

Testimony of

Bruce Reese

May 12, 2004

THE SATELLITE HOME VIEWER EXTENSION ACT

WRITTEN TESTIMONY OF BRUCE REESE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BONNEVILLE INTERNATIONAL CORPORATION ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

MAY 12, 2004

INTRODUCTION AND SUMMARY

Ever since Congress crafted the original Satellite Home Viewer Act of 1988 ("SHVA"), it has worked to ensure both (1) that free, over-the-air network broadcast television programming will be widely available to American television households, and (2) that satellite retransmission of television broadcast stations will not jeopardize the strong public interest in maintaining free, over-the-air local television broadcasting. Those two goals remain paramount today. There can be no doubt that delivery of local stations by satellite is the best way to meet these twin objectives. The first two times Congress considered the topic -- in 1988 and 1994 -- delivery of local stations by satellite seemed far-fetched. Congress therefore resorted to a considerably less desirable solution: permitting importation of distant television stations, although only to households that could not receive their local network stations over the air. When Congress revisited this area in 1999, the world had changed: local-to-local satellite transmission had gone from pipe dream to technological reality. And in response, in the 1999 Satellite Home Viewer Improvement Act ("SHVIA"), Congress took an historic step, creating a new "local-to-local" compulsory license to encourage satellite carriers to deliver local television stations by satellite to their viewers. At the same time, Congress knew that allowing satellite carriers to use the new license to "cherry-pick" only certain stations would be very harmful to free, over-the-air broadcasting and to competition within local television markets. Congress therefore made the new "local-to-local" license available only to satellite carriers that deliver all qualified local stations. Congress' decision to create a carefully-designed local-to-local compulsory license has proven to be a smashing success. Despite gloomy predictions by satellite carriers before enactment of SHVIA that the "carry-one-carry-all" principle would sharply limit their ability to offer local-to-local service, the nation's two major DBS companies, DirecTV and EchoStar, today deliver local stations by satellite to the overwhelming majority of American television households.

Thanks to the wise decision by the FCC and the Department of Justice to block the proposed horizontal merger of DirecTV and EchoStar, the two DBS firms continue to compete vigorously against one another in expanding their delivery of local stations. While EchoStar predicted when it sought to acquire DirecTV that it would never be able to serve more than 70 markets without the merger, EchoStar now serves 121 Designated Local Markets ("DMA's") that collectively cover more than 85% of all U.S. TV households. Nor is there any sign that EchoStar's expansion of local-to-local service has stopped.

The story with DirecTV is even more dramatic. With the successful launch of a new satellite last week, DirecTV expects to serve 100 DMAs covering 85% of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs covering 92% of all TV

households. And as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in all 210 DMAs." In *Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, 332, MB Docket No. 03-124 (released Jan. 14, 2004) (emphasis added).

The local-to-local compulsory license is the right way -- and the distant-signal compulsory license is the wrong way -- to address delivery of over-the-air television stations to satellite subscribers. Regardless of what other changes Congress may choose to make to Section 119, it should - as a matter of simple logic -- limit the distant-signal compulsory license to markets in which the satellite carrier does not offer local-to-local service. It makes no sense, for example, to treat a satellite subscriber as "unserved" by its local CBS station when the subscriber's DBS firm offers that station as part of its satellite-delivered package, with what the satellite industry describes as "a 100 percent, crystal-clear digital audio and video signal." And even if Congress elects to allow certain subscribers who are technically considered "unserved" today to retain distant network signals, Congress should not allow any new signups for distant signals in local-to-local markets.

Although the rapid rollout of DBS local-to-local service has vindicated the actions that Congress took in SHVIA in 1999, there is one major blemish on the success story: an outrageous form of discrimination that EchoStar has inflicted on some local stations. EchoStar's method of discrimination is simple, but devastating. While placing what it considers the most "popular" stations in a market on its main satellites, EchoStar relegates certain stations (particularly Hispanic and foreign-language stations) to a form of satellite Siberia -- placing them on remote "wing satellites" far over the Atlantic or Pacific, which can be seen only if one obtains a second satellite dish. Very few subscribers actually do acquire a second dish, thereby rendering many local stations invisible to their own local viewers. As DirecTV has acknowledged, this practice violates the "carry one, carry all" principle of the SHVIA. The FCC has thus far tolerated this grossly improper practice, imposing only minor restrictions on this form of discrimination. Congress should step in to halt this misconduct.

While the local-to-local compulsory license has (with the exception of EchoStar's two-dish abuse) generally worked well, the history of the distant-signal compulsory license (codified in Section 119 of the Copyright Act) has been just the opposite. For the first ten years after this law was enacted, satellite carriers systematically ignored the clear, objective definition of "unserved household" and instead delivered distant signals to anyone willing to say that they did not like their over-the-air picture quality. Only through costly litigation -- culminating in a 1998 ruling against PrimeTime 24 and a 1999 ruling against DirecTV -- were broadcasters able to bring a halt to most of this lawlessness. Even after those rulings, however, EchoStar has continued to serve hundreds of thousands of illegal subscribers, forcing broadcasters to spend years chasing it through the courts to obtain relief. Last June, a United States District Court found (after a ten-day trial) that EchoStar willfully or repeatedly violated the distant-signal provisions of the Copyright Act and, in the process, broke a sworn promise to the court to turn off large numbers of illegal subscribers. This finding was only the latest in what has been a long string of instances in which courts and the FCC have found EchoStar to have violated statutes and rules -- and abused legal processes -- for its own private benefit.

Startlingly, EchoStar, having engaged in this widespread pattern of misconduct, and having been content to violate the distant-signal license until ordered by a court to stop breaking the law, now urges Congress to radically expand the distant-signal compulsory license. In particular, EchoStar now asks to be allowed to import ABC, CBS, Fox, and NBC programming from New York and Los Angeles stations to millions of households that can receive the same programming from their local stations over the air - and in most cases, can also get their local stations in superb quality, by satellite, from EchoStar and DirecTV as part of their local-to-local package. Although these homes are unquestionably "served" by their local stations, EchoStar proposes to be allowed to deliver the same programming from New York or Los Angeles if the household is - in their view -- "digitally unserved."

The EchoStar proposal - by a company with a long track record of lawlessness -- is a recipe for mischief. As this Committee has repeatedly recognized, the distant-signal compulsory license is a departure from marketplace principles that is appropriate only as a "lifeline" for households that otherwise cannot view network programming. It would make no sense to override normal copyright principles for households that can readily view their own local stations. It would give the DBS firms a government-provided crutch that would set back for years what would otherwise be a market-driven race between DirecTV and EchoStar - further spurred by competition with cable -- to deliver digital signals on a local-to-local basis. And when local stations later sought to reclaim their own local viewers from the distant digital transmissions, there would be a consumer firestorm much like what occurred when two major satellite carriers were required to turn off (illegally-delivered) distant analog signals to millions of households in 1999. Finally, given the rapid pace of technological and economic change, Congress should again specify that Section 119 will sunset after a limited, five-year period, so that Congress can decide then if there is any reason to continue this government intervention in the free market for copyrighted television programming.

I. THE PRINCIPLES OF LOCALISM AND OF RESPECT FOR LOCAL STATION EXCLUSIVITY ARE FUNDAMENTAL TO AMERICA'S EXTRAORDINARILY SUCCESSFUL TELEVISION DELIVERY SYSTEM

As Congress has consistently stressed -- going back to 1988, when it originally crafted the rules governing satellite importation of distant broadcast stations -- the principles of localism and of local station exclusivity have been pivotal to the success of American television.

A. The Principle of Localism is Critical

To America's Extraordinary Television Broadcast System

Unlike many other countries that offer only national television channels, the United States has succeeded in creating a rich and varied mix of local television outlets through which more than 200 communities -- including towns as small as Glendive, Montana, which has fewer than 4,000 television households -- can have their own local voices. But over-the-air local TV stations -- particularly those in smaller markets such as Glendive -- can survive only if they can generate advertising revenue based on local viewership. If satellite carriers can override the copyright interests of local stations by offering the same programs on stations imported from other markets, the viability of local TV stations -- and their ability to serve their communities with the highest-quality programming -- is put at risk.

