stations. And, second, importing distant signals should only be used as a last resort in extreme circumstances where there is no alternative.

Over the years, EchoStar has repeatedly misused and abused this second, last-resort option. I strongly urge the Committee to reauthorize a SHVIA that recognizes the paramount importance of localism, takes heed of the mistakes of the analog past, and does not repeat those mistakes in the digital future.

Thank you.

[The prepared statement of Mr. Reese appears as a submission for the record.]

Chairman HATCH. Thank you so much.

Mr. HARTENSTEIN.

STATEMENT OF EDDY HARTENSTEIN, VICE CHAIRMAN, THE DIRECTV GROUP, INC., EL SEGUNDO, CALIFORNIA

Mr. HARTENSTEIN. Chairman Hatch, Senator Leahy, Senator Kohl and members of the Committee, my name is Eddy Hartenstein. I am the vice Chairman of the DirecTV Group and it is my honor to be here today. Thank you for allowing me to testify on behalf of DirecTV regarding SHVIA.

The members of this Committee deserve a great deal of credit for their role in creating competition in the subscription television industry. SHVIA, which you helped enacted, extended a compulsory copyright license to the retransmission of local television signals within each station's local market, known as local-in-local. This, combined with improved technology, has allowed satellite operators such as ourselves and EchoStar to offer programming service much more comparable to that offered by cable.

For us, with last week's launch of our DirecTV 7S spot beam satellite, we will in a matter of days begin the process of providing local-into-local service in just over 100 DMAs nationwide. And we also have pending in front of the FCC another proposal which will

extend our capacity to reach 130 DMAs as soon as this summer. At that point in time, we will be offering local broadcast channels in markets serving 92 percent of American television households. And in coming years, we plan to continue rolling out the rest of the DMAs into the remaining markets.

In other words, SHVIA has been an extraordinary success and we hope Congress will build on its success. But we know SHVIA is a complex issue in these complex times, and we realize that with today's world events of last week and going forward, this is a very busy legislative session and Congress and this Committee do not have a lot of time to act.

With that realization in mind, and putting things in proper perspective, we have been meeting with representatives of the broadcast industry to see if we could reach some common ground on some of the issues associated with SHVIA reauthorization. These discussions are still ongoing, but we have been able to agree on several basic points. Among them are the following.

Legislation should extend satellite operators' ability to import distant signals for up to 5 years or longer; permanently would be nice, but again we would be willing to settle for 5 years. The legislation should also, subject to some limitations, allow satellite operators to offer the same out-of-market significantly viewed stations that cable operators already offer today.

That same legislation should extend for 5 years the satellite carrier retransmission consent exemption for distant-signal stations, and we should extend for the same period of time the provision prohibiting television stations from entering into exclusive retransmission consent agreements.

The legislation should extend the good-faith negotiating requirement to all distributors and it should provide a mechanism for grandfathered distant-signal subscribers to choose between distant and local signals. We should also gradually implement a "no distant where local" concept whereby satellite operators can't offer new subscribers distant signals where local-into-local signals are available. But in doing so, however, I think we should ensure that the legislation allows existing subscribers who have both distant and local-into-local to keep them.

Finally, the legislation should clarify what "carry one, carry all" means, and we believe that satellite carriers may not split local analog or local digital signals, respectively, in one market between two dishes.

Now, do these principles reflect everything that DirecTV would like from a SHVIA reauthorization? Of course not. But all and all, we think that these principles represent a reasonable compromise. There is, however, another issue to discuss that lies at the heart of this Committee's jurisdiction.

We are deeply troubled by the prospect of rate increases, particularly if there is no such increase in the rates paid by cable operators. We are also concerned with the prospect of participating in an admittedly flawed, distracting, extremely expensive and time-consuming CARP process, and that is a process that cable operators are not even subjected to.

You may hear a lot this afternoon about whether the satellite industry pays more or less in royalty fees than cable. The fact is one

cannot make an apples-to-apples comparison because the two royalty regimes are so very different. So I would take with a grain of salt any analysis claiming that cable operators pay more than satellite operators.

To the extent that copyright-holders are really saying that neither cable nor satellite fees adequately compensate them, I would note that Congress must balance the goal of reimbursing copyright-holders with the goal of giving consumers access to programming at a reasonable price.

Most importantly, I would remind the Committee that satellite operators control, in aggregate, only about 20 percent of the subscription television market. And in nearly every town in America, we compete against a cable operator with at least 70-percent market share. In such a market structure, any effort to raise only satellite royalty rates would be a competitive disaster. If Congress truly believes it is time to raise royalty rates, and thus pay TV prices, it should do so only in the context of harmonizing the cable and satellite royalty rate regimes.

In conclusion, Mr. Chairman and members of the Committee, I would like to thank you for all that Congress has done to nurture the satellite industry as a vibrant competitor to subscription television and cable, and with your help we will continue to do this and provide the highest quality, best, competitive service to consumers.

Thank you.

[The prepared statement of Mr. Hartenstein appears as a submission for the record.]

Chairman HATCH. Thank you, Eddy.

Fritz, we will turn to you.

STATEMENT OF FRITZ ATTAWAY, EXECUTIVE VICE PRESIDENT AND WASHINGTON GENERAL COUNSEL, MOTION PICTURE ASSOCIATION OF AMERICA, WASHINGTON, D.C.

Mr. ATTAWAY. Thank you, Mr. Chairman, Senator Leahy, Senator Kohl. I appreciate you affording me this opportunity today to speak on behalf of content owners, without which, I should point out, none of the people at this table would be in business.

The Satellite Home Viewer Act was enacted in 1988 and extended for 5-year periods in 1994 and 1999. In 1999, in response to fierce lobbying by the satellite industry, Congress imposed a substantial discount on market-based compulsory license rates set a year earlier by an independent arbitration panel and approved by the Copyright Office and the Librarian of Congress.

These discounts—30 percent for superstation programming and 45 percent for network and PBS programming—went into effect in July of 1999. Since the reduction of royalty rates in 1999, there have been no further adjustments of the compulsory license rates. In the 5 years since the last extension of the satellite compulsory license, the cost of programming that satellite companies license in the free market for resale to their subscribers has increased substantially, as have the fees charged by satellite companies to their subscribers. The only financial figure that has not increased is the compensation provided to owners of retransmitted broadcast programming.

Satellite carriers now pay 18.9 cents per subscriber, per month, for all of the programming on a distant independent broadcast station like WGN in Chicago and KTLA in Los Angeles. The satellite carriers then sell this programming to their subscribers for many times that amount. The royalty rates for the year 2004 should increase to reflect increases that satellite companies have paid in the marketplace for comparable programming.

Some satellite carriers—I say "some" now because Mr. Hartenstein was absolutely correct; you cannot compare cable and satellite. They are apples and oranges. Any claim that cable systems pay more now than satellite is simply not true. The cable compulsory license is so completely different from the satellite compulsory license formula that any attempt at comparison is likely to be misleading. As I said, it is comparing apples and oranges.

But with that disclaimer in mind, let me give you some comparisons. EchoStar charges $34.99 for its basic package that includes WGN as a distant signal. It pays 18.9 cents in compulsory license royalties. Under the cable formula, it would pay 33.5 cents. DirecTV charges $39.99 for its Total Choice package, which includes WGN. It pays 18.9 cents under the satellite compulsory license formula. It would pay 38 cents under the cable formula.

EchoStar sells its add-on Dish Net Superstation Package, which includes five distant independent stations, for an additional $5.99 a month. It pays 94.5 cents for these five stations under the satellite formula. Under the cable formula, for these same five distant independent stations, the cable system in Ogden City, Utah, would pay $1.57. The cable system in Provo would pay $2.33. The cable system in Salt Lake would pay $1.66. The cable operator in St. Johnsbury, Vermont, would pay only $.52, actually less than the satellite carrier would pay. But the cable operator in Montpelier would pay $2.27, and the cable operator in Burlington, Vermont, would pay $5.79.

The cable operators that we have looked at would pay more than satellite would pay. However, the truth is we are comparing apples and oranges. I think the point to be made here is that in the past 5 years, satellite carriers have experienced cost increases. I suspect the cost of transponders has gone up, as has the cost of parabolic dishes.

Certainly, the cost of programming on the 100-or-so non-broadcast channels carried by satellite operators has gone up. But in none of these cases have the satellite carriers come to the Congress and asked for a subsidy. Only in the case of retransmitted broadcast programming do these carriers say that they should be insulated from market forces.

Mr. Chairman, Senator Leahy, Senator Kohl, by any reasonable market analysis the cable compulsory license rates should be adjusted upward. I trust that you will help make that happen.

Thank you very much.

[The prepared statement of Mr. Attaway appears as a submission for the record.]

Chairman HATCH. Thank you.

Mr. King, we will take your testimony last here.

STATEMENT OF JOHN KING, PRESIDENT AND CHIEF EXECUTIVE OFFICER, VERMONT PUBLIC TELEVISION, COLCHESTER, VERMONT

Mr. KING. Thank you, Mr. Chairman, and thank you for inviting me to appear today to testify on behalf of the Satellite Home Viewer Extension Act. I would like to thank you and the members of your Committee for the work that you have done for satellite viewers, and a special thank you to Senator Leahy for all he has done especially in Vermont to get satellite signals to our State. It has been extremely important to us.

Today, I would like to speak to the importance of local-to-local satellite carriage for educating, informing and connecting viewers, especially in rural States like Vermont. And I will ask help from this Committee so that Vermont stations will be available by satellite in Vermont's two southern counties.

Vermont Public Television is proud to be a PBS station broadcasting national PBS programming, but what really makes us Vermont Public Television is the local programming we produce about Vermont's public affairs, culture, nature and history.

We are more than a TV station. In our programming and community outreach, we are a unifying force helping Vermonters understand one another and fostering participation in civic life. Although Vermont Public Television operates four transmitters, our State's mountainous terrain makes over-the-air reception difficult, particularly in the southern area of the State.

In Vermont, there are many daily and weekly newspapers, but no single statewide newspaper. Public broadcasting and the commercial TV stations are the only statewide media, and access by satellite is crucial for all Vermonters. When satellite service began, Vermonters embraced it. The one drawback was the absence of local channels. There was great excitement 2 years ago when EchoStar began offering local channels. Satellite subscription spiked and now more than 30 percent of the households in the Burlington DMA have satellite.

I would like to thank you, Mr. Ergen, for that service.

Viewers were delighted. One woman from a small town in Vermont wrote, quote, "We are happy to say that as of today we now have truly local Vermont TV channels through Dish Network. We have felt disconnected and alienated from the State of Vermont as far as the news is concerned. Once we heard that local Vermont TV, including Vermont Public Television, was available in our county, we immediately signed up."

One of the best features of SHVIA is the "carry one, carry all" provision. Vermont Public Television is on EchoStar's main satellite, along with the four commercial affiliates as part of the local channel package. Unfortunately, the good news in 2002 about local-into-local did not apply statewide. Because local service is determined by Nielsen DMAs, Vermont's two southern counties are excluded, as they lie outside the Burlington DMA.

Windham County, in the southeast corner, is assigned to the Boston DMA, and Bennington County, in the southwest corner, to the Albany, New York, DMA. Would-be viewers in those counties were surprised to find they couldn't get Vermont channels, only Boston and Albany stations. As good as those stations are and as

interesting as the news from New York and Massachusetts may be, Vermonters wanted news, weather, emergency information and local public affairs programming from Vermont.

Last month, EchoStar took a positive step toward bringing southern Vermonters into the community of Vermont viewers. Thanks to an agreement between EchoStar and Vermont Public Television, EchoStar began offering Vermont Public Television as an a la carte channel. This is a good first step, but we think viewers would prefer access to Vermont Public Television as part of a local channel package.

Vermont Public Television and the commercial TV stations are a unifying force in our rural State, giving Vermonters information to help them to be more knowledgeable, active citizens of their State and community. We look forward to the day when all Vermont satellite viewers can see our programs about State government. The Speaker of the House in Vermont and the Chair of the Vermont Senate Judiciary Committee are both from southern Vermont, and we think their constituents should have been able to see their recent appearances on our air.

We would like all Vermonters to be able to participate in the regular call-in shows we do with the Governor or the members of our Congressional delegation. In an election year, statewide TV is essential. I would like Vermont Public Television's candidate debates and public affairs programs and the commercial stations' news and information to reach all Vermonters. I urge this Committee to work with the satellite companies on giving all Vermonters access to all of their State's television stations.

Thank you, Mr. Chairman.

[The prepared statement of Mr. King appears as a submission for the record.]

Chairman HATCH. Well, thank you, Mr. King.

Let me turn to you, Mr. Reese. Can you discuss the long-term effect on advertising revenues in small markets if we were to allow the continual retransmission of distant signals by satellite in areas already served by local-to-local retransmission?

Mr. REESE. I find it interesting that the SHVIA Act and SHVIA reauthorization are characterized here as a way to balance the playing field between satellite and cable, and that the sort of fundamental communication mechanism, the policy decision that was made in this country 80 years ago about the need for local, over-the-air, free broadcasting, is sort of a footnote in this conversation.

What we as broadcasters have to support in our obligations to serve the community is the ability to reach our audiences. There is an absolute need that we have access to those people. We are grateful to have competition to cable via satellite. We are pleased with the results from local-to-local. We look forward to the day when satellite and cable will be delivering our digital signals within the markets that we serve.

But it is extremely important that broadcasters have access with their signals to all of the viewers within our area, and the retention of these so-called grandfathered homes is simply not justifiable either in terms of retaining the viability of commercial television, but more importantly in terms of the public policy, the public safe-

ty, the localism situations, the localism policies that underlie the Telecommunications Act.

Chairman HATCH. Would you please comment further on Mr. Ergen's digital white area proposal? Tell me how that would work in my home State of Utah. And, of course, I would be happy to hear from the rest of you witnesses on that as well.

Mr. REESE. Well, in the State of Utah, as you very well know, despite being the seventh largest State geographically, we are also the seventh most urban State in America because so much of the population is concentrated in and around the Salt Lake City area, with about 90 percent of the land mass of Utah owned by the Federal Government and fairly sparsely populated.

Beginning 40 years ago, through the combined efforts of the State and two legendary broadcasters in Utah, Arch Madison and George Hatch, broadcasters there began building translators throughout the State of Utah, not because there was a commercial benefit to it, because local Salt Lake advertisers receive no benefit from viewership in Monticello, Utah, but because there was a feeling that it was important that those people be part of the State, that they have access to the news and public safety information that comes out of the State capital.

Those translators—and there are now 622 of them in Utah that we know about. They are not licensed generally to the stations, but are licensed to county governments, city governments, the Lion's Club, the Rotary Club, in a community that wanted to see television.

Until we solve the bureaucratic issues related to the transition of those translators, which is an issue that is before the FCC and that they are moving on, but until we solve all of the technical issues related to the main channel transitions, we really don't get to the translator issues.

What happens if we do a digital white area is that large portions of your State might well be watching Los Angeles television stations. It provides no incentive, then, to try and solve this translator problem to be able to deliver local Salt Lake City television stations into the State of Utah.

We have local-into-local satellite. There is no need for those people to be able to—they can see Salt Lake City stations now under SHVIA. We hope someday to be able to have digital local-into-local, in which case those rural viewers would be able to watch digital Salt Lake City stations. There is no policy that is benefitted by getting those people watching Los Angeles digital signals.

Mr. ERGEN. I think it is a little bit different. Our white area proposal is for high-definition television. Through satellite today, every square inch of the United States and every consumer in America could get HD signals. They could get the football games, the Master's golf tournament, the Tonight Show, all the things that are being broadcast on HDTV public broadcasting.

Should you be denied that because you live in rural America? Should you be denied that because your local broadcaster hasn't put up the signal, even though they were supposed to 2 years ago?

In fact, in Salt Lake City a majority of broadcasters now are leasing their digital spectrum to a service—I think it is called U.S. Digital—which is broadcasting, in competition with satellite and

cable systems, channels like ESPN and CNN news. So they are not using the signal for HDTV and we don't have the right to bring HDTV in, and the only people we can get it from, broadcasters in Salt Lake City, aren't using it for HDTV. So I think the translator issue that Mr. Reese mentioned is a valid issue, but it is a smokescreen in terms of Salt Lake City because they are not doing high-definition television.

Having said that, I think that there should be some common ground here. You now, we are problem-solvers. We don't have all the solutions and we certainly are willing to enter into dialogue. It seems to me that we should have some kind of transition period to bring HDTV to the State of Utah until the translator issue can be resolved.

At some point, we need to get spectrum from the FCC, and so forth, so that we can do local-to-local HD, and it seems to me that we shouldn't deprive people today. We should speed the digital revolution for HD. We should get the analog spectrum back so it can be used by other people to increase productivity in the United States.

It seems to me that we want to open the dialogue. We don't have all the answers and I think there are good points on every side. But we do know that consumers aren't calling us about two dishes. Consumers are calling us about why can't they get HDTV. Consumers are calling us about why they can't get a network signal when it is snowy with an off-air antenna. They are calling about a waiver process they don't understand. Those are things we hope this legislation will address.

Chairman HATCH. Thank you.

Does anybody else care to comment?

Mr. REESE. If I could just add, Senator, some stations in Salt Lake are cooperating with U.S. DTV. Those stations can, however, still broadcast a digital signal. There is the flexibility in the spectrum to do that and to be able to provide this further competition to cable and to satellite with Steve Lindsley and U.S. DTV.

Mr. ERGEN. We are talking about two different things. I am talking about high-definition television and Mr. Reese is talking about a digital signal. The digital signal is very similar to the analog signal. It doesn't go on a wide screen. It doesn't go on the 16-by-9 with all the 1080(i) lines. So that takes the full spectrum.

I believe, based on everything I have seen, that what we have proposed is high-definition television using the full spectrum through the 1080(i) that was mandated by Congress.

Mr. REESE. Which, as I understand it, is what we are still able to do while working with Steve Lindsley and U.S. DTV.

Chairman HATCH. Thank you. My time is up.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. You know, as I was listening to some of the openings on this, we are expecting a grandchild in July. We don't know whether it is going to be a boy or a girl, but whatever it is, I think I will name it Farnsworth. It is the only way I am going to get into this plan, with apologies to the child when the child hears that.

Chairman HATCH. Well, I want the name "Philo," as well, you know.

[Laughter.]

Senator LEAHY. Don't push it. That will be the next one; that will be the next grandchild.

Chairman HATCH. Can you imagine, Philo Leahy? That sounds pretty good. It has a ring to it.

Senator LEAHY. I am not sure it will in Vermont, but that is okay.

Chairman HATCH. I think I am going to start calling you Philo.

Senator LEAHY. The President has nicknames for all of us, and we were out to dinner and somebody asked my wife what his nickname was for me and she said, well, we don't use that in polite company.

[Laughter.]

Senator LEAHY. No. Actually, it was very nice.

Getting back to the subject, Mr. Carson, first off, I just want to thank you and the Copyright Office. You come over here so often, all of you, and you are so helpful. The hearings are the tip of the iceberg. I know the staffs on both sides of the aisle are calling all the time, and I have never known a time when the Copyright Office wasn't ready and able to come right back with answers for us.

I think in the satellite TV industry, you don't have to be a genius to know that one of the reasons for the growth of it is partly due to the availability of local-into-local television, and a lot of that came from the work done in this Committee and the House Judiciary Committee. You might have two satellite companies and a cable company in an area, and it is great because you get some competition and go from there.

If we do this reauthorization, assuming like most reauthorizations it is not just simply a one-line "it is hereby reauthorized for 'x' amount of time" and we start adding some things, what can we do to increase competition in the areas where it now exists?

Mr. CARSON. Well, Senator Leahy, there are a number of things you can think about doing. Actually, in 1997 we made quite a few suggestions, including, for example, trying to harmonize the rate structures which are very different in the two industries.

But if your question is, as I understand it, what can you do this year in the context of a reauthorization, I think you have to set your sights considerably lower. First of all, while we recommend that you take a look at the cable regime—and when we are talking about harmonization and convergence, we are talking about looking at both licenses, not just changing one to look more like the other—I don't think anyone is talking about changing the cable regime this year.

What can you do this year? Well, one thing that I mentioned in my testimony that you could do would be to deal with the issue of the significantly viewed signal. As I mentioned, cable has the ability right now to transmit a signal from an adjacent area when it is significantly viewed over the air in a particular locality.

