Before the
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Washington, D.C.

In re *Section 109 Report to Congress* *Notice of Inquiry*	Docket No. 2007-01

REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") appreciates this opportunity to reply to the initial comments and oral testimony offered in this proceeding.[1] Of the many proposals offered by copyright holders and broadcasters, those seeking to make the Section 119 statutory license operate "more like the marketplace" are perhaps the most pernicious. The Copyright Office has been told that syndicated exclusivity and network nonduplication should apply to satellite, royalty rates should go up, and copyright holders should get audit rights – all because these are allegedly "marketplace" terms and conditions.

But they are not marketplace terms and conditions. They are terms and conditions that *one side might seek* in (hypothetical) marketplace negotiations. DIRECTV would not agree to such terms without significant concessions from copyright holders and broadcasters. And it would object to exclusivity rules in particular – both because they would place a double burden (exclusivity rules *and* "unserved household" restrictions) on satellite that does not apply to cable, and because DIRECTV cannot implement them on a reasonable economic basis.

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[1] *Section 109 Report to Congress: Notice of Inquiry*, 72 Fed. Reg. 19039 (Apr. 16, 2007) ("*NOI*").

Imposing these new terms by regulatory fiat would undermine the balance struck by Congress in enacting the statutory license for satellite operators. When criticizing a cable industry proposal to modify *its* statutory license, the Motion Picture Association put it this way:

> That's just the way the compulsory license is. It is a package, and it's a package that is very favorable for [cable] and very unfavorable for us. If they don't like the package, let's get rid of it, the whole thing. But [it] is very disingenuous for [cable] to come in and say, pick out one little part of that package, and say they're paying too much. It's absurd.[2]

The broader point holds true for the satellite license. One side's "wish list" cannot be the basis for disturbing the political compromise embodied in Section 119.

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DIRECTV has consistently argued that the statutory license for satellite delivery of signals from out-of-market broadcast television stations does not need the legislative equivalent of major surgery (much less euthanasia).[3] Rather, as we put it in our testimony, "one or two aspirin will suffice."[4] That is, Congress should allow satellite carriers to more easily serve two classes of subscribers that may never be reached by local signals – those outside of the satellite beam on which such signals are provided and those in smaller markets without a full complement of network broadcast affiliates – and whose receipt of distant signals is consistent with the intent of Section 119. But Congress should otherwise leave the distant signal license alone.

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2 *Hearing: Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Testimony of Fritz Attaway, Exec. Vice President and Special Policy Advisor, MPAA, Tr. at 358 ("*Hearing*").

3 Comments of DIRECTV, Inc. ("DIRECTV Comments"). Unless indicated otherwise, all comments referenced in these Reply Comments were filed on July 2, 2007.

4 *Hearing*, Testimony of Michael Nilsson, Partner, Harris, Wiltshire & Grannis LLP on behalf of DIRECTV, Inc., Tr. at 110.

Copyright holders and broadcasters, however, have other ideas. The most radical of these is to eliminate the distant signal license altogether.[5] DIRECTV believes the merits of this idea, such as they are, have been fully addressed in our earlier comments and those of many others.[6] There is no serious prospect that private negotiations could replace the distant signal license in any reasonable timeframe.[7] As DIRECTV and many others have pointed out, unless Congress is prepared to rob thousands upon thousands of satellite subscribers of their only source of network programming, elimination of the distant signal license is an idea that no policy-maker should take seriously.

Perhaps sensing this, copyright holders also offer another set of proposals based on the assumption that Congress will renew the distant signal license. If the statutory

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5 *See, e.g.*, NAB Comments at 54-55.

6 *See, e.g.*, NPS Comments at 2; EchoStar Comments at 6; Devotional Claimants Comments at 2; Public Television Coalition Comments at 2.

