The Committee on Energy and Commerce

Memorandum

June 10, 2013

To: Members and Staff, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Satellite Television Hearing

The Subcommittee on Communications and Technology will hold a hearing on Wednesday, June 12, 2013, at 10:30 a.m. in 2123 Rayburn House Office Building entitled, "The Satellite Television Law: Repeal, Reauthorize, or Revise?" One panel of witnesses will testify:

1. Marci Burdick, Senior V.P. of Broadcasting, Schurz Communications, Inc.
2. Geoffrey Manne, Senior Fellow, TechFreedom
3. Mike Palkovic, Executive Vice President, Services and Operations, DIRECTV
4. Ben Pyne, President, Global Distribution, Disney Media Networks
5. Hal Singer, Managing Director, Navigant Economics
6. Amy Tykeson, CEO, Bend Broadband

I. Overview

Does the satellite television law, now 25 years old, still serve an important function or is it out of step with today's video marketplace? Should Congress repeal the law, reauthorize it as is, or revise it, possibly even tackling non-satellite specific video issues?

Congress first granted satellite providers special privileges in 1988 to redistribute broadcast programming under the premise that the then-fledgling satellite industry would be unable to negotiate carriage in the marketplace. Today, however, DirecTV and DISH are the second and third largest pay-TV providers. Is the satellite law merely distorting the market in favor of those providers or is it still necessary to ensure consumers get the content they want?

Are other video regulations also distorting the market? Do the retransmission consent rules unfairly advantage broadcasters or do they simply facilitate a marketplace negotiation? What about cable regulations such as the must-carry rules, the basic tier and buy through provisions, the program carriage and program access rules, and the set-top box requirements? When Congress passed the 1992 Cable Act and the 1996 Telecommunications Act, cable operators controlled 98 and 89 percent of the pay-TV market. As of 2010, that figure was 59.3 percent.

And with the rise of streaming, are Internet-based video companies the nascent providers of the day needing protection, or does the increased competition mean it's time to deregulate?

Ultimately, the question is can Congress better ensure viewers have access to the content they want while respecting the investments of the programmers that create it and the distributors that deliver it, and does doing so require more government intervention or less?

II. Satellite Television Law

Distant Signal Service. Households far from broadcast stations or blocked by terrain may not be able to receive television signals over the air from their local broadcasters. To help address this, as well as aid the fledgling satellite television industry, Congress passed the Satellite Home Viewer Act of 1988 (SHVA). SHVA allowed satellite operators to redistribute the distant signals of out-of-market broadcast network affiliates to "unserved" households. Because all the content each operator provides must be on the few satellites they use to serve the nation, the operators did not have sufficient capacity to carry each of the approximately 1,700 local broadcast stations throughout the country, especially when they first launched service. Instead, they carried the network affiliates for New York, Chicago, Denver, and Los Angeles, making it possible to offer unserved households the national network news and primetime lineup for each time zone.

To facilitate distant signal service, the Communications Act exempts satellite providers from the ordinary obligation of obtaining the consent of broadcasters before retransmitting their signals. Similarly, the Copyright Act exempts the satellite providers from the obligation of obtaining the permission of the program content owner and grants the satellite provider a compulsory license at a rate overseen by the government. These provisions are codified in section 339 of the Communications Act and section 119 of the Copyright Act.

Congress reauthorized distant signal service in the Satellite Home Viewer Act of 1994, the Satellite Home Viewer Improvement Act of 1999 (SHVIA), the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), and the Satellite Television Extension and Localism Act of 2010 (STELA). The distant signal provisions next expire December 31, 2014, unless Congress re-authorizes them again. By some estimates, between 1 and 1.5 million of the 115.9 million U.S. television households as of 2010 still receive distant signal service.

Local-into-Local Service and Carry-One, Carry-All. When Congress reauthorized distant signal service in 1999 with SHVIA, it also adopted provisions allowing satellite operators to carry local broadcast stations into the stations' own local markets. Under these "local-into-local" provisions, codified in section 338 of the Communications Act, a satellite operator may only carry a local broadcast station into a local market if it carries all the local broadcast stations in that market. This satellite version of the cable must-carry laws is referred to as the "carry-one, carry all" requirement.

Because a satellite operator must carry all the local broadcast stations in a market if it carries any, providing local broadcast signals in a market can use significant capacity. The satellite operator could otherwise use that capacity to carry national, non-broadcast programming that may have a larger nationwide audience than the local broadcast stations would, especially in less populated markets. As a result, the satellite operators rolled out local-into-local service gradually, starting with the largest of the 210 Nielsen markets and working down. DirecTV currently offers local-into-local service in 197 markets. DISH reached all local markets in June 2010 as part of a deal implemented in STELA reinstating DISH's authority to provide distant signal service under the compulsory license. Because DISH had been providing distant signal

service to ineligible households that could receive a local signal over the air, a court took that authority away in 2006, invoking a penalty in the satellite law.

Unlike with distant broadcast signals, satellite operators can provide local signals to viewers regardless of whether the viewers can receive those signals over the air, but are not exempt from the requirement to receive the retransmission consent of the local broadcast station and may need to pay such broadcaster if the station does not elect mandatory carriage. Section 122 of the Copyright Act grants the satellite operator a compulsory license to carry the content in that signal at a rate of zero. Neither section 338 nor section 122 contains a sunset provision.