Most people, I think, who have been discussing reauthorization of the satellite license this year have agreed that that is not a bad idea with respect to satellite. It helps in terms of convergence. It helps in terms of giving satellite the ability to deliver something that many customers will want and that they can get from cable.

That may be all you can do this year, really, in that respect, given the very limited nature and limited time of the process this year.

Senator LEAHY. Mr. King, thank you for coming down from Vermont this morning to be here. I will probably see you on the streets or in the grocery store in Vermont this weekend when I am back up there.

The House Judiciary Committee passed out a bill that addresses a problem regarding two northern counties in New Hampshire which seem to have very similar situations to the two southernmost counties that you talked about, Windham and Bennington counties. The counties in northern New Hampshire are Grafton and Sullivan and they are actually in the Burlington designated market area, even though our whole State is between there. They receive Vermont stations through local-into-local satellite service.

Under the House bill, a major network station in Manchester, New Hampshire, would be able to have its signals offered through local-into-local service to those northern New Hampshire counties even though they are in the Burlington, Vermont, market. That means some New Hampshire residents would be offered both WMUR, the Manchester station, and a competing Vermont network station. We have to assume that probably they are watching the New Hampshire one more.

Do the same reasons you gave in your testimony about providing Vermont station signals to our southern counties apply with equal force to permitting a New Hampshire station to serve two northern counties in New Hampshire with local-into-local? That is a long way around to ask a simple question.

Mr. KING. I don't know whether to call you Senator Farnsworth or not, but in response to your question, absolutely the logic applies equally in my mind to WMUR in New Hampshire in the northern counties of Vermont as it does to the southern counties of Vermont in terms of Vermont stations.

People who live in New Hampshire may receive Vermont stations, but clearly our indication from our viewer responses and letters and phone calls and e-mails would indicate that nothing is more important to them than local news. And if WMUR serves a statewide population, which in most cases I believe it does, then the logic would apply and they should be on the dish as well.

Senator LEAHY. Speaking of calling me Senator Farnsworth, I actually ran into somebody once who called me Senator Tuttle. That is a local joke, for those of you who don't know Vermont.

I also had somebody come up to me in the Capitol here recently who said I looked familiar. I told him I was Pat Leahy, a Senator from Vermont, and he looked at me carefully and said, no, no, you are not. And I said, well, I will accept that, but why aren't I? He said, well, I have seen him on television; he is about five-two and you are about six-four. I said, what if I was a foot shorter? He said, oh, you could pass for him easy.

Mr. Attaway, sometimes we look different wherever we are.

Mr. Ergen, there has been some question here, and I know you have heard this criticism about two satellite dishes to offer the full complement of stations. Am I correct that this allowed local-into-local faster than it would have been otherwise?

Mr. ERGEN. First of all, as you recall, in 1999 all of us were involved, as were you, in legislation for SHVIA. The "must carry" passed, which is "carry one, carry all," and as part of that legislation the compromise was that a two-dish solution was allowed. The broadcasters' lawyers and teams of lobbyists were certainly well aware of that; it has been black and white in the law. So we have followed the law.

Every Congressman and every Senator that I have seen since 1999 has begged us to bring local-to-local to their communities, and we have done that. We have done almost twice as many as our competitor, DirecTV. In other words, we are the good guys here.

The only channels that we put predominantly on the wing satellites are channels that do not have local content. In other words, they don't have local news, weather, sports. If it is a religious station, it is exactly the same as a national religious channel. We carry Trinity Broadcasting and we carry them on a national basis. If there is not capacity available, they have gone on a wing satellite. Only 11 percent of our channels are on wing satellites. Only 30 percent of our markets require two dishes. So that allows us in your case to do Vermont some three or 4 years before maybe DirecTV is going to do that.

So the balance for us had to be do we bring more competition with local channels and more local markets? And we are now in 49 States, Senator, 88 percent of the population. Or do we go to a single-dish solution and do half that number?

Because it was the law, because it was agreed to by all parties in 1999, and because we were encouraged by Congress, we did that. It seems to me very punitive to now pass a law that says, EchoStar, you did a great job, but now we are going to penalize you and you have to retroactively go out and take those customers who are on one dish and put them on two-dish markets, or in some cases take down local markets.

I think the solution is to give us a period of time, going forward, to be able to implement that. That may require spectrum. It may require a new satellite. As you know, it takes probably 3 years to build and launch a new satellite and some $250 million.

We don't want to be in a two-dish solution. We don't want any broadcaster to be on a second dish, even in local content, but we need time to do that. DirecTV, of course, is now against two dishes because they are not really a satellite company, solely. They are obviously a broadcaster owned by news corporations. So we are the only independent company left. And they don't have spectrum for two dishes. Everything they have ever done has been on a single dish because that is the only spectrum they have.

So we are kind of fighting this. While you may see agreement to the left-hand side of me on two-dish, it is rare that Congress would pass legislation that is solely directed anti-competitively at one company, particularly a company that has done more for local-to-local than any other company.

Senator LEAHY. My time is up. I will have some questions for the record. The question was raised on HDTV. Are any of you suggesting that you would not be planning to carry HDTV on every channel that might have it? I don't think anybody is suggested that, are they?

The reason I ask this is I know I hear some talk about, gee, this is great if we give the broadcasters more spectrum so that we can have HDTV. And they say, well, if we just send a regular signal, of course, we can use that extra bandwidth to use any number of commercial things on it.

Let me ask this question. Is anybody suggesting in their business, assuming they are in the business, that they are not going to carry HDTV everywhere it is available?

Mr. REESE. Mr. Leahy, we are certainly not suggesting that, but we need help from the Congress and from the regulatory perspective to make sure that a group not here today, the cable industry, and the satellite people carry our digital signals, our HD signals when we as broadcasters put them on the air.

Senator LEAHY. You know, this is a whole new consumer area once it becomes available. Senator Hatch and I are old enough to remember when the first TV sets started showing up in our homes, and then the wonder of color, even though I think RCA carried about—it could only be seen by a handful of people, but they started broadcasting more and more programs in color, and then everybody did. And today the rare set is the black-and-white set.

Thank you, Mr. Chairman. I have some thing I will submit, but I just want to compliment you again for holding this hearing.

Chairman HATCH. Well, thank you, Senator Leahy. We are going to keep the record open for questions, and I have a number of questions I am going to submit in writing.

We are appreciative of all of you being here and for the respective points of view. Mr. Carson, we will particularly pay attention to what you suggest to us. You have been terrific through the years, and so has the Office. So we just want to compliment you on that.

In closing, I would like to thank all of you witnesses for your testimony today. I think we have had a good, small hearing here, and I will look forward to working with interested parties to go ahead with legislation this year. I want to mention that I would anticipate fairly quick action on this in our Committee. We have put S. 2013 on the agenda for the markup tomorrow, and I hope that we will be able to move that through Committee within the next couple of weeks. So we need all your suggestions.

We certainly don't want to hurt anybody. We want to get this so that it works in the best way for everybody. As you know, I take particular interest in the Satellite Home Viewer Act. I remember when we had to fight that through and it was a very, very difficult thing to do. Hopefully, we will have a little easier time this time and hopefully we can resolve some of these conflicts that we have. If not, we will do the best we can.

So with that, we will adjourn until further notice.

[Whereupon, at 3:43 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

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June 14, 2004

Chairman Orrin G. Hatch
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Hatch:

Per your request attached please find the answers to questions from Committee members pertaining to the United States Senate Judiciary Committee hearing regarding "The Satellite Home Viewer Extension Act" on May 12, 2004.

Thank you for the opportunity to reply to questions from the Committee members. If you require further information to complete the hearing record please contact me.

Sincerely,

Fritz Attaway

FEA:keo
enclosure

Questions of Senator Richard J. Durbin

1. Yes, it is feasible and reasonable to expect that every satellite carrier will negotiate for the right to retransmit every program channel. The proof of this statement is demonstrated by the fact that both satellite carriers and cable operators today negotiate in the free marketplace for the vast majority of program channels they retransmit to their subscribers. Satellite and cable retransmit over a hundred channels of programming today, only a handful of which are covered by a government mandated compulsory license. In the vast majority of cases the satellite or cable operator negotiates a retransmission license with the channel operator – USA Network, for instance – which has negotiated national retransmission rights with individual program owners. All this is accomplished in the free marketplace upon marketplace terms and conditions. Given the very large number of program services available to satellite and cable consumers, it must be recognized that this system works – in fact, exceedingly well.

Only broadcast stations are subject to a compulsory license which substitutes the operation of the free marketplace for government mandated terms and conditions. And even in the case of broadcast station programming, experience has demonstrated the superiority of the marketplace over government mandates. WTBS of Atlanta at one time was the most widely retransmitted superstation under both the satellite and cable compulsory licenses. Now it is retransmitted under marketplace licenses which are more flexible than the compulsory licenses to meet the needs of program owners, channel operators and satellite/cable operators. There is no reason that WGN could not follow the steps of WTBS. Indeed, there is speculation that this will happen.

2. Satellite carriers pay, on average, some $2.50 per subscriber per month to carry ESPN. Copyright Owners have never suggested that satellite carriers should pay a comparable amount to carry WGN or any other superstation.

On the other hand, the sports programming on WGN -- as well as the sports programming on other stations carried pursuant to the Section 119 compulsory license -- is comparable to sports programming on ESPN. Indeed, in some cases the sports programming on the Section 119 stations (such as the World Series, Super Bowl, NBA Championships and NCAA Final Four), is even more attractive than the programming on ESPN. Copyright Owners thus believe that the fees satellite carriers pay for ESPN in free market negotiations -- just like the fees they pay in free market negotiations for other comparable cable networks -- should be taken into consideration when setting the Section 119 royalty.

The free marketplace fees for those comparable networks have risen significantly during the past 5 years -- while the Section 119 royalty has remained frozen at less than 19 cents per subscriber per month. Copyright Owners strongly believe that there is no justification for perpetuating that rate freeze.

Questions of Senator Kohl

1. All costs, at the end of the day, are passed on to consumers. When the cost of satellite dishes, uplink facilities, satellite transponders and the vast majority of program channels which are not covered by the compulsory license increase, all of these cost increases are ultimately passed on to subscribers. That is how a free marketplace works. The only answer I have for Senator Kohl's question is another question: Why should the owners of broadcast programs retransmitted by satellite carriers be treated differently than the owners of other retransmitted programming, or the owners of equipment and services satellite carriers must purchase in the free marketplace in order to conduct their business? Why should broadcast program owners be forced by government mandate to subsidize satellite carriers, when no other satellite service supplier is forced to sell its goods or services at a discount?

2. Section 119 should not be made permanent because Congress should periodically review the operation of the compulsory license and make adjustments where necessary. Marketplace licenses evolve over time and adjust to prevailing market conditions. Compulsory licenses, too, should be adjusted in light of market conditions. Indeed, Congress should not only from time to time consider whether adjustments to the compulsory license are necessary, it should consider whether the compulsory license itself is necessary to serve the public interest.

An increasing number of cable systems retransmit no distant broadcast stations under the cable compulsory license. They find that their subscribers are best served by programming services acquired in the free marketplace. This marketplace trend suggests that both the cable and satellite compulsory licenses are becoming irrelevant, and at some point in the not too distant future should be repealed. By extending the satellite compulsory license for only a five-year period, Congress will insure that it takes another look at the design of, and justification for, the compulsory license in 2010.

Questions of Senator Leahy

1. The Copyright Owners suggest that Congress direct the Copyright Office to adopt reasonable audit procedures through notice-and-comment rulemaking. The Owners envision that the Section 119 audit process would be comparable to the audit process that the Copyright Office has adopted for other compulsory licenses. *See, e.g.,* 37 C.F.R. Sections 261.6-261.7. This process includes requirements for public notice and coordination of audits, limitations on the frequency of audits, an obligation to retain records during the potential audit period, provisions for consultation about alleged issues contained in draft audit findings, and payment for the cost of the audit.

2. In almost every situation, healthy competition serves consumer interests. This is certainly true in the multichannel program service environment where healthy competition between cable and satellite services has increased consumer choices and has imposed marketplace price controls on both competitors. Competition between satellite and cable services tends to limit the ability of both service providers to pass increased costs on to their subscribers. This is true of non-broadcast programming costs, which constitute the vast bulk of programming delivered by satellite and cable operators. It will also be true of any increase in the costs of the relatively small amount of programming carried under the compulsory license. It is certainly more fair for Congress to encourage competition as a means of placing limits on consumer subscription rates than to force broadcast program owners to subsidize satellite carriers by imposing a compulsory license at below market rates. It should be pointed out, in this regard, that when Congress reduced the satellite compulsory license rates in 1999 by 30% for superstations and 45% for network affiliates, there was no discernable decrease in the charges made by the satellite carriers to their subscribers. All the evidence suggests that this government-mandated subsidy by program owners was simply pocketed by the satellite carriers.

6/14/04

RESPONSES OF DAVID O. CARSON
GENERAL COUNSEL, U.S. COPYRIGHT OFFICE
TO WRITTEN QUESTIONS FROM MEMBERS OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

THE SATELLITE HOME VIEWER EXTENSION ACT

HEARING DATE: MAY 12, 2004
DATE OF RESPONSES: JUNE 22, 2004

QUESTION OF SENATOR LEAHY

Q: Mr. Carson, is there some reasonable approach that could simplify the cable royalty rate system to make it more comparable, in the sense of simplicity and transparency, to satellite rates?

A: Yes. As we reported to this Committee in our 1997 report reviewing the cable and satellite licenses, the royalty payment mechanism of the section 111 cable license is woefully out-of-date and hyper-complex. At the time, we noted that a flat per subscriber per month royalty fee like the one employed in the section 119 satellite license would permit a simple and straightforward calculation of the royalty payments due. The flat per subscriber per month royalty fee would reduce the burden on copyright owners, and cable operators, to verify that the correct fee is paid and eliminates the legal grey areas currently associated with the section 111 cable license.

QUESTION OF SENATOR KOHL

Q: Why shouldn't we make the 119 license permanent? Do you think we will be in a better position to do so in five years?

A: While the Copyright Office is opposed in principle to compulsory licensing, we stated in our 1997 report to this Committee on the cable and satellite licenses that as long as the cable industry has a permanent compulsory license, so should the satellite industry. However, we believe that issues such as the transition from analog to digital broadcasting and the projected expansion of local-into-local service to virtually all households within the next few years are likely to make it advisable to reexamine the terms and conditions of the satellite license. Moreover, we note that S. 2013 would require that the Copyright Office study the operation and revision of the statutory licenses under sections 111, 119, and 122, and that one possible outcome of that study would be recommendations to harmonize the satellite and cable licenses. In light of these developments, we believe that we will be in a better position to determine whether the satellite license should be permanent, and what its long-term contours should be, in another five years.

QUESTION OF SENATOR RICHARD DURBIN

Q: Do the Superstations such as WGN raise legitimate concerns (regarding a potential increase in the royalty rate for superstations under the proposed legislation). Please explain, and provide your views on ways that the proposed legislation could accommodate their concerns.

A: The current per subscriber per month royalty fee for satellite carriage of a superstation like WGN is 18.9 cents. This fee, which has been in effect for the last five years, represents a reduction from the 27 cent per subscriber per month rate that was in effect for a superstation prior to the 1999 reauthorization of the Satellite Home Viewer Act. The proposed legislation, S. 2013, directs a Copyright Arbitration Royalty Panel (CARP) to adjust the current 18.9 cent rate to reflect the fair market value of the programming retransmitted on a superstation and then reduce the fair market value by 30 percent.

The Copyright Office has a longstanding opposition to compulsory licenses such as the satellite license, believing that they are an abrogation of the exclusive rights granted to copyright owners under section 106 of the Copyright Act. Compulsory licenses force copyright owners to license their works at government set rates. Since it appears likely that Congress will reauthorize the satellite license for another 5 years, we believe that adjusting the rates to reflect marketplace value will at least provide copyright owners with fair compensation for the use of their works. S. 2013 goes a step further, however, and reduces the fair market rate for superstations by 30 percent thereby depriving copyright owners of just compensation. We oppose this reduction.

If satellite carriers choose to drop the signals of superstations such as WGN after enactment of S. 2013, it will be a business decision on their part to do so. We, however, believe this is unlikely for the following reasons. First, the programming provided by WGN is obviously valuable to subscribers, which is why WGN is the most widely-watched superstation on satellite and cable TV. Second, satellite carriers will still be able to retransmit the signal of WGN at 30 percent below the marketplace value of the programming, which is a considerable discount. Third, even if satellite carriers are required to pay more for WGN than they currently are under the satellite license, the carriers nonetheless enjoy the considerable benefit of doing so under a compulsory license. Satellite carriers can clear the rights to all programming broadcast by WGN through payment to a single source (the Copyright Office) thereby eliminating the transaction costs associated with licensing the programs individually through agreements with multiple copyright owners.

In sum, we believe that the benefits conferred by enactment of S. 2013 will assure that WGN remains available to satellite subscribers.

Responses of EchoStar Communications Corporation to
Follow-up Questions
The Satellite Home Viewer Extension Act

Responses to Questions of Senator Richard J. Durbin:

If the royalty rate provisions in the bill contemplated by the House Judiciary Committee is adopted by the Senate Judiciary Committee and thus becomes law this year, and the CARP process leads to an increase in the rates for your industry, how would you deal with WGN? Would you keep the Superstation and pass along the rate increase to the subscribers or would you consider dropping the station from your channel line-up?

EchoStar is concerned that the resulting rates paid by DBS for the retransmission of superstations may become too high to bear at retail should the Senate Judiciary Committee adopt the bill that is being contemplated by the House Judiciary Committee. If satellite carriers were to become subject to a cost of living increase that looks back and calculates a cumulative increase based on inflation for the past five years, followed by a new CARP process, it is possible that the resulting rate will be extremely unreasonable. Subjecting satellite to a spike in the rates will potentially put satellite carriers at a further competitive disadvantage vis-à-vis cable.

If EchoStar is faced with extremely high increases, it will be necessary to make a determination whether to continue offering WGN and pass the increase through to subscribers, reduce WGN's distribution, or drop the channel entirely. Today, EchoStar carries WGN as part of the America's Top 120 (AT120) and America's Top 180 (AT180) programming packages. These packages account for well over half of all subscribers. If the cost of carrying WGN to these millions of subscribers becomes too high and would place an unfair burden on consumers, among the most realistic options would be to drop WGN from one or both of the programming packages or pass the increase through to subscribers. In addition, even if EchoStar were not to drop the channel after passage of the Act, a possible further increase as a result of a CARP process could force the pricing of WGN to become so uneconomical to the consumer that dropping the channel entirely may prove to be the most consumer friendly alternative.

Responses to Follow-up Questions of Senator Kohl:

Despite more competition, cable rates have continued to increase at many times the rate of inflation. Can you explain why satellite competition has not disciplined cable rates?

Undoubtedly, cable operators still enjoy market power in the multi-channel video programming distribution market, with an average share still lingering close to 75% in their local franchise areas. They can therefore continue to get away with above-competitive prices. Possible factors that explain this continued power include:

- Cable systems provide local stations throughout the country;
- Digital cable systems have much more bandwidth than the limited spectrum available to DBS providers, positioning them well, for example, to offer more expansive High-Definition Television, Pay-per-View and Video-on-Demand type services;
- Cable systems have a return link, and can therefore provide interactive video as well as a package of video and high-speed Internet access. The DBS spectrum is still one-way for consumers;
- Large MSOs control significant chunks of the most popular cable programming, while the program access rules in place have large loopholes and the FCC has not vigorously enforced them in the first place;
- Certain federal, state and administrative rules still discriminate in favor of cable systems at the expense of satellite carriers. Cable systems enjoy a broader copyright license; they can avail themselves of the "significantly viewed" and other provisions; they are favored by discriminatory sales tax regimes in a number of states.

According to your most recent data, how many of your subscribers fall into the following categories:

The requested information is proprietary and cannot be provided for the public record.

Whatever increase is charged to the satellite companies, therefore, will apparently be passed through to the consumer. At a time when consumers are paying more and more for television, how can this be justified?

Even an increase of a few cents on the dollar would cost our company tens of millions of dollars over the next five years. As a publicly traded company with fiduciary obligations to our shareholders, EchoStar does not believe that it should be expected to absorb this cost. Although EchoStar takes pride in having the lowest all digital price in America, if it

is to continue its current level of service, it would have little choice but to pass the increase through to our consumers.