7 *See* DIRECTV Comments at 6-7 n.16 (arguing that eliminating the statutory license would result in a distant signal market characterized by a number of transaction costs and market failures, including misaligned incentives of copyright owners affiliated with broadcasters, market holdouts, coordination problems in establishing bargaining collectives, inability of MVPDs to know in advance which copyrighted works will be displayed on broadcast signals, and substantial social costs resulting from shutdowns attributable to failures to reach agreements with copyright owners). One copyright holder has suggested that network-station affiliation agreements already provide copyright clearance for cable and satellite retransmission. *See Hearing*, Testimony of Preston Padden, Exec. Vice President, Worldwide Government Relations, The Walt Disney Co., Tr. at 354-55 ("I think what is referred to in the business as the better view is that the contracts we have to exhibit a program on the ABC television network include the right through to the cable or satellite viewer.") DIRECTV has always understood this not to be so in the vast majority of cases. *See* U.S. Copyright Office, Register of Copyrights, *1965 Supplementary Report of the Register of Copyrights* at 42-43, *quoted in* U.S. Copyright Office, Register of Copyrights, *The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis* at 8 (March 1992) ("A particularly strong point [against finding copyright liability for cable operators' broadcast retransmissions] is the obvious difficulty, under present arrangements, of obtaining advance clearance for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it."); U.S. Copyright Office, Register of Copyrights, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 16-17 (Aug. 1997), *available at* www.copyright.gov/reports (discussing transaction costs of clearing copyright).

license cannot be eliminated, they argue, it should be made to operate more like a marketplace negotiation.[8] Thus, according to copyright holders and broadcasters:

- The syndicated exclusivity and network nonduplication rules should apply to satellite because they "work[] well in the marketplace."[9]
- Royalty rates should go up, because satellite carriers (the story goes) already pay more for certain affiliation agreements.[10]
- Copyright holders should get audit rights because "[a]udit rights are a standard component of free marketplace license agreements."[11]

These are not, however, really proposals to make the statutory license function like a marketplace negotiation. They are instead calls for the *government to grant copyright holders and broadcasters terms and conditions that they might seek in a marketplace negotiation*. Satellite carriers, just like copyright holders and broadcasters, have their own ideas for more favorable terms and conditions that could be included in the statutory license. But this alone cannot serve as a basis for disturbing the compromise that is Section 119.

There should be no doubt that the copyright holders' and broadcasters' proposals – application of exclusivity rules, higher royalty fees, and audit rights – represent drastic changes to the *status quo*. If (against all reasonable expectation) there *were* a true marketplace negotiation for satellite carriage of network and syndicated programming to out-of-market subscribers, copyright holders and broadcasters would never be able to

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8 *See, e.g.*, Written Testimony of Preston R. Padden, Exec. Vice President, Worldwide Government Relations, The Walt Disney Co., at 2.

9 NAB Comments at 27.

10 Joint Sports Claimants Comments at 5-9 n.4.

11 *Id.* at 10.

obtain any of the terms and conditions they seek in this proceeding without substantial compromises of their own.[12]

Copyright holders and broadcasters might, for example, seek to apply the syndicated exclusivity and network nonduplication rules to satellite. But DIRECTV would object to such terms for two reasons. First, any such proposal would disadvantage DIRECTV against its cable competitors. Today, cable operators are subject to syndicated exclusivity and network nonduplication restrictions, while satellite operators generally are not. But satellite operators are subject to the "unserved household" restriction, while cable operators are not. This state of affairs results in a rough parity between satellite and cable (although DIRECTV suspects cable operators can deliver distant signals to more subscribers than can satellite). Broadcasters and copyright holders, however, want DIRECTV to be subject to *both* the unserved household restriction *and* the exclusivity rules. Cable would remain subject only to the latter. As a matter of principle and practicality, DIRECTV would not welcome such a proposal in a marketplace negotiation.

