The Committee on Energy and Commerce

Memorandum March 10, 2014

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Subject: Legislative Hearing on "Reauthorization of the Satellite Television Extension and Localism Act"

I. Overview

The Subcommittee on Communications and Technology will hold a hearing on Wednesday, March 12, 2014, at 10:30 a.m. in 2123 Rayburn House Office Building entitled "Reauthorization of the Satellite Television Extension and Localism Act." One panel of witnesses will testify.

1. Mr. Mike Palkovic, Executive Vice President, Services and Operations, DIRECTV;
2. Ms. Marci Burdick, Senior Vice President of Broadcasting, Schurz Communications, Inc.;
3. Mr. Michael Powell, President and CEO, National Cable and Telecommunications Association; and
4. Mr. Matt Zinn, Senior Vice President, General Counsel and Chief Privacy Officer, TiVo.
5. Mr. Matt Wood, Policy Director, Free Press

Over the past two years, this Subcommittee has spent considerable time reviewing the state of the video marketplace in order to determine whether Congress should reauthorize, revise, or sunset the Satellite Television Extension and Localism Act (STELA), the satellite video distribution law. Certain provisions – in particular, the distant signal copyright and retransmission rules – will expire on December 31, 2014. Absent a reauthorization of these provisions, satellite television customers could lose access to local or network television. Because this is considered "must pass" legislation, other industry stakeholders have sought to include additional reforms to video distribution law.

During this hearing, the subcommittee will consider a discussion draft of legislation to reauthorize STELA along with several narrowly tailored changes to the video distribution law, intended to ameliorate perceived flaws in the current system. However, the Committee is concurrently working on major changes to the Communications Act, which is the better venue for a comprehensive review of necessary changes to the communications sector and its governing laws.

II. Discussion Draft

Most importantly, the discussion draft reauthorizes for five years the provisions of the Communications Act that allow satellite providers to bring "distant signals" to certain subscribers; contains narrow changes to government involvement in retransmission consent discussions; and includes language to relieve cable operators of the obligation to include CableCARDs in operator-deployed set-top boxes.

A. Five-Year Extension of Satellite/Broadcast Retransmission Rights and Obligations

At the end of 2014, the provisions that allow satellite providers to beam "distant signals" to 1.5 million unserved households will expire, unless Congress reauthorizes those provisions. Distant signals are used to serve subscribers in markets where their satellite provider does not offer local programming and in unserved parts of the country, including "short markets," where one of the four national broadcast networks does not have an over-the-air affiliate.

This draft extends the provisions in the Communications Act that allow satellite providers to offer those distant signals. Specifically, the draft extends the provision that exempts providers from having to obtain retransmission consent for those signals. A complementary provision in the Copyright Act provides a compulsory copyright license that enables the satellite providers to retransmit those signals. Together, these two provisions provide access to network television signals to unserved households.

Congress passed the first Satellite Home Viewer Act of 1988 (SHVA) to facilitate the growth of the fledgling satellite industry and to make network signals available to unserved households. Mindful of the evolving state of video competition, Congress determined that the distant signal provisions should be revisited every five years to re-assess whether they were still necessary. Since then, those distant signal provisions have been re-authorized five times. Each iteration of the satellite video law has attempted to reduce the use of distant signal provisions and increase carriage of local stations in local markets. Currently, Dish provides local signals in all 210 DMAs, and DirecTV provides local signals in approximately 195 DMAs.

Nonetheless, the satellite industry continues to provide distant signals to approximately 1.5 million subscribers across the nation. The discussion draft maintains the availability of those distant signals to those subscribers for an additional five years. Five years offers regulatory stability for the satellite video providers and broadcasters through the update of the Communications Act.

B. Elimination of "Sweeps" Week Prohibition on Signal Changes

Under current law, cable operators are not permitted to drop broadcast signals during the weeks when Nielsen Media Research does its major audience measurements (so called "sweeps" weeks). Traditionally, four times per year, Nielsen sends diaries to sample homes in the various markets around the country, for the residents to record the shows they watched. These diaries are then "swept" up, and the results analyzed to determine the ratings for television programming and channels. These viewing figures are the basis upon which rates for local advertisers are set, *i.e.*, the greater the audience for a particular program or channel, the higher the advertising rates.