In addition to the provision of local stations, are there other changes in the law Congress can make to further even the playing field with cable?

- Require increased enforcement of program access rules; close the "terrestrial" loophole;
- Establish regulatory parity between satellite and cable by giving satellite operators the same opportunities to retransmit broadcast stations that cable systems have, including, the ability to retransmit significantly viewed channels and a permanent authorization to retransmit distant signals, at non-discriminatory cost;
- Clarify the retransmission consent provision to direct the Commission to scrutinize discriminatory behavior and bundling practices by broadcasters, since cable operators have much more leverage in retransmission negotiations than satellite distributors;
- Explicitly preempt discriminatory satellite sales taxes imposed by states, confirming that these taxes are contrary to the Constitution.

Why shouldn't we make the 119 license permanent? Do you think we will be in a better position to do so in five years?

EchoStar believes that Congress should make the 119 license permanent. As long as the satellite TV industry's chief competitor – cable – continues to enjoy a permanent, statutorily-granted compulsory license, both equity and the Congressional desire to promote competition in the MVPD marketplace dictate that satellite carriers be permitted to avail themselves of a compulsory license under the same terms as cable.

Can you please explain why you have rejected digital-only local stations for carriage?

EchoStar has not commenced carriage of digital local stations because a regulatory framework for carriage of these stations has not yet been put into place by the FCC. The FCC has sustained EchoStar's position, explaining that "[s]uch issues as material degradation limitations, good signal quality parameters, and the procedures for requesting and obtaining carriage must be decided before the digital signal carriage rights of television broadcast stations, with regard to satellite carriers, can be enforced. These matters have been raised but not resolved by the Commission." The FCC has accordingly declined to require satellite providers to carry digital stations. Moreover, in any event, broad-based carriage of digital local stations is currently not feasible due to technical constraints -- the bandwidth limitations to which DBS providers are subject.

Responses to Additional Questions Submitted by Senator Leahy:

On average about how quickly is the DISH Network able to install a second dish after a customer requests that dish and how do dish owners learn that they can apply for the second dish?

Customers who request free installation of a second dish experience less of a wait than customers who request service for any other reason. Today, EchoStar's completion rate for all work orders is a seven-day average of approximately 7.77 days, while the nationwide average from the time a work order is created until the date of completion for second dish installations is about 7.56 days, slightly lower than the average overall. Furthermore, due to an increase in resources and improving inventory levels companywide, the average for all work orders to be completed is diminishing and expected to move toward a national average of 5 days for all jobs, including second dish installations.

EchoStar employs a number of consumer education and notification initiatives to make clear to all subscribers and potential subscribers how they may obtain a free professionally installed second dish in those markets where relevant. Some of these initiatives include: a) direct communications to subscribers, including local-into-local subscribers, by letters specifically addressing the free second dish; b) customer service representative scripts used to educate both current subscribers and potential subscribers when contacting the DISH Network toll-free number; c) advertising materials that clearly disclose; d) training for retailers and installers to fully inform subscribers and prospective customers that a free second dish is required in some markets in order to receive all stations; e) the DISH Network web site which highlights the need for a free second dish to receive all stations in select markets; and f) other additional publicity initiatives to ensure that EchoStar subscribers both know of the existence of the second dish, and also understand that they may receive it, and its installation, free of charge.

What is your rough timetable for offering every household in the continental U.S. local-into-local satellite television service and what is the single most significant impediment to getting that job done.

EchoStar is committed to providing consumers, including those in rural areas, with an obvious, money-saving alternative to cable that includes local-into-local service. EchoStar has been working hard to meet this goal as quickly as possible taking into account our limited spectrum and our need to remain economically viable. In demonstration of that commitment, our DISH Network has launched local-into-local service into 133 markets nationwide. This covers nearly 91% of all US television households.

It is not possible to provide a timetable for offering local-into-local service in all markets with our current technology and our present allocation of spectrum. In filings to the Federal Communications Commission, EchoStar has requested that the Commission free up more spectrum for direct broadcast satellite services. EchoStar believes that

additional spectrum could be used for offering local broadcast stations in more markets as well as providing other services. EchoStar is already working toward the worthy goal of expanding the availability of local stations in the smaller television markets, and would welcome any assistance that you could provide in making additional spectrum available so that it may someday offer local stations in all 210 markets.

The House Judiciary Committee reported bill includes a provision which might override some of those "twists of fate" by applying a version of the "significantly viewed test" used in cable into the satellite compulsory license approach thus allowing satellite carriers such as EchoStar to offer additional signals to satellite dish owners.

Please provide an estimate of: how many dish owners could receive additional signals under this approach, were it to become law, and how many states would contain dish owners who would benefit from this approach. Also, which ten, or so, states would be the big winners in terms of containing significant numbers of dish owners who would be able to receive at least one additional signal under the significantly viewed test?

EchoStar believes that the ability to provide significantly viewed stations to consumers would have a considerable positive impact on the number of signals that can be provided to viewers. To illustrate, the FCC's list of significantly viewed stations, first compiled in 1972, is attached.[1] While the list is a moving target and may be imperfect in some respects, it does demonstrate that many communities across the nation have access to a number of significantly viewed stations through their cable operators. Applying the significantly viewed rule to satellite providers will ensure that satellite subscribers are able to receive the same local broadcast stations that are available to cable subscribers. This will make satellite service a more attractive option for consumers in all states and most importantly will create a greater degree of parity between the competing MVPD services.

It is difficult to anticipate which states in particular will stand to gain the most with such a provision. EchoStar, however, is offering local service in all 50 states and the District of Columbia, and thus fully expects that many satellite consumers across the nation will reap the benefit of being able to watch the same broadcast channels that an over-the-air viewer or cable customer in their neighborhood can see today.

On the other hand, EchoStar remains concerned that this benefit may be undermined depending on the conduct of local broadcast stations. In particular, because satellite carriers have much less leverage than cable operators, EchoStar is afraid that local network stations will seek to exercise *their* power to condition retransmission consent on a contractual ban on the satellite importation of significantly viewed stations. Such a contractual limitation would thwart Congressional intent and should be prevented.

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[1] EchoStar notes that the 1972 list has been modified from time to time by the FCC in *ad hoc* adjudications.

Also, would your company have the capacity to provide the additional signals if the significantly viewed test were applied to the satellite TV service?

As long as our company can provide significantly viewed signals under the same rules as cable, EchoStar would generally require no additional spectrum to deliver these signals. In most cases, consumers eligible to receive the significantly viewed stations would reside within the satellite beam of the neighboring market in which the significantly viewed station originates. EchoStar's customers cannot watch the channel today because the signal is scrambled outside the DMA. Therefore, EchoStar would merely need to command the eligible customer's set top boxes to descramble the incoming significantly viewed station in order to receive the service.

Do you recommend that the Senate adopt the House Judiciary Committee language?

EchoStar does not recommend that the Senate adopt the House Judiciary Committee's language. The Senate version of the bill takes a more balanced approach with respect to matters such as retransmission of significantly viewed stations and the timing of cost-of-living increases in the royalty rate. EchoStar does, however, recommend that the Senate adopt the House Judiciary's Committee's provision making new royalty rates under the Section 119 license effective January 1, 2006.

Responses to May 26, 2004 Questions
Senate Judiciary Committee
Eddy Hartenstein
Vice Chairman, The DIRECTV Group, Inc.

Senator Durbin

1. If the royalty rate provisions in the bill contemplated by the House Judiciary Committee is adopted by the Senate Judiciary Committee and thus becomes law this year, and the CARP process leads to increase in the rates for the industry, how would you deal with WGN? Would you keep the superstation and pass along the rate increase to the subscribers or would you consider dropping the station from your channel lineup?

Were Congress to pass the House Judiciary Committee print, superstation royalties would likely increase dramatically over the next five years. The last Copyright Arbitration Royalty Panel ("CARP") proceeding recommended an *increase of over 300%*. We are, of course, deeply troubled by the prospect of any such rate increase, as well as the prospect of participating in an admittedly flawed, distracting, and extremely expensive CARP process – neither of which would apply to our chief competitors, the dominant cable operators.

We have not yet determined how we would treat WGN (the only superstation that DIRECTV still carries) in the wake of any such rate increase. But you accurately describe the two options available to us – we could either pass along the rate increase to our subscribers, or we could drop WGN.

As superstation royalty rates rise incrementally, WGN becomes an incrementally less attractive proposition for our subscribers, and, correspondingly, for DIRECTV. If rates rise high enough, WGN would at some point become less attractive than alternative programming. This is nothing against WGN. It is simply a matter of basic economics. We have not yet conducted an economic analysis of WGN's comparative value after a rate increase, and, frankly, hope never to have to do so. At this point, however, we are not in a position to take any option off the table.

Senator Kohl

1. Despite more competition, cable rates have continued to increase at many times the rate of inflation. Can you explain why satellite competition has not disciplined cable rates?

First of all, it may be overstating the matter to suggest that satellite competition "has not" disciplined cable rates. Even the GAO study you cited acknowledges that DBS competition has caused cable operators to lower rates (although not as much as competition from overbuilders and the like) and to improve their service offerings dramatically. We think it undeniable that satellite competition has (a) prevented cable

operators from raising their rates even faster than they actually have and (b) forced cable operators to try to offer better packages and more reliable customer services. So we would caution against dismissing out of hand the competitive benefits that the satellite industry has brought to the subscription television industry.

The GAO did, however, find a disparity between DBS operators and overbuilders with respect to discipline on cable pricing. We believe that, as DBS operators continue to roll out local-into-local (and, in the medium-term, HD) services in more markets, this sort of disparity will diminish.

Apart from the provision of local broadcast signals, DBS operators labor under one significant disadvantage compared to cable operators – cable can bundle its video service with high-speed broadband services. Satellite broadband offerings are not yet fully competitive with those of cable operators.

Bundling, in and of itself, does not distort competition. But cable's *pricing* of the bundle can do so. Many cable operators offer their customers relatively low prices for broadband service when it is bundled with video service, but extremely high prices for stand-alone broadband. This means that DIRECTV can beat cable on the quality and price of its video package and still fail to win customers who fear losing the "bundled" price for their broadband service.

DIRECTV has been working diligently to find partners, including DSL providers, that can help it counter cable's video/broadband bundle. Recently, we entered into agreements with both Verizon and Bell South to offer a competitive alternative to cable's bundled service. Moreover, DIRECTV continues to seek additional spectrum from the FCC that will in the longer term help it increase its own broadband capability.

2. *According to your most recent data, how many of your subscribers fall into the following categories:*

a) *total number of grandfathered subscribers;*

Approximately 100,000 customers.

b) *number of grandfathered subscribers who also subscribe to local-into-local signals;*

Approximately 50,000 customers.

c) *total number of subscribers receiving distant network signals; and*

Approximately one million customers.

d) total number of subscribers receiving distant network signals and local-into-local signals.

Approximately 300,000 customers.

3. Whatever increase is charged to the satellite companies, therefore, will apparently be passed through to the consumer. At a time when consumers are paying more and more for television, how can this be justified?

DIRECTV competes in the marketplace every day to win and retain customers who can choose from a number of MVPD operators, including incumbent cable operators. It is thus the last entity that can afford to anger current and potential customers through unjustified rate increases – certainly where, as in the scenario presented here, such rate increases would come with no improvement in service. This is why DIRECTV has been so vocal against royalty rate increases, particularly those not also imposed on cable operators.

That said, royalty rates are an input cost for DIRECTV's service. DIRECTV would have no choice but to treat an increase in royalty rates as it would an increase in any of its other input costs. It could pass such an increase along to consumers directly. Or it could do so indirectly by foregoing other improvements to its facilities and services that it would have made in the absence of the increase. Either way, though, customers would lose.

4. In addition to the provision of local stations, are there other changes in the law Congress can make to further even the playing field with cable?

The single most important change Congress can make would be to close the so-called "terrestrial loophole," through which cable operators are increasingly denying satellite viewers local sports programming.

By way of background, in 1992, Congress was concerned with the market power of cable systems, and the growing integration between cable systems and cable programming (Time Warner cable owning HBO, for example). In particular, Congress worried that cable operators and so-called "vertically integrated programmers" (programmers affiliated with cable operators) would freeze out satellite operators and other non-cable distributors by negotiating exclusive programming contracts. Thus the 1992 Cable Act included "program access" provisions that, among other things, restricted exclusive contracts between vertically integrated programmers and cable operators.

When Congress was drafting the program access provisions in 1992, it anticipated that regional and national programming (such as ESPN, CNN, etc.) would be delivered to cable offices via satellite. So Congress drafted the exclusive contract restriction for "*satellite* cable programming" (that is, "video programming which is transmitted via satellite").

This arrangement worked well for several years. But, as the massive amounts of fiber optic capacity deployed by telecommunications carriers in the 1990s depressed the price of such "terrestrial" capacity, it became possible for cable operators to deliver regional and national programming to cable offices terrestrially, rather than via satellite. When Comcast in 1996 created Comcast SportsNet – a regional sports channel with exclusive rights to the Philadelphia Phillies, Flyers, and 76ers (the latter two of which Comcast happens to own) – it delivered this channel to cable operators terrestrially, not via satellite. Comcast then negotiated exclusive contracts for SportsNet with Philadelphia area cable operators (virtually all Comcast systems), claiming that it could do so because SportsNet is not "satellite cable programming." To this day, sports fans in the Philadelphia area *must* subscribe to cable if they wish to watch their favorite teams.

Satellite operators have always thought that Comcast's use of what is now known as the "terrestrial loophole" is, at best, an evasion the 1992 Cable Act. But the FCC (and, later, the DC Circuit) have held that the loophole is consistent with the statutory language – *i.e.,* because Comcast SportsNet is not "*satellite* cable programming," Comcast can continue to freeze out its competitors in Philadelphia.

Now, other cable operators are getting into the act. Cox, for example, now offers Cox Sports Television – with exclusive rights to many New Orleans Hornets games – only to cable operators (including, of course, Cox cable). Cox also offers 4SD – with exclusive rights to San Diego Padres games – only to cable operators. Similar exclusive deals are rumored to be in the works.

The clear consensus is that regional sports networks such as Comcast SportsNet and Cox Sports Television are "must have" television – and thus critical to any distributor's ability to compete. DIRECTV's low penetration in Philadelphia is evidence of what happens when a cable operator can lock up such programming through exclusive arrangements. *Even Cox* has said much the same thing, when it was worried about exclusive deals between DIRECTV and Fox Sports Net. The FCC has confirmed the importance of sports programming, and the dangers of sports programming exclusivity, on many occasions.

DIRECTV thus asks that Congress close the terrestrial loophole – a fix as simple as removing the reference to "satellite" cable programming. This would do no more, and no less, than return the program access rules to Congress' original intent; to deny vertically integrated cable operators the opportunity to freeze out satellite providers and ensure that the dominant cable operators cannot withhold regional sports programming as a club against their competitors.

5. Why shouldn't we make the 119 license permanent? Do you think we will be in a better position to do so in five years?

DIRECTV certainly believes, and has stated in Congressional testimony, that we should not be debating these same issues once again five years from now. Cable operators enjoy

the benefits of a permanent compulsory license, and satellite operators should be placed on the same competitive footing.

As you are aware, however, DIRECTV has been meeting with representatives of the broadcast industry over the last month or so to see if we could reach common ground on some of the issues associated with SHVIA reauthorization during this busy legislative session. As a result of these discussions, DIRECTV and the broadcast industry have agreed on a series of SHVIA reauthorization principles – among them, that the compulsory license should be renewed for five years, not permanently. Of course, this is not DIRECTV's preferred outcome. On the other hand, it is probably fair to say that some aspects of these principles do not reflect the broadcast industry's preferred outcome. Taken as a package, both DIRECTV and the broadcast industry believe that these principles are a reasonable compromise, and reflect sound public policy. Thus, *assuming SHVIRA reauthorization reflects the totality of this package*, DIRECTV would support a five-year extension.

Senator Leahy

1. I understand that because of your successful launch of a spot beam satellite that DirecTV intends to offer local-into-local service in the near future. What is your latest rough guess as to when such service would be offered?

On June 4, 2004, DIRECTV completed the transition of programming from the DIRECTV-5 satellite to its newest spot beam satellite, DIRECTV-7S. Over the next few weeks, DIRECTV will be able to use the additional capacity created by this spot beam technology to launch local-into-local service in approximately 42 more markets.

DIRECTV also has pending before the FCC a proposal to migrate the DIRECTV-5 satellite (which was freed up by DIRECTV-7S) to a Canadian DBS orbital location, which would enable DIRECTV to serve a total of 130 markets – including Burlington, Vermont with local-into-local services. DIRECTV will be able to begin serving these additional markets approximately 80 days after the FCC grants the pending applications.

2. Is there some way that you and other stakeholders, including those representing content owners, could come to some resolution of [royalty rate issues] to put before this Committee.

In accordance with your suggestion, and the suggestion of other Members of Congress, DIRECTV has had numerous meetings with representatives of the content owners and other stakeholders regarding royalty rates. DIRECTV is very much encouraged by the progress made at these meetings, and will continue to work towards a resolution of royalty rate issues. At this point, however, no such resolution has been reached.

3. Please provide us with an estimate of: how many dish owners could receive additional signals under [the House Judiciary Committee's significantly viewed] approach, were it to become law, and how many states would contain dish owners who

would benefit from this approach. Also, which ten states would be the big winners in terms of containing significant numbers of dish owners who would be able to receive at least one additional signal under the significantly viewed test? Also, would your company have the capacity to provide the additional signals if the significantly viewed test were applied to the satellite TV service? Do you recommend that the Senate adopt the House Judiciary Language?

Clearly, giving satellite operators the ability to deliver out-of-market signals that are "significantly viewed" will allow DIRECTV to provide additional signals to many of its customers, and to more closely approximate the offerings of the incumbent cable operators in many markets. But to determine the communities in which DIRECTV could actually provide significantly viewed signals (assuming such a provision were to become law), DIRECTV would have to evaluate a number of factors for each community in question. These include, for example, whether DIRECTV already carries the station in question in its home market, whether it carries the community's incumbent stations, whether the community falls within the same spot beam contour as the station's home market, the available capacity on that particular spot beam, the level of perceived interest in the station, etc. While DIRECTV has begun analyzing these issues, it is not yet in a position to specify with any accuracy the communities or states in which it would be able to provide significantly viewed signals.

The House Judiciary Committee language reflects this reality by allowing, but not requiring, satellite operators to offer significantly viewed signals. For that reason, DIRECTV strongly supports the House provision. DIRECTV has several relatively minor concerns with the language, which we have transmitted to appropriate Committee staff. Assuming (as we do) that our concerns can be addressed, we would certainly recommend that the Senate adopt the House's language.

Follow-up Questions
Senator Kohl
The Satellite Home Viewer Extension Act
May 12, 2004

Mr. King:

1) THE REAUTHORIZATION OF THE 119 LICENSE

It was not so long ago that we were wrestling with many of these same issues. In the business world, five years is a not a very long period of time. Yet, we continue the tradition of reauthorizing satellite's ability to transmit distant network signals in five year increments. Cable, on the other hand, enjoys a permanent license for the same privilege.

Question: Why shouldn't we make the 119 license permanent? Do you think we will be in a better position to do so in five years?'

Follow-up Question
Senator Kohl
The Satellite Home Viewer Extension Act
May 12, 2004

Question: Why shouldn't we make the 119 license permanent?

John King's response: Technology in satellite transmission is evolving rapidly, and that could result in significant changes within the next five years. In addition, the issues of digital vs. analog satellite carriage have not been resolved and probably won't be for several years. Cable is regulated locally, while DBS is not. Under these circumstances, a five-year review and reauthorization seems highly appropriate.

Question: Do you think we will be in a better position to do so in five years?
John King's response: Perhaps. But not at this time.

ADDITIONAL QUESTIONS SUBMITTED BY SENATOR LEAHY
Satellite Home Viewer Extension Act

Questions for Mr. John King, President and CEO of Vermont Public Television

1. Mr. King, the House Judiciary Committee bill has reported out a bill which addresses a problem regarding two northern counties in New Hampshire which seems very similar to the situation of Vermont's two southernmost counties.

Two counties in northern New Hampshire, Grafton and Sullivan, are actually in the Burlington designated market area and thus receive Vermont stations through local-into-local satellite service even those counties are in New Hampshire.