The "unserved household" limitation is simply the latest way in which the Congress and the FCC have implemented the fundamental policy of localism, which has been embedded in federal law since the Radio Act of 1927. / In particular, the "unserved household" limitation in the SHVA implements a longstanding communications policy of ensuring that local network affiliates -- which provide free television and local news to virtually all Americans - do not face importation of duplicative network programming.

The objective of localism in the broadcast industry is "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663 (1994) (*Turner I*); see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 & n.39 (1968) (same). That policy has provided crucial public interest benefits. Just a few years ago, the Supreme Court declared that

Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.

Turner Broadcasting Sys. v. FCC, 117 S. Ct. 1174, 1188 (1997).

Thanks to the vigilance of Congress and the Commission over the past 50 years in protecting the rights of local stations, over-the-air television stations today serve more than 200 local markets across the United States, including markets as small as Presque Isle, Maine (with only 28,000 television households), North Platte, Nebraska (with fewer than 15,000 television households), and Glendive, Montana (with fewer than 5,000 television households).

This success is largely the result of the partnership between broadcast networks and affiliated television stations in markets across the country. The programming offered by network affiliated stations is, of course, available over-the-air for free to local viewers, unlike cable or satellite services, which require substantial payments by the viewer. See *Turner I*, 512 U.S. 622, 663; *Satellite Broadcasting & Communications Ass'n v. FCC*, 275 F.3d 337, 350 (4th Cir. 2001) ("SHVA . . . was designed to preserve a rich mix of broadcast outlets for consumers who do not (or cannot) pay for subscription television services."); Communications Act of 1934, § 307(b), 48 Stat. 1083, 47 U.S.C. § 307(b). Although cable, satellite, and other technologies offer alternative ways to obtain television programming, tens of millions of Americans still rely on broadcast stations as their exclusive source of television programming, *Turner I*, 512 U.S. at 663, and broadcast stations continue to offer most of the top-rated programming on television.

The network/affiliate system provides a service that is very different from nonbroadcast networks. Each network affiliated station offers a unique mix of national programming provided by its network, local programming produced by the station itself, and syndicated programs acquired by the station from third parties. As Congress recognized in drafting the original SHVA in 1988, "historically and currently the network-affiliate partnership serves the broad public interest." H.R. Rep. 100-887, pt. 2, at 19-20 (1988). Unlike nonbroadcast networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network affiliate provides a customized blend of programming suited to its community -- in the Supreme Court's words, a "local voice."

The local voices of America's local television broadcast stations make an enormous contribution to their communities. In Appendix A, we list just a few examples of television broadcasters' commitment to localism in the form of help to local citizens -- and local charities -- in need. It is through local broadcasters that local citizens and charities raise awareness and educate members of the community.

Community service programming -- along with day-to-day local news, weather, and public affairs programs -- is made possible, in substantial part, by the sale of local advertising time during and adjacent to network programs. These

programs (such as "Alias," "CSI," "American Idol," and "Friends") often command large audiences, and the sale of local advertising slots during and adjacent to these programs is therefore a crucial revenue source for local stations. A variety of technologies have been developed or planned -- including cable, satellite, open video systems, and the Internet -- that, as a technological matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the network/affiliate system, Congress or the Commission (or both) have acted to ensure that the retransmission system does not import duplicative network programming from distant markets. A recent example is the threat of unauthorized Internet retransmissions of television stations, which was quickly halted by the courts (applying the Copyright Act) and condemned by Congress as outside the scope of any existing compulsory license. /

In the case of cable television, for example, the FCC has since the mid-1960's imposed "network nonduplication" rules on cable systems. 47 C.F.R. §§ 76.92-76.97 (1996). As the Commission explained when it strengthened the network nonduplication rules in 1988:

[I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary. /

2. Protecting the Rights of Copyright Owners to License

Their Works in the Marketplace is Another Principle

Supporting a Highly Circumscribed Distant-Signal Compulsory License

By definition, the Copyright Act is designed to limit unauthorized marketing of works as to which the owners enjoy exclusive rights. See U.S. Constitution, art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

While Congress has determined that compulsory licenses are needed in certain circumstances, the courts have emphasized that such licenses must be construed narrowly, "lest the exception destroy, rather than prove, the rule."

Fame Publ'g Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975); see also *Cable Compulsory License; Definition of Cable Systems*, 56 Fed. Reg. 31,580, 31,590 (1991) (same). The principle of narrow application and construction of compulsory licenses is particularly important as applied to the distant-signal compulsory license, because that license not only interferes with free market copyright transactions but also threatens localism.

3. In Enacting the SHVA and the SHVIA, Congress Reaffirmed the

Central Role of Localism and of Local Program Exclusivity

When Congress crafted the original Satellite Home Viewer Act in 1988, it emphasized that the legislation "respects the network/affiliate relationship and promotes localism." H.R. Rep. No. 100-887, pt. 1, at 20 (1988). And when Congress temporarily extended the distant-signal compulsory license in 1999, it reaffirmed the importance of localism as fundamental to the American television system. For example, the 1999 SHVIA Conference Report says this:

"[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. . . . [T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations." SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).

The SHVIA Conference Report also stressed the need to interfere only minimally with marketplace arrangements -- premised on protection of copyrights -- in the distribution of television programming:

"[T]he Conference Committee is aware that in creating compulsory licenses . . . [it] needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate. . . . [A]llowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right--bought and paid for in market-negotiated arrangements--to show the works in question undermines those market arrangements."

Id. The Conference Report also emphasized that "the specific goal of the 119 license, which is to allow for a life-line network television service to those homes beyond the reach of their local television stations, must be met by only allowing distant network service to those homes which cannot receive the local network television stations. Hence, the 'unserved household' limitation that has been in the license since its inception." *Id.* (emphasis added).

Finally, the SHVIA Conference Report highlighted "the continued need to monitor the effects of distant signal importation by satellite," and made clear that Congress would need to re-evaluate after five years whether there is any "continuing need" for the distant signal license. *Id.* That time, of course, is now.

II. PROPERLY IMPLEMENTED, THE LOCAL-TO-LOCAL COMPULSORY LICENSE IS A WIN-WIN-WIN FOR CONSUMERS, BROADCASTERS, AND SATELLITE COMPANIES

Unlike the importation of distant network stations, which can do grave damage to the network/affiliate relationship, delivery of local stations to the stations' own local viewers -- e.g., Salt Lake City stations to viewers in the Salt Lake City area -- is a win-win-win for consumers, local broadcasters, and DBS firms alike. As Congress explained in 1999 when it created a new local-to-local compulsory license in Section 122 of the Copyright Act, the new Act "structures the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations." 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).

A. Satellite Firms Have Enjoyed Extraordinary Growth, Thanks In Major Part To the Local-to-Local Compulsory License

As the FCC recognized in its January 2004 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, the Direct Broadcast Satellite ("DBS") industry is thriving -- and offering potent competition to cable. The DBS industry, which signed up its first customer only decade ago, grew to more than 20 million subscribers as of June 2003. Annual Assessment, MB Dkt. No. 03-172, 8 (released Jan. 28, 2004). The growth rate for DBS "exceeded the growth of cable by double digits" in every year between 1994 and 2002, and in 2003 exceeded the cable growth rate by 9.2%. *Id.* Just in the 12 months between June 2002 and June 2003, the DBS industry added 2.2 million net new subscribers, surging from 18.2 million to 20.4 million households. *Id.* DirecTV is currently the second-largest multichannel video programming distributor ("MVPD"), behind only Comcast, while EchoStar is the fourth-largest MVPD. *Id.*, 67. The DBS firms take many subscribers away from cable: "according to [DirecTV] internal data, approximately 70% of its customers were cable subscribers at the time that they first subscribed to DirecTV." *Id.*, 65.

The growth of the DBS industry has far outstripped even optimistic predictions made just a few years ago. In its January 2000 Annual Assessment, for example, the FCC quoted bullish industry analysts who predicted that "DBS will have nearly 21 million subscribers by 2007." 2000 Annual Assessment, 15 FCC Rcd. 978, 70. As the statistics quoted above show, DBS reached that level not in 2007, but in 2003 -- four years earlier than predicted.

