



**Hearing on
“Satellite Television Laws In Title 17”**

**United States House of Representatives
Committee on Judiciary**

***Subcommittee on Courts,
Intellectual Property and the Internet***

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Statement of Gerard J. Waldron

**On behalf of the
National Association of Broadcasters**

INTRODUCTION AND SUMMARY

Good morning, Chairman Coble, Ranking Member Watt, and members of the Subcommittee. My name is Gerry Waldron. I am a Partner at the law firm of Covington and Burling, and am testifying here today on behalf of the thousands of broadcasters – both those affiliated with the ABC, CBS, FOX, NBC and Univision networks as well as independent broadcasters – who serve their communities with free, local, over-the-air television and are members of the National Association of Broadcasters (NAB).

Thank you for the opportunity to discuss the reauthorization of the Satellite Television Extension and Localism Act of 2010 (STELA), and specifically certain provisions which are set to expire at the end of 2014. NAB looks forward to working with this Subcommittee as we again consider how the public interest can best be served through satellite carriage of broadcast television signals.

Today I will discuss the bedrock principle of localism that underpins STELA and its predecessors; provide a background on the copyright and communications laws that govern the satellite industry; and examine whether the distant signal license is still needed. Additionally, I will focus on one issue that, while not in any way relevant to STELA reauthorization, has been raised by others – retransmission consent.

The Subcommittee should start with a basic question, one that no doubt is asked about every bill that comes before this panel: Is legislation needed? Should the distant signal be reauthorized? At NAB, we ask that question in earnest, because Congress intended the distant signal to be *temporary* in nature. Yet, here we are 25 years later debating whether to extend it for the fifth time. Given that we're now in the fourth decade of a "temporary" provision, we think the satellite industry needs to prove to

members of the Subcommittee why this “temporary” exception to the norms of copyright law should not sunset. In the event that the Subcommittee does deem reauthorization of the distant signal license, in some form, necessary, Congress should limit any action to those narrow issues relevant to today’s environment in which local-into-local service is now provided in all markets. Any efforts to address unrelated issues would only prolong and complicate this reauthorization process.

I. Localism: The Core Principle Underpinning the Satellite Laws

The starting point for considering any reauthorization must be localism – the bedrock principle rooted in the Communications Act of 1934 that has guided both communications and related copyright policy in this area for decades. In crafting the Satellite Home Viewer Act of 1988 (“SHVA”) and its progeny, Congress strived to promote this local model by adhering to two interrelated policy objectives: (1) enabling the wide availability of free, locally-focused, over-the-air television programming in American television households, while (2) ensuring that the satellite retransmission of television broadcast stations did not discourage broadcasters from continuing to offer this free television service.¹ These objectives should continue to guide your review of legislation today.

What does localism mean for the public served by local television broadcasters, your constituents? Localism is coverage of matters of importance for local communities, such as local news, severe weather and emergency alerts, school closings, high school sports, local elections and public affairs. Localism is support for

¹ S. Rep. No. 92, 102 Cong., 1st Sess. 36 (1991).

local charities, civic organizations and events that help create a sense of community. Locally based broadcast stations are also the means through which local businesses educate and inform the public about their goods and services and, in turn, create jobs and support local economies. Local broadcasters address the needs of the public, based on a familiarity with and commitment to the cities and towns where they do business.

I could recount numerous examples of NAB stations excelling in all of these locally-focused capacities, but there is no better example of the benefits of broadcasters' local focus than the role that broadcasters performed in their coverage of the tornados in Oklahoma earlier this year. Before, during, and after the tragic tornado in Moore touched down on May 20, local broadcast television stations served Oklahomans with up-to-the-minute, life-saving information.² Whether it was warning viewers to seek shelter based on Doppler radar reports, providing aerial footage of the storm and its destruction from a helicopter or helping emergency personnel communicate rescue and recovery information to residents, broadcasters were there in Moore, Oklahoma as *first informers*. At 5:30 pm local time, shortly after the worst of the storm, over 475,000 television viewers in the Oklahoma City market were watching local news coverage on broadcast television. To put that in perspective, 375,000 viewers in this market watched last year's Super Bowl.