Under the House bill, a major network station in Manchester, WMUR, will be able to have its signals offered through local-into-local service to those two northern New Hampshire counties even though they are in the Burlington market area.

Is this likely to mean that that some New Hampshire residents, who would be offered both WMUR and a competing Vermont network station, would be more likely to watch WMUR, than the Vermont station?

2. Mr. King, the House of Representatives Judiciary Committee is considering a satellite bill which would allow satellite carriers to provide local broadcast network signals from "significantly viewed" television stations to households in a different Nielsen market area.

One list of significantly viewed stations is 76 pages long, in very small font size, with four columns of stations on each page

It appears from these massive lists that dish owners in almost all states could receive additional signals via satellite under this House proposal.

These are exceptions to the rule that satellite carriers, under the section 122 local-into-local license, should only provide local broadcast network signals from local network broadcast stations in a particular Nielsen designated market area.

It would seem to me only fair -- if dish owners in other states are going to be able to receive this additional selection of signals -- that Vermonters living in our two southern-most counties should be able to receive Vermont stations.

The Nielsen market area system is based, in many cases, on arbitrary twists of fate – the height of a transmission tower built years ago thus expanding the market coverage of a broadcast station. The signal strength emitted by a tower, the contour of mountain sides facing the tower, the location of repeater towers built years ago, the direction of valleys, or the historic growth patterns of cities are some factors that may have determined a market area boundary.

Mr. King, is there some merit to tasking national experts at the FCC, the academy of sciences, and representatives of the television and satellite industry, to see if a more rational system could be developed that takes into account what consumers want while protecting the very important local affiliate system?

Additional Questions Submitted by Senator Leahy
The Satellite Home Viewer Extension Act
May 12, 2004

Question 1:
John King's response:
It is difficult to predict how viewers will respond to any television programming. It is possible that residents of Grafton and Sullivan counties (Burlington DMA) would be more likely to watch WMUR for New Hampshire news and information. Depending on scheduling and selection, they may choose either a Vermont or New Hampshire station for network and syndicated programming.

Question 2:
John King's response: Yes, as long as local stations are protected.

SUBMISSIONS FOR THE RECORD

May 21, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Re: S. 2013, Satellite Home Viewer Extension Act of 2004

Dear Mr. Chairman and Mr. Ranking Minority Member:

The American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") write to set forth their views in regard to the reauthorization of the Satellite Home Viewer Act ("SHVA"). We appreciate your expression of willingness to address this issue, as you did on May 12, 2004, during a legislative hearing on S. 2013, the Satellite Home Viewer Extension Act of 2004, and welcome the opportunity to participate in this most important process.

As you know, BMI and ASCAP represent close to 500,000 American songwriters, composers, lyricists and music publishers who create and own the copyrights to millions of musical works. On their behalf, ASCAP and BMI license the non-dramatic public performances of their musical works and distribute the license fees paid by the users for such performances in the form of royalties. In addition, through affiliation agreements with performing rights societies in other countries, BMI and ASCAP license the works of thousands of foreign writers and publishers. Accordingly, ASCAP and BMI seek to ensure that their member and affiliated writers and publishers are fairly compensated for the use of their works.

We have always believed that most compulsory licenses, such as the SHVA, fail to fairly compensate our members for the use of their copyrighted works. Compulsory licensing schemes remove perhaps the most fundamental basis of copyright protection – that of providing the copyright owner with the exclusive right to grant a license for a set term of years. Shifting this right to governmental hands limits -- indeed severely impairs -- the copyright owner's ability to receive a just price for the use of his or her work. It is through the free marketplace, through willing buyers and sellers, that our members and affiliates recognize the true value of their performances. Only in the most extreme circumstances, and as a last resort when a free marketplace simply cannot function, should a compulsory license be considered.

BMI and ASCAP do not believe that the retransmission of broadcast television programming from distant markets by satellite carriers (or, indeed, by cable systems) presents such extreme circumstances. Our experience with the satellite (and cable) industries leads us to conclude that negotiating licenses in the free marketplace for the retransmission of distant broadcasts is simple and the obvious next step. Accordingly, it is our position that Congress should request the proponents of the satellite compulsory license to make a strong showing that an extension of the license serves the public interest. If that showing is not made by clear and convincing evidence, Congress should not reauthorize the SHVA.

Should Congress conclude that reauthorization of the SHVA is necessary, ASCAP and BMI would like to stress the need for increased royalty rates. As set out in the testimony of Fritz Attaway on May 12th, Congress in 1999 imposed a significant discount on the rate set by the independent Copyright Arbitration Royalty Panel. Since then, the rate has not increased. Taking into account ordinary inflation, reauthorization at the same rate would effectively *decrease* the rate over the ten-year period! Considering the already below fair market, keeping the rate at the current level would deprive creators and copyright owners of their just compensation from satellite carriers. Accordingly, we request that S. 2013 be modified so as to increase royalty rates.

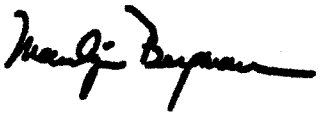
We do not take a position on the precise form and timing of the necessary rate increase. We do, however, share Mr. Attaway's view that rate increase and audit mechanisms are necessary. To that end, BMI and ASCAP will endeavor to work with the Senate Committee on the Judiciary to reach a just solution.

Mr. Chairman, we are grateful for this opportunity to submit our thoughts on these issues. We hope to work with you, your Committee, the House Committee on the Judiciary, the Copyright Office and all other interested parties to create a system that works.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Marilyn Bergman



Frances W. Preston

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TESTIMONY
OF FRITZ ATTAWAY
EXECUTIVE VICE PRESIDENT
AND
WASHINGTON GENERAL COUNSEL
MOTION PICTURE ASSOCIATION OF AMERICA

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

"THE SATELLITE HOME VIEWER EXTENSION ACT"

MAY 12, 2004

Chairman Hatch, Senator Leahy, members of the Committee, thank you for giving me this opportunity to present the views of owners of television programming on an extension of the Satellite Home Viewer Act. Although I speak only for the member companies of the Motion Picture Association of America, I am authorized to tell you that the

following organizations endorse the views set forth in this statement: the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association.

BACKGROUND

The Satellite Home Viewer Act (SHVA) of 1988 created in Section 119 of the Copyright Act, for a five-year period, a "compulsory license" that allowed satellite program distributors (such as EchoStar and DirecTV) to retransmit broadcast television programming from distant markets without the permission of the copyright owners of that programming. This satellite compulsory license forces copyright owners to make their copyrighted programs available without their consent and without any ability to negotiate with the satellite companies for, among other things, marketplace compensation.

The SHVA was extended for five-year periods in 1994 and 1999. The 1994 renewal provided for a royalty rate adjustment procedure aimed at providing copyright owners with market value compensation for the use of their programming by satellite companies. This procedure was in fact exercised, which resulted in the assessment of market-based

royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office.

Although satellite companies pay market based license fees for scores of program services that they sell to their subscribers, they strongly objected to paying market based royalty rates for the retransmitted broadcast programming they sell to their subscribers, and successfully petitioned Congress to impose a substantial discount on the market based rates. These discounts – 30 percent for "superstation" programming and 45 percent for network and PBS programming – went into effect in July of 1999.

Since the reduction of royalty rates in 1999, there have been no further adjustments to the compulsory license rates. If the SHVA were simply extended for another five years, at the end of that period the satellite royalty rates will have been frozen for a period of ten years. In the five years since the last extension of the satellite compulsory license, the cost of programming that satellite companies license in the free market for resale to their subscribers has increased substantially, as have the fees charged by satellite companies to their subscribers. The only fiscal measure that has not increased is the compensation provided owners of retransmitted broadcast programming.

COPYRIGHT OWNERS' POSITION

1. Compulsory licenses are a serious derogation of the rights of copyright owners. They substitute the heavy hand of government for the efficient operation of the marketplace and arbitrarily transfer wealth from copyright owners to privileged users. Compulsory licenses should be imposed only as a last resort when marketplace forces clearly are incapable of operating in the public interest. It has been 15 years since the satellite compulsory license was first imposed. Congress should demand from proponents of the satellite compulsory license clear and convincing evidence that an extension of the license is necessary to serve the public interest.

2. If Congress reauthorizes the satellite compulsory license, the royalty rates for the year 2004 should be increased to reflect increases that satellite companies have paid in the marketplace for comparable programming.

3. Starting in 2005, the royalty rates should be adjusted annually to keep pace with the license fees paid by satellite companies in the free market for comparable programming services.

4. Copyright owners should have the right to audit satellite companies to ensure that they are accurately reporting and paying their royalties.

BASES FOR COPYRIGHT OWNERS' POSITION

There is no equitable justification for freezing the satellite compulsory license royalty rates for a period of ten years.

- The rate freeze that has been in effect since 1999 is unique among the compulsory licenses. All of the other compulsory licenses in the Copyright Act have procedures for increasing the royalty rates, either automatically or through rate adjustment proceedings. Section 111 of the Copyright Act provides for a rate cable adjustment next year. Satellite companies have unjustifiably received special treatment by not having their royalty rates subject to periodic adjustments.

- Satellite companies themselves have raised the prices that consumers pay to receive distant broadcast signals. For example, according to the web site "Echostar Knowledge Base," which states that it is not affiliated with Echostar Communications, the EchoStar satellite service raised the monthly price of its package of distant "superstation" signals from $4.99 per subscriber in 1998 to $5.99 in 2002 – despite the fact that the royalty cost of distant signal programming was reduced by Congress in 1999. In other words, since 1998 this satellite service has increased its charges for distant broadcast programming by 20 percent, while its copyright royalty payment for that programming has been reduced by 30 percent!!

Copyright owners of retransmitted broadcast programming should not be forced to accept freezes in the satellite compulsory license royalty rates when all other costs to satellite carriers are increasing and the fees charged by satellite carriers to their subscribers are increasing as well.

- The fees that satellite companies pay for comparable programming not subject to compulsory licensing have steadily increased. For example, in 1998, a panel of independent arbitrators determined that broadcast programming transmitted pursuant to the satellite compulsory license was most comparable to the programming on the 12 most widely carried cable networks, such as TNT, CNN, ESPN, USA and Nickelodeon. The license fees for those twelve networks have increased by approximately 60 percent since 1998. A report issued by the General Accounting Office last year found that cable and satellite service programming costs had risen 34 percent in the previous three years. These increases reflect substantial increases in the production costs of entertainment programming. For instance, the average production cost of network half-hour sitcoms increased from $994,000 to $1,227,000 per episode, or 23.4 percent, between 2000 and 2003 alone.

- There is well-established precedent for allowing copyright owners royalty rate increases over the years. When Congress first extended

the satellite compulsory license in 1994, it adopted rates that represented an increase over the rates in the original satellite compulsory license, and provided a mechanism for adjusting those rates in the future to reflect the market value of programming. In the 1999 extension legislation, Congress again adopted rates that represented an increase over those put in place in 1994, even though those rates were less than those that were set by an independent arbitration panel.

Annual adjustments should be built into the royalty rates so that those rates reflect increases in payments for programming made by satellite companies in the free market.

- A provision to allow annual royalty rate adjustments will eliminate the unfairness of discriminatory rate freezes for long periods of time. Building in annual rate adjustments tied to an objective marketplace benchmark will ensure some measure of fair compensation to copyright owners over the life of the compulsory license.

- Periodic royalty fee adjustments will simplify the royalty rate process. With a built-in annual adjustment based on a known benchmark, there will be less potential for dramatic rate changes necessary to make up for long periods without adjustments and greater certainty for copyright owners and satellite companies as well.

- Other compulsory licenses have provisions for periodic royalty rate increases. Section 119 is alone among the royalty-based compulsory licenses in not providing a mechanism for royalty rate increases on a periodic basis.

Copyright owners should have a reasonable opportunity to ensure that satellite companies are properly reporting and calculating the royalties due under the satellite compulsory license.

- Under the current law, copyright owners have no means of verifying royalty payments short of initiating copyright infringement lawsuits. Copyright owners have no ability under the compulsory license to resolve unexplained discrepancies between satellite companies' public statements concerning subscribership and their compulsory license royalty payments. The only current avenue available to copyright owners is to institute wasteful and expensive copyright infringement litigation over what may be honest or simple errors in reporting and calculating royalties. Most cable systems operate under local franchises which require public availability of subscriber charges and number of subscribers served. Satellite carriers are not required to obtain local franchises, nor do they pay local franchise fees which amount to around 5% of gross revenues for most cable operators.

- Other compulsory licenses have provisions for verifying royalty payments. Other compulsory licenses in the Copyright Act, including

Sections 112 and 114, allow copyright owners to inspect the records of the compulsory licensees to ensure compliance with the compulsory license.

- Licensing agreements that satellite companies enter into for other programming routinely contain audit provisions. Inclusion of an audit provision in the satellite compulsory license would not add any new burden on satellite companies, and is a provision that they have been willing to accept in the marketplace.

A JUST COPYRIGHT ROYALTY RATE ADJUSTMENT WILL MORE FAIRLY COMPENSATE PROGRAM OWNERS AND WILL NOT HARM CONSUMERS

The satellite industry claims that satellite carriers pay higher compulsory license royalties than cable systems, and that consumers will be harmed by a compulsory license rate increase. The facts show that both claims are demonstrably false.

These are the real facts.

- If EchoStar or DirecTV paid royalties under the cable compulsory license, they would pay far more than under the satellite

compulsory license. The SBCA's own study admits that "cable and satellite systems are required to use completely different rules and methodologies to calculate and pay copyright royalties to the Copyright Office." Because the cable compulsory license ties royalty payments to subscriber fees, DirecTV and EchoStar would pay a minimum monthly royalty of more than 31 cents per subscriber to carry a single superstation - versus the 19 cents they pay under the satellite compulsory license. These numbers are unrefuted.

- The satellite carriers retransmit far more distant broadcast stations than the average cable system. While the average cable system carries only 2.1 distant signals, EchoStar, one of the largest satellite carriers, offers SIX superstations plus DOZENS of additional network stations.

- If cable systems carried the same number of distant broadcast stations carried by satellite carriers, they too would pay MORE -- in most cases MUCH MORE -- than the satellite carriers pay. As was presented during the House Subcommittee hearing, cable systems in Los Angeles, San Antonio and Montgomery County would pay from 150% to 370% more than their satellite

competitors are now paying in compulsory license royalties. The satellite industry never challenged this evidence.

- The satellite carriers feign concern for their subscribers, but when the compulsory license royalty rates were reduced by 30% for superstations and 45% for network affiliates in 1999, NONE of the savings was passed on to subscribers. It is a fact that satellite charges to subscribers have gone UP since 1999, not down.

- Since the reduction of royalty rates in 1999, there have been no adjustments to the satellite compulsory license rates. If the SHVA were simply extended for another five years, at the end of that period the satellite royalty rates will have been frozen for a period of ten years.

Again, I thank you for this opportunity to present the views of television program copyright owners, and I look forward to responding to your questions.

United States Copyright Office
The Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20540
(202) 707-8380

STATEMENT OF DAVID O. CARSON
GENERAL COUNSEL

Before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

108th Congress, 2d Session
May 12, 2004

Mr. Chairman, Senator Leahy, and distinguished members of the Committee, I appreciate the opportunity to appear before you to testify on the extension of the Satellite Home Viewer Improvement Act of 1999 and the statutory license contained in section 119 of the Copyright Act. As you know, the section 119 license enables satellite carriers to retransmit the signals of over-the-air television broadcast stations to their subscribers for private home viewing upon semi-annual payment of royalty fees to the Copyright Office. Since its enactment in 1988, the Office has collected over $500 million in royalties and distributed them to copyright owners of the over-the-air television broadcast programming retransmitted by satellite carriers. The section 119 license, along with its counterpart for the cable television industry, the section 111 license, have provided the means for licensing copyrighted works to broadcast programming in the television retransmission marketplace.

The Statutory Licensing Regimes for Over-the-Air Broadcast Signals

There are currently three statutory licenses in the Copyright Act, title 17 of the United States Code, governing the retransmission of over-the-air broadcast signals. A statutory copyright license is a codified licensing scheme whereby copyright owners are required to license their works to a specified class of users at a government-fixed price and under government-set terms and conditions. There are one statutory license applicable to cable television systems and two statutory licenses applicable to satellite carriers. The cable statutory license, 17 U.S.C. § 111, allows a cable system to retransmit both local and distant over-the-air radio and television broadcast stations to its subscribers who pay a fee for such service. The satellite carrier statutory

license in section 119 of the Copyright Act, 17 U.S.C. § 119, permits a satellite carrier to retransmit distant over-the-air television broadcast stations (but not radio stations) to its subscribers for private home viewing, while the statutory license in section 122 permits satellite carriers to retransmit local over-the-air television broadcast (but not radio) stations to its subscribers for commercial and private home viewing. The section 111 cable license and the section 122 satellite license are permanent. The section 119 satellite license, however, will expire at the end of this year.

It is difficult to appreciate the reasons for and issues relating to the satellite license without first understanding the cable license that preceded it. Therefore, I will describe the background of the cable license before addressing the satellite license.

1. *The section 111 cable statutory license.*

The cable statutory license, enacted as part of the Copyright Act of 1976, applies to any cable televison system that carries over-the-air radio and television broadcast signals in accordance with the rules and regulations of the Federal Communications Commission (FCC). These systems are required to submit royalties for carriage of their signals on a semi-annual basis in accordance with prescribed statutory royalty rates. The royalties are submitted to the Copyright Office, along with a statement of account reflecting the number and identity of the over-the-air broadcast signals carried, the gross receipts from subscribers for those signals, and other relevant filing information. The Copyright Office deposits the collected funds in interest-bearing accounts with the United States Treasury for later distribution to copyright owners of the over-the-air broadcast programming through the procedure described in chapter 8 of the Copyright Act.

The development of the cable television industry in the second half of the twentieth century presented unique copyright licensing concerns. Cable operators typically carried multiple over-the-air broadcast signals containing programming owned by scores of copyright owners. It was not realistic for cable operators to negotiate individual licenses with numerous copyright owners and a practical mechanism for clearing rights was needed. As a result, Congress created a statutory copyright license for cable systems to retransmit over-the-air broadcast signals. The structure of the cable statutory license was premised on two prominent congressional considerations: first, the perceived need to differentiate between the impact on copyright owners of local versus distant over-the-air broadcast signals carried by cable operators; and, second, the need to categorize cable systems by size based upon the dollar amount of receipts a system receives from subscribers for the carriage of broadcast signals. These two considerations played a significant role in evaluating what economic effect cable systems have on the value of copyrighted works shown on over-the-air broadcast stations. Congress concluded that a cable operator's carriage of local over-the-air broadcast signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over-the-air broadcasting. Therefore, the cable statutory license essentially allows cable systems to carry local

signals for free.[1] Congress also determined that distant signals do affect the value of copyrighted over-the-air broadcast programming because the programming is reaching larger audiences. The increased viewership is not compensated because local advertisers, who provide the principal remuneration to broadcasters enabling broadcasters to pay for programming, are not willing to pay increased advertising rates for cable viewers in distant markets who cannot be reasonably expected to purchase their goods and services. As a result, broadcasters have no reason or incentive to pay greater sums to compensate copyright owners for the receipt of their signals by distant viewers on cable systems. The classification of a cable system by size, based on the income from its subscribers, assumes that only the larger systems which import distant signals have any significant economic impact on copyrighted works.

The royalty payment scheme for the section 111 license is complicated. It stands in sharp contrast to the royalty payment scheme for the section 119 satellite carrier license which uses a straightforward flat rate payment mechanism. To better understand the marked differences between the two licenses, it is necessary to explain how royalties are paid under the section 111 cable license.

Section 111 distinguishes among three sizes of cable systems according to the amount of money a system receives from subscribers for the carriage of broadcast signals. The first two classifications are small to medium-sized cable systems–Form SA-1's and Form SA-2's–named after the statement of account forms provided by the Copyright Office. Semiannually, Form SA-1's pay a flat rate (currently $37) for carriage of all local and distant over-the-air broadcast signals, while Form SA-2's pay a fixed percentage of gross receipts received from subscribers for carriage of broadcast signals irrespective of the number of distant signals they carry. The large systems, Form SA-3's, pay in accordance with a highly complex and technical formula, based in large part on regulations adopted by the FCC that governed the operation of cable systems in 1976, the year that section 111 was enacted. This formula requires systems to distinguish between carriage of local and distant signals and to pay accordingly. The vast majority of royalties paid under the cable statutory license come from Form SA-3 systems.