As the FCC has repeatedly pointed out, delivery of local stations by satellite has been a major spur to this explosive growth. E.g., 2004 Annual Assessment, 8. In June 1999, just before the enactment of the new local-to-local compulsory license in the SHVIA, the DBS industry had 10.1 million subscribers. 2000 Annual Assessment, 8. Only four years later, the industry had more than doubled that figure to 20.4 million subscribers. 2004 Annual Assessment, 8. That this growth has been spurred by the availability of local-to-local is beyond doubt: the DBS industry's own trade association, the Satellite Broadcasting & Communications Association, stressed just a few months ago that "[t]he expansion of local-into-local service by DBS providers continues to be a principal reason that customers subscribe to DBS." SBCA Comments at 4, Dkt. No. 03-172 (filed Sept. 11, 2003) (emphasis added).

The latest subscriber figures reported by DirecTV and EchoStar confirm that the DBS industry is continuing to enjoy extraordinary growth: just in the first quarter of 2004, the two firms added 820,000 net new subscribers. /

B. Contrary to the DBS Industry's Pessimistic Predictions, Satellite Local-to-Local Service is Now Available to the Overwhelming Majority of American Television Households

Over the past few years, EchoStar and DirecTV have repeatedly claimed that capacity constraints will severely limit their ability to offer local-to-local service to more than a small number of markets. The DBS firms used that argument -- unsuccessfully -- in 1999 in attempting to persuade Congress that it should permit DBS companies to use a new compulsory license to "cherry-pick" only the most heavily-watched stations in each market. They used it again in arguing -- again unsuccessfully -- in 2000 and 2001 that the courts should strike down SHVIA's "carry one, carry all" principle as somehow unconstitutional. And they trotted out the same claims as a justification for the proposed horizontal merger of the nation's only two major DBS firms, DirecTV and EchoStar. As recently as 2002, for example, the two DBS firms claimed that unless they were permitted to merge, neither firm could offer local-to-local in more than about 50 to 70 markets. EchoStar, DirecTV CEOs Testify On Benefits of Pending Merger Before U.S. Senate Antitrust Subcommittee, www.spacedaily.com/news/satellite-biz-02p.html ("Without the merger, the most markets that

each company would serve with local channels as a standalone provider, both for technical and economic reasons, would be about 50 to 70.") (quoting DirecTV executive).

Contrary to these pessimistic predictions, the two DBS firms already offer local-to-local programming to the overwhelming majority of U.S. television households. Although the DBS firms claimed they would never be able to serve more than 70 markets unless they merged, EchoStar already serves 121 Designated Local Markets ("DMA's"), which collectively cover more than 85% of all U.S. TV households. / Nor is there any sign that EchoStar's expansion of local-to-local service has stopped.

DirecTV's plans are still more ambitious. As of November 2003, DirecTV offered local-to-local to 64 markets covering more than 72% of all U.S. television households. With the launch of a new satellite last week, DirecTV will serve 100 DMAs covering 85% of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs that collectively include 92% of all U.S. TV households. / And as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in all 210 DMAs." / In other words, DirecTV alone will soon offer local-to-local service to virtually all American television households -- even though EchoStar told Congress and the FCC just two years ago that this result was unthinkable unless the two firms merged.

C. EchoStar And DirecTV Boast About The Excellent Technical Quality Of Their Current Local-To-Local Service -- Which Retransmits "Digitized" Analog Signals

As discussed below, the satellite industry now demands that Congress expand the distant-signal compulsory license - which EchoStar has systematically abused over the past eight years -- by creating a new category of households that are "digitally unserved." But any suggestion that EchoStar and DirecTV have difficulty attracting customers under the current law is belied by the following facts.

First, both DirecTV and EchoStar can now -- or will within a few months -- each be able to deliver local television stations by satellite to nearly 90% of U.S. television households. Second, both DBS firms obtain excellent-quality analog signals from the stations, often working with the stations themselves to obtain a direct feed from the station's studios. Third, after receiving a high-quality analog signal, the DBS firms then "digitize" the signals and retransmit them in digital format to their customers. See www.dishnetwork.com/content/programming/index.shtml ("DISH Network now has your digital local channels.") (emphasis added). While these signals do not equal the quality of a signal originating from a digital broadcast, or particularly of a high-definition broadcast, the result, according to the DBS industry's trade association, is that DBS "always delivers a 100 percent, crystal-clear digital audio and video signal," even if the original source is an analog broadcast. SBCA Web site, www.sbca.com/mediaguide/faq.htm (emphasis added).

In other words, consumers who receive an excellent-quality "digitized" analog signal from a local station from a DBS firm -- as opposed to an imported digital station -- are scarcely in a "hardship" position. Of course, it has never been the case that "obtaining the best-quality signal" would justify abandoning the principles of localism and free market competition. The principle behind the long-standing "Grade B intensity" standard for determining which households are "unserved" is that Grade B intensity is an objective proxy for an acceptable signal, not for the optimal signal. If localism could be so easily sacrificed, Congress would not have adopted -- and twice reaffirmed -- the Grade B intensity standard. /

Finally, these local channel offerings have made DBS so attractive to consumers that it is gaining millions of new subscribers every year while the number of cable subscribers is actually shrinking. 2004 Annual Assessment, 8 ("In the last several years . . . cable subscribership has declined such that as of June 2003, there were approximately the same number of cable subscribers as there were at year-end 1999.") While delivery of local digital signals by DirecTV and EchoStar would be a highly desirable development, there is no basis for suggesting that DirecTV and EchoStar need to import distant digital signals to serve their customers.

D. DirecTV and EchoStar Have Many Options For Continuing To Expand Their Ability To Deliver Local Signals, Including Local Digital Signals

As discussed above, DirecTV and EchoStar have brilliant engineers who constantly find ways to deliver more programming in the same spectrum. Nevertheless, in policy debates in Washington, the two firms regularly assure Congress (and the FCC) that no further technological improvement can be achieved. To mention one other example: even as DirecTV was doubling its "compression ratio" between 1998 and 2001 - enabling it to carry twice as many channels in the same amount of spectrum - it repeatedly told the FCC that it had hit a brick wall as far as any further progress in compression technology:

? July 31, 1998: "DIRECTV has substantially reached current limits on digital compression with respect to the

capacity on its existing satellites. Therefore, the addition of more channels will necessitate expanding to additional satellites"

? Aug. 6, 1999: "DIRECTV has substantially reached current limits on digital compression with respect to the capacity on its existing satellites."

? Sept. 8, 2000: "DIRECTV has substantially reached current technological limits on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."

? Aug. 3, 2001: "DIRECTV has offered digitally compressed signals from its inception, and has substantially reached current technological limits on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity." /

This year, the Committee can expect to hear from EchoStar yet again that it has no hope of significantly expanding their capacity. For example, we can expect to hear from EchoStar that it will never be able to carry the digital signals of local television stations, and that it should instead be given a crutch by Congress to help it compete with cable. In fact, the satellite firms have available to them a wide range of potential new techniques for massively expanding their capacity, including:

- o spectrum-sharing between DirecTV and EchoStar;
- o use of Ka-band as well as Ku-band spectrum;
- o higher-order modulation and coding;
- o closer spacing of Ku-band satellites;
- o satellite dishes pointed at multiple orbital slots;
- o use of a second dish to obtain all local stations; / and
- o improved signal compression techniques.

If Congress allows the power of American technical ingenuity to continue to move forward, we can expect to see DirecTV and EchoStar continue to make tremendous progress in doing more with the same resources. Just as today's desktop computers are unimaginably more powerful than those available just a few years ago, we can expect similar quantum improvements from America's satellite engineers - if Congress leaves the free market to do its magic, and leaves necessity to continue to be the mother of invention.