Second, compliance with syndicated exclusivity and network nonduplication would represent an extraordinary hardship for DIRECTV from a practical standpoint. A typical cable operator carries only a dozen or so broadcast stations – perhaps two or three of which are distant signals to which the exclusivity rules might apply. In such

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[12] In a true marketplace negotiation, for example, DIRECTV would seek terms with respect to exclusivity that would look very different from the regime sought by broadcasters and copyright holders. It might, for example, seek rights from the networks to provide network feeds directly to the smallest markets, rather than retransmitting dozens of duplicative, sparsely-viewed local broadcast stations. It is possible that such an arrangement would be more valuable to DIRECTV than exclusive territorial carriage rights are to small-market broadcasters. However, there is no way to know how such a negotiation would turn out – and no basis to award one side its desired outcome without compensating the other side in a commensurate manner. Likewise, a true marketplace negotiation might not produce terms equivalent to today's must-carry rules. Certainly, DIRECTV would seek compensation for the burden of carrying the lowest-rated stations.

circumstances, it is relatively easy to determine which programming must be blacked out.[13]

Not so for DIRECTV, which carries around 1200 local stations (each of which can request blackouts) and nearly 30 distant stations (each of which would have to be blacked out). DIRECTV would thus have to continuously monitor *thousands* of distant/local combinations, reviewing thousands of program guide entries for each day for each market and adjusting blackouts accordingly. DIRECTV has no systems in place to handle such a task, and does not know whether the process could be automated (nor, if it can, how much it would cost to do so). Nor does it know whether it would be possible to adjust blackouts among thousands of stations to account for changes to a station's schedule (preemptions, emergencies, long sports events, *etc.*). For DIRECTV, attempting to comply with the syndicated exclusivity and network nonduplication rules throughout the country would be a nightmare – a task far more complicated than, for example, the normal operations of DIRECTV's conditional access system cited by the broadcasters.[14]

In a (hypothetical) marketplace negotiation, copyright holders and broadcasters might also ask for higher royalty rates than are paid today, and might argue that they get such rates in some affiliation agreements. DIRECTV would respond that it often pays *lower* rates in similar agreements.[15] More importantly, DIRECTV would point out that,

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[13] Since, by definition, the cable operator already offers the subscriber the programming in question from the local station, the consequences to the subscriber of such blackouts are not very severe. Blacked-out distant signal programming is, essentially, replacement programming for cable operators. This is not the case for DIRECTV subscribers in markets where DIRECTV does not yet offer local signals. Such subscribers would lose all satellite access to blacked-out programming.

[14] *See* NAB Comments at 29.

[15] *See Hearing*, Testimony of Eric Sahl, Senior Vice President of Programming, EchoStar, Tr. at 172. ("I can tell you [Section 119 royalty] rates are very much higher than the fair market value rate, if you define fair market value as me taking the hundreds of retransmission [consent] agreements I have today and what we pay.").

in those other agreements, it receives distribution rights "in the clear" – that is, it can distribute the programming in question to all U.S. subscribers or, in the case of local broadcast retransmissions, to all subscribers within a particular local market. DIRECTV would *never* pay the same price for rights to distribute programming to only a limited number of subscribers – each of whom must undergo a complicated and expensive qualification process.

Likewise for audit rights. In a true "marketplace" negotiation, DIRECTV might accede to audit rights, but only if it got something in return. Perhaps it might seek eligibility determinations based on zip codes, rather than outdated predictive models and complicated tests. Or it might seek expanded rights to provide high-definition programming in markets where it does not yet offer local digital signals. Or it could ask for rights to provide service to boats along the lines of RV service today. But it would not agree to audit rights merely because copyright holders and broadcasters asked for them.

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DIRECTV is *not* asking the Copyright Office to recommend implementation of its wish list with respect to eligibility, testing, high definition signals and the like. By the same token, copyright holders and broadcasters should not ask the Copyright Office to recommend imposing burdensome and unfair exclusivity rules, raising rates, and adding audit rights. The Section 119 distant signal license is a political compromise – one that has by and large worked well for both sides. Congress should not modify that compromise for the benefit of one side only.

Respectfully submitted,

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