Testimony of

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On

"Reauthorization of the Satellite Television Extension and Localism Act"

Before the

House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

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Good Morning, Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee. My name is Mike Palkovic and I am the Executive Vice President of Services and Operations of DIRECTV. Thank you for inviting me back to testify on reauthorization of the Satellite Television Extension and Localism Act of 2010 (or "STELA").

STELA reauthorization is critical to millions of your constituents who depend on DIRECTV for their television service. Without Congressional action, key provisions expire this December. The Energy and Commerce Committee and its staff have put in many hours to produce the first discussion draft of legislation that would reauthorize these provisions.

So my first and most important message is simple: Thank you. DIRECTV and its subscribers appreciate your hard work and your willingness to address STELA reauthorization.

I suspect you have already heard from dozens of media companies telling you what you should and should not have done with the discussion draft. Some may even be telling you to do nothing, or to simply change the date of expiration in a "clean" reauthorization—something Congress has never done before.[1]

This, however, is the *satellite* home viewer act. I am here on behalf of the nation's leading satellite provider to say that we agree with the Committee's approach.

Does the discussion draft contain everything DIRECTV thinks it should? Of course not. But it does two critically important things. It preserves service for millions of distant signal subscribers. And it addresses one particularly egregious abuse of the FCC's rules that is raising prices for consumers.

I'd like to talk about each of these topics in turn.

[1] Attached as Exhibit A to this testimony please find a brief overview the Satellite Home Viewer Act of 1988 and its progeny, listing the principal changes contained in each reauthorization.

I. The Discussion Draft Preserves Distant Signal Service

With all of the other issues before this Committee, it's sometimes easy to forget that key distant signal provisions are due to expire this December. Your constituents, however, have *not* forgotten about these provisions.

More than 1.5 million subscribers, many in the most rural areas of the country, receive at least one distant network signal from DIRECTV or DISH. I think we can all agree that these subscribers have as much right to receive network television as those in big cities. But only STELA permits them to receive that programming. In many cases, only STELA permits them to receive network television at all.

Were Congress to fail to reauthorize STELA, these subscribers would all lose service that most Americans take for granted.

I want to be absolutely clear on this point. Some have suggested from time to time that private licensing could take the place of STELA. That may be true for *local* programming. It may even be true under Congressman Scalise's approach, which would deregulate all programming entirely.

But nobody seriously contends that, if Congress were to eliminate STELA's *distant signal* provisions only, private licensing would replace them. Even NAB, which led the calls for eliminating distant signals, doesn't believe this.[2]

In other words, if Congress does not renew these provisions, distant network signals will disappear. So DIRECTV appreciates this Committee's work to ensure continuity of service to millions.

II. The Discussion Draft Addresses One Particularly Egregious Abuse of the FCC's Rules

This Committee has heard for months from all sides, including DIRECTV, regarding how the law should treat the relationship between broadcasters and pay-TV providers. As I said in my last testimony, we see two general approaches Congress could take in the long term. One is to jettison broadcast regulation altogether and create a truly free market in which broadcast programming is no longer treated differently than every other type of programming. The other is to make the laws smarter to reflect the 21st century video marketplace.

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[2] United States Copyright Office "Section 302" Report at 71-72 (2011), http://www.copyright.gov/docs/section302/ ("NAB concluded that given the overwhelming economic importance to the station of appealing to viewers in its own market as opposed to cable or satellite subscribers in some distant market, there is little likelihood that stations would adjust their existing licensing models for broadcast programming specifically to accommodate the programming preferences of a distant cable operator or satellite carrier. NAB also stated that there is no incentive for a broadcaster to undertake the additional cost and administrative burden of negotiating for additional rights in order to be able to sublicense all of its station's programs to cable operators or satellite carriers serving subscribers in distant markets.").

The discussion draft takes one step toward the second approach. It addresses one particular abuse of the FCC's broadcast ownership rules. It does so, moreover, *without* attempting to address the full range of policy questions surrounding retransmission consent. That, of course, will be a task for this Committee when it considers updating the Communications Act. DIRECTV looks forward to being an active participant in those efforts.

The draft bill's step-by-step approach has its advantages, because reasonable people can differ on the policy questions that divide broadcasters and pay-TV providers. For example, broadcasters think our subscribers don't pay them enough for their programming. We wish broadcasters would pay *us* for delivering their signals to millions upon millions of our subscribers who would never be able to get them over the air.

(Many of these subscribers would have been able to receive distant signals because of STELA's changes to the FCC's "rooftop antenna" standard for distant signal eligibility. Unfortunately, the FCC failed to implement these changes, leaving some subscribers without access to network programming altogether.[3])

Whatever one's views on these broader issues, however, most people agree that you shouldn't be able to evade FCC rules through legal tricks. Yet this is exactly what broadcasters are doing today—and this is exactly what the discussion draft would stop.