The royalty scheme for Form SA-3 systems employs the statutory device of the distant signal equivalent (DSE). The status of an over-the-air broadcast station as either local or distant to a cable system is determined by application of two sets of FCC regulations: the "must-carry" rules for over-the-air broadcast stations in effect on April 15, 1976, and a station's television market as currently defined by the FCC. A signal is distant for a particular cable system when that system would not have been required to carry the station under the FCC's 1976 must-carry rules and the system is not located within the station's local television market.

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[1] It should be noted, however, that cable systems that carry only local signals and no distant signals (a rarity) are still required to submit a statement of account and pay a basic minimum royalty fee. All cable systems must pay at least a minimum fee for the privilege of using the section 111 license.

Cable systems pay for carriage of distant signals based upon the number of distant signal equivalents (DSE's) they carry. The statute defines a DSE as "the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of a primary transmitter of such programming." 17 U.S.C. § 111(f). A DSE is computed by assigning a value of one to a distant independent over-the-air broadcast station, and a value of one-quarter to distant noncommercial educational and network stations, which have a certain amount of nonnetwork programming in their broadcast days. A cable system pays royalties based upon a sliding scale of percentages of its gross receipts depending upon the number of DSE's it carries. The greater the number of DSE's, the higher the total percentage of gross receipts and, consequently, the larger the total royalty payment.

As noted above, operation of the cable statutory license is intricately linked with how the FCC regulated the cable industry in 1976. The FCC regulated cable systems extensively, limiting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where a local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules). In 1980, the FCC deregulated the cable industry and eliminated both the distant signal carriage and syndicated exclusivity ("syndex") rules. Cable systems were now free to import as many distant signals as they desired.

The Copyright Royalty Tribunal, pursuant to its statutory authority, and in reaction to the FCC's deregulation, conducted a rate adjustment proceeding for the cable statutory license to compensate copyright owners for the loss of the distant signal carriage and syndex rules. This rate adjustment proceeding established two new rates applicable only to Form SA-3 systems. 47 Fed. Reg. 52,146 (1982). The first new rate, to compensate for the loss of the distant signal carriage rules, was the adoption of a royalty fee of 3.75% of a cable system's gross receipts from subscribers, for over-the-air broadcast programming for carriage of each distant signal that would not have previously been permitted under the former distant signal carriage rules.

The second rate, adopted by the Copyright Royalty Tribunal to compensate for the loss of the syndex rules, is known as the syndex surcharge. Form SA-3 cable systems must pay this additional fee when the programming appearing on a distant signal imported by the cable system would have been subject to black-out protection under the FCC's former syndex rules.[2]

Since the Tribunal's action in 1982, the royalties collected from cable systems have been divided into three categories to reflect their origin: 1) the "Basic Fund," which includes all royalties collected from Form SA-1 and Form SA-2 systems, and the royalties collected from Form SA-3 systems for the carriage of distant signals that would have been permitted under the FCC's former distant carriage rules; 2) the "3.75% Fund," which includes royalties collected

[2] Royalties collected from the syndex surcharge later decreased considerably when the FCC reimposed syndicated exclusivity protection in certain circumstances.

from Form SA-3 systems for distant signals whose carriage would not have been permitted under the FCC's former distant signal carriage rules; and 3) the "Syndex Fund," which includes royalties collected from Form SA-3 systems for carriage of distant signals containing programming that would have been subject to black-out protection under the FCC's former syndex rules.

In order to be eligible for a distribution of royalties, a copyright owner of over-the-air broadcast programming retransmitted by one or more cable systems on a distant basis must submit a written claim to the Copyright Office. Only copyright owners of nonnetwork over-the-air broadcast programming are eligible for a royalty distribution. Eligible copyright owners must submit their claims in July for royalties collected from cable systems during the previous year. Once claims have been processed, the Librarian of Congress determines whether there are controversies among the parties filing claims as to the proper division of the royalties. If there are no controversies–meaning that the claimants have settled among themselves as to the amount of royalties each claimant is due–then the Librarian distributes the royalties in accordance with the claimants' agreement(s) and the proceeding is concluded. The Librarian must initiate a Copyright Arbitration Royalty Panel (CARP) proceeding in accordance with the provisions of chapter 8 of the Copyright Act for those claimants who do not agree.

The section 111 statutory license is not the only means for licensing programming on over-the-air broadcast stations. Copyright owners and cable operators are free to enter into private licensing agreements for the retransmission of over-the-air broadcast programming. Private licensing most frequently occurs in the context of particular sporting events, where a cable operator wishes to retransmit a sporting event carried on a distant broadcast station, but does not wish to carry the station on a full-time basis.[3] The practice of private licensing is not widespread and most cable operators rely exclusively on the cable statutory license to clear the rights to over-the-air broadcast programming.

2. *The section 119 satellite carrier statutory license.*

The cable statutory license was enacted as part of the Copyright Act of 1976 and is a permanent license. In the mid-1980's, the home satellite dish industry grew significantly, and satellite carriers had the ability to retransmit over-the-air broadcast programming to home dish owners. In order to facilitate this business and provide rural America with access to television programming, Congress passed the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667 (1988), which created the satellite carrier statutory license found in 17 U.S.C. § 119.

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[3] Under the cable statutory license, a cable operator that carries any part of an over-the-air broadcast signal, no matter how momentary, must pay royalties for the signal as if it had been carried for the full six months of the accounting period.

The section 119 license is similar to the cable statutory license in that it provides a means for satellite carriers to clear the rights to over-the-air television broadcast programming (but not radio) upon semi-annual payment of royalty fees to the Copyright Office. The section 119 license differs from the cable statutory license, however, in several important aspects. First, the section 119 license was enacted to cover only distant over-the-air television broadcast signals. In 1988, and for many years thereafter, satellite carriers lacked the technical ability to deliver subscribers their local television stations. Local signals are not covered by the section 119 license. Second, the calculation of royalty fees under the section 119 license is significantly different – and much simpler – than it is under the cable statutory license. Rather than determine royalties based upon the complicated formula of gross receipts and application of outdated FCC rules, royalties under the section 119 license are calculated on a flat, per subscriber per signal basis. Over-the-air broadcast stations are divided into two categories: superstation signals (i.e., commercial independent over-the-air television broadcast stations), and network signals (i.e., commercial televison network stations and noncommercial educational stations); each with its own attendant royalty rates. Satellite carriers multiply the respective royalty rate for each signal by the number of subscribers who receive the signal during the six-month accounting period to calculate their total royalty payment. Congress set the rate for a superstation in 1988 at 12 cents per subscriber per month and the rate for a network station at 3 cents per subscriber per month. These rates were based on an approximation of what large Form SA-3 cable systems paid for these signals in the mid-1980's.[4]

Third, while satellite carriers may use the section 119 license to retransmit superstation signals to subscribers located anywhere in the United States, they can retransmit network signals only to subscribers who reside in "unserved households." An unserved household is defined as one that cannot receive an over-the-air signal of Grade B intensity of a network station using a conventional rooftop antenna. 17 U.S.C. § 119(d).[5] The purpose of the unserved household limitation is to protect a local network broadcaster whose station is not provided by a satellite carrier from having its viewers watch another affiliate of the same network on their satellite television service, rather than watch the local network affiliate.

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[4] Congress also provided for an arbitration proceeding (the forerunner to the Copyright Arbitration Royalty Panel process) in 1991 which adjusted these rates to 6 cents per subscriber per month for a network stations, 14 cents per subscriber per month for a superstation that would not have been subject to the FCC's syndicated exclusivity rules, and 17.5 cents per subscriber per month for a superstation that would have been subject to the FCC's syndicated exclusivity rules. The reason for the dual rate for superstations was to compensate copyright owners for loss of exclusivity protection since the FCC syndicated exclusivity rules only applied to cable and not to satellite at that time.

[5] Certain exemptions to the unserved household limitation were added by the Satellite Home Viewer Improvement Act of 1999, including recreational vehicles and commercial trucks, certain grandfathered subscribers, subscribers with outdated C-band satellite dishes and subscribers obtaining waivers from local network broadcasters.

The section 119 satellite carrier statutory license created by the Satellite Home Viewer Act of 1988 was scheduled to expire at the end of 1994, at which time satellite carriers were expected to be able to license the rights to all over-the-air broadcast programming that they retransmitted to their subscribers. However, in 1994 Congress reauthorized the section 119 license for an additional five years. In order to assist the process of ultimately eliminating the section 119 license, Congress provided for a Copyright Arbitration Royalty Panel (CARP) proceeding to adjust the royalty rates paid by satellite carriers for network stations and superstations. Congress also changed the standard for setting the satellite royalty. Unlike the original standard, and unlike the royalties for cable systems, which pay fixed royalty rates adjusted only for inflation, the standard set by Congress in 1994 mandated that satellite carrier rates should be adjusted to reflect marketplace value. It was thought that by compelling satellite carriers to pay statutory royalty rates that equaled the rates they would most likely pay in the open marketplace, there would be no need to further renew the section 119 license and it could expire in 1999.

The period from 1994 to 1999 was the most tumultuous in the history of the section 119 license. The satellite industry expanded its subscriber base considerably during this time and provided many of these subscribers with network stations in violation of the unserved household limitation. Broadcasters issued challenges, lawsuits were brought, and many satellite customers had their network service terminated. Angry subscribers wrote their congressmen and senators protesting the loss of their satellite-delivered network stations, focusing attention on the fairness and application of the unserved household limitation. In the meantime, the Library of Congress conducted a CARP proceeding to adjust the royalty rates paid by satellite carriers. Applying the new marketplace value standard as it was required to do, the CARP not surprisingly raised the rates considerably. The satellite industry, with less than 10 million subscribers, was required to pay more in statutory royalty fees than the cable industry, which had nine times the number of subscribers. The satellite industry and its customers were irate.

Congress's response to the furor over the section 119 license was the Satellite Home Viewer Improvement Act of 1999. The Act codified a new vision for the statutory licensing of the retransmission of over-the-air broadcast signals by satellite carriers. The heart of the conflict over the unserved household limitation – indeed, the reason for its creation – was the inability of satellite carriers (unlike cable operators) early on to provide their subscribers with their local television stations. By 1999, satellite carriers were beginning to implement local service in some of the major television markets in the United States. In order to further encourage this development, Congress created a new, royalty-free license.[6] Congress also made several changes to the unserved household limitation itself. The FCC was directed to conduct a rulemaking to set specific standards whereby a satellite subscriber's eligibility to receive service of a network station

[6] The section 122 statutory license is discussed *infra*.

could accurately be predicted.[7] For those subscribers that were not eligible for network service, a process was codified whereby they could seek a waiver of the unserved household limitation from their local network broadcaster. In addition, three categories of subscribers were exempted from the unserved household limitation: owners of recreational vehicles and commercial trucks, provided that they supplied certain required documentation; subscribers receiving network service which was terminated after July 11, 1998, but before October 31, 1999, and did not receive a strong (Grade A) over-the-air signal from their local network broadcaster; and subscribers using the old-style large C-band satellite dishes.

In reaction to complaints about the outcome of the 1997 CARP proceeding that raised the section 119 royalty rates, Congress abandoned the concept of marketplace value royalty rates and reduced the CARP-established royalty fee for network stations by 45 percent and the royalty fee for superstations by 30 percent. Finally, the Satellite Home Viewer Improvement Act of 1999 extended the revised section 119 statutory license for five years – until midnight on December 31 of this year.

3. *The section 122 satellite carrier statutory license.*

The section 122 satellite carrier statutory license completes the regime for satellite retransmission of over-the-air television broadcast stations. While the section 111 license permits cable systems to retransmit both local and distant over-the-air television broadcast signals, such a privilege is parsed among two statutory licenses for the satellite industry. As discussed above, the section 119 license covers retransmissions of distant signals. The section 122 license, first enacted in 1999, covers the retransmission of local signals and, unlike the section 119 license, is permanent. The section 122 license is royalty free, and is conditioned on a satellite carrier carrying all local over-the-air television stations within a given market. In other words, a satellite carrier may not pick and choose which stations in a given local market it wishes to provide to its subscribers residing in that market.

Should the Section 119 License be Extended?

The Copyright Office has traditionally opposed statutory licensing for copyrighted works, preferring instead that licensing be determined in the marketplace by copyright owners through the exercise of their exclusive rights. However, in the Office's report to the Senate and House Judiciary Committees before to the passage of the Satellite Home Viewer Improvement Act of 1999, we stated that "the satellite carrier industry should have a compulsory [statutory] license to retransmit broadcast signals as long at the cable industry has one." *A Review of the Copyright*

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[7] The Commission confirmed that the Grade B signal intensity standard provided an adequate television picture when received with a conventional rooftop receiving antenna, and adopted a predictive model to determine when subscribers likely received an over-the-air signal of Grade B intensity. *Report*, 15 FCC Rcd 24321 (Nov. 29, 2000)(Grade B intensity); *First Report and Order*, 15 FCC Rcd 12118 (May 26, 2000)(predictive model).

Licensing Regimes Covering Retransmission of Broadcast Signals (Report of the Register of Copyrights, August 1, 1997) at 33. Nothing has changed since 1997 to alter this point of view, and there is no reason that would justify retaining the section 111 cable statutory license while abandoning the section 119 satellite carrier statutory license. Consequently, the Copyright Office supports extension of section 119 at this time.

Should There be a Royalty Adjustment?

A statutory license is an abrogation of the exclusive rights granted to copyright owners under section 106 of the Copyright Act. When, in the view of the Congress, it is necessary to enact a statutory license, the Copyright Office is of the firm position that copyright owners whose works are subject to the license should be compensated fairly for their use. Fair compensation is, in our view, the price of a license that a willing buyer and a willing seller would negotiate in the open marketplace – i.e., fair market value.

The Copyright Arbitration Royalty Panel (CARP) that adjusted the section 119 satellite rates in 1999 applied the fair market value standard then set forth in the law and determined the royalty fee for a superstation and a network station to be 27 cents per subscriber per month for each signal. The Librarian of Congress and the United States Court of Appeals for the District of Columbia Circuit upheld this determination, but satellite carriers and many of their subscribers objected, and when Congress reauthorized the section 119 license in 1999, the fair market value rates determined by the CARP were reduced by 45 percent for network stations and 30 percent for superstations.[8] These rates have remained in effect for the last five years without any adjustment.

One proposal for adjustment of the section 119 rates is to provide for a cost of living adjustment over the last five years, followed by an annual cost of living adjustment. We believe that such an adjustment by itself is advisable and fair. However, a cost of living adjustment will not raise the section 119 rates to a level commensurate with fair market value, which should be the effective standard for adjusting section 119 royalty rates. Consequently, the Office supports inclusion of a provision to permit a new determination of the fair market value of broadcast programming retransmitted by satellite carriers and to set new royalty rates based on that fair market value.

Should Satellite Carriers be Permitted to Provide Subscribers with their Significantly Viewed Television Broadcast Stations?

One issue that has received particular attention during this session involves satellite delivery of "significantly viewed" over-the-air television broadcast stations. Before addressing the merits of permitting carriers to deliver such signals, a brief discussion of the history and concept of significantly viewed stations is in order.

As discussed above, the cable statutory license was created at a time when the Federal Communications Commission heavily regulated the number and character of television signals that a cable system could carry. Cable systems were required to carry local stations and, depending

[8] These reductions result in an effective rate of 14.85 cent for a network station, and 18.9 cents for a superstation.

upon their particular circumstances, could carry up to three distant stations. However, additional distant stations could be carried provided that they were "significantly viewed" in the communities served by the cable system. The FCC determined when a broadcast station was significantly viewed in a particular community, relying on measurement of over-the-air viewing of the signal in the community in combination with several other factors. The significantly viewed station list was created in 1972 and has been added to throughout the years, most recently in 2000. Both television broadcasters and cable operators are permitted to petition the FCC for a determination as to whether a particular broadcast station is significantly viewed in one or more communities.

The concept of "significantly viewed" has import for the cable copyright license. Cable systems are permitted to carry significantly viewed television stations without incurring the royalty fee normally attributable to distant signals. Cable systems therefore get the added benefit of carrying additional stations without incurring additional copyright fees.

Satellite carriers have expressed interest in having the concept of "significantly viewed" stations applied to the section 119 license. The particular attraction is that it will allow satellite carriers to provide additional network stations to their subscribers without running afoul of the unserved household restriction contained in section 119. As with the cable license, satellite carriers would be allowed to provide subscribers with their significantly viewed stations without a copyright fee. Satellite carriers would, however, only be allowed to provide significantly viewed stations to subscribers receiving service of local signals from that carrier. This would ensure that any subscriber receiving a "significantly viewed" signal will also be able to receive the signal of the local network affiliate.

The Copyright Office is not opposed to the inclusion of carriage of significantly viewed television stations in the section 119 license, particularly in light of the fact that it has had a long-time application in the cable license. Allowing carriage of significantly viewed stations, particularly network signals, will permit many satellite subscribers to receive the stations that they have traditionally watched over-the-air for free in their respective communities. The concept of "significantly viewed" is well established at the FCC and the current significantly viewed station list has remained unchanged since 2000. It is important to note, however, that the concept of significantly viewed stations is not a mechanism for expanding the reach of otherwise distant signals that have not been traditionally viewed in a community. In other words, if a station – and in particular a network station – has not been traditionally been able to be watched over-the-air in a community, the satellite subscribers in that community would not be able to gain access to the station by virtue of adoption of a rule permitting delivery of a "significantly viewed" signal.

A Copyright Office Study of the Statutory Licenses for Cable and Satellite.

The legislation being considered in the House of Representatives would require the Copyright Office to compare and contrast the statutory licenses for the retransmission of television broadcast signals and consider whether they should be harmonized. In addition, the Office would

be asked to examine the fees charged to subscribers of cable systems and satellite carriers for the service of broadcast signals and compare those fees to the copyright royalty fees paid for the privilege of carrying such signals to determine whether any "savings" are passed onto subscribers as a result of statutory licensing. This aspect of the study is troubling for three reasons.

First, the Copyright Office lacks the means to obtain the necessary information. We do not have subpoena power or other regulatory authority to demand complete and accurate information concerning cable and satellite revenues. While cable systems do submit data on the gross revenues they earn for retransmission of broadcast stations, satellite carriers do not provide such information because it is wholly unnecessary to the calculation of their royalty fees. Furthermore, even though cable systems provide the Copyright Office with information on gross revenues, they do not provide us with information regarding the costs of providing broadcast signals. Without such information, a determination as to whether "savings" are passed onto subscribers is not possible.

Second, the concept of "savings" is nonspecific and assumes a difference between actual and perceived cost. If what is meant by "savings" is the lesser fees that the cable and satellite industry pay by virtue of enjoying statutory licenses as opposed to negotiating private licenses, it must be remembered there are no private licenses precisely because of these licenses. In other words, it is not possible for the Copyright Office to determine what satellite, and in particular cable, might be paying for broadcast stations if they did not have statutory licensing. Without being able to determine marketplace rates for broadcast stations for cable and satellite, it is not possible to measure the value of "savings" that these industries enjoy as a result of statutory licensing.

Third, matters regarding the rates charged by cable systems are within the jurisdiction of the Federal Communications Commission, which engages in considerable regulation of the cable industry. The Office is concerned that its examination of cable and satellite rates and revenues without involvement of the FCC may yield results that are not only inaccurate but are inconsistent with FCC policy or objectives. Consequently, if the "savings" provision of the study is retained, the Office requests that it work jointly with the FCC in completing that portion of the study.

We look forward to working with you, Mr. Chairman and members of the Committee, to resolve these and other matters regarding the extension of the section 119 satellite license. Thank you.

UNITED STATES SENATOR • OHIO
Mike DeWine

FOR IMMEDIATE RELEASE
MAY 12, 2004

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HEARING STATEMENT [AS PREPARED]
JUDICIARY COMMITTEE
"THE SATELLITE HOME VIEWER EXTENSION ACT"
U.S. SENATOR MIKE DEWINE
MAY 12, 2004

Thank you, Mr. Chairman, for holding today's hearing on S. 2013, the Satellite Home Viewer Extension Act of 2004, which is the reauthorization of the Satellite Home Viewer Improvement Act, otherwise known as SHVIA. I am pleased to be an original sponsor of S. 2013, along with you, Senator Leahy, and Senator Kohl.

