Written Testimony of
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Thank you for inviting DIRECTV to discuss the future of the satellite statutory copyright licenses. I sit before you today on behalf of more than seventeen million of your constituents. They get hundreds of channels, amazing picture quality, state-of-the-art innovation, and industry-leading customer service. DIRECTV, DISH Network, and others present a real challenge to our cable competitors. The result is better television for everybody.

While DIRECTV can take some of the credit, much of the credit goes to Congress. In 1988, you passed the Satellite Home Viewer Act ("SHVA"), allowing satellite carriers to retransmit broadcast signals for the first time. In 1992, you passed the program access provisions of the Cable Act, giving satellite subscribers access to key cable-owned programming. And in 1999, you passed the Satellite Home Viewer Improvement Act ("SHVIA"), allowing satellite carriers to retransmit *local* broadcast signals for the first time. The result is today's vibrant competitive video marketplace, which provides consumers more choice and better service than ever before.

This year, you have the opportunity to continue Congress's commitment to consumers and competition as you consider reauthorization of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"). SHVERA provides the basic legal infrastructure for delivery of television programming to millions of Americans. Their access to this programming depends on this infrastructure.

But SHVERA, like all infrastructure, must be maintained. Just as our roads and bridges need repair and our aviation system demands modernization, SHVERA requires some updating to reflect the realities of a 21st century video market. DIRECTV offers the following suggestions:

- Congress should renew and improve the satellite distant signal license. It should *not* harm consumers by eliminating or rewriting the license.
- Congress should improve consumer access to and choice of local stations. It should *not* require satellite subscribers to bear the burden of nationwide mandatory carriage.
- Congress should modernize the retransmission consent system to reflect the new market structure brought about by competition. It should protect consumers from inflated prices and withheld signals.

Implementing these recommendations will help ensure both that your constituents continue to receive the channels on which they have come to depend and that the satellite licenses work efficiently, predictably, and in a consumer-friendly manner.

I. The Satellite Distant Signal License Serves Consumers Across the Nation.

A. Renewing the License Will Protect Consumers.

The satellite distant signal license lets consumers who can't receive over-the-air television receive out-of-market television stations from satellite. Since its inception, the license has brought network television to millions of Americans who otherwise wouldn't have access to it. For this reason, the distant signal license is a great success story that serves the public interest.

Today, most satellite subscribers receive network programming from their local stations. And the law now restricts satellite operators' ability to bring distant signals to those subscribers. Yet nearly a million satellite subscribers still rely on the distant signal license today. Others will rely on the license into the future, including those in markets

where we don't yet offer local signals, those in markets missing one or more network affiliates, and those in places like parts of Alaska that are outside of any local market. To all of these people, the distant signal license is critical. Without it, they would be denied access to programming that they love and that virtually all other Americans get to see. Without this license, rural Americans would be cut out of the national conversation.

Copyright holders contend that there are other ways to serve these consumers. They hypothesize "market mechanisms," "voluntary licensing arrangements," "sublicensing" and the like. Yet nobody really thinks such alternatives will actually result in satellite carriers offering distant signals. Sublicensing, for example, depends on broadcasters amending all of their programming contracts to permit satellite distant signal retransmission. No one has explained why broadcasters, who oppose the very notion of distant signals in the first place, would undertake such an effort.

The satellite distant signal license, though far from perfect, is the only realistic way to bring network programming to millions. It should not be allowed to expire.

B. "Harmonizing" the Cable and Satellite Statutory Licenses Will Lead to Unacceptable Consumer Disruption.

Some have suggested that Congress should "harmonize" the cable and satellite distant signal licenses by creating one giant, omnibus license. This idea has theoretical appeal because it would apply the same rules to satellite and cable. Yet harmonization is better in theory than in practice. It would take an extraordinary amount of work to achieve results that, in a perfect world, would largely replicate the system already in place today.