The FCC's media ownership rules generally prohibit ownership of more than one "big four" network affiliate in a market.[4] They also generally prohibit excessive concentration of broadcast ownership across markets.[5]

Broadcasters, however, increasingly evade these rules through the joint negotiation of retransmission consent. The American Cable Association identified 48 instances in which broadcasters used a single negotiator to conduct retransmission consent negotiations for non-commonly owned stations in a single market. DIRECTV's own internal records show that *in nearly half* of the markets in which we carry local signals, we must negotiate with a party representing multiple affiliates of the "Big Four" networks. This doesn't even count the increasing practice of networks insisting on negotiating retransmission consent on behalf of their allegedly independent affiliates.

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[3] *Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension & Reauthorization Act of 2004*, 25 FCC Rcd. 16471 (2010); *see also*, *e.g.*, Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 10-148 (filed Sept. 22, 2010) (specifying changes to prior standard). We have attached a redline of the 2010 changes to the antenna standard as Appendix B to these comments.

[4] 47 C.F.R. § 73.3555(b).

[5] 47 C.F.R. § 73.3555(e).

DIRECTV carries more broadcasters than just about anyone. I assure you that these arrangements harm viewers. They lead to higher prices (as much as 161 percent higher, according to ACA). They by definition cause greater harm when blackouts occur.

This is why the FCC appears poised to prohibit joint negotiations between two or more stations in a single market, unless such stations are commonly owned.[6] The discussion draft likewise restricts the joint negotiation of retransmission consent for non-commonly owned stations in a single market.

We support this approach. If implemented, broadcasters will once and for all no longer be allowed to evade the FCC's rules. This is sensible and long-overdue reform.

* * *

This Committee may hear about what it failed to do in the discussion draft. But on behalf of DIRECTV's more than 20 million subscribers, I would like to thank the Committee for what it *did* do. While no legislation is perfect, the discussion draft preserves service for millions and addresses an egregious abuse of the Commission's rules. DIRECTV supports the Committee's work, and hopes to assist it and the entire Congress so that the renewal of STELA will improve the video experience for all consumers.

[6] Tom Wheeler, "Protecting Television Consumers By Protecting Competition," (posted Mar. 6, 2014), http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition ("Wheeler Statement"); *Ex Parte* Submission of the United States Department of Justice, MB Docket Nos. 98-182, 07-294, and 04-256 (filed Feb. 20, 2014) (concluding that "failure to treat JSAs and similar arrangements as attributable interests could provide opportunities for parties to circumvent any competitive purposes of the multiple ownership limits").

APPENDIX A

A BRIEF HISTORY OF THE SATELLITE HOME VIEWER ACT

1. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667 ("SHVA")

- Created distant signal statutory license. (17 U.S.C. § 119)
- Limited distant signal service to "unserved" households—defined as households that, among other things, had not subscribed to a cable system within the previous 90 days.

2. Satellite Home Viewer Act of 1994, Pub. L. No. 103-369 ("SHVA")

- Created "challenge" procedures for networks to dispute eligibility of households, and measurement procedures for satellite carriers to demonstrate eligibility.
- Created "loser pays" formulation for signal measurement.

3. Satellite Home Viewer Improvement Act of 1999, Pub L. No. 106-113, App. I. ("SHVIA")

- Created new statutory license for local into local transmissions. (17 U.S.C. § 122)
- Created Communications Act "carry-one, carry-all" rules for satellite. (47 U.S.C. § 338)
- Subjected satellite local carriage to retransmission consent. (47 U.S.C. § 325)
- Created Communications Act distant signal rules. (47 U.S.C. § 339)
- Changed definition of "unserved household" in distant signal license to remove reference to cable subscription.
- Created waiver process by which local stations could permit distant signals to be delivered to houses otherwise ineligible.
- Created rules governing distant signal eligibility based on predictive model and measurement, replacing prior "challenge" procedure.
- Created "C-band" and "Grade B doughnut" exemptions permitting distant signal service to a limited number of longtime subscribers.
- Created RV and Truck eligibility.

- Permitted carriage of national PBS feed.

- Conditioned copyright license on compliance with FCC carriage rules.

- Subjected satellite carriage of distant signals to sports blackout rules.

- Subjected satellite carriage of nationally distributed superstations to syndicated exclusivity and network nonduplication rules.

- Created extensive complaint procedure for allegations of provisions of distant signals to ineligible subscribers.

4. Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447 ("SHVERA")

- Permitted satellite carriage of "significantly viewed" signals.

- Created "no-distant-where-local" formulation, including separate waiver provisions.

- Created license for limited local retransmission of low-power TV signals.

- Permitted carriage of non-network stations in commercial establishments.

- Created privacy rights for satellite subscribers corresponding to those that had applied to cable subscribers.

- Prohibited "two-dish" arrangement under which DISH required subscribers to obtain second satellite dish to see lesser-viewed local stations.

- Created special rules requiring carriage of all local signals in Alaska, and prohibiting out-of-state distant signals in Alaska.

- Provided for expedited DOJ consideration of voluntary agreements to provide local carriage in additional markets.

- Permitted carriage of distant and local digital signals, and created separate "digital white area."

- Created special exemptions for carriage of in-state signals in certain markets.

- Created "testing waivers" under which satellite could not deliver distant digital signals to stations experiencing problems completing the digital transition.

- Permitted satellite carriers to rely entirely on predictive modeling and to refuse to engage in on-site testing, other than at the subscriber's request and expense.

5. Satellite Television Extension and Localism Act of 2010, Pub L. No. 111-175 ("STELA")

- Reinstated distant signal license to DISH Network (which had lost the right to provide such service under the so-called "death penalty" provisions) upon verification of DISH's service of all 210 local markets.

- Eliminated "Grade B Bleed" by defining "unserved household" restriction based on off-air reception of *in market stations only*.

- Prohibited distant signal service to those who can receive local *multicast* signals off-air (with complex implementation phase-in).

- Harmonized "no-distant-where-local" rules to combine prior analog- and digital-specific rules.

- Prohibited discrimination in carriage of high definition public television stations.

- Required FCC to develop predictive model for digital signals.

- Increased statutory damages for distant signal violations tenfold.

- Permitted carriage of low-power stations throughout local market.

- Permitted distant signal carriage of networks of public stations.

- Modified cable statutory license to resolve several technical problems that had arisen over the years, including carriage of multicast streams.

- Directed Copyright Office to initiate filing fees.

- Directed Copyright Office to permit audits of statements of account.

- Directed FCC, Copyright office, GAO to issue six reports collectively.

Appendix B

Excerpt from Letter Regarding FCC Antenna Standard

Appendix
Redline of Key Provisions

17 U.S.C. § 119(d)

(10) Unserved household. The term "unserved household", with respect to a particular television network, means a household that--

(A) cannot receive, through the use of a**n**~~conventional, stationary, outdoor rooftop receiving~~ antenna, an over-the-air signal ~~of a~~**the** primary **stream, or on or after the qualifying date, the multicast stream, originating in that household's local market and** ~~network station~~ affiliated with that network of

(i) **if the signal originates as an analog signal,** Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47**,**~~of the~~ Code of Federal Regulations, as in effect on January 1, 1999; **or**

(ii) **if the signal originates as a digital signal, intensity defined in the values for the digital television noise-limited service contour, as defined in regulations issued by the Federal Communications Commission (section 73.622(e) of title 47, Code of Federal Regulations), as such regulations may be amended from time to time;**

47 U.S.C. § 339(c)(3)

(A) Predictive model.—Within 180 days after the date of the enactment of the Satellite **Television Extension and Localism Act of 2010**~~Home Viewer Improvement Act of 1999 [enacted Nov. 29, 1999]~~, the Commission shall ~~take all actions necessary, including any reconsideration, to~~ develop and prescribe by rule a point-to-point predictive model for reliably and presumptively determining the ability of individual locations**, through the use of an antenna,** to receive signals in accordance with the signal intensity standard in **section 73.622(e)(1) of title 47, Code of Federal Regulations, or a successor regulation, including to account for the continuing operation of translator stations and low power television stations**~~effect under section 119(d)(10)(A) of title 17, United States Code~~. In prescribing such model, the Commission shall rely on the Individual Location Longley-Rice model set forth by the ~~Federal Communications~~ Commission in **CS** Docket No. 98-201**, as previously revised with respect to analog signals, and as recommended by the Commission with respect to digital signals in its Report to Congress in ET Docket No. 05-182,**

FCC 05-199 (released December 9, 2005). ~~**and ensure that such model takes into account terrain, building structures, and other land cover variations.**~~ The Commission shall establish procedures for the continued refinement in the application of the model by the use of additional data as it becomes available.

(B) On-location testing.—The Commission shall issue an order completing its rule-making proceeding in ET Docket No. 06-94 within 180 days after the date of enactment of the Satellite Television Extension and Localism Act of 2010. In conducting such rulemaking, the Commission shall seek ways to minimize consumer burdens associated with on-location testing.