E. If The FCC Does Not Act, Congress Will Need To Step In To Correct A Major Abuse Of Local-To-Local By Echostar

In crafting the SHVIA, Congress was well aware that if a DBS firm were permitting to select only some -- but not all -- local stations for retransmission, the stations left off the service would have little chance of reaching viewers who obtain their TV service from the satellite company. In the same spirit as the requirement in the 1992 Cable Act that cable systems carry all qualified local stations in each market in which they operate, the SHVIA specifies that if a satellite carrier chooses to use the local-to-local license to carry signals in a particular market, it must carry all qualified local stations. 47 U.S.C. § 338(a)(1). That requirement has been upheld against constitutional attack by EchoStar, DirecTV, and their trade association. *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001). The purpose of the "carry one, carry all" principle is, of course, to ensure the continued availability of a wide variety of different over-the-air channels, and to prevent the local-to-local compulsory license from interfering with existing vigorous competition among all of the broadcast stations in each local market. Since late 2001, EchoStar has egregiously violated the requirement that it carry all stations in a nondiscriminatory manner: in many markets, EchoStar forces consumers to acquire a second satellite dish to receive some -- but not all -- local stations. Here in the Washington, D.C. area, for example, EchoStar enables its customers to see the ABC, CBS, Fox, and NBC stations (and a handful of other local stations) with a single satellite dish, pointed at EchoStar's main satellites. See EchoStar web site, www.dishnetwork.com/content/programming/locals/index.shtml. On the other hand, viewers wishing to see Channel 14 (Univision), Channel 32 (WHUT -- PBS), Channel 53 (WNVN -- International), Channel 56 (WNVC -- International), or WJAL (Channel 68 --Independent) are forced to obtain a second satellite dish aimed at a satellite far over the Atlantic. Id. (In this and other markets, EchoStar targets public television, Hispanic, and other foreign-language stations for this discrimination.) Because few viewers will go to the time and trouble of obtaining a second dish -- e.g., a long wait at home for an installer the net result is that only a tiny

percentage of EchoStar subscribers can actually view all of their local stations. To date, the FCC has taken only ineffective steps to address this egregious form of discrimination, / even though EchoStar's fellow DBS company, DirecTV, has told the FCC that EchoStar's two-dish ploy "is inconsistent with the language of the Satellite Home Viewer Improvement Act. " See Letter from Merrill S. Spiegel to Marlene H. Dortch, Dkt. No. 00-196 (Jan. 16, 2003). The Commission has recently indicated that it plans to take action soon to address EchoStar's two-dish practices, / but it remains uncertain when it will act on pending petitions for review. Should the Commission fail to take prompt action, Congress should step in to ensure that EchoStar can no longer thumb its nose at Congress' unmistakable directive that DBS firms that local-to-local means carriage of all local stations, without relegating many of the stations to an inaccessible electronic ghetto.

III. THE DISTANT-SIGNAL COMPULSORY LICENSE HAS BEEN EGREGIOUSLY ABUSED BY SATELLITE CARRIERS, AND THE NEED FOR IT IS RAPIDLY DIMINISHING WITH THE GROWTH OF LOCAL-TO-LOCAL

America's free, over-the-air television system is based on local stations providing programming to local viewers. When satellite carriers began delivering television programming in the 1980's, however, retransmission of local television stations by satellite was not yet technologically feasible. In 1988, Congress therefore fashioned a stopgap remedy: a compulsory license that allows satellite carriers to retransmit distant network stations, but only to "unserved households." 17 U.S.C. § 119. The heart of the definition of "unserved household" is whether the residence can receive an over-the-air signal of a certain objective strength, called "Grade B intensity," from an affiliate of the relevant network. *Id.*, § 119(d)(10) (definition of "unserved household"). In 1994, Congress extended the distant-signal license for another five years, although it expressly placed on satellite carriers the burden of proving that each of their customers is "unserved." 17 U.S.C. § 119(a)(5)(D).

In 1999, Congress again extended the distant-signal license as part of the SHVIA, and statutorily mandated use of the FCC-endorsed computer model (called the "Individual Location Longley-Rice" model, or "ILLR") for predicting which households are able to receive signals of Grade B intensity from local network stations. 17 U.S.C. § 119(a)(2)(B)(ii). In the SHVIA, Congress also classified certain very limited new categories of viewers as "unserved," including (1) certain subscribers who had been illegally served by satellite carriers but whom Congress elected to "grandfather" temporarily, see 17 U.S.C. § 119(e), and (2) qualified owners of recreational vehicles and commercial trucks, see *id.*, § 119(a)(11).

By its terms, grandfathering will expire at the end of 2004. 17 U.S.C. § 119(e). Unlike in 1999, when Congress saw grandfathering as a way to reduce consumer complaints by allowing certain ineligible subscribers to continue receiving distant signals, the end of grandfathering will have little impact in the marketplace. This special exception should therefore be allowed to expire routinely. /

A. Delivery Of Distant Signals Is A Poor Substitute For Delivery Of Local Television Stations

From a policy perspective, there is no benefit -- and many drawbacks -- to satellite delivery of distant, as opposed to local, network stations. Unlike local stations, distant stations do not provide viewers with their own local news, weather, emergency, and public service programming. Nor does viewership of distant stations provide any financial benefit to local stations to help fund their free, over-the-air service. To the contrary, distant signals, when delivered to any household that can receive local over-the-air stations, simply siphon off audiences and diminish the revenues that would otherwise go to support free, over-the-air programming.

Members of Congress and other candidates for election are uniquely injured by distant signals: a viewer in Vermont, for example, will never see political advertisements running on local Vermont stations if he or she is watching New York or Los Angeles stations from EchoStar or DirecTV instead. Such viewers become virtually unreachable by political advertising, unless (for example) a candidate in Vermont wishes to purchase advertising on stations in the costliest media markets in the United States - New York and Los Angeles.

B. Satellite Carriers Have Grievously Abused the Distant-Signal Compulsory License

Satellite carriers -- most egregiously EchoStar -- have systematically abused the distant-signal compulsory license since its creation. To the extent that satellite carriers have complied with the limitations placed by Congress on the distant-signal license, it is solely as a result of litigation that broadcasters were forced to undertake to halt satellite carrier lawbreaking.

From 1988 until 1998, satellite carriers simply ignored the objective "Grade B intensity" standard and instead signed up anyone willing to say that they were dissatisfied with their over-the-air picture. Starting in the mid-1990s, when the large "C-band" dishes began to be replaced by the hot-selling 18-inch dishes offered by DirecTV and EchoStar, the

carriers' distant-signal lawbreaking quickly became a crisis.

When DirecTV went into business in 1994, and when EchoStar did so in 1996, they immediately began abusing the narrow distant-signal compulsory license to illegally deliver distant ABC, CBS, Fox, and NBC stations to ineligible subscribers. In essence, the DBS companies pretended that a narrow license that could legally be used only with remote rural viewers was in fact a blanket license to deliver distant network stations to viewers in cities and suburbs.

/

As a result of EchoStar's and DirecTV's lawbreaking, viewers in markets such as Meridian, Mississippi, Lafayette, Louisiana, Traverse City, Michigan, Santa Barbara, California, Springfield, Massachusetts, Peoria, Illinois, and Lima, Ohio were watching their favorite network shows not from their local stations but from stations in distant cities such as New York. Since local viewers are the lifeblood of local stations, EchoStar's and DirecTV's copyright infringements were a direct assault on free, over-the-air local television.

When broadcasters complained about this flagrant lawbreaking, the satellite industry effectively said: if you want me to obey the law, you're going to have to sue me. Broadcasters were finally forced to do just that, starting in 1996, when they sued the distributor (PrimeTime 24) that both DirecTV and EchoStar used as their supplier of distant signals. But even a lawsuit for copyright infringement was not enough to get the DBS firms to obey the law: both EchoStar and DirecTV decided that they would continue delivering distant stations illegally until the moment a court ordered them to stop.

The courts recognized -- and condemned -- the satellite industry's lawbreaking. See, e.g., *CBS Broadcasting Inc. v. PrimeTime 24*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (entering preliminary injunction against DirecTV's and EchoStar's distributor, PrimeTime 24); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc. v. DIRECTV, Inc.*, No. 99-0565-CIV-NESBITT (S.D. Fla. Sept. 17, 1999) (permanent injunction after entry of contested preliminary injunction); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction).