Local broadcast television remains unique because it is free, it is local and it is *always on* – even when other forms of communication may fail. As local broadcasters

² During the week of May 20-26, which saw a tornado strike the area on May 20, 99 of the top 100 rated programs were found on broadcast television. The top 20 shows for the week were all storm-related coverage, in particular special news coverage of tornado and its aftermath. http://www.tvb.org/measurement/PRR_Week35

continue to reach more people and touch more lives than any other communications medium, the Subcommittee and your constituents would be well served by once again focusing on localism in any reauthorization effort.

II. Legal Background

It is important to appreciate that three distinct statutory licenses in the Copyright Act govern the retransmission of *distant* and *local* over-the-air broadcast station signals:

- Section 119 permits a satellite carrier to retransmit distant television signals to subscribers for private home viewing and to commercial establishments for a per subscriber fee.
- Section 122 permits a satellite carrier to retransmit the signals of each local television station into the station's local market and also outside the station's market where the station is "significantly viewed," on a royalty-free basis.
- Section 111 permits a cable operator to retransmit both local and distant radio and television signals to subscribers.

I want to emphasize that only the Section 119 license sunsets at the end of 2014 and is the subject of this hearing. The Section 111 and 122 licenses are permanent. Of course, all of these licenses are contingent upon the users complying with certain conditions imposed by the Communications Act, including rules, regulations, and authorizations established by the Federal Communications Commission (FCC) governing the carriage of television broadcast signals, but that is the focus of another Committee.

A. The Section 119 License

In 1988, Congress responded to concerns of companies using large satellite dishes, mostly in rural areas, to deliver multichannel service to consumers far away from a TV station, by adopting the Satellite Home Viewer Act (SHVA). That law, adopted years before DISH or DirecTV were even launched, created the Section 119 statutory license enabling satellite carriers to retransmit the signals of *distant* television network stations and superstations to satellite dish owners for their private home viewing. The Section 119 license enabled satellite carriers to provide *distant* network programming to households unable to receive adequate over-the-air signals from their local network affiliates.

In adopting Section 119, Congress carefully wrote in a number of conditions to promote fundamental policies. Respecting the principle of localism, only those subscribers who live in unserved households are eligible to receive distant network station signals. SHVA defined an “unserved household” as a household that cannot receive, through the use of a “conventional, outdoor rooftop receiving antenna,” an over-the-air signal of a network station of Grade B intensity. The purpose of this provision was to protect the local viewing public’s ability to receive locally oriented news, information and other programming by preserving the exclusivity local television stations have in their network and syndicated programs. That territorial exclusivity, which is common in many industries, enables stations to generate revenue needed to provide local service.

The law was originally set to expire at the end of 1994; however Congress reauthorized Section 119 in 1994, 1999, 2004, and again in 2010 for additional five year periods.

B. The Section 122 License

The 1999 renewal, called the Satellite Home Viewer Improvement Act of 1999 (SHVIA), also created a new royalty-free Section 122 license that allowed, but did not require, satellite carriers to retransmit *local* television signals into their own markets. The Section 122 license was intended, in part, to make the satellite industry more competitive with cable. In that it was wildly successful. The number of satellite subscribers sky-rocketed. Satellite carriers have increasingly relied upon the Section 122 license to provide *local* television signals to their subscribers. Currently, DISH provides local-into-local service in all television markets (referred to as Designated Market Areas (DMAs)), and DirecTV reportedly offers local-into-local service to all but 15 DMAs.

The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) reauthorized Section 119 once again, but also set rules to further limit importation of distant network station signals into local television markets. For example, SHVERA required the satellite carriers to phase out retransmission of distant signals in markets where they offered local-into-local service. Generally, a satellite carrier was required to terminate distant station service to any subscriber who elected to receive local-into-local service, and was precluded from providing distant network station signals to new subscribers in markets where local-into-local service was available.