No-Distant-Where-Local. Local affiliates generally disfavor satellite importation of distant signals into their markets because it potentially dilutes their viewing audience and thus can hurt revenues. Some broadcast stations even dislike being imported, since the satellite law allows such importation without their consent. Consequently, broadcasters obtained in SHVERA a provision prohibiting satellite operators from providing a distant signal even to a subscriber who cannot receive a local signal over the air if the satellite operator is carrying the local affiliate on the satellite. In such circumstances, the subscriber is only eligible to receive the local signal.

Significantly Viewed Signals, Out-of-State Programming, and Short Markets. Whether a broadcast station is "local" for purposes of satellite carriage is based on Nielsen's "designated market areas" (DMAs). Because broadcast signals follow laws of physics and not DMAs, however, some households can receive a signal over the air from stations outside the DMA. Originally, satellite operators were not permitted to provide a subscriber such a signal under a compulsory license. Cable operators, by contrast, are allowed to carry such signals if they are viewable over the air by a "significant" number of households in the DMA, as determined by the FCC. To create parity, SHVERA added section 340 to the Communications Act giving satellite operators similar authority.

Section 340 is also intended to ameliorate "out-of-state programming" and "short market" issues. Because neither broadcast signals nor DMAs necessarily abide by state borders, some communities fall within DMAs outside their state. This means that a satellite subscriber's "local" station may be broadcasting from another state and not carrying news, sports, or other content that the subscriber considers truly local. Also, in some DMAs, particularly in less populous parts of the country, one or more networks do not have a local affiliate. These DMAs with missing affiliates are referred to as "short markets." In out-of–state programming and short market circumstances, the satellite operator may be able to carry a significantly viewed station to offset the market's shortcomings. STELA took two additional steps to address these issues. First, it clarified that restrictions on carrying out-of-state programming do not apply if the satellite operator negotiates carriage for the programming, rather than rely on a compulsory license. Second, it facilitates the ability of local affiliates in a short market to carry on their multicast streams the signals of missing networks.

III. Non-Satellite Specific Video Issues

Retransmission Consent. All subscription-TV providers, not just satellite operators, ordinarily must obtain the consent of broadcasters to retransmit their signals if the broadcasters do not elect must-carry. Some cable, satellite, and phone companies providing television service argue that the ability of broadcasters to pull their signals gives them little choice but to agree to high

retransmission consent fees. In the past, they have asked the government to impose an arbitration process or some other mechanism to resolve disputes and prevent programming from being dropped. They also argue that the network non-duplication and syndicated exclusivity rules restricting pay-TV providers from importing the same programming from neighboring markets should be reformed to provide alternate sources of the content during a dispute. Broadcasters argue that retransmission consent is nothing more than a market negotiation over programming and distribution, that most deals get done, and that the network non-duplication and syndicated exclusivity rules merely provide a way to enforce contract provisions programmers negotiate with affiliates regarding the scope of the service areas, much like any arrangement between a franchisor and a franchisee. They argue no changes should be made to the regulations, especially if they are not paired with elimination of the compulsory copyright license for broadcast programming.

Cable Regulation. Cable companies argue that many of the regulations they are subject to no longer make sense in light of increased competition and changes in technology. Cable had 98 percent of the pay-TV distribution market when Congress passed the 1992 Cable Act and 89 percent when Congress passed the 1996 Telecommunications Act. As of 2010, cable's market share had dropped to 59.3 percent of pay-TV households and 51.6 percent of all TV households in light of competition from satellite operators and now also phone companies. Because of this drop, they argue they should be relieved from regulations such as the must-carry obligations, the requirement to put all broadcast programming on the entry level tier, the prohibition on subscribers purchasing any other cable programming unless they get the entry level tier, the program carriage and access rules restricting flexibility in negotiating terms for cable carriage and programming, and set-top box rules restricting flexibility in designing cable equipment.

Internet Delivered Video. The increasing availability of video over the Internet is further disrupting the marketplace with competition. Netflix is offering original content. Hulu and Amazon are following suit. Hulu is also on the auction block and Amazon just signed a deal with Viacom. ESPN has discussed subsidizing viewers' wireless broadband use with at least one carrier to facilitate its streaming service, which has been characterized by some as a way to minimize costs on consumers and by others as an affront to the FCC's network neutrality rules. Upstart company Aereo is in a legal spat with broadcasters for enabling people to view broadcast television programming over the Internet in New York City and Boston, with additional markets to come. The broadcasters say Aereo is illegally retransmitting their content without compensating them. In early rounds, the Second Circuit has sided with Aereo while the Ninth Circuit has sided with the broadcasters in a similar case. At least one cable executive has suggested his company might adopt the Aereo model to avoid retransmission consent fees and at least two broadcast network executives have suggested that if the Aereo decision stands they might move their content off broadcasting to ensure they get paid. How should Congress account for these developments? Are new regulations needed to protect Internet-distributed video? Or does the presence of additional competition and new technology mean the time has come to break the cycle of government intervention in the video marketplace?