



Testimony of

R. Stanton Dodge

Executive Vice President and General Counsel of DISH Network L.L.C.

on

“Innovation Versus Regulation in the Video Marketplace”

before the

House of Representatives

Committee on Energy and Commerce

Subcommittee on Communications and Technology

September 11, 2013

Chairman Upton, Ranking Member Waxman, Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the General Counsel of DISH Network, the nation's third largest pay-TV provider and the only provider of local television service in all 210 of this nation's local TV markets.

The broken retransmission consent regime is in dire need of comprehensive reform. In the past few years we have seen an escalating number of blackouts arising from impasses in negotiations between the broadcasters and their distributors. And, these blackouts are lasting longer than in the past, and impacting millions more subscribers. The recent headlines about the CBS service interruption during its dispute with Time Warner Cable serve as a stark reminder. The retransmission consent problem has reached a crescendo. It is the most severe crisis since Congress decided to give broadcasters a retransmission consent right in the 1992 Cable Act. This is the most destructive and outdated remnant of the 1992 Act and does not match up with the vibrant, ever-changing, competitive landscape in the modern video marketplace.

The American Television Alliance ("ATVA"), whose membership encompasses cable and satellite providers, independent programmers, and public interest groups, and of which DISH is a member, is unified in calling for targeted fixes of these outdated retransmission consent rules as part of the STELA re-authorization.

We and many other members of ATVA have voiced support for proposals such as interim carriage authority, which would temporarily permit a distant signal to be imported during a retransmission consent dispute. That measure would alleviate the problem of service disruptions

and prevent the use of consumers as pawns. And, the broadcaster whose signal is imported will be compensated under the already established distant signal royalty rate. If the broadcaster's local content is as valuable to consumers as they assert, then the imported distant network is a poor substitute, and both parties would continue to have every incentive to reach an agreement. The imported distant signal simply fills the void for the network programming.

Others in ATVA have expressed interest in a discussion of standalone broadcast station offerings, which would give consumers the choice of whether to pay separately to receive a particular local broadcast station. And some in ATVA support the deregulatory approach embodied in Rep. Scalise's legislation from the 112th Congress. ATVA lauded Rep. Scalise for his leadership in starting the necessary debate about the need for comprehensive reform.

Today, we applaud Ranking Member Eshoo for introducing the Video CHOICE Act. Critically, the discussion draft proposes concrete legislative ideas to give consumers greater choice over their programming, tackles the growing problem of bundling of cable channels with network channels, and empowers the FCC with significant authority to curtail blackouts. We look forward to working with Ranking Member Eshoo and the Subcommittee to ensure that meaningful legislation is passed this Congress.

As one can see, there are many ways to address the broken retransmission consent system. Without immediate action by Congress, it is likely that the blackout problem will continue to escalate, millions more screens will go dark every year, and consumers will be forced to pay more and more for their cable and satellite service as a result. The time to act is now.

This afternoon, I will briefly review the origins and purpose of the retransmission consent system, and then outline one solution that can be implemented to avoid consumer disenfranchisement and abuse of the 1992 retransmission consent right.

But first, let me say a few words about DISH. DISH employs over 25,000 people across the country and is a leader in innovation, having rolled out advanced place shifting and DVR functionality that provides our customers with the ability to view their content where, when, and how they want it. To stay relevant, we must continue to adapt to our customers' evolving preferences, and we believe that the only way to do that is to embrace innovation and change as a company. And our laws, which set the framework for a competitive video marketplace, must do the same.

The Broken Retransmission Consent Regime Leaves Consumers in the Dark – Literally

In 1992, Your Regional Cable Operator Was the Only Game in Town. The broadcasters' retransmission consent right did not always exist. Congress created it and gave it to the broadcasters in the 1992 Cable Act. Before that time, distributors could simply retransmit local stations under the cable statutory license of Section 111.