By the time the courts began putting a halt to this lawlessness, however, satellite carriers were delivering distant ABC, CBS, Fox, and NBC stations to millions and millions of subscribers, the vast majority of whom were ineligible urban and suburban households. See *CBS Broadcasting*, 9 F. Supp. 2d 1333.

By getting so many subscribers accustomed to an illegal service, DirecTV and EchoStar put both the courts and Congress in a terrible box: putting a complete stop to the DBS firms' lawbreaking meant irritating millions of consumers. Any member of Congress who was around in 1999 will remember the storm of protest that DirecTV and EchoStar stirred up from the subscribers they had illegally signed up for distant network stations.

Even when the courts ordered the DBS firms to stop their massive violations of the Copyright Act, they took further evasive action to enable them to continue their lawbreaking. In particular, when their vendor (PrimeTime 24) was ordered to stop breaking the law, both DBS firms fired their supplier in an effort to continue their lawbreaking.

When DirecTV attempted this in February 1999, a United States District Judge promptly stopped it from doing so. *CBS Broadcasting Inc. et al v. DirecTV*, No. 99-565-CIV-Nesbitt (S.D. Fla. Feb. 25, 1999); see *id.* (S.D. Fla. Sept. 17, 1999) (stipulated permanent injunction).

EchoStar has played the game of "catch me if you can" with greater success, thanks to a series of stalling tactics in court. But in 2003, a United States District Court judge for the Southern District of Florida held a 10-day trial in a copyright infringement case brought by broadcast television networks, and trade associations representing local network affiliates, originally filed against EchoStar in 1998. / In June 2003, the District Court issued a meticulously-documented 32-page final judgment, holding EchoStar liable for nationwide, willful or repeated copyright infringement by violating the distant-signal compulsory license. *CBS Broad., Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237 (S.D. Fla. 2003).

EchoStar had the burden of proving that each of its subscribers receiving distant ABC, CBS, Fox, and NBC stations is an "unserved household." 17 U.S.C. § 119(a)(5)(D). Yet the District Court found that EchoStar had failed to prove that any of its 1.2 million distant-signal subscribers is in fact "unserved." That is, EchoStar did not prove that any of its subscribers is unable to receive a Grade B signal, is grandfathered, or is eligible on any other basis. *Id.*, 82.

Worst of all, the District Court found that EchoStar had deliberately sought to mislead the court about what it did with the vast pool of illegal subscribers it accumulated between 1996 and 1999. Most important, EchoStar made -- and then deliberately broke -- a sworn pledge (in a declaration by its CEO, Charles Ergen) to turn off the many ineligible subscribers it signed up using the unlawful do-you-like-your-picture method. *Id.*, 46. Far from turning off its accumulated illegal subscribers, EchoStar knowingly continued delivering distant signals to many hundreds of thousands of customers that it knew -- from a study EchoStar itself ordered to be ineligible. *Id.*, 38-47.

EchoStar's decision to continue its highly profitable lawbreaking was the height of cynicism: as the District Court found, "EchoStar executives, including Ergen and [General Counsel] David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, elected instead to break Mr. Ergen's promise to the Court." *Id.*, 46 (emphasis added).

Nor is EchoStar's abuse of the distant-signal compulsory license the only example of its flouting of laws and regulations and misuse of legal processes. Appendix B is a list of other violations by EchoStar of substantive legal rules, and of instances in which EchoStar has abused judicial and administrative procedures. / This is, of course, the same EchoStar that now asks Congress to expand the distant-signal compulsory license -- and to do so in ways that would allow EchoStar to offer highly profitable programming packages to millions of subscribers, at virtually no cost to EchoStar, but at great cost to broadcasters, program suppliers, and the principle of localism.

C. With The Widespread Availability Of
Local-To-Local Service, The Number Of
Truly "Unserved" Households Is Minimal

Unlike the local-to-local compulsory license, the distant-signal compulsory license threatens localism and interferes with the free market copyright system. As a result, the only defensible justification for that compulsory license 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." 145 Cong. Rec. at H11792-793. (emphasis added). /

Today, more than 80% of all U.S. television viewers have the option of viewing their local network affiliates by satellite -- and that number is growing all the time. Even satellite dish owners in local-to-local markets who cannot receive Grade B intensity signals over-the-air (e.g., a household in a remote part of the Washington, D.C. DMA) are obviously not "unserved" by their local stations: they can receive them, with excellent technical quality, directly from their satellite carrier, just by picking up the phone. And they can do so without any need to obtain a waiver, and without regard to what the ILLR model predicts about the over-the-air signal strength at their home.

The widespread availability of local-to-local network affiliate retransmissions means that, as a real-world matter, there are no unserved viewers in areas in which local-to-local satellite transmissions of the relevant network are available, because it is no more difficult for viewers to obtain their local stations from their satellite carriers than to obtain distant stations. There is therefore no policy justification for treating satellite subscribers in local-to-local markets as "unserved" and therefore eligible to receive distant network stations.

The distant-signal compulsory license is not designed to permit satellite carriers to sabotage the network/affiliate relationship by delivering to viewers in served households -- who can already watch their own local ABC, CBS, Fox, and NBC stations -- network programming from another source. Yet satellite carriers have aggressively advertised the benefits to served households of obtaining distant signal programming, including most notably:

? time-shifting (e.g., Mountain and Pacific Time Zone viewers watching network programming two or three hours earlier from East Coast stations)

? out-of-town sports: because TV networks often show different sports events (such as NFL games) in different cities, a subscription to an out-of-town network station enables viewers to see sports events that are not televised locally.

These abuses of the compulsory license damage both the network/affiliate system and the free market copyright regime. Consider, for example, a network affiliate in Sacramento, California, a DMA in which there are today no DBS subscribers who are genuinely "unserved" because both DIRECTV and EchoStar offer the local Sacramento ABC, CBS, Fox, and NBC stations by satellite. Nevertheless, for any Sacramento-area viewer who is technically "unserved" under the Grade B intensity standard, DIRECTV and EchoStar can scoop the Sacramento stations with the stations' own programming by offering distant signals from East Coast stations. The Sacramento station -- and every other station in the Mountain and Pacific Time Zones that has local-to-local service -- therefore loses badly needed local viewers, even though the viewers have zero need to obtain a distant signal to watch network programming. Similarly, the ability of satellite carriers to offer distant stations that carry attractive sports events is a needless infringement of the rights of copyright owners, who offer the same product -- out-of-town games -- on a free market basis. For example, the NFL has for years offered satellite dish owners (at marketplace rates) a package called "NFL Sunday Ticket," which includes all of the regular season games played in the NFL. The distant-signal compulsory license creates a needless "end-around" this free-market arrangement by permitting satellite carriers to retransmit distant network stations for a pittance through the compulsory license.

The House Energy & Commerce Committee has approved a bill that would bar any new signups for distant network stations in local-to-local markets and create transitional procedures for existing distant network customers. In the spirit of compromise, on the understanding that other important reforms (such as elimination of the two-dish scam) will be implemented, and that other ill-advised proposals (such as the so-called "digital white area" and "ILLR reform" proposals) are not adopted, NAB believes that such an approach is reasonable.

D. For the Small Number of Markets in Which The DBS Firms
Do Not Now Offer Local-to-Local, The FCC Has Repeatedly

and Recently Reaffirmed that the Grade B Standard and the ILLR Model Are the Best Tools for Determining Which Households are "Unserved"

For the ever-shrinking number of markets in which the DBS firms do not offer local-to-local (which will encompass no more than 8% of U.S. television households by the end of 2004 for DirecTV), the Grade B intensity standard, implemented via the FCC-endorsed Individual Location Longley-Rice ("ILLR") model, continues to be the logical method for predicting which households are unable to receive local stations over the air.

For years, the satellite industry simply ignored the objective signal intensity standard that Congress established in 1988, and instead used a meaningless subjective standard ("are you satisfied with your picture quality?") that was effectively no standard at all. As discussed above, in 1998, the courts found that the satellite industry had broken the law by signing up millions of subscribers using this illegal method. Rather than coming into compliance, the satellite industry raced to the FCC to demand that the Commission alter (in the satellite industry's favor) what the DBS firms characterized as an "antiquated," "1950's-era" Grade B standard.