The SHVIA has been the foundation of the competitive relationship between cable and satellite providers. Appropriate management of this relationship is critical to bringing lower prices and more choices to consumers, and today's hearing is an important step in that process. The SHVIA, which became law in 1999, has played a critical role in spurring competition in the paid TV market. It created, among other things, a compulsory copyright license for satellite TV, allowing the satellite companies to re-transmit local network TV signals within each station's local TV market, often referred to as "local-into-local" service.

This license, combined with rapid technological advances by satellite TV, has led to more and more viewers being able to see their own local TV network affiliates as part of their satellite TV package. For example, "local-into-local" service is now available in my home state of Ohio in the cities of Cleveland, Cincinnati, and Columbus. Additionally, EchoStar offers "local-into-local" service into Dayton, and DIRECTV -- with the recent launch of a new satellite by the end of the year -- will also be offering this service into Dayton. I am hoping that other Ohio cities, like Toledo and Youngstown, will be getting this service soon.

Since 1999, the number of subscribers nationwide to satellite TV has increased from 10 million to 22 million -- partly as a result of the increased capacity to provide local signals.
As Chairman of the Antitrust Subcommittee I have worked with Ranking Member Kohl, as well as Chairman Hatch and Ranking Member Leahy, to help competition flourish in the pay-TV market, and I am pleased to see that the SHVIA has helped to make satellite TV a more appealing option for consumers. In my view, the 1999 Act is in need of some fine-tuning -- not a complete overhaul. The basic framework is in place to promote competition in the paid TV

-more-

market, and we should keep this framework in place, with an eye toward strengthening it where needed. We should take advantage of this opportunity to make sure that the law has kept up with technological advances since 1999, that "localism" in broadcasting is being promoted, and that all stakeholders are being treated equally -- including, especially, consumers.

I look forward to hearing the testimony today of our witnesses and working with my colleagues to pass this important piece of legislation.

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EXECUTIVE SUMMARY
TESTIMONY OF CHARLES W. ERGEN
Before the
U.S. SENATE
COMMITTEE ON JUDICIARY

The Satellite Home Viewer Improvement Act ("SHVIA") helped create a more level playing field for cable and satellite TV providers in the multichannel video programming distributor ("MVPD") market. But there are still many significant differences in the regulatory treatment of cable and satellite that affect their relative attractiveness to consumers. Congress should take the following steps to alleviate these regulatory differences and ensure that satellite can compete vigorously with cable in the MVPD market.

- Section 119 of the Copyright Act, which allows satellite carriers to transmit distant network programming to "unserved households," should be reauthorized and made permanent like the license governing cable operators. Eligible distant signal subscribers also should not be denied the choice as to whether to watch their local broadcaster or a distant broadcaster on their satellite platform, if local service becomes available via satellite in their area.

- Congress should extend the "grandfather" clause in Section 119 so that households that subscribed to distant network signals prior to October 31, 1999 can continue to receive such signals.

- The lack of parity between the royalty mechanisms that apply to competing MVPDs, and between the resulting royalty rates should be addressed in this SHVIA reauthorization. The rate satellite pays *today* yields generally higher payments than the cable mechanism. Satellite should not be subject to a cost of living increase that looks back and calculates a cumulative increase based on inflation for the past five years, followed by a new CARP process to relegate rates. This will further exacerbate the disparity and put satellite carriers at a further competitive disadvantage vis-à-vis cable.

- By extending the compulsory license to allow satellite TV providers to offer DTV programming to households that are not served with a local over the air digital signal, Congress would increase demand for digital television sets among satellite TV subscribers. This will spur the lagging DTV transition and help firm up the December 31, 2006 DTV transition deadline set for broadcasters to return their analog spectrum.

- Regulatory parity between cable and satellite may be improved (but still not completely alleviated) by giving satellite TV providers the ability to retransmit "significantly viewed"

stations within a community. Congress should afford the same market modification opportunities to satellite that cable systems have.

- The sunset on the non-exclusivity and good faith requirements for retransmission consent should be eliminated. These limitations on broadcasters' ability to negotiate retransmission consent agreements are essential for the preservation of a competitive MVPD market and for keeping video programming prices low.

- Congress should not outlaw EchoStar's two-dish plan for complying with its must-carry obligations, nor require an unrealistic compressed time schedule for transitioning local markets to one dish.

COMMITTEE ON JUDICIARY
U.S. SENATE

HEARING
ON

"REAUTHORIZATION OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT"

Wednesday, May 12, 2004
226 Dirksen Senate Office Building

Testimony of Charles Ergen
Echostar Communications Corporation
Chairman and Chief Executive Officer

TESTIMONY OF CHARLES W. ERGEN
Chairman and Chief Executive Officer
EchoStar Communications Corporation
before the
U.S. Senate Committee on Judiciary
May 12, 2004

Thank you Chairman Hatch, Senator Leahy, and distinguished members of the Committee, 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 Charles Ergen, and I am Chairman and Chief Executive Officer of EchoStar Communications Corporation.

The reauthorization of the Satellite Home Viewer Improvement Act ("SHVIA") offers Congress an excellent opportunity to preserve and extend the pro-competitive measures in the current Act, as well as to improve regulatory parity between cable and satellite TV providers. While SHVIA helped create a more level playing field for cable and satellite TV providers in the multichannel video programming distributor ("MVPD") market, there are still many significant differences in the regulatory treatment of cable and satellite that affect their relative attractiveness to consumers. In reauthorizing and revising SHVIA, Congress should take steps to eliminate these regulatory differences and ensure that satellite carriers can continue to compete vigorously with cable in the MVPD market. At the same time, care should be taken not to impose new requirements on satellite carriers that further disadvantage them relative to their primary MVPD competitors, the dominant cable industry.

Reauthorization of Section 119 – Carriage of Distant Network Signals

Under Section 119 of the Copyright Act, which is set to expire on December 31, 2004, satellite carriers are allowed to make distant network programming available to "unserved

households." Satellite carriers' ability to provide distant signals is of crucial importance to millions of consumers, mostly in rural areas, who cannot receive an adequate, over-the-air local broadcast signal. One of the reasons there are so many unserved households is because the cost to broadcasters of serving these additional households often exceeds the advertising revenue that the broadcasters hope to generate. To ensure that such households continue to have access to distant network signals from their satellite providers, we urge you to reauthorize Section 119 and to make the statutory license permanent. Cable operators currently enjoy a permanent license with respect to distant signals. Satellite carriers should enjoy the same right.

Broadcasters have asked you to limit our ability to provide distant signals in markets in which we provide local-into-local service. We oppose this change to the distant signal license. Consumers who do not have access to an over-the-air signal, and who have to pay for their television service, should have a choice as to whether to watch their local broadcaster or a distant broadcaster on their satellite platform. Just as a consumer in Kalamazoo, Michigan can purchase either the Kalamazoo Gazette or the Los Angeles Times, satellite subscribers who qualify under the current law should continue to have this same basic choice. It is not right to penalize satellite carriers for making the substantial investments necessary to provide local-into-local service by taking away their distant signal rights. Nor is it right to penalize consumers by taking away an option they have today merely because a satellite carrier has worked to make available to them an additional option.

By reauthorizing the distant signal license, you will also be providing a spur to broadcasters to improve and extend their over-the-air signal to reach as many households as possible. In contrast, taking away that license would remove any such incentive for broadcasters

who find it less costly to serve unserved households by cable or satellite than to improve their signals.

Section 119 also permits satellite carriers to retransmit non-network broadcast stations (i.e. superstations) to satellite subscribers. Superstations are a staple of cable line-ups and their availability on satellite systems has been a key driver of growth in the satellite television industry. Reauthorization of Section 119 will ensure that satellite carriers will continue to have the same opportunity as cable to offer such popular programming to satellite subscribers.

Also, Congress should extend the "grandfather" clause in Section 119 so that households that subscribed to distant network signals prior to October 31, 1999 can continue to receive such signals. We have hundreds of thousands of satisfied, long-term subscribers that have come to rely on this provision. There is no reason to disenfranchise them now.

And Congress should not place a new deadline on eligible consumers' ability to receive distant stations. Congress has now had long enough experience with the distant station license to appreciate its benefits. The license should become permanent.

Royalty Rates

The lack of parity between the royalty mechanisms that apply to competing MVPDs, and between the resulting royalty rates, is also of major concern to EchoStar. First, cable enjoys a permanent compulsory license that includes a permanent copyright structure. The royalty rates that satellite carriers pay, on the other hand, are subject to review by Congress every few years, along with the temporary licenses that Congress has been enacting since 1988, and to a varying methodology for computing rates. This lack of permanence fosters uncertainty.

Second, royalty rates under the cable compulsory license are calculated according to a statutory formula and may be adjusted for inflation only—once every 5 years. Satellite carriers, on the other hand, have been subject to a process of rate adjustments by a Copyright Arbitration Royalty Panel. In 1997, this process led to such excessively high rates that Congress had to step in and reduce them. Third, while it is difficult to compare the rates that cable and satellite carriers pay because of the complexities of the cable formula, the net effect has been that satellite carriers pay much more than cable systems in the majority of cases. I understand that some parties have presented isolated hypothetical examples where the reverse may be the case. The problem is that these mixes of distant stations appear to be aberrant and not to correspond to the typical case. But there is a simpler way to solve this Gordian knot than by weighing studies based on two or three examples: impose on cable systems too, whatever rates you decide to impose on satellite carriers. A regime of uniform rates and a uniform method for adjusting them would achieve parity between satellite and cable automatically. It would be useful to solicit the cable industry's views on this proposal.

You should also resist requests to relegate rate-setting to a new CARP process. CARP proceedings are cumbersome and protracted, and their outcome is totally uncertain. Satellite carriers would have to price distant stations in their offerings to consumers with the hovering threat of significantly higher royalty rates that may make these offerings uneconomical. In addition, the manner in which prior CARPs have implemented the statutory standards has been misguided. The last CARP derived the excessive rates that I mentioned above mainly by looking at the rates paid by cable systems, not for the same distant broadcast stations, but rather for the most popular cable networks, such as CNN and ESPN. This is to compare apples to oranges. Among many other factors, cable networks give distributors valuable "ad avails," or free ad time,

in exchange for the fees they receive. By contrast, in the case of distant broadcast stations, satellite carriers are prohibited by the terms of the Section 119 license from deleting any content and inserting their own ads. In sum, by relegating the rate-setting function to a CARP process, you could be paving the path for another unreasonable result that you might have to step in again and try to rectify, as you had to do in 1999. I urge you not to go down that path.

As for cost of living adjustments to the current rates, they might be an appropriate adjustment mechanism on a going forward basis. I urge you, however, not to impose a cost of living increase that looks back and calculates a cumulative increase based on inflation for the past five years. In addition to the customary inequities of retroactivity, the problem here is that the base rate was too high to start with in 1997, and remains too high today. As I have mentioned, that rate satellite pays *today* yields generally higher payments than the cable mechanism. To compound it with a cumulative five year look back adjustment would further exacerbate the disparity and put satellite carriers at a further competitive disadvantage vis-à-vis cable.

Transition to Digital Television

The reauthorization of SHVIA also offers Congress an opportunity to broaden the existing definition of "unserved household" so that consumers who cannot receive a digital television (DTV) signal from their local broadcaster will have the ability to receive it from their satellite TV provider. This will spur the transition to digital TV broadcasting, which has lagged to date despite the statutory deadline of December 31, 2006 for the relinquishment of analog TV spectrum. Specifically, a significant number of viewing households (as of February 2004, all except 17 out of 210 markets) still lack access to a full complement (ABC, CBS, NBC, FOX,

and PBS) of full-power digital broadcasts from the networks serving their areas. And while the broadcasters have told Congress that only a handful of network stations have failed to build DTV stations that operate at full power, a study the NAB recently presented to the FCC contradicts this claim – even according to that partisan study, more than half the operational DTV stations are not operating at their licensed power level. Consumers cannot reasonably be expected to make the investment in DTV equipment if they cannot even receive DTV signals.

By extending the compulsory license to allow satellite TV providers to offer DTV programming to households that are not served with a local over the air digital signal, Congress would increase demand for digital television sets among satellite TV subscribers. With more digital TV sets in the market, broadcasters will have increased incentives to make their digital signals available to more households sooner. To a significant extent, the rate of DTV adoption has been slow because consumers are not willing to buy DTV sets until there is more DTV programming, while broadcasters are not willing to provide DTV programming until more consumers have DTV sets. Allowing satellite carriers to beam distant DTV signals to unserved households would help leverage the deployment of DTV in one part of the country into other parts of the country that have no such service. By accelerating the rate of DTV adoption in this way, the vicious cycle that impedes DTV deployment may at last be broken.

To achieve this, however, it is not enough to ask the FCC to submit a report to Congress about an appropriate predictive model. First of all, this is a "death by committee" approach: it would ensure that nothing happens to expedite the DTV transition until after the deadline for the transition has elapsed.

Second, no model is necessary in cases where the local broadcaster has not built any DTV facilities whatsoever. In those cases, there is no need for a prediction – *all* of the

households that the broadcaster was supposed to reach with a DTV signal are certainly unserved. Consequently, Congress should allow immediate distant HDTV service to those DTV unserved households for which no prediction is necessary, and should require the FCC to establish a DTV predictive model by expedited rulemaking for all other cases.

Not surprisingly, this plan is vehemently opposed by broadcast interests. But these same broadcasters are busily developing lots of creative ideas for extracting all the benefits offered by digital spectrum, including a plan to use their DTV spectrum to set up wireless cable systems to compete with satellite and traditional cable systems. At the same time, they are failing to hold up their end of the bargain with the American public by providing full power DTV and returning the analog spectrum on a timely basis. The broadcasters should not be permitted to reap all of the benefits of digital, while shirking their obligations. Congress should adopt our proposal to hasten the digital transition.

Determining Which Households are "Unserved Households"

Congress also has an opportunity to improve the process for determining which households are "unserved households" under Section 119 in the following ways.

First, it can improve the model used to predict whether a household can receive a local network signal of grade B intensity so as to take into account interference conditions and "multi-path" transmission problems. Currently, the Individual Location Longley Rice ("ILLR") model predicts many households to be served when in fact they cannot receive an adequate signal because local interference conditions have weakened the signal. In addition, even when the signal strength is adequate, a household may receive an unwatchable picture as a result of "ghosting" caused by multi-path transmissions. Such households should be treated as unserved.

Congress should also consider directing the FCC to increase the grade B intensity threshold to reflect modern consumer expectations about picture clarity. The current standard was adopted in the 1950s and based on consumer quality expectations from that era of hazy TV reception. Modern consumer expectations are considerably higher.

Second, Congress could improve SHVIA's waiver and signal strength testing process, which is not working as envisioned. Five years of experience with this process shows us that it often leads to a bad customer experience. In some instances, the law is unclear; in other cases consumers have unrealistic expectations; and in still other cases, DBS providers and their customers are subject to the whims of broadcasters. We recommend narrowing the waiver process to permit only consumers predicted as receiving *weak* Grade B signals to request a signal strength test. We also recommend an explicit clarification of what we believe to be the current law: that broadcasters may not revoke waivers once given so long as a subscriber receives continuous service from the DBS provider – the customer should not be victim to whimsical rescissions of previously granted waivers. Further, the rules should be clarified to eliminate consumer confusion when a subscriber is predicted to receive the same network signal from two local network affiliates in different DMAs. In those cases, a waiver should be required 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.

Third, Congress should clarify that where there is not the full complement of four network stations in a given DMA (*e.g.* ABC, CBS, NBC are present, but not Fox), then satellite providers can import a distant signal of the missing network into that DMA, even though some households in the DMA might be predicted to be served by an affiliate of that network in a neighboring DMA.

Carriage of Broadcast Stations

Significantly Viewed Stations. We encourage the Senate to improve regulatory parity between cable and satellite by giving satellite TV providers the ability to retransmit "significantly viewed" stations within a community, and afford the same market modification opportunities that cable systems have. Significantly viewed signals should also be exempted from network nonduplication, syndicated exclusivity and sports blackout rules in the communities where those stations are significantly viewed. We note that, even with these changes, cable operators will still enjoy a broader copyright license than the license of Section 119, but these adjustments will help lessen the gap.

Retransmission Consent. The Committee should also eliminate the sunset on the non-exclusivity and good faith requirements for retransmission consent. Currently, for local stations that elect retransmission consent rather than must-carry, Section 325(b)(3)(C)(ii) of SHVIA and the Commission's rules prohibit exclusive retransmission consent agreements and require the local station to negotiate retransmission agreements in good faith. These requirements sunset on January 1, 2006.

EchoStar considers these limitations on broadcasters' ability to negotiate retransmission consent agreements to be essential for the preservation of a competitive MVPD market and for keeping video programming prices low. Exclusive retransmission consent agreements not only can result in limiting the distribution of a local station's signal to a single MVPD (rather than all of the providers that choose to carry that signal), but may even give that unfair advantage to an affiliate of the local broadcaster. In addition, elimination of the good faith requirement might further encourage troublesome current practices such as bundling of programming networks.

Many local broadcast stations are now controlled by conglomerates with many other video programming properties. EchoStar's experience has been that retransmission consent negotiations provide such companies with the opportunity every three years to renegotiate video programming deals or to foist on MVPDs additional video programming that consumers do not want as a condition of retransmission consent for important local broadcast stations. While the good faith requirement has not been very effective in preventing such practices and may need to be strengthened, EchoStar believes that it does have an influence on the bargaining behavior of broadcasters and should, at a minimum, be preserved.

Also, Congress should resist the "symmetry" of imposing "reciprocal" requirements on distributors. Such restrictions make sense only when the negotiating party has market power that it can use as leverage in the negotiations. This is true of broadcast stations that elect retransmission consent versus must-carry, and it may also be true of the dominant MVPDs – cable systems. But it is not true of all MVPDs, and Congress should not impose such obligations across the board on all distributors. To do so would only give broadcasters a negotiating tool that would neutralize the discipline Congress intended to impose on broadcasters by making provision for a unilateral good faith obligation in 1999.

Local-into-local and Two-dish

EchoStar is a pioneer of local-into-local service. We knew that it was essential to provide such service if we were to compete effectively with cable. We lobbied Congress in the late 1990s for the rights to be able to retransmit such signals, and were pleased when Congress passed SHVIA to give satellite providers such rights. We then invested billions of dollars in satellite technology to launch local markets as quickly as possible. Today, EchoStar offers more

local broadcasters' signals within their local communities than any other cable or satellite TV provider. DISH Network was the first satellite TV provider to offer local channels with a roll-out of 13 markets. In less than five years since passage of SHVIA, EchoStar's DISH Network has launched local-into-local service in 119 television markets, serving more than 86% of the country.

Early on, in order to make maximum use of scarce spectrum resources, we began providing local-into-local service in a number of markets using a 2-dish solution. Under this solution, subscribers who want local stations in certain markets are provided with a second dish completely free of charge so that they can receive all of their local stations. Once the second dish is installed, the fact that the local stations are being provided through two dishes instead of one is completely transparent to the consumer – all the local channels are listed contiguously on our electronic program guide. The use of the 2-dish solution has allowed us to deliver local-into-local into more markets, more quickly than would otherwise have been possible.

Notably, our two dish solution is no different conceptually from the requirement, in many locations, of multiple over-the-air antennas to receive all local stations. The multiple antennas are necessitated by the fact that all broadcasters in a market seldom use the same transmitter tower, or even locate their individual towers in the same area. Where transmitter towers are located in different areas, multiple reception antennas pointed in the direction of the different transmitters are necessary. Ironically, while broadcasters have decried EchoStar's two-dish solution, broadcasters appear to expect consumers to accept the need for multiple over-the-air antennas as a fact of life.

Nevertheless, the broadcasters are asking Congress to outlaw our company's specific plan for complying with must-carry and require its abolition within one year. The wiser course is to

resist these misguided calls and let consumer preferences be the guiding criterion that will lead to optimal carriage of local broadcast stations. There are many good reasons for this.