The current prohibition on dropping broadcast signals during sweeps week guarantees broadcasters carriage on cable systems during the time when Nielsen measures audiences, ensuring that a retransmission dispute does not impact Nielsen ratings, and thus advertising rates.

However, stations that have elected to seek retransmission consent have foregone mandatory carriage in favor of retransmission consent fees, another important revenue stream. Inconsistently, the sweeps week rule allows retransmission consent broadcasters to take advantage of must-carry rules selectively during a sweeps week carriage dispute. Since cable providers do not have a corresponding right to demand access to programming during a retransmission dispute, elimination of this provision is a deregulatory step to remove the government from the market negotiation for signal carriage. Additionally, because satellite providers are not subject to the rule, this will provide regulatory parity between cable and satellite operators.

C. Limitations on Joint Retransmission Consent Negotiations

"Joint sales agreements" (JSAs) allow broadcasters to enter into an arrangement to, among other things, manage multiple stations in the same market, share resources, and share the high costs of producing local content, particularly in areas where the economy might not otherwise support additional stations. These types of agreements have been approved by the Commission for quite some time and are actively in use in markets across the country.

In some instances, these agreements have been used to jointly negotiate retransmission consent agreements with cable and satellite carriers. Critics argue that such arrangements could give broadcasters an unfair advantage in negotiations, because a negotiating impasse would result in the loss of two local programming streams rather than one and may give the broadcaster the ability to demand retransmission fees above the market value each broadcaster could command alone.

Because these arrangements have beneficial effects on broadcasters' ability to bring programming to unserved and underserved communities, they should not be banned. Rather, a middle ground that recognizes their potential value and guards against competitive abuse is a preferred approach. The draft proposes to prohibit two independently owned stations (whether under a JSA or not) from negotiating retransmission consent jointly unless the cable or satellite operator agrees to joint negotiations.

The discussion draft also addresses the Federal Communications Commission's (FCC) recent interest in the role of JSAs in the media ownership debate. Specifically, it requires the Commission to complete its statutory duty to review all of its media ownership rules every four years (the "quadrennial review") prior to taking action on the specific issue of JSAs. While sharing arrangements may warrant a hard look, just as the UHF discount may warrant re-examination, the Commission's review should take place in its quadrennial review, not as a piecemeal substitute for complying with its governing statute.

D. Repeal of the Set-top Box Security Integration Ban

Section 629 of the Communications Act, added as part of the Telecommunications Act of 1996, requires the FCC to foster a market for third-party set-top boxes – set-top boxes that could

be sold at retail and used on any multichannel video programing distributor's network. In adopting rules to comply with Section 629, the Commission's required that the portion of the cable box that decrypts the cable signal be physically separated from the other functions of the box ("the separable security requirement"). The consumer electronics (CE) and cable industries developed the CableCARD, a module that could be deployed in third-party electronics (televisions or retail set-top boxes) to decrypt the cable signal for viewing via a third-party set-top box. The most widely deployed retail set-top box is TiVo. Its subscribers use approximately 600,000 CableCARDs today.

However, the Commission's rules applied to both third-party boxes and those leased from a cable provider. This ban on integrating the security into the cable-owned boxes was intended to motivate cable systems to work with the CE industry by forcing reliance on a common technology. Practically, this means that cable systems are not only required to support CableCARDs in third-party boxes, but must also deploy CableCARDs in their own set-top boxes. This was called the "integration ban." Use of a separate CableCARD in cable-leased set-top boxes reportedly increases the cost of the unit $40-50 per device. The cable industry estimates that it has spent as much as $1 billion on CableCARDs in leased boxes since the integration ban went into effect in 2007.

The language in the discussion draft – taken from H.R. 3196, a bi-partisan bill introduced by Rep. Bob Latta, Vice-Chair of the Subcommittee – does not repeal the Commission's section 629 mandate to foster the retail set-top box market. Rather, it eliminates the section of the Commission's rules that require CableCARDs in leased set-top boxes, leaving the Commission free to use other tools at its disposal to regulate the set-top box marketplace. It is worth noting that, as a result of judicial action, large parts of the FCC's CableCARD regulatory regime are no longer in effect (*See* EchoStar Satellite v. FCC, 704 F.3d 992 (D.C. Cir. 2013)). Nonetheless, the integration ban and separable security requirements continue to be good law, and cable operators continue to use CableCARDs to comply.

If you need more information, please call David Redl or Grace Koh at (202) 225-2927.