The FCC carefully considered the engineering data and other evidence presented by the satellite industry, but concluded that, in fact, there was no basis for changing the Grade B standard. In *Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, 32-43, Dkt. No. 98-201 (released Feb. 2, 1999). Although the Grade B standard was originally established in the 1950's, the Commission pointed out that it had repeatedly re-evaluated the standard during the intervening decades and found it to be still sound. *Id.*, 42. As the Commission observed, many of the changes that have occurred since the 1950's have made it easier to obtain a picture of acceptable quality with the same strength signal: for example, the "low cost noisy tubes and . . . components" of the 1950s have been replaced by "modern solid state components that produce lower set noise." *Id.*, 41. Overall, the FCC found that the "environmental and technical changes that have taken place" since the Grade B standard was first established have moved "in opposite directions and tend to cancel each other out." *Id.*, 42.

Despite this exhaustive review by the Commission in 1998 and 1999, when Congress approved the SHVIA, it directed the Commission to conduct yet another proceeding to evaluate whether Grade B intensity is an appropriate standard. After carefully evaluating the submissions by all interested parties, including engineering data submitted by the satellite industry, the Commission recommended that the Grade B standard remain unchanged in virtually all respects. In *Re Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act*, ET Dkt. No. 00-90 (released Nov. 29, 2000).

Similarly, the FCC's ILLR predictive model, first announced in 1999, grew out of years of Commission experience with the Longley-Rice model in other contexts. In *Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, at 61-88. In response to Congress' directive in the SHVIA, and after reviewing all of the satellite industry's submissions, the Commission made further refinements to the ILLR model in May 2000 and reaffirmed that ILLR is an accurate and reliable model. In *Re Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, ET Docket No. 00-11 (released May 26, 2000). In doing so, the Commission considered how ILLR predictions fared when compared to actual signal intensity measurements at the same location, and found that in many cases ILLR actually underpredicts the actual signal strength available at particular households -- precisely the opposite of the satellite industry's claims. *Id.*

IV. THE DBS INDUSTRY'S PROPOSAL TO EXPAND THE DISTANT-SIGNAL COMPULSORY LICENSE DEFIES LOGIC AND WOULD SET BACK LOCAL-TO-LOCAL CARRIAGE OF DIGITAL SIGNALS FOR YEARS

Having elected to deliberately violate the limits that Congress imposed on the existing compulsory license unless and until ordered by a federal court to obey them, EchoStar now demands that Congress radically expand the distant-signal license they have abused. The Committee should reject this irresponsible proposal out of hand.

In essence, EchoStar asks the Committee to create a brand-new compulsory license to permit them to deliver the digital broadcasts of the New York and Los Angeles ABC, CBS, Fox, and NBC stations to millions of households nationwide, even though (a) the households can receive the same programming over the air from their local station's analog signal and (b) in the overwhelming majority of cases, EchoStar and DirecTV already deliver the same programming via what SBCA describes as "a 100 percent, crystal-clear digital audio and video signal" retransmitted from the local station's analog broadcasts.

The simple greed behind this proposal is clear, and the tactic is familiar. In the 1990s, the DBS industry sought to offer network broadcast programming "on the cheap" by delivering the analog broadcasts of New York and Los Angeles stations nationwide -- completely bypassing the network/affiliate system that Congress and the FCC have worked so hard to foster. (Indeed, in the 1990's satellite companies urged Congress to eliminate the "unserved household" restriction entirely and to permit universal distribution of New York and Los Angeles stations in return for payment of a "surcharge.") This Committee, and Congress as a whole, blocked those maneuvers, instead insisting on

localism and on marketplace solutions. By standing its ground against the "quick fix" urged by the DBS industry, Congress has fostered the win/win/win result described above: DirecTV and EchoStar (and their contractors) dug deep to find technical solutions to enable them to offer local-to-local broadcast programming to the overwhelming majority of U.S. television households -- and soon to all of them. (They found these solutions, of course, only after repeatedly telling Congress and the FCC that the technical problems were unsolvable.)

EchoStar's current proposal is equally self-serving. EchoStar would enjoy a tremendous financial benefit from being able -- again "on the cheap" -- to deliver the digital broadcasts of New York and Los Angeles ABC, CBS, Fox, and NBC stations to many millions of viewers nationwide. Instead of investing in delivering local digital broadcasts, as cable systems are gradually beginning to do, EchoStar could use a single, inexpensive national feed (e.g., of WCBS in New York) to deliver digital programming of a particular network around the country. Although this gambit would cost the DBS firms virtually nothing, they would gain enormously, both in additional customers (at \$40, \$50 or more per month) and in selling additional network packages (at \$6 per month) to both old and new customers.

While the "distant digital" proposal would be a tremendous windfall for EchoStar, it would be a disaster for Congress, the public, and broadcasters. As discussed in detail below, the supposed "factual" basis for this proposal -- that the broadcast television industry has not been diligent in pushing the digital transition -- is palpable nonsense. And as also described below, this gift to the DBS industry would come at a crippling cost in terms of Congress' public policy objectives.

A. The Broadcast Industry Has Spent Enormous Sums and Dedicated Extraordinary Efforts to Implementing the Transition to Digital Broadcasting -- With Tremendous Success in Rolling Out Digital to the Vast Majority of American TV Households

Contrary to the satellite industry's ill-informed accusations, broadcasters have worked tirelessly to implement the transition to digital broadcasting. Thanks to the expenditure of billions of dollars and millions of person-hours, broadcasters have built - and are on-air with -- digital television ("DTV") facilities in 203 markets that serve 99.6% of all U.S. TV households. / Midway through the transition, almost three-quarters -- 73.7% -- of U.S. television households have access to at least six free, over-the-air digital television signals. / Nationwide, 1411 television stations in 203 markets are delivering free, over-the-air digital signals today. / More than 70 million households receive six or more DTV signals; 49 million households receive nine or more DTV signals; and a full 30 million households receive 12 or more DTV signals. More digital stations are resolving their obstacles and going on the air almost daily. The digital transition is working and moving ahead quickly, and the claims of the satellite industry to the contrary are empty rhetoric, not fact.

In the top ten markets, covering 30% of U.S. households, all top four network affiliates are on-air - 38 with licensed full-power digital facilities and two New York city stations with Special Temporary Authority ("STA") currently covering a significant chunk of their service areas and with plans to expand even more. In markets 11-30 (representing another 24% of U.S. households), all 79 top four affiliated stations are on-air - 72 with full-power licensed digital facilities and seven with STAs. Thus, all ABC/CBS/Fox/NBC affiliates in the top 30 markets, representing 53.5% of all U.S. households, are on-air with DTV -- 110 stations with full power licensed digital facilities and nine with STAs. / Even as to smaller stations in these markets and stations in smaller markets - which have far fewer resources but equally high costs -- 1292 of 1524 stations are on air with digital, / having overcome enormous challenges and in many cases mortgaging their stations to do so, despite having no immediate prospect of revenues to offset these huge investments.

Those who do not understand the digital transition sometimes claim that DTV stations operating with STAs broadcast with very low power. That is simply wrong. Many stations, particularly those outside the largest stations in the largest markets, are "DTV maximizers," i.e., are maximizing their power to greatly exceed their analog coverage. Many maximizers need only a fourth or less of their maximum (licensed) power to cover their entire analog service area. Maximizers operating at even much reduced power are still covering 70% or more of their analog service areas. Almost 19% of current DTV stations operating pursuant to STAs currently serve more than 100% of their analog service area with a digital signal. / This number will expand exponentially as the transition continues. This high percentage is particularly striking given that there are still no FCC rules for digital translators or booster stations, which will further expand digital signals in rural areas (at still further cost to local broadcasters). Free, over-the-air broadcasters take seriously the potential for expanding their service area and diminishing the very small number of households nationwide that cannot receive local signals, and the digital transition will provide an opportunity to increase nationwide broadcast service.