SHVERA additionally permitted satellite carriers to deliver television station signals from adjacent markets that were determined by the FCC to be “significantly viewed” in the local market so long as the satellite carrier provided local-into-local service to those subscribers. SHVERA also expanded the copyright license to make express provision for digital signals.

C. STELA: Part Copyright Law, Part Communications Act

Sections 119 and 122 discussed above are part of the Copyright Act. These copyright sections work in tandem with certain provisions in the Communications Act. For example, Section 325 of the Communications Act requires satellite carriers to obtain retransmission consent for the carriage of local stations, but exempts carriers from obtaining such consent to retransmit *distant* network signals to unserved households.

Section 338 of the Communications Act contains provisions governing the carriage of local stations. These provisions include the “carry one, carry all” requirement under which a satellite carrier offering carriage of one local station in a market must offer carriage to all stations in the market.

Section 339 of the Communications Act governs the carriage of distant signals. Its provisions include: provisions relating to replacing distant signals with local signals; carriage of distant digital signals; digital signal strength prediction testing; and program exclusivity rules for satellite. Lastly, Section 340 has provisions relating to the carriage of significantly viewed signals.

While none of the Communications Act sections are scheduled to sunset, certain provisions within the key sections do sunset in 2014. Specifically, the following provisions related to retransmission consent are set to expire: (1) the exemption satellite

carriers enjoy from having to obtain retransmission consent from stations whose signals they provide to unserved households; (2) the prohibition against stations entering into an exclusive carriage agreement with only one cable or satellite provider; and (3) the requirement to negotiate retransmission agreements in good faith.

III. Does the Section 119 License Continue To Promote Localism?

Given the narrow scope of the Section 119 license, we invite the Subcommittee to consider whether the time has come for this “temporary” *distant* signal license to sunset. While the distant signal license may have served its purpose in 1988, when the back-yard satellite industry was just getting started; and again when DISH and DirecTV first launched their small-receiver services in the mid-1990s; today, in 2013, the distant signal license is a vestige of a bygone era, a time before fiber optics, compression technology, digitalization, and the ability they have brought to provide local stations to nearly all subscribers. While the satellite companies are in the best position to precisely identify the number of their subscribers currently receiving distant signals, four years ago, the last time Congress looked at this issue, only some two percent (2%) of households continued to receive a distant signal package, and that number was steadily declining.

Experience has shown that the Section 122 local-into-local compulsory license is the right way to address delivery of over-the-air television stations to satellite subscribers. NAB strongly supported the Section 122 license when it was adopted and continues to believe that it is mutually beneficial to stations, to carriers and, most importantly, to consumers. Local-into-local has provided a boon for the satellite industry

and greatly enhanced its ability to compete with cable. The *local* license also has promoted localism, since viewers truly realize the benefits of the local broadcast model where they receive a local signal. Thus, Congress’s focus at this time should be to further these trends and promote local-into-local service in all markets.

To a great extent, Section 119 has outlived its usefulness. Unlike the local-into-local compulsory license, the distant-signal compulsory license as applied to distant network signals threatens the statutory goal of localism.³ As a result, the only defensible justification for this exception is as a “hardship” exception—to make network programming available to the small number of households that otherwise have no access to it. The 1999 SHVIA Conference Report states that principle eloquently: “the specific goal of the 119 license . . . is to allow for a *life-line network television service to those homes beyond the reach of their local television stations.*” SHVIA Conference Report, 145 Cong. Rec. at H11792-793 (emphasis added).⁴

Today, over 98 percent of all U.S. television viewers can view their *local* network affiliates *by satellite*—and that number is growing all the time. In practical terms, with few exceptions, *there are no unserved viewers* in areas in which local-into-local satellite transmissions are available, because it is no more difficult for subscribers to obtain local stations from their satellite carriers than to obtain distant stations from those same carriers. Accordingly, no public policy justifies treating satellite subscribers in local-into-

³ The portion of Section 119 enabling retransmission of “superstations” does not pose such a threat to localism.