First of all, it is important to recognize that a "same dish" requirement for all broadcast stations does *not* necessarily mean a "single dish" for all consumers. If our two dish plan were prohibited, compliance with the new rule would still require many two-dish markets, albeit with all broadcast stations on the same dish. In those two-dish markets, all subscribers that want even one network station will need a second dish. Furthermore, compliance with the rule will likely require some current single-dish markets to be converted to two-dish markets, as shown by DIRECTV's own attempt at remapping EchoStar's system.

Second, prohibiting our plan would cause massive disruption and possibly loss of local service for our subscribers in 15 to 30 markets. This is because moving a market A station from a wing slot to a "full-CONUS" spot beam that now provides some local stations from markets A, B and C will require the displacement of markets B and/or C from the spot beam. This in turn means that the subscribers whose stations are displaced will need a second (or different) dish. To illustrate, take our EchoStar 7-11 spot beam. That beam currently provides more fully effective competition to cable, and more choice for consumers, in Chicago, Indianapolis, St. Louis and Grand Rapids. It has the physical capacity to carry a total of 24 channels. Some have suggested that we should increase the compression ratio of our signals to squeeze more channels onto the spot beam. We have concluded, however, that increasing the compression ratio above current levels would degrade signal reception quality to a level we are unwilling to impose on our customers. We do not compress our signal to a greater extent on any of our satellites, whether spot beam or full CONUS.

Consequently, the entire capacity of that spot beam is consumed by four channels from Chicago, seven channels from Indianapolis, six channels from St. Louis and seven channels from Grand Rapids. In order to be able to serve all of these markets, five channels from Chicago, two channels from Indianapolis and two channels from St. Louis were placed on the wing satellite located at 61.5 degrees in compliance with existing law. If the law is now changed, the five wing channels from Chicago could be placed in the spot beam, but since the capacity of the spot beam is limited to 24 channels, in order to comply with a single dish edict this would necessitate that all of the channels from Indianapolis, St. Louis and Grand Rapids which are currently in the spot beam be relocated to the 61.5 degree location, or to a satellite located at some other orbital position in order to make all markets in this spot beam "same dish" markets.

Equally important, the number of subscribers that will need second or new dishes will overwhelm EchoStar's capacity to install them. The result? With a one-year time frame, many subscribers will lose their local service.

Third, there are many misconceptions circulating about our two dish solution. For example, the argument that no one is willing to install dishes to watch programming from two locations is just plain wrong. Almost two million of our customers have had dishes installed to view programming from our 61.5 or 148 degree locations. While the "look angle" from those locations has been cited as a problem by detractors, in fact with respect to most of our 61.5 degree two dish markets, the angle for a dish pointed at EchoStar III, located at our 61.5 degree orbital location, is better than the angle of a dish pointed at the spot beam satellites located at our 119 and 110 degree orbital locations, where the remaining local channels are carried. That is, a consumer is actually more likely to be able to view programming from the 61.5 degree wing location, than from the 119 degree "core" location. Simple math, and the help of a map,

confirms the mid-point of 119 and 61.5 degrees longitude to be approximately 90 degrees, a longitudinal line running approximately through Madison, Wisconsin, to Springfield, Illinois and Memphis, Tennessee, to Jackson, Mississippi and New Orleans, Louisiana in the southern United States. From any location east of that line, the look angle to the 61.5 degree satellite is empirically better than is the look angle from a dish which must view programming from a satellite located at 119 degrees.

Another common misconception is that EchoStar charges more for channels located at wing slots, or charges for the dish required to view those channels. Again, this is simply not accurate. The second dish necessary to view those channels, together with professional installation of the second dish and the channels themselves, are in all cases offered absolutely free to the customer. While the cost to EchoStar to provide the second dish and installation is substantial, we absorb that cost, having concluded that it is more important to be able to offer the local channels in the greatest number of markets.

Detractors also have complained that EchoStar does not inform customers of the availability of the wing channels free of charge, and that we discriminate against the wing channels in channel guide location. These assertions are inaccurate. Channels at a wing location are located in our program guide in a fully integrated manner with the channels located at other locations. Channel numbering – regardless of location - is contiguous, with each local channel assigned the channel number it carries off air (with the exception of older EchoStar boxes where off air channel numbering is not possible for any local channels, but all local channels are in that event offered with contiguous numbering). Scrolling through the on screen channel guide, a consumer who has installed a second dish has no visibility to the existence of that second dish

and can not in any way distinguish between channels being delivered from satellites located at different orbital positions.

Importantly, where a consumer decides not to take local channels from the wing satellite, the on screen guide boldly advertises the availability of the second dish and installation free of charge. Tuning to the wing channel produces the following bold message: "YOU MUST HAVE A SECOND DISH TO VIEW THIS CHANNEL. DISH NETWORK WILL PROVIDE THE DISH FREE OF CHARGE. CALL 1-800-333-DISH". Clearly, we give our customers notice and the choice of getting the wing slot stations for free, **if they want them**.

Fourth, it is important to recognize that we have reduced the number of two-dish markets to only 38 out of 119 markets currently being served with local stations. Overall, we now carry a total of 895 of local broadcast stations. Of those, only 106 are offered from one of our wing satellites. Economics has been the driving force for this reduction. Economically, it is in our best interest to offer a single-dish solution where possible simply because we offer the second dish and related hardware, and a professional installation, free to every consumer who wants a second dish. The cost to EchoStar is well over $100 for each second dish installed, a significant incentive to offer channels from a single dish wherever possible, and eliminating the need for governmental intervention. In fact, over the last year we have already transitioned eight two dish markets to a single dish solution (Charlotte, Cincinnati, Ft. Myers, Grand Rapids, Kansas City, Lexington, Miami and Raleigh), and based on the focus on this issue provided in recent weeks, we are pleased to advise that effective this week we have also been able to transition Albuquerque, Phoenix, San Antonio and Tucson from two dish, to one dish solutions. We are also moving a total of 27 channels from wing satellites to spot beams over the next week. As

stated, this reduces our two dish markets from 42 to 38 and reduces the number of wing satellite channels from 133 to 106.

In fact, I am prepared to commit to you today that, barring changes in channel configurations in local markets, we do not intend to add any more 2-dish markets beyond the 38 that currently exist. We will continue to migrate existing 2-dish markets to single dish as we are able to find or create additional spectrum capacity to do so. We hope to be able to complete that process entirely within four years. But if we are required to complete the transition on an artificially compressed time schedule (such as the one-year time frame being mentioned), the result will be a lose-lose for consumers and competition. That deadline is both unrealistic and, in any case, unnecessary because EchoStar plans on migrating all of its subscribers to a same-dish solution for local-into-local service within four years anyway. Legislation is simply not necessary to address this transitory issue.

Conclusion

In conclusion, in reauthorizing SHVIA, I urge you to lessen the gap that still separates DBS providers from cable operators, create greater parity between the two competing modes, and resist the creation of obstacles that would further hamper our efforts to compete.

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Statement of U.S. Senator Russ Feingold
For the Senate Judiciary Committee Hearing on "The Satellite Home Viewer Extension Act"

As Submitted to the Hearing Record

May 12, 2004

Mr. Chairman, I want to thank you for convening this hearing on the Satellite Home Viewer Extension Act. Also, I appreciate the efforts of the witnesses who are here today to provide us with their insight and expertise on the issues surrounding satellite broadcasting services. With many provisions of the Satellite Home Viewer Improvement Act (SHVIA) set to expire at the end of 2004, this is an important and timely topic for this Committee to consider.

Direct broadcasting services (DBS) have provided television programming choices to millions across the country, particularly in rural areas of the country that do not receive over-the-air broadcast signals. When SHVIA was enacted in 1999, satellite providers were for the first time given permission under the copyright laws to retransmit local signals to their customers. This has enabled the satellite industry to develop as a strong competitor to cable. In addition, in some rural areas with limited cable access, satellite provides a much needed alternative to poor over-the-air reception.

One concern that I hear from my constituents, particularly on the western side of the Wisconsin, is that the local television stations provided by DBS are not Wisconsin stations. SHVIA permits DBS companies to provide local broadcast television signals to all subscribers who reside in the local station's Designated Market Area (DMA), as defined by Nielsen Media Research. The Minneapolis-St. Paul DMA extends into a number of Wisconsin counties, so for these individuals, local programming is not from Wisconsin - its from Minnesota. But many of my constituents tell me that they would prefer to receive Wisconsin news, sports, and other programming. More specifically, most Wisconsin residents, even if they live near the Minnesota border, are Packer fans not Viking fans. So they aren't happy when their local station, as defined by Nielson, doesn't show their local team.

In the area of cable television, the FCC has some discretion in modifying the market to best serve

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the needs of the customers to receive local programming, but as I understand it, this is not the case for satellite. So I urge the Committee to consider proposals that would allow some flexibility in the stations that DBS companies can provide through the local to local license.

I also believe that the Committee should do whatever it can to minimize disruptions in service to consumers who now receive distant signals. As local signals become available to satellite subscribers in more and more markets, I believe it is only fair to ask subscribers to make a choice between local and distant signals. But I also believe that consumers now legally receiving distant signals should be able to continue to do so rather than switching to local signals if that is what they prefer. Similarly, it seems to me that the grandfather provision contained in SHVIA should be extended.

With the availability of DBS and increased competition, more and more consumers have a true choice in their source of video programming, which should lead to lower prices and better services. I believe that maintaining and encouraging true competition in the marketplace is the only viable solution to the continuous and troubling rise in cable and satellite television rates across this country over the past few years. Congress should continue to promote competition between the cable and satellite industries. SHVIA has done that and we should both extend it and improve it

# # #

The Satellite Home Viewers Act Reauthorization
Statement by
Patrick Gottsch
President, RFD-TV
May 12, 2005

Mr. Chairman, on behalf of RFD-TV, I appreciate the opportunity to submit testimony in strong support of reauthorization of the Satellite Home Viewers Act, with improvements made based on the facts learned since the last Act was enacted.

RFD-TV is America's first 24-hour television network dedicated to serving the needs, and interests, of rural America. Launched in December of 2000, it is now carried on both DIRECTV and DISH Network satellite systems, Mediacom Cable and a growing number of rural cable systems.

As America's only rural network, RFD-TV has its finger on the pulse of rural life more than any other broadcast entity. Since the 1st SHVIA, the role of satellite television has had a very significant factor in improving the quality of rural life, and presented a window-to-the-world of news, information, and entertainment that was not possible before this technology. This progress must continue, and be encouraged.

As you know, for most of rural America, cable lines stop at the edge of town and broadcast signals a few, snowy and intermittent. Rural America launched and has supported home-satellite since its inception. There is no one group, made up of millions of Americans, which this pending legislation can and will affect more, as for most there is not the alternative available to urban homes.

Last week, during the Commerce Committee's consideration of the Satellite Home Viewers Act, Senator Conrad Burns perhaps said it best:

> "Rural Americans have helped power drive DBS into a major communications force. Rural America needs access to local television stations and network programming."

If the Satellite Home Viewers Act were allowed to lapse, it is possible that hundreds of thousands and perhaps millions of Americans will lose access to network programming.

Such loss would be disruptive and felt most severely by rural Americans who rely on satellite television as their link to the rest of the nation.

In passing the Satellite Home Viewers Act (SHVA) and the Satellite Home Viewers Improvement Act (SHVIA), the Congress unleashed a new wave of investment in satellite technologies capable of delivering local signals via satellite. It helped clarify the conditions under which viewers could receive distant network signals.

For those who get local signals, viewers are connected to digital quality streams of national and local information.

Since the passage of the SHVIA, every few weeks DBS providers have made new local signals available. Local channels arrived first in the most populated areas and only recently have been reaching more rural markets. I would commend both DISH Network & DIRECTV for aggressively adding these services with their limited capacity.

In addition to the passage of SHVIA, the Congress also enacted loan guarantees to encourage the delivery of local signals to rural areas. While significant progress has been made, it is becoming clear that many rural markets, especially those in the bottom fifty or sixty television markets will not get their local signals via satellite anytime soon.

For those who can not get local signals delivered via satellite and those who can not get a quality signal via broadcast antennae, there should be no-hassle access to distant network signals.

As America converts from analog to digital television signals, another large digital divide will open-up. Today, a significant number of rural Americans view broadcast television signals which most Americans would find unacceptable. Reception of these signals depends on weather, terrain, foliage and other factors. Soon, even that second class television service will become unavailable.

Unlike current television signals which degrade gradually with distance, digital signal availability drops rapidly. Also, the effect of foliage and buildings can affect the strength of digital signals. Once the digital conversion is complete, I predict that thousands of rural Americans will completely lose their access to over the air television.

That is why the Satellite Home Viewers Act reauthorization is so important. In extending this legislation Congress must be certain that satellite providers are encouraged to bring local signals to rural markers, that rural viewers have a convenient and economical way to get a national network feed when a local channel is not available for any reason.

Rural Programming/Public Interest Stations

Media consolidation and changing demographics have pushed rural and farm broadcasting off the traditional radio and TV dial. Local farm programs are either being replaced by infomercials or broadcast at inconvenient times.

Rural Americans make up 25% of the population and inhabit 75% of the landmass of this great country. What rural Americans desire is not that different from what urban Americans receive. They want to be connected to news, information and entertainment that is relevant to their lives. That is where RFD-TV comes in.

Satellite technology offered a unique opportunity to aggregate and service rural audiences with programming that meets their needs.

Even with the power to aggregate rural viewers, RFD-TV would not exist without enlightened government policy. Without the public interest set-aside mandated by the FCC, there would be no rural network today, whatsoever.

As the Congress considers laws affecting satellite television, it should do nothing that would in any way weaken the availability of public interest capacity and should work to ensure that all viewers have access to this vital source of alternative voices.

The Congress and the Federal Communications Commission should ensure that public interest programmers continue to have capacity available, are included in program guides and channel listings and are available to all viewers without extra charge.

RFD-TV is a great example of the success of the public interest set aside program. Since our launch more than 3 years ago, many ag and rural associations have benefited from the distribution that has been provided by RFD-TV. Our network has provided a much needed communications tool for rural organizations such as the Future Farmers of America (FFA) and their 450,000 members and 8,000 individual chapters, the 4-H and their 4 million members and advisors, the National Cattlemen and their 800,000 members, the National Pork Board and their 80,000 producers, and the American Farm Bureau Federation and their 5,000,000 plus members, just to name a few. Millions of homes that now have access to, and benefit from, this programming.

Information from these groups not only serves rural Americans, but our city cousins as well.

RFD-TV's sole focus has been to establish distribution and exposure for rural interests to serve all of America. This network was conceived and launched out of frustration that urban-based media was evolving away from, and becoming out-of-touch with, rural America and agriculture. If it weren't for a drought, a disaster, or something bad going on in rural areas, there seemed to be no media coverage at all.

In my own hometown near Omaha, Nebraska, farmers used to be able turn on the TV to watch a morning ag news program, get the latest cash market quotes at noon, and on Fridays one of the local stations even honored and featured a "Farm Family of the Week". No more.

Unfortunately, I'm here to tell you today, in no uncertain terms, that this disturbing trend continues, and in fact, seems to be picking up steam. As all media – television, radio, and print – continues to consolidate into the hands of urban-based broadcast giants, service for and about rural America continues to erode through traditional means.

To offer you but a few examples, even profitable, well-respected companies such as our friends at the Tribune are following this trend. In the past year, U.S. Farm Report, America's #1 agribusiness television program, was moved on WGN-TV from 7am on Saturday morning, a timeslot that this show has occupied for 28 years, to 5am. The 7am

timeslot now airs infomercials. In addition, the WGN noon ag radio program, again a staple to Midwest farmers for over 40 years, was cancelled this past January 5 and replaced with urban drive programming. Ag magazines that used to be thick with news articles and information are now a mere shell of their former selves. AgDay, the only daily syndicated ag television program continues to be pushed back in time in many small markets. Contrary to the popular belief by some, farmers do not get up at 4am, and if they do, they are not running to turn on the TV set.

This trend is not being limited to only commercial entities, as even Oklahoma State University, one of our leading Land Grant Universities, who has produced Sun Up, a weekly television program focused on Oklahoma agriculture and on the air since 1986, cancelled this program earlier this year due to budget cuts, thus interrupting its service to Oklahomans on local broadcast television, and its national exposure on RFD-TV. Rural America does not need fewer communication options. It needs more.

Although we understand that media has always evolved, it is so important that this disturbing situation be addressed today, and that solid plans be put in place to better serve the backbone of this country, rural America, for tomorrow, and for many years to come.

As RFD-TV begins its 4th year of broadcasting, I am proud of what has been accomplished over the past 3 years. If nothing else, this channel has proven that rural Americans have the strongest possible desire for news, information, and programming that is more reflective of their lifestyle and family-oriented values.

Since our launch, RFD-TV has received literally hundreds of thousands of e-mails, letters, and calls with one common message – "It's about time that someone paid attention to rural America." At the same time, I know that RFD-TV is only scratching the surface in what could be done to fill this gigantic communication's void. Many organizations and associations are just beginning to ramp-up their efforts to produce new productions to reach this large, but scattered audience. The feedback to FFA, Farm Bureau, and various commodity organizations that have experimented recently with primetime, "Town Hall" type shows on RFD-TV has been off-the-charts. The exposure provided to USDA and some of their agencies, the Land Grant Colleges & Universities, and others has finally put immediate information right into the living rooms of rural homes in all 50 states by using satellite technology. We even broadcast a recent program by Utah State's Extension that received tremendous audience favor.

A rural network's potential was never more evident than this past January with the "Mad Cow" outbreak. RFD-TV was the only television network that carried, in their entirety, USDA press conferences "live" and repeated this important, timely information in primetime for all to see, carried a 2-hour special from Iowa State University Extension on BSE that was previously only distributed to state extension offices, and RFD-TV produced and aired a primetime 90-minute "Live" Town Hall satellite meeting where NCBA executives answered questions and addressed concerns from cattlemen and women from 38 different states during that broadcast. Before the BSE outbreak, NCBA commissioned a survey in 2003 and found that 85% of their members "preferred and

would be very excited to receive their news and information from the organization via satellite" – more than all other media options combined. One can safely and logically assume that this unprecedented number has now grown to an even a higher percentage. In like manner, informal surveys conducted by the Pork Board and FFA have shown similar results, with 80% of pork producers and nearly 3 out of 4 FFA members confirming that they have watched these special broadcasts with the highest degree of enthusiasm. To summarize, in cowboy talk, they want more.

Overcoming Obstacles

Satellite delivery is the key for finally taking the Information Superhighway down each and every country road. However, based on our years of experience, I would stress and strongly suggest that provisions be made that will insure that obstacles are not put in place that would block mass distribution of these services to rural America.

Although RFD-TV is enjoying some carriage on rural cable systems, again the obstacle for mass distribution of this channel is the existing capacity issue that is limiting the launch of all new services. It is clear that before a rural communication's revolution can be realized, an expanded pipeline must be put in place that would truly carry a proportionate number of rural vs. urban services to the rural home, no matter what their chosen distribution source.

Finally, in closing, I would point out to you that it was 108 years ago that communications was first revolutionized in rural America with the introduction and implementation of Rural Free Delivery by the U.S. Postal Service. For the first time, news and information was delivered directly to, and from, rural homes, putting them "on par" with their city cousins, and making it no longer necessary for rural Americans to have to travel to town to deliver or receive their mail. This established a most important communications link that resulted in the development and economic growth of rural areas throughout this country. In many ways, rural America is at a similar crossroads today. It is again time to bring rural homes up-to-speed with communication options and content that are equal to those being offered to urban America.

In conclusion, I urge the Congress to prevent the lapse of the Satellite Home Viewers Act, create the proper incentives to encourage the carriage of all appropriate local signals and to ensure that the much needed diversity of public interest broadcasters and rural programming is preserved and advanced.

Written Testimony of
Eddy Hartenstein
Vice Chairman, The DIRECTV Group
Before the Senate Committee on the Judiciary
May 12, 2004

Chairman Hatch, Senator Leahy, and members of the Committee, my name is Eddy Hartenstein and I am the Vice Chairman of The DIRECTV Group, Inc. 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 this Committee in 1999 when Congress was deliberating SHVIA. I am pleased to return to report on the progress that the Direct Broadcast Satellite ("DBS") industry has made as a competitor to cable since that time.

The members of this Committee deserve a great deal of credit for their role in creating competition in the subscription television industry. SHVIA, which you helped enact, 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 subscription television market.