An authoritative study from last fall shows that on-air DTV facilities are serving 92.7% of the population served by the corresponding analog stations. / The small percentage of viewers who do not yet receive a fully replicated digital signal of their local television stations is shrinking by the day as broadcasters work hard, at great expense, to expand

the coverage of their digital stations.

On the programming side, broadcasters, both networks and local stations, are providing an extraordinary amount of high-quality DTV and high-definition television ("HDTV") programming to entice viewers to join the digital television transition and purchase DTV sets to display the glory of dazzling HDTV programs and the multiple offerings of the growing DTV multicasts. Three networks offer virtually all their prime time programming in HDTV, as well as high-profile specials and sporting events, such as

- o The Academy Awards
- o The Grammys
- o 11 National Hockey League playoff games
- o The Kentucky Derby
- o The Super Bowl
- o The AFC Championship
- o Masters' Golf
- o US Open Tennis
- o College football
- o NCAA Tournament games
- o The Stanley Cup
- o The NBA Finals
- o The primary NFL games of the week
- o The entire schedule of Monday Night Football

PBS is launching its HD Channel, in addition to its multicast channels of educational fare. WB is doubling its amount of HD programming this fall to account for more than half of its program schedule. PAX is multicasting on its digital channels, including prime time fare. And now many special effects, like the first-down marker and graphics, are also going high definition, to enhance the viewer experience and move the transition along faster and faster.

While it is local stations that bring these national HDTV programs to the vast majority of viewers, these local stations also are doing more and more on the local level to supplement the network HDTV and multicast fare. Examples abound of local HDTV and multicast broadcasts (at an enormous cost for full local HD production facilities):

? WRAL-TV produces its local news in HDTV

? Post-Newsweek's Detroit station broadcast live America's Thanksgiving Day Parade in HD

? WRAZ-TV in Durham NC broadcast 10 Carolina Hurricanes hockey games in HD last winter

? KTLA in LA broadcast last January's Rose Parade in HD in a commercial-free broadcast simulcast in Spanish and closed captioned and repeated it throughout the day and distributed it on many Tribune and other stations

? Last April, Belo's Seattle station KING-TV began producing its award-winning local programs Evening Magazine and Northwest Backroads in HDTV. Evening Magazine is daily. These programs are broadcast on Belo's other Seattle and Portland and Spokane stations

? KTLA last March broadcast live LA Clippers and the Lakers in HD. It was the third sports presentation by KTLA, which included two Dodgers games

? Many public TV stations are providing adult and children's education, foreign language programming and gavel-to-gavel coverage of state legislatures

? NBC and its affiliates are planning a local weather/news multicast service

? ABC is multicasting news/public affairs and weather channels at its KFSN station in Fresno, Calif. It plans to replicate this model at the nine other stations it owns.

? WKMG in Orlando plans to broadcast a Web-style screen with local news, weather maps, headlines and rotating live traffic views.

This ever-increasing variety of DTV and HDTV programming, being broadcast to the vast proportion of American households, will attract consumers to purchase DTV sets. Another major driver of the transition is the FCC's August 2002 Tuner Order, which requires all new television sets, on a phased-in basis and starting this summer with the half of the largest sets, to have a DTV tuner. As a result, DTV tuners will be available in an ever-increasing number of households, thereby further hastening the transition.

In short, the suggestion that broadcasters have somehow failed America in the transition to digital broadcasting is demonstrably false. Indeed, EchoStar's General Counsel, David Moskowitz, admitted as much in testimony before the House Judiciary Committee in February: "I agree with you completely [that broadcasters can't be blamed for decisions by consumers not to invest in digital sets]. I'm not saying the NAB or the broadcasters are at fault." / Moreover, the notion that new compulsory license for "digital white areas" would improve matters is sheer fantasy. In fact, allowing satellite carriers to deliver distant digital (or HD) signals to so-called "digital white areas" would set the stage for a consumer nightmare almost identical to what occurred in 1999, when hundreds of thousands of households had to switch from (illegally-delivered) distant signals to over-the-air reception of local stations.

The reason is simple: as Congress painfully experienced from mountains of letters, emails, and phone messages in 1999, viewers who are accustomed to receiving all of their TV programming (including network stations) by satellite are often enraged when told that they must switch to a hybrid system in which they combine satellite reception with an off-air antenna or cable service. The import of the "distant digital" proposal is therefore clear: after EchoStar had "grabbed" customers with a distant digital signal, the costs to local broadcast stations of reclaiming those viewers would go sky-high, since stations would face not only the same financial costs they do now but also the high costs of confronting thousands of angry local viewers with the need to change their reception setup. EchoStar knows all of this, and it fully understands the implication: the "distant digital" plan would not encourage a smooth digital transition, and would not encourage stations to invest in the digital rollout, but would simply make it easy for EchoStar to hook customers on (distant) satellite-delivered digital signals and keep them forever. /

If there were any doubt about EchoStar's tenacity in retaining distant-signal customers once they begin serving them - regardless of the legality of doing so -- EchoStar's behavior with regard to analog distant signals would eliminate it. As a District Court found last year after a 10-day trial, EchoStar was so determined to retain its illegal distant-signal customers that, "when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers," the key "EchoStar executives, including [CEO Charles] Ergen and [General Counsel] David Moskowitz," choose instead "to break Mr. Ergen's promise to the Court" that it would turn them off. *CBS Broad., Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d at 1246, 46.

B. The Radical New Compulsory License Demanded by EchoStar Is Unnecessary and Would Do Lasting Damage to Localism

At all times since 1988, the purpose of the distant-signal license has been to make over-the-air broadcast programming available by satellite solely as a "lifeline" to satellite subscribers that had no other options for viewing network programming. / The EchoStar proposal would do exactly the opposite: Congress would override normal copyright principles to permit DBS companies to transmit distant network stations to many millions of additional households, even though (1) the households get a strong signal from their local stations over the air and (2) in most cases, the DBS firm already offers the local analog broadcasts of the same programming, in crisp, digitized form, as part of a local-to-local package. The suggestion that Congress needs to step in to offer a "lifeline" under these circumstances is baffling. /

The consequences of this radical proposal, if adopted, would be likely to be grave. According to EchoStar, for example, if a station (through no fault of its own, e.g., because of a local zoning obstacle) has been unable to go on-air with a digital signal, every household in that station's market would be considered "unserved" -- and therefore eligible to receive a retransmitted signal from the New York or Los Angeles ABC, CBS, Fox, and NBC affiliates' digital broadcasts. In these markets, EchoStar would take us back to the dark days of the mid-1990s, when, before courts began to intervene, the DBS firms used national feeds to deliver ABC, CBS, Fox, and NBC network programming to any subscriber who asked for it. / And they would do so even though, in most cases, the DBS firms are themselves already delivering the same programming by satellite from the local stations. With DBS penetration already at more than 20 million households nationwide, and with the highest levels of DBS penetration in smaller markets, the impact on the viability of local broadcasters could be devastating. / Worse yet, based on the misconduct of EchoStar in their retransmission of distant analog signals, once EchoStar has begun delivering distant digital stations, it will take enormous efforts (and years of struggle) to get them to ever stop doing so, even if they have "promised" to do so, and even if the law squarely requires them to do so.

Granting this enormous government subsidy to the DBS industry, at the expense of local broadcasters (and ultimately at the expense of local over-the-air audiences), would also have profoundly negative long-term consequences for the continued progress of the satellite industry. Over-the-air broadcasting is a local phenomenon, and the right way to

deliver local stations is on a local-to-local basis. In their drive to compete with cable, and with each other, DirecTV and EchoStar are likely to devise ingenious technical solutions to enable them to carry digital broadcasts on a local-to-local basis, just as they have -- despite their gloomy predictions -- found a way to do so for analog broadcasts. But rewriting the laws to give EchoStar a cheap, short-term, government-mandated "fix" will take away much of the incentive that would otherwise exist to continue to find creative technological solutions. Congress wisely refused to abandon the bedrock principles of localism and free market competition in the 1990s, when the satellite industry made similar proposals, and Congress should do the same now. /

The EchoStar proposal would also sabotage another key objective of the SHVIA, namely minimizing unnecessary regulatory differences between cable and satellite. If EchoStar could deliver an out-of-town digital broadcast to anyone who does not receive a digital broadcast over the air, it would have a huge (and wholly unjustifiable) leg up on its cable competitors, which are virtually always barred by the FCC's network non-duplication rules from any such conduct. See 47 C.F.R. §§ 76.92-76.97 (1996).