⁴ See, e.g., Satellite Home Viewer Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) (“The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today’s network-affiliate relationship.”); *id.* at 26 (“The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely.”); *id.* at 14 (1988) (“Moreover, the bill respects the network/affiliate relationship and promotes localism.”).

local markets as “unserved” and therefore eligible to receive distant network stations. Quite the contrary, there is every reason to close this loophole.

IV. Retransmission Consent

The retransmission consent right is contained within the Communications Act, and was established by Congress in 1992 and upheld by the Supreme Court in 1997. Retransmission consent recognizes local broadcasters’ property interest in their over-the-air signal, permitting them to seek compensation from cable operators and other multichannel video programming distributors (MVPDs) for carriage of their signals.

In the course of the Subcommittee’s reexamination of STELA, it is likely to hear from interests seeking enactment of new exceptions to the copyright laws that would undermine broadcasters retransmission consent right. Broadcasters across the country urge the Subcommittee to resist these overtures, since they would pose significant harm to the locally-focused broadcast model that has served the viewing public so well for decades.

Specifically, a change in law that would permit a satellite carrier to import a distant signal — not based on need, but to gain unfair market leverage in a retransmission consent dispute — would be contrary to decades of Congressional policy aimed to promote localism. Such a proposal would undermine the locally-oriented contractual exclusivity of the network/affiliate relationship by delivering to viewers in *served* households—*i.e.*, those who can already watch their own local ABC, CBS, Fox, and NBC stations—network programming from another distant market. This importation of duplicative distant network programming jeopardizes the viability of the local network-

affiliated stations that offer the local news, weather and emergency information that viewers value.

When Congress adopted the retransmission consent right, it sought to implement a *market-based* system of property rights and private contracts to address “a distortion in the video marketplace.”⁵ Congress acted to address the distortion caused by the ability of cable operators to retransmit and resell a local broadcast station’s signal without its permission. Thus, Congress acted to rebalance the distortion caused by the compulsory statutory license which cable companies enjoyed. The fundamental factual, equitable and competition policy considerations before Congress in 1992 remain true and valid today.

In 1992, Congress found that “[b]roadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems.”⁶ Based on these facts, Congress reasoned that “a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals,” and because “cable operators pay for the cable programming services [such as Comedy Central or Animal Planet] they offer to their customers ... that programming services on a broadcast channel should not be treated differently.”⁷ Finally, looking at the presence of competing channels owned by cable operators through a competitive lens, Congress did “not believe that public policy support[ed] a

⁵ S. Rep. No. 92, 102 Cong., 1st Sess. at 35.

⁶ *Id.*

⁷ *Id.*

system under which broadcasters in effect subsidize the establishment of their chief competitors.”⁸ All of these findings remain as relevant today as they were in 1992.

Both local broadcasters and pay television providers have an incentive to complete retransmission negotiations in the marketplace before any disruption to the viewer occurs, and for that very simple reason almost all negotiations are completed on time and with no drama. NAB studies show that over a recent five-year period, service interruptions from retransmission consent impasses represented approximately one one-hundredth of one percent (0.01%) of annual U.S. television viewing hours.⁹ That means consumers are more than 20 times more likely to lose access to television programming due to a power outage than a retransmission negotiation impasse.¹⁰ Further, in the handful of instances where retransmission consent negotiations do result in temporary service disruptions, there is one distinct pattern – the involvement of Time Warner Cable, DirecTV and DISH. Since 2012, these three companies have been party to **89 percent of broadcast television service disruptions nationwide**.¹¹ Moreover, broadcasters have never been found by the FCC to be in violation of their obligation to negotiate in good faith.