In the *real* world, however, harmonization would almost certainly result in consumer disruption. The cable and satellite industries have built their contracts and

delivery plans all around the country on the stability of their respective statutory licenses. DIRECTV, in particular, has spent billions of dollars to design its systems to comply with the satellite statutory licenses. Changing the rules now would disturb the settled expectations of viewers throughout the country and would cause compliance problems on all sides. Inevitably, both cable and satellite viewers would lose stations they now rely upon.

Harmonization would also ignore important differences between cable and satellite technologies and businesses. To take one example, the cable license ensures broadcast exclusivity through the network nonduplication and syndicated exclusivity rules, while the satellite license does so through the "unserved household" requirement. The cable exclusivity rules make sense for operators of localized cable systems, who can easily measure "zones of protection" for the handful of stations they carry and can manage blackouts where necessary. DIRECTV, which retransmits thousands of stations across the country from satellites above the equator, cannot do any of this.

Imposing cable rules on satellite is problematic. Imposing satellite rules on cable cannot be any better. Congress should resist the temptation to combine the cable and satellite licenses.

C. Congress Should Maintain the *Status Quo* on Royalty Rates and Eligibility Rules.

As an alternative to eliminating the distant signal license or combining it with the cable license, some parties have called on Congress to make drastic changes to the mechanisms of the license itself. Because we believe that such changes will undermine the consumer experience, we urge Congress to resist these calls.

First of all, Congress should not drastically increase royalty rates. As a business that depends on content, DIRECTV recognizes the value of intellectual property. DIRECTV is thus willing to pay its fair share, and was able to negotiate reasonable rates at arm's length with copyright holders during the last reauthorization. These, however, are exceptionally difficult economic times for all Americans. In such circumstances, Congressional action that would directly lead to drastic price increase for consumers would be especially difficult.

Second, Congress should not let the digital television transition change the distant signal eligibility rules. Congress set a "hard deadline" for the DTV transition *after* it last renewed the distant signal license. This created several ambiguities in the law. Some of these could make it easier to sign up for distant signals, others could make it harder, but none were intended. Thus:

- The DTV transition should *not* mean that everybody is "unserved," as the broadcasters fear.
- The DTV transition should *not* mean that DIRECTV can no longer offer high-definition distant signals in markets where it offers local signals in standard definition.
- The DTV transition should *not* mean that viewers become ineligible for distant signals when a local station adds network programming to a multicast feed.

If, as we believe, Congress never intended to change these rules after the transition, it should now clarify the law accordingly.

D. Simplifying the "Unserved Household" Provision Will Make The Law Fairer and More Understandable For Your Constituents.

While DIRECTV does not advocate wholesale revision of the distant signal license, Congress could help consumers by making modest changes to the distant signal license's "unserved household" restriction. This restriction limits satellite distant signals to those consumers who can't get local signals over-the-air. But the process for determining which households are "unserved" satisfies no one. Satellite carriers think it is far too complicated and expensive. Broadcasters think it allows satellite carriers to count too many households as "unserved." Most importantly, consumers despise the process of computer prediction, waiver, and on-site testing.

We have two suggestions to simplify the license. One concerns markets in which we offer local stations. The other concerns the "unserved household" definition more generally.

1. Over-the-Air Qualification Is Unnecessary in Local Markets Served by Satellite.

In markets where a satellite carrier offers local service, the criteria for "unserved household" should not be *over-the-air* reception. The test instead should be whether the viewer can get local service *from satellite*. More specifically, subscribers in such markets should be eligible for distant signals only if they are located outside the satellite spot beam on which local channels in a particular market are offered.

This approach has numerous advantages. It is logical because, in markets where subscribers receive local signals over the satellite, over-the-air reception is irrelevant. It is simple because spot-beam coverage is a known quantity. It is fair because spot-beam

coverage can be published so everybody knows who's eligible. Most importantly, it ensures that all subscribers can receive network programming.

2. Congress Should Address the "Grade B Bleed" Problem More Generally.

Under today's rules, subscribers in markets lacking one or more network affiliates, or subscribers outside the satellite spot beam, are ineligible for distant signals if they are within the service contour of a neighboring, out-of-market station. This is known as the "Grade B bleed" problem, and it can prevent subscribers from getting any network service via satellite.