Finally, it would be particularly inappropriate to grant EchoStar a vastly expanded compulsory license when it has shown no respect for the rules of the road that Congress placed on the existing license. If Congress were to adopt this ill-conceived proposal, it can expect more years of controversy, litigation, and -- ultimately -- millions of angry consumers complaining to Congress when their "distant digital" service is eventually terminated. This Committee should rebuff the invitation to participate in such a reckless folly.

V. DBS CARRIAGE OF "SIGNIFICANTLY VIEWED" STATIONS

The concept of "significant viewing" of TV stations -- as applied to cable carriage -- dates back more than 30 years. In 1972, the FCC adopted a rule, using data about over-the-air viewing in 1971, to establish which television stations were viewed over the air by a significant number of households in each community (usually by county). Local cable systems that would not otherwise have been allowed to carry these stations were permitted to do so on the theory that, if significant numbers of viewers could watch a station over the air in a given area, cable subscribers in that area should also be able to view the station. See 47 C.F.R. § 76.92(f) (exception to "network nonduplication" rule permitting cable carriage of stations in areas in which the stations are significantly viewed).

The FCC maintains a list of significantly-viewed stations, based on standards set forth in 47 C.F.R. § 76.54. If a station is significantly viewed in the community served by a cable system, the cable operator may carry that station on a copyright-free basis in that community under 17 U.S.C. § 111. The Commission has procedures for adding stations to the list for additional communities based on new data, as well as a waiver procedure by which stations can effectively be removed from the list for particular communities. If a station is dropped from the list for a particular area, the network nonduplication rules once again apply to carriage of that station in that area.

The local-to-local compulsory license for satellite carriers is currently limited to retransmissions within a station's own local market, or DMA. The DBS industry has asked Congress to modify the law to permit satellite carriers to deliver TV stations outside of their own local markets into areas in which the stations are considered "significantly viewed" by the FCC.

In the spirit of accommodation, NAB does not oppose a carefully-tailored amendment extending to DBS the ability to retransmit "significantly-viewed" television stations. Any amendment to allow DBS firms to retransmit TV stations into "significantly viewed" areas, however, needs to be consistent with the principles of localism that underlie the entire Satellite Home Viewer Improvement Act. Such amendments should, to the extent possible, provide the satellite industry with the same right to retransmit "significantly viewed" stations that the cable industry now enjoys, and impose the same restrictions now imposed on cable. In addition, given the years of violations of existing copyright law and abuse of FCC processes by EchoStar, any amendments must be airtight -- and create the strongest possible incentives to those companies to comply with the law -- to reduce the risk that a new exception will become the basis for a new round of lawbreaking.

In particular, an amendment to add "significantly-viewed" stations to the list of those that DBS firms may carry should implement the following principles:

1. Strict enforcement provisions to protect against abuse by DBS firms. As Congress is aware, EchoStar has broken a sworn promise to a federal judge to turn off illegal distant-signal subscribers, and in many other instances has shown a disregard for compliance with the law. / Any "significantly-viewed" amendment should guard against a new wave of lawbreaking by creating strict, objective, verifiable, and enforceable rules about when satellite carriers can deliver out-of-market signals into "significantly viewed" areas. In particular:

? The FCC, and not any DBS company, should make the determination about whether a particular TV station is "significantly viewed" in a particular community.

? To make it easier to check on their compliance, DBS firms should indicate separately which subscribers are being served under the "significantly viewed" provision in their monthly reports to networks listing new local-to-local subscribers. .

? If DBS firms violate these simple, objective rules after being notified of the violation, they would forfeit the privilege

of delivering stations in that market to "significantly viewed" areas outside the market. For example, if EchoStar illegally delivered Washington, D.C. stations to viewers in Florida, falsely claiming that the stations are "significantly viewed" over the air there, EchoStar should lose the privilege of retransmitting any Washington, D.C. station outside of the Washington, D.C. DMA. In addition, if the FCC determines that a station is no longer significantly viewed in a defined geographic area, the compulsory license permitting DBS to carry that station should expire shortly thereafter. ? The FCC should be directed to establish expedited enforcement procedures so that affected stations can obtain quick relief from the Commission for violations by a DBS firm. (In the example above, stations in Florida could quickly obtain relief against the unlawful retransmission of Washington, D.C. stations to subscribers in Florida.)

2. Protection against potentially severe harm to localism. Delivery of out-of-market stations to a household should be a supplement to the DBS firms' delivery of a viewers' local stations, not a substitute for true local-to-local. (This is always true for cable, which always offers local stations.) For example, in the case cited by the DBS firms in their testimony, delivery by DBS firms of New York City stations to "significantly viewed" areas in the Hartford/New Haven DMA would be in addition to DirecTV's and EchoStar's delivery of local Hartford/New Haven stations.

It would be extraordinarily damaging, however, if the DBS firms could deliver an out-of-market station into a market in which they do not offer local-to-local service. For example, if EchoStar could deliver out-of-market stations into DMAs in which EchoStar does not offer local-to-local, EchoStar subscribers in the latter markets would see an out-of-town station on their DBS lineup, but would not see their own local stations. Particularly because the DMAs in which local-to-local is not yet available are generally small markets, the economic health, and even the viability, of free, over-the-air local stations could be threatened as out-of-town stations siphoned off their local viewers.

For the same reasons, delivery of an out-of-market station in digital (or high-definition) format into a market in which the local stations are available only in an analog form would be very damaging to the local stations in the "invaded" market. Congress should therefore draft any amendment carefully to ensure that any importation of digital signals into a market does not harm the local stations in the market.

In addition, allowing importation of signals into non-local-to-local markets (or allowing importation of digital signals into analog-only local-to-local markets) would damage the incentives for the DBS firms to continue expanding the number of markets they serve with local-to-local. In some small markets, DirecTV and EchoStar could get much of the benefit of local-to-local by relying on the "significantly-viewed" exception to deliver stations from neighboring markets. As a result, the satellite carriers would have much less reason to invest in providing true local-to-local service in currently unserved markets.

To ensure that expanding the DBS license to include carriage of "significantly viewed" stations does not have these harmful effects, therefore, any proposal to do so must permit delivery of stations into "significantly-viewed" areas only if the satellite carrier is already providing local-to-local service in those areas. When the DBS firm carries the "significantly-viewed" station in a digital format, it should be allowed to import the station into another market into the relevant community only if doing so will not unfairly harm the local stations -- for example, if the DBS firm is already offering the local stations in digital.

Finally, an additional amendment is necessary to put broadcasters' carriage negotiations with satellite carriers on the same footing as negotiations with cable operators, once both cable and DBS have the benefit of delivering stations in "significantly viewed" communities. The amendment should direct the FCC to amend its regulations to allow broadcasters, in appropriate cases, to make their elections between retransmission consent and mandatory carriage on a community-by-community, rather than DMA-wide, basis.

VI. WHAT CONGRESS SHOULD DO THIS YEAR

As the Committee is aware, the local-to-local compulsory license is permanent, but Congress has wisely extended the distant-signal license (in Section 119 of the Copyright Act) only for five-year increments. Given the short legislative calendar and the press of other urgent business, Congress may wish simply to extend Section 119, as now in force, for another five years.

If Congress wishes to do anything other than a simple extension of the existing distant-signal compulsory license, NAB urges:

? No distant signals where local-to-local is available. For the reasons discussed above, Congress should amend the definition of "unserved household" to exclude any household whose satellite carrier offers the household's own network stations on a local-to-local basis. There is no logic to interfering with localism -- and with basic copyright principles -- under these circumstances. It makes no sense, for example, to give satellite carriers the right to "scoop" local stations on the West Coast (and in the mountain West) by delivering 8 Simple Rules, Everybody Loves Raymond, 24, or The Tonight Show two or three hours early, or to permit EchoStar to evade normal copyright restrictions by delivering out-of-town NFL games to local-