In particular, the ability to offer local-into-local service has enabled satellite operators to offer a full slate of quality programming comparable to cable offerings. With last week's successful launch of our DIRECTV 7S spot beam satellite we will soon 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 130 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.

The results have been nothing short of astounding. 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 over 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.

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

But we know that SHVIA is a difficult and complex issue, and we also know that, in this busy legislative session, Congress does not have a lot of time to act. With this realization in mind, we have been meeting with representatives of the broadcast industry over the last month or so to see if we could reach common ground on some of the issues associated with SHVIA reauthorization. We thought that, if we could reconcile our differences on these issues, the end result would likely represent sound and reasonable public policy.

These discussions are still ongoing. But we have been able to find some common ground, at least conceptually, on several basic SHVIA issues. Among these issues are the following:

- Legislation should extend satellite operators' ability to import distant signals for five years.
- Legislation should allow, subject to some limitations, satellite operators to offer the same out-of-market "significantly viewed" stations that cable operators already offer. Just as cable operators are able to retransmit both Washington and Baltimore stations into Columbia, Maryland, so to should satellite operators.
- Legislation should extend for five years the existing satellite carrier retransmission consent exemption for distant signal stations.
- Legislation should extend for five years the existing statutory provision prohibiting television stations from entering into exclusive retransmission consent agreements.
- Legislation should extend the good faith negotiating requirement to all multichannel video providers.
- Legislation should provide some sort of mechanism for "grandfathered" distant signal subscribers (also known as "Grade B Doughnut" subscribers) to choose between distant and local-into-local signals.
- Legislation should gradually implement a "no-distant-where-local" concept, whereby satellite operators cannot offer new subscribers distant signals where

local-into-local signals are available. In doing so, however, legislation must ensure that existing subscribers with both distant and local-into-local service get to keep both.

- Finally, legislation should clarify that "carry one carry all" means that satellite carriers may not "split" local analog or local digital signals, respectively, in one market between two dishes.

Do these principles reflect everything DIRECTV would want from SHVIA reauthorization? Of course not. We still think, for example, that Congress should reauthorize the distant signal compulsory license on a permanent basis, so that we don't find ourselves once again discussing these same issues in five years. But all in all, we think that these principles represent a reasonable compromise between two parties that entered these discussions with very different points of view. And we think these principles represent a modest improvement over current law.

There is, however, another issue to discuss that lies at the heart of this Committee's jurisdiction. We are extremely concerned about any proposed increase in satellite royalty rates (with no similar increase in the rates paid by cable operators). We have no objection to analyzing royalty rates, including the historical, technical and regulatory differences between the satellite and cable regimes. But we are deeply troubled by the prospect of programming rate increases, as well as by the prospect of participating in an admittedly flawed, distracting, and extremely expensive Copyright Arbitration Royalty Panel ("CARP") process – neither of which would apply to our chief competitors, the dominant cable operators.

You may hear a lot this afternoon about whether the satellite industry pays "more" or "less" in royalty fees than cable. The fact is, as set forth in great detail by Mr. Carson of the United States Copyright Office, one cannot make "apples to apples" comparisons, because the two royalty regimes are so very different. Cable royalty rates, for example, depend greatly on the size of the cable system, while satellite royalty rates do not. Cable operators' payments are predicated on a certain tiering structure that satellite operators do not employ. Cable rates for "distant network signals" cover the retransmission of such signals to *all* cable customers, while satellite operators of course may only retransmit such signals to "unserved households." I could go on and on. But I would take with a grain of salt any analysis that purports to show definitively that cable operators "pay more" (or, for that matter, "pay less") than satellite operators.

To the extent that copyright holders are really saying that *neither cable nor satellite fees* adequately compensate copyright holders, I have a few reactions. First, both the cable and the satellite statutory licenses are designed to achieve a number of goals – of which compensating copyright holders is only one. In particular, Congress must balance that goal with the goal of ensuring that consumers have access to the programming they want at a reasonable price. I would submit that some of the ideas that have been put on the table – a fifty percent increase over two years, for example – do not strike an appropriate balance between these goals. And, when your constituents' bills go up, I think they will feel the same way.

Above all, though, I would ask this Committee to remember that satellite operators, despite recent growth, control in the aggregate only about 20 percent of the subscription television market. And, in nearly every city and town in America, we compete against a dominant cable operator with at least 70 percent market share. In such a market structure, any effort to raise *only* satellite royalty rates would be a competitive disaster. If Congress truly believes it is time to raise pay-TV prices, it should at the very least do so only in the context of harmonizing the cable and satellite royalty rate regimes. Any SHVIA reauthorization containing a satellite-only rate increase – no matter how positive other aspects of the bill may be – would represent a significant step backwards from current law.

Conclusion

In conclusion, Mr. Chairman and members of the Committee, I would like to thank you for all that Congress has done to nurture the satellite television industry as a vibrant competitor in the subscription television market. With your help, we will continue to provide the highest quality, best-priced competitive service to consumers.

I am happy to take your questions.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

May 12, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"THE SATELLITE HOME VIEWER EXTENSION ACT"

Good afternoon and welcome to today's hearing on the "Satellite Home Viewer Extension Act." Today we will be discussing some very important issues relating to the reauthorization of section 119 of the Copyright Act, which provides a statutory license for the retransmission of distant network signals. The extension of section 119 has far reaching implications for the satellite and broadcast television industries, as well as for those who create video content, and I am sure that the tremendous panel of witnesses that we have here today will do their best to make this somewhat difficult subject matter accessible to all of us, while also providing us with some insight into the economics of providing direct broadcast satellite or DBS service.

Television has come a long way since it was invented by Utah native Philo T. Farnsworth in 1927. The first television image was nothing more than a straight line that rotated 90 degrees from a vertical to a horizontal position on the screen. I think that most people would agree that television programming has, at the very least, become more interesting than Philo's rotating line.

Although, based on all the letters I have received about the last Super Bowl half-time show, I am not sure that all of my constituents think that the *taste* in programming has improved all that much.

I want to take some time to describe in a general way the approach that I believe Congress needs to take on this legislation. Before I do that, I want to emphasize that I have been impressed by the degree of bipartisan and bicameral cooperation that has been apparent thus far in our work on this legislation. I thank Senators Leahy, Kohl, and DeWine for their efforts on this bill, and I hope that we will continue to work together to pass legislation that appropriately balances the interests of the affected parties and industries, while advancing sound public policy and consumer choice.

With that in mind, I will outline some of the larger policy objectives that I believe should be important in guiding us to a resolution of a number of issues that have been raised in connection with this legislation.

First, we need to bear in mind that compulsory licenses are strongly disfavored due to the market distortions they create and then perpetuate. Although I support extending the statutory

license in section 119 for another five years, Congress needs to think carefully about how to begin minimizing the overall distorting effect of this compulsory license on the market, while retaining its central purpose of providing broadcast network signals via satellite to households that cannot receive them over the air. With local stations now available from DBS providers in over 110 markets which, I am told, encompass roughly 85 percent of U.S. television households, one obvious approach is to create appropriate incentives that will further encourage a transition from the section 119 distant signal license to the section 122 local-into-local license.

Second, I believe that we need to have a reasonable adjustment of the copyright royalty rates that are paid under the section 119 license. Once we depart from rates that are set at or near fair market value under a compulsory license, not only do we introduce substantial – and potentially increasing – market distortions, but Congress eventually finds itself without any clear guiding principle to apply in determining the proper rate. For this reason, unless the affected parties can move toward some resolution of the rate issue, the Senate should consider an approach similar to the approach taken in the House Judiciary Committee, in which a Copyright Arbitration Royalty Panel would determine the rate, and it would then be subject to Congressionally-mandated discounts.

Third, Congress should carefully consider ways to increase parity between cable and DBS to ensure that consumers continue to benefit from competition and have increased programming choices. For example, I believe satellite providers should be allowed to provide significantly viewed stations to their subscribers in the same way that cable companies do.

Finally, I want to mention the two-dish issue. I believe that the Senate should prohibit the discriminatory placement of certain stations on a second satellite, requiring subscribers to obtain a second dish to receive them. I am particularly concerned that Spanish-language, religious, and public broadcast stations have been singled out for this treatment.

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Testimony by John King, President and CEO of Vermont Public Television Before the U.S. Senate Committee on the Judiciary Hearing on The Satellite Home Viewer Extension Act
May 12, 2004

My name is John King. I am president and CEO of Vermont Public Television, the statewide PBS network.

Thank you, Mr. Chairman, for inviting me to testify about the Satellite Home Viewer Extension Act. Thank you and the members of the Committee for your work on behalf of satellite viewers. Thank you, Senator Leahy, for all you have done to give satellite viewers access to their local channels. This has been extremely important for Vermont.

I will testify to the importance of local-into-local satellite carriage for educating, informing and connecting viewers, especially in rural states like Vermont.

I will ask for help from this Committee so that Vermont stations will be available by satellite in Vermont's two southern counties.

Vermont is one of the smallest and most rural states. Many of our 600,000 people live in villages or in homes scattered through the countryside.

Vermont Public Television, like most of the commercial channels, has headquarters in our largest city, Burlington, in the northwest of the state.

Vermont Public Television is proud to be a PBS station, broadcasting national PBS programming. What really makes us *Vermont* Public Television is the local programming we produce -- about Vermont's public affairs, culture, nature and history. We're more than a TV station. In our programming and community outreach, we're a unifying force, helping Vermonters understand one another and fostering participation in civic life.

Although Vermont Public Television operates four transmitters, our state's mountainous terrain makes over-the-air reception difficult, particularly in the south of the state.

Cable is available in cities and larger towns, but there are miles of country roads that cable companies cannot afford to wire.

In Vermont, there are many daily and weekly newspapers but no single statewide newspaper. Public broadcasting and the commercial TV stations are the only statewide media, and access by satellite is crucial for all Vermonters.

When satellite service began, Vermonters embraced it. The one drawback was the absence of local channels.

For years, viewers could see only the national affiliates. For public television, they could subscribe to the PBS National Service, but overwhelmingly, they told us they wanted Vermont Public Television.

There was great excitement two years ago when DISH Network began offering local channels. Satellite subscriptions spiked, and now, more than 30% of households in the Burlington DMA have satellite. Thank you, Mr. Ergen, for that service.

Viewers were delighted. One woman from a small town wrote, "We are happy to say that as of today, we now have truly 'local' Vermont TV channels through DISH Network ...We have felt disconnected and alienated from the state of Vermont as far as the news is concerned. Once we heard that local Vermont TV, including Vermont Public Television, was available in our county, we immediately signed up!"

One of the best features of SHVIA is the "carry one, carry all" provision. Vermont Public Television is on DISH Network's main satellite, along with the four commercial affiliates, as part of the local channel package.

There is a problem in some parts of the country with local PBS stations being carried by DISH Network only on the "wing" satellite. Satellite subscribers must install a second dish in order to see their PBS station. This splitting of local channels seems to me to discriminate against subscribers who want access to the public television stations that are an essential part of their community. I encourage the Committee to provide that all local channels be offered as a group on the main satellite, within a year of the extension of SHVIA. We believe the language in the House draft bill is a reasonable approach.

Unfortunately, the good news in 2002 about local-into-local service did not apply statewide. Because local service is determined by Nielsen DMA, Vermont's two southern counties are excluded, as they lie outside the Burlington DMA. Windham County, in the southeast corner, is assigned to the Boston DMA, and Bennington County, in the southeast corner, to the Albany DMA.

Would-be viewers in those counties were surprised to find they couldn't get Vermont channels, only Boston and Albany stations. As good as those stations are, and as interesting as the news from New York and Massachusetts may be, Vermonters wanted news, weather, local programming and advertising from Vermont.

These requests are typical: "Please help me get Vermont Public Television on DISH Network. I work nights for someone who has VPT, and I can't believe I can't get it." And "Can you be of any help in getting our beloved VPT crystal clear on our dish?"

When we send out direct mail solicitations for contributions, we often get responses from southern Vermonters saying they won't support us because we're not available on satellite. Some are disgruntled with us for not "going on the satellite."

We have talked with hundreds of viewers who ask "What can I do to get you?" We have encouraged them to contact their satellite company and our members of Congress. One activist from Windham County worked with her state legislators to get a joint resolution passed urging the congressional delegation to help make Vermont channels available. See Appendix B.

Vermont Public Television and thousands of subscribers eagerly await DirecTV's local-into-local service this year. But southern Vermonters will be left out again, unless you can find a way to help them.

Last month, DISH Network took a positive step toward bringing southern Vermonters into the community of Vermont viewers. Thanks to a special agreement with PBS, DISH Network began offering Vermont Public Television as an "a la carte channel."

This is a good first step, but we think viewers would prefer access to Vermont Public Television as part of a local channel package.

Vermont Public Television -- and the commercial TV stations -- are a unifying force in our rural state, giving Vermonters information to help them be more knowledgeable, active citizens of their state community.

We look forward to the day when all Vermont satellite viewers can see our programs about state government. The Speaker of the Vermont House and the chair of the Vermont Senate's Judiciary Committee are both from southern Vermont and we think their constituents should have been able to see their recent appearances on our air. We'd like all Vermonters to be able to participate in the regular call-in shows we do with the governor or the members of our congressional delegation.

In an election year, statewide TV is essential. I'd like Vermont Public Television's candidate debates and public affairs programs, and the commercial stations' news and political ads, to reach all Vermonters.

In just a few years, satellite service has gone from a luxury to an affordable, reliable source of information and entertainment, one that is especially important in rural areas. Vermonters support Vermont Public Television with their contributions and their tax dollars, and it seems only fair to give them access to a service they help pay for.

I urge this Committee to work with the satellite companies on giving all Vermonters access to all their state's television stations.

Finally, Mr. Chairman, on behalf of PBS stations, I want to put in a word for satellite carriage of digital signals. We and other public television stations will provide even more educational and informational programming with digital multicasting and datacasting. We recognize that time does not permit Congress to consider post-transition satellite carriage rights this year. However, we suggest that Congress address carriage

rights for stations that may convert to digital-only broadcast early, before the next reauthorization of this law.

While cable carriage rules allow digital-only stations to claim equivalent cable carriage rights, SHVIA is silent on the issue. Carriage of a station's digital signal in place of its analog signal does not impose any greater burden on satellite providers, and we hope the Committee will use this extension of SHVIA to grant digital-only stations the same analog-equivalent carriage rights they are given by cable rules.

Thank you.

APPENDIX A
Comments by Vermont viewers

APPENDIX B
Joint Resolution of the Vermont Legislature Requesting Local-into-local service in Southern Vermont

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

May 12, 2004

Statement Of Senator Patrick Leahy
Senate Judiciary Committee
Hearing on "The Satellite Home Viewer Extension Act"
Wednesday, May 12, 2004

Mr. Chairman, you and I have worked very closely together on satellite television issues for many years. In November 1997 we joined together to find a way to avoid cutoffs of satellite TV service to millions of homes and to protect the local affiliate broadcast system. In early 1998, working with members of this Committee, including Senators DeWine and Kohl, we forged an alliance behind a strong satellite bill to permit local stations to be offered to viewers by satellite, thus increasing competition between cable and satellite providers. We worked with the Public Broadcasting System so they could offer a national feed as they transitioned to having their local programming beamed up to satellites, and then beamed back down to much larger, new audiences.

I am pleased that John King of Vermont Public Television will testify today about how local-into-local television has benefited Vermonters as well as residents of every other state. He will talk about how VPT is now available in Bennington and Windham counties through the EchoStar Dish Network.

I want all other Vermont broadcast stations to also be available in those two counties. For way too long, Bennington and Windham counties have not been able to receive television news about what is happening in Vermont. If you live in Vermont, hearing about a school fire, a traffic jam, or a flood in Framingham, Massachusetts, is not the same as hearing about a school fire, a traffic jam or a flood in Rutland, Vermont.

By working together, this Committee has made it possible for millions of viewers to now receive all their local network broadcast stations over satellite. Millions of consumers now have a choice between cable service, or Dish Network or DirecTV satellite service. When we started working on this in 1997,

millions of viewers across America could not even receive signals from the four broadcast networks over the air.

Because of Vermont's alpine topography, with many towns in the saddles of our mountains, thousands of Vermonters did not receive any Vermont television stations over the air. I want to thank Charlie Ergen whose Dish Network has been offering local-into-local service in Vermont since 2002. Vermont is also looking forward to DirecTV satellite service in the near future.

This Committee, working with other committees in the Senate and the House over the last seven years, has helped create vast viewing options and alternatives for consumers, and has helped expand a tremendous new industry. I intend to work with Chairman Hatch and all members of this committee to go the next step forward as we reauthorize the satellite home viewer act. Our original legislation – the Satellite Home Viewer Act – was a home run. I see our role now as building on that success.

Mr. Chairman, I'm happy to see our satellite bill – S. 2013 – that we introduced with Senators Kohl and DeWine on the agenda for tomorrow's markup. It is important we get this process moving. I understand that we plan to hold the bill over for a week to allow all members to work with us on these important issues. I look forward to joining my fellow Committee members in drafting a consensus substitute bill.

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- TOP OF THIS PAGE
- RETURN TO HOME

PRINTER FRIENDLY VERSION

May 12, 2004

The Honorable Orrin Hatch
Chairman
224 Dirksen Senate Judiciary Committee
Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Leahy:

During today's hearing, Mr. Charlie Ergen of EchoStar Communications repeatedly asserted that (1) EchoStar's two-dish policy was consistent with the intent of the carry one, carry all statute and that (2) the policy is the product of some type of "compromise" between the Direct Broadcast Satellite (DBS) and the local television broadcast industry. Both of these assertions are patently false.

The claim that local broadcasters somehow consented to the two-dish policy is unfounded. During hearings and debates leading up to enactment of the 1999 Act, EchoStar said nothing about a two-dish policy. Moreover, when EchoStar started its abusive two-dish practice in 2001, NAB immediately filed a petition challenging its legality and local public and commercial television stations protested vigorously at the FCC.

EchoStar's claim that the two-dish scheme is consistent with the "carry one, carry all" principle is absolutely without merit, as is its assertion that the FCC blessed the two-dish policy in 2002. The FCC's Media Bureau ruled that as it was then being implemented, the scheme was in clear violation of the statute. The Bureau, for instance, noted that EchoStar's mechanisms for alerting subscribers of the availability of a second dish were woefully inadequate. The Bureau documented several instances in which EchoStar's Customer Service Representatives were either vastly misinformed or intentionally mislead customers who were inquiring about obtaining a second dish for the purpose of viewing their local stations. Two of the FCC Commissioners heatedly dissented from the Media Bureau's decision, stating that the two-dish scheme was flatly illegal.

The Commission has yet to rule on appeals from the Mass Media Bureau's 2002 Order. The FCC has indicated plans to revisit the two-dish scheme and determine whether it is

inherently discriminatory. (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). Meanwhile, EchoStar has continued its pattern of abuse. On at least four occasions, the Media Bureau has found EchoStar to have violated its Order. As recently as March 16th, 2004, the Media Bureau found, "There remains evidence of subscribers not being fully informed or even being misinformed by EchoStar CSRs [Customer Service Representatives], retailers, and/or installers about the need for a second dish in order to view all the available local station in the market, yet being charged full price for an incomplete package." (See Agape Church Inc. v. EchoStar Communications Corporation, CSR-6249-M, Memorandum and Order).

Regardless of EchoStar's claims, the two-dish scheme directly harms religious, Spanish language, and public television stations. All available data indicates that only a sliver of EchoStar's subscribers will endure the hassle of obtaining a second dish. Ultimately, this means that important constituencies are left unserved and local stations that serve these constituencies are rendered "invisible" to the majority of viewers in the market. EchoStar itself, while previously claiming that moving all local stations to one dish would require it to end local-to-local in some markets, recently conceded that it could indeed reshuffle its primary and secondary dish assignments. (See, for instance, Broadcasting and Cable, May 3rd, 2004).

Reauthorization of the 1999 Act provides a prime opportunity to put an end to the harmful two-dish practice. Where the FCC has not yet acted, Congress should. The Committee Print of the "Satellite Home Viewer Extension and Reauthorization Act" being considered in the House commerce and Judiciary Committees would take decisive steps to end EchoStar's abusive practice. I strongly urge the Senate Judiciary Committee to include comparable language as it moves forward with reauthorization.

Sincerely,

John Orlando
Executive Vice President
Government Relations
National Association of Broadcasters

cc: Senate Judiciary Committee

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