Back then, we lived in a different world. Most markets were served by only a single cable company. Satellite wasn't an option, unless you wanted to install a 3-meter dish in your backyard. The Internet was in its infancy. If we had a mobile device, it was probably the size of a brick. All these years of progress later, with increased competitive forces now at play in the video marketplace, it is difficult to look at the laws on the books and tell that much has changed. Except for its extension to the satellite arena, the retransmission consent system remains largely the same two-plus decades later.

Today, Networks Leverage Their Monopolies to Play Distributors Against Each Other.

In most places today, multiple distributors using a traditional distribution model (the cable company, two satellite providers, and often a telco) compete for customers. This is not to mention over-the-top providers such as Netflix, Amazon, and Hulu, which are potential or present competitors, too. The multiplicity of distributors has a significant implication under the current retransmission consent regime. Network stations play providers against one another. Instead of a broadcaster and a single regional cable operator engaging in a relatively fair fight and coming to terms on a reasonable retransmission fee, networks threaten to pull their programming, effectively (and sometimes affirmatively) pushing consumers onto other providers' systems – providers that may have given in to the same unreasonable demands of the broadcaster. In contrast to the cable and satellite providers, each broadcaster effectively owns a monopoly in its given market. No other station in the market can offer the same network programming by virtue of the network system of exclusive franchises. Consequently, the broadcasters have the luxury of threatening to withhold their programming altogether in order to extract higher and higher retransmission consent fees. The result: broadcasters leverage their government-protected exclusive network franchises by means of their government-created retransmission consent right.

The problem is exacerbated by the increasing consolidation we have seen in the broadcasting industry. In the last four months alone, acquisitions have preoccupied the industry, with the Sinclair Group seeking to increase its holdings from just over 100 stations to almost 150; Gannett proposing to acquire Belo Corporation to bring Gannett's holdings of local broadcast stations to 43; Tribune acquiring Local TV Holdings to bring its total station ownership to 42; and Media General and New Young Broadcasting announcing their intention to

merge and combine ownership of their 30 broadcast station affiliates. This consolidation further imbalances the market, as multiple markets are presented to carriers with take-it-or-leave-it propositions for extraordinary rates. We are seeing increased fee demands of between three and six hundred percent when compared to just three years ago, when Congress last acted and passed STELA.

There are also serious antitrust issues that arise when broadcasters enter into arrangements to jointly negotiate retransmission consent deals. For example, in 2012, DISH was forced to black out three Big-4 stations in Casper, Wyoming and two Big-4 stations in Cheyenne, Wyoming. Although the five stations were ostensibly owned by three different entities, DISH was required to negotiate with a single appointed representative for all five stations. After negotiations broke down, the blackout lasted for 4 months. The consolidation of so much local broadcast programming under one negotiator gives the broadcasters inordinate additional leverage, precipitating and prolonging the blackouts for DISH subscribers.

Consumers Are Getting Left in the Dark. The result: consumers are being left in the dark—literally. To gain leverage during retransmission consent negotiations, broadcasters increasingly pull their signals, resulting in blackouts of major television networks. Cable, satellite, and telco subscribers are deprived of key network programming, along with important local safety, emergency, weather, and news information, precisely what the broadcasters claim is their public interest charge. And the problem is worse than ever.

These blackouts are affecting more consumers in more markets than ever before. The proof is in the numbers. In 2010, there were 12 instances where a broadcast signal was blacked out in a local TV market. In 2011, there were 51. In 2012, the number soared to almost 100 blackouts affecting millions consumers. And the pace has yet to level off. In 2013, we're on

track for 120 blackouts. Like most snowballing crises, individual incidents are increasing in severity. In this case, the blackouts are increasing in length. The longest blackout lasted only 24 days in 2010. In 2011, there were 16 blackouts lasting over 24 days. Last year, there were 30 blackouts that lasted over 24 days, two of which lasted 121 days. And the CBS blackout lasted over four weeks, affecting more than 3 million consumers in some of the nation's largest markets. During the blackouts, CBS even barred Time Warner Cable's Internet customers, some of whom had third-party video providers such as DISH, from accessing full episodes of CBS programming on the Internet. Like many blackouts, the dispute coincided with a marquee event—in this instance, the anticipated start of the NFL season.