The spot-beam proposal described above would address the Grade B bleed issue in the majority of markets in which DIRECTV provides local service. Yet the problem caused by neighboring stations' over-the-air signals harms consumers in the remaining markets, as well.

This harm is most acute for consumers in markets missing one or more network affiliates. Lafayette, Indiana, for example, has a CBS affiliate but no other affiliates. So one might logically expect DIRECTV to be able to deliver NBC, ABC, and FOX distant signals to Lafayette subscribers. But some subscribers in the Lafayette market are predicted to get one or more faint over-the-air signals from Chicago, Indianapolis, or Champaign. We cannot deliver these subscribers local network programming (because there is none), nor can we deliver them distant network programming (because they are technically "served"). These antiquated rules deny subscribers access to network programming based on the transmissions of non-Lafayette stations.

There is a solution. The test should be whether a subscriber can receive a sufficiently strong signal *from an in-market station*. We see no reason why out-of-market

stations, whatever their predicted signal contour, should deny consumers in other markets access to distant network signals.

II. Targeted Changes Would Greatly Improve the Satellite Local Signal Statutory License, But an Unfunded Carriage Mandate Would Harm Consumers.

A second statutory license permits satellite operators to deliver local stations within their own "local markets," generally defined in terms of "designated market areas" (or "DMAs"). This license has generated far less controversy than the distant signal license and, unlike the distant signal license, does not expire at the end of year. While it, too, needs updating and modernization, Congress should resist attempts by the broadcasters to rewrite it to impose onerous unfunded carriage mandates on consumers.

A. Addressing Inequities in the DMA System Will Give Viewers the Stations that Truly Serve their Communities.

Congress could begin by modernizing "local markets" and the decades-old DMA system. DMAs are part of a private subscription service offered by Nielsen Media Research, used primarily for advertising purposes. This system was never meant to determine which local signals are available to viewers. Using it for this purpose means that viewers throughout the country are barred from receiving local news, sports, and entertainment because they happen to live on the wrong side of a DMA border.

The problem is most acute in so-called "orphan counties" that are located in one state but placed in a DMA centered in another state. Fulton County, Pennsylvania, for example, is in the Washington, D.C. DMA. But Washington, D.C. newscasts do not run stories about Fulton County. Nor do they typically report emergencies, severe weather, or other public safety issues in Fulton County. Fulton County residents thus receive service that cannot really be described as "local."

We understand Congressman Ross will soon introduce legislation, the Local Television Freedom Act that would begin to address these issues. It would allow viewers in counties like Fulton to receive stations from in-state "adjacent" markets that better serve their communities. DIRECTV urges members of the Committee to support this legislation.

B. Fixing the "Significantly Viewed Rules" will Rescue Congress's Good Idea from the FCC's Implementation Mistakes.

Cable operators have long been permitted to offer neighboring "significantly viewed" stations. (For example, certain New York stations are "significantly viewed" in New Haven, Connecticut.) In an explicit attempt to level the playing field with cable, Congress gave satellite carriers similar rights in 2004. Congress also, however, included an "equivalent bandwidth" provision that does not apply to cable. The FCC subsequently interpreted this rule so onerously that it effectively undid Congress's efforts.

Satellite operators (unlike cable operators) must offer local stations the "equivalent bandwidth" offered to significantly viewed stations. But the FCC has interpreted this to mean that DIRECTV must carry local stations in the same format as significantly viewed stations every moment of the day. This is infeasible. DIRECTV cannot monitor the format of hundreds of station pairs around the clock. Nor can DIRECTV black out signals when, for example, a high-definition ballgame runs late on one station while the other offers standard definition hourly fare. We think the FCC's decision conflicts with Congress's intent to promote cable-satellite parity. Unless Congress revisits this issue, satellite operators will remain unable to carry signals that cable operators have carried for years.

C. Unfunded Carriage Mandates Unfairly Burden Satellite Subscribers.

This testimony suggests a few modest attempts to update the local signal license. Broadcasters, by contrast, seek to alter the very essence of the license with huge unfunded carriage mandates. These are technically infeasible, hugely expensive, and unfair to satellite subscribers.