Opponents of retransmission consent cite rising retail cable and satellite bills as justification to “reform” retransmission consent. However, broadcast costs are not responsible for the steep increase in cable bills. The truth is that MVPDs are seeking to limit one of their operating costs - in this case, broadcast programming - and asking for

⁸ *Id.*

⁹ See Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 30 (May 27, 2011), attached to NAB Comments in MB Docket No 10-71 (filed May 27, 2011).

¹⁰ *Id.*

¹¹ *Publicized Broadcast Signal Blackouts* SNL Kagan.

Congress's help; not to lower cable bills, but to increase their own profit. The rise in cable rates outpaced inflation long before a penny of retransmission consent was paid to broadcasters.¹²

NAB has demonstrated across numerous economic studies that retransmission consent payments are not responsible for the high and rising consumer prices charged by MVPDs.¹³ Additionally, a recent independent analysis reveals a stark contrast in the weight of costs of cable programming: it estimated that while only *two cents* of every dollar of cable video revenue goes to retransmission consent, nearly 20 cents goes to cable programming fees.¹⁴ This disparity exists despite the fact that broadcast programming remains the most compelling, most watched programming available. That's not our opinion; that is what the ratings show. During the 2011-2012 television season, *96 of the top 100* most watched prime time programs were aired by broadcast stations.

The fact that new competitors in the MVPD space have emerged in recent years does not weaken the justification for retransmission consent. Certainly both the marketplace and much of the underlying technology have undergone changes over the past two decades. However, the variety of MVPDs in a marketplace does not necessarily mean that the MVPD marketplace is more competitive. Rather, MVPD concentration and market power is actually *increasing* in local markets. Indeed, just last

¹² FCC Cable Industry Price Reports; Bureau of Labor Statistics.

¹³ *Id.* at 11-24 (“data simply do not support the claim that increases in MVPD prices are caused” by retransmission consent fees, as these fees represent a tiny fraction of MVPD costs); *see also* Eisenach & Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010), Appendix A to the Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 13-17, 21-22 (demonstrating that even a “flawed analysis” conducted for MVPD interests “shows little effect of retransmission consent fees on consumers,” and that retransmission fees make up a small fraction of MVPD programming costs and an even smaller percentage of MVPD revenues).

¹⁴ *Where Your Cable Dollar Goes*, Multichannel News (Mar. 28, 2011) at 10-11.

week the Second Circuit Court of Appeals found that “[c]able operators may not be as dominant as they were in 1992 when Congress enacted the Cable Act [but] [n]evertheless, cable operators continue to hold more than 55% of the national MVPD market and to enjoy still higher shares in a number of local MVPD markets.”¹⁵ Accordingly, these changes in the marketplace do not erode Congress’s original rationale that broadcasters should be compensated for their signal as a matter of fairness and sound competition policy, but rather speaks to the wisdom of the property-based framework that it established in the first place. Retransmission consent merely vests in local broadcasters the right to negotiate for the retransmission of their signal—it does not guarantee carriage on an operator’s system nor does it dictate the terms or outcome of that negotiation.

CONCLUSION

With the perspective gained from 25 years of experience with STELA and its predecessors, the Subcommittee should be guided by the same underlying principle it has consistently applied when examining the satellite laws: localism. When viewed through that lens, the distant signal license, which dates back to the inception of an infant satellite industry in the 1980s, has outlived its usefulness and can no longer be justified. This Subcommittee should promote the principle of localism by encouraging local-into-local satellite service for all Americans in each of the 210 television markets.

This Subcommittee should also resist calls to create exceptions to the copyright laws that weaken local television stations’ retransmission consent rights. Instead,

¹⁵*Time Warner Cable, Inc. v. FCC*, No. 11-4138 at 43 (slip op.) (2d Cir. Sept. 4, 2013).

Congress should continue to rebuff the efforts of the satellite and cable industries to intervene in free-market retransmission negotiations, which the FCC has expressly found benefit cable/satellite operators, broadcasters and, “[m]ost importantly, consumers.”¹⁶

¹⁶ FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005) at ¶ 44.