In the past, subscribers' access to the World Series and the Oscars has been threatened by broadcasters' brinksmanship. Ultimately, the losers in these one-sided contests are the consumers who get their programming pulled from them by the broadcasters and then see their bills on the rise as a result of ever-increasing broadcaster price demands. Some broadcasters have floated the idea of becoming a cable channel, thus stopping the broadcast of their channels over the air. If the broadcasters choose to do that, they should give back all of their free government-granted broadcast spectrum, must carry rights, and other public subsidies.

Congress Can Fix the Problem. Among other things, Congress can restore balance to the negotiating table by temporarily allowing cable and satellite carriers to substitute a distant network signal from a non-local market during an impasse in retransmission consent negotiations with a local market affiliate of that same network. This approach has broad support from across the industry and public interest groups.

Here is how the proposal would work: If a broadcaster blacks out, for example, the local Denver NBC station, the cable or satellite provider would be able to temporarily offer

subscribers an out-of-market station, such as the Cheyenne NBC station. The replacement station will not be a perfect substitute for the blacked-out local station, since consumers won't have their local content, but at least people will be able to receive network programming. And, the broadcaster whose signal is imported will be compensated under the already established distant signal royalty rate.

Additionally, this solution will introduce some competition into the marketplace—just as pay-TV providers face competition from one another that mitigates against dropping broadcast programming. Here the broadcaster would face some degree of competition from a network affiliate in another market. The local broadcaster might think twice before pulling its signal from cable or satellite subscribers. Consumers will benefit.

Today's Laws Should Reflect Today's Marketplace, A Marketplace in which DISH is Prepared to Compete

The video industry is a place where the marvels of yesterday have become commonplace today. The needs and desires of consumers are evolving to keep pace with the options that new technology makes available to them. Our laws should also evolve to create a framework that facilitates the functions of the free market. This framework would help providers to give American consumers what they want: the content that they want, when they want it, and how they want it. Consumers want to watch their programming of choice on their television sets, on their phones, and on their tablets. They also want to surf the web or make a phone call—no matter where they are. When we look at the marketplace for video, we need to be able to provide all of those options to every one of our customers, and we need to do it anywhere, anytime, on any device.

Our company is moving to meet this need. By rolling out technological innovations like the Hopper with Sling, our customers can use a smartphone or tablet in a controlled and private

manner to enjoy the video content for which they have already paid. Our new PrimeTime Anytime and AutoHop functionality take the DVR to a new level. Consumers can, at their option, enable these features to gain the ability to more easily view their preferred programming when they want, while skipping what they don't want to see.

These are some of the ways in which we have responded to our customers' changing needs. But we have further to go. In the past, we haven't shrunk from "betting the company," so to speak, in order to stay competitive. We went from selling big dishes to launching our own small-dish DBS business. To give customers what they want, including mobile video, voice, and data, we are taking a risk again. Recognizing the evolution in video, DISH is on its way to becoming a wireless service provider. We acquired satellite spectrum and, after almost two years, secured FCC approval to use that spectrum for terrestrial mobile broadband services. We now want to compete against the established players by offering video, voice, and data inside and outside the home, from a single platform.

DISH is driven to provide consumers with all that they want, including the choice in services and providers that they seek. If we are successful, we will fuel billions of dollars in investment and create tens of thousands of new jobs throughout the United States. But just as businesses must foster change in a rapidly evolving video marketplace to keep pace with what consumers want, government should work to ensure its regulations mirror today's competitive realities, consumer expectations, and advances in technology.

Thank you. I look forward to answering any questions you may have.