DIRECTV today offers local television stations by satellite in 150 of the 210 local markets in the United States, serving 95 percent of American households. (Along with DISH Network, we offer local service to 98 percent of American households.) DIRECTV also offers HD local service in 119 markets, serving more than 88 percent of American households. By the FCC's calculations, over ***80*** percent of DIRECTV's satellite capacity is now devoted to local service – nearly triple the amount cable operators can be required by law to carry.[1] We have devoted several billions of dollars to this effort. And we are working every day to serve more markets. In the meantime, we have developed equipment that allows subscribers in the remaining markets to integrate digital terrestrial broadcast signals seamlessly into their DIRECTV service.

All of this does not satisfy the broadcasters. Last week, legislation was introduced that would require satellite carriers to serve all remaining local markets by satellite within a year. Very respectfully, while expanding the reach of broadcast service might be a worthy goal, H.R. 927 is the wrong approach.

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[1] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Rcd. 5351, ¶ 11 n.48 (2008) ("*Satellite HD Carriage Order*") (using hypothetical local and national programming carriage figures to estimate that a satellite operator would dedicate 91 percent of its capacity to local programming). With DIRECTV's actual figures, this number is closer to 80 percent.

H.R. 927 would upset the delicate balance that has guided Congressional policy in this area for decades. In enacting SHVIA's statutory copyright license for local broadcast signal carriage, Congress specifically recognized that the capacity limitations faced by satellite operators were greater than those faced by cable operators.[2] In light of those limitations, Congress adopted a "carry-one, carry-all" regime in which satellite operators can choose whether to enter a market, and only then must carry all qualifying stations in that market.[3] This regime was carefully crafted to balance the interests of broadcasters and satellite carriers alike. Indeed, both Congress and the courts concluded that the carry-one, carry-all regime was constitutional largely because it gave satellite carriers the choice of whether not to serve a particular market.[4]

The same concerns that led Congress to limit satellite carriage requirements still apply today. Last year, the FCC "recognize[d] that satellite carriers face unique capacity, uplink, and ground facility construction issues" in connection with offering local service.[5] It concluded that, if faced with onerous carriage requirements, satellite carriers might be "forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity," or might be "inhibited from

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2 145 Cong. Rec. H11,769 (1999) (joint explanatory statement), 145 Cong Rec H 11769, at *H11792 (LEXIS) ("To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.") ("Conference Report").

3 47 U.S.C. § 338(a)(1).

4 *See* Conference Report at *H11795 ("Rather than requiring carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license."); *SBCA v. FCC*, 275 F.3d 337, 354 (4th Cir. 2001) (holding that the carry-one, carry-all rule was content-neutral because "the burdens of the rule do not depend on a satellite carrier's choice of content, but on its decision to transmit that content by using one set of economic arrangements [*e.g.*, the statutory license] rather than another").

5 *Satellite HD Carriage Order*, ¶ 7.

adding new local-into-local markets."[6] In light of these findings, we respectfully urge Congress not to upset the balance it struck in 1999.

By imposing such burdens, H.R. 927 would unintentionally create real inequality. Broadcasters already make their signals available in every market over the air, for free. More people could surely receive those signals if offered over satellite. But more people could also receive those signals if broadcasters themselves invested in the infrastructure to increase their own footprint so everyone in the market could receive a free over the air signal. We suggest that it is inequitable, especially in this economy, to place the financial burden of expanding broadcast coverage on satellite subscribers alone.

III. Retransmission Consent is Broken.

Numerous parties have suggested that, in considering SHVERA reauthorization, Congress should examine the rules governing retransmission consent agreements. DIRECTV reluctantly agrees. I say "reluctantly" because DIRECTV has successfully negotiated thousands of programming agreements over the years – many hundreds of them with broadcasters. While these were often contentious, hard-fought battles, the marketplace generally worked to deliver consumers the programming they want. Because of recent changes in the market, however, many consumers now pay more than they should for broadcast programming and broadcasters withhold their signals far too often.

The retransmission consent marketplace worked, in part, because of the equilibrium that used to exist between broadcasters and cable operators. In 1992, Congress gave all full-power television stations the right to engage in private carriage

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[6] *Id.*, ¶ 8 (citations omitted).

negotiations with cable operators.[7] Back then, these negotiations pitted one monopoly against another. Each broadcaster had a monopoly over the distribution of content within its local market. Each cable operator had a monopoly over multichannel distribution within its franchise area. Because the value to broadcasters of expanded carriage roughly equaled the value to cable operators of network programming, most retransmission consent agreements did not involve cash payments.

In 1999, Congress allowed satellite operators to carry local stations. This was an overwhelmingly good thing for consumers. But it had the unintended effect of skewing retransmission consent negotiations. Cable and satellite operators still had to negotiate with monopoly broadcasters. But broadcasters could now play cable and satellite against one another. In this new market, broadcasters found their relative bargaining power dramatically increased.

Today, the market is tilted even more heavily in favor of broadcasters. Every broadcaster has at least three competitors with whom to negotiate. Some have five or more. All the while, they maintain government-protected exclusive control over their content, not to mention the public airwaves they enjoy for free. The result is predictable: higher retransmission consent fees (which get passed along to subscribers), more frequent threats to withhold stations (which confuse subscribers), and more withheld signals (which deprive subscribers, who have done nothing wrong, of critical network programming).

Exacerbating this imbalance is the recent influx of private equity investments in broadcast television. This has resulted in broadcasters demanding ever increasing rates,

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[7] This is not a copyright "exclusive right." Rather, retransmission consent is a right given to broadcasters separate and apart from copyright.

in some instances two to three times what we were previously paying. One broadcaster reported a 23 percent rise in retransmission consent revenues between 2006 and 2007 alone.[8] Another broadcaster recently told the FCC that it could reasonably demand ***$20.00*** per-sub-per-month for a single station.[9]

It does not appear that this additional money is being used to provide more or better local programming. In fact, the opposite appears to be true. Many broadcasters are producing less local news, and others have replaced local programming with national infomercials.

As I said earlier, DIRECTV willingly pays for high-quality content that our subscribers value. All programming entities deserve fair and reasonable compensation for the product they produce. This includes value-added content we receive from broadcasters. But it does not serve the American public if broadcasters are allowed the unfettered ability to raise rates without any correlating benefit to consumers in the form of improved local content.

While I believe the retransmission consent regime is broken, I cannot sit here today and give you a specific solution. Rather, we would like to work with members of this committee to establish a construct that accomplishes the following policy goals:

- It should *fairly and reasonably compensate the broadcaster for its investment in high-quality content*. DIRECTV has always been willing to pay a fair price to

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8 "Nexstar Expects $75M from Retrans Deals," TVNewsday, Feb. 19, 2009, *available at* http://www.tvnewsday.com/articles/2009/02/19/daily.12/.

9 *See* Reply Comments of Hearst-Argyle Television, Inc., MB Docket No. 07-198, at 9-10 (filed Feb. 12, 2008) (arguing that the true market value of the average Hearst-Argyle station is $20.18 per subscriber per month and stating that, while it has not yet sought such fees, "the Commission could hardly conclude, on any basis of fairness of equity, that a negotiating request for such a fee was not based on marketplace considerations or was in any way inappropriate or unlawful").

retransmit local signals. We are not looking at SHVERA reauthorization to change this.

- It should *protect consumers from withheld service*. Consumers caught in the middle of a retransmission consent dispute don't care about the particulars of the dispute. They simply want their programming. Congress should consider restricting, to all but the most limited circumstances, the ability of broadcasters to shut off signals.

DIRECTV hopes to work with this Committee and other stakeholders to develop specific proposals that would meet these criteria.

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Mr. Chairman and members of the Committee, please allow me to end where I began. Consumers throughout America – whether they subscribe to satellite or not – are better off because of the legislation you and your Committee championed over the years. I ask you to keep those same consumers in mind as you consider SHVERA reauthorization this year.

Thank you once again for allowing me to testify. I would be happy to take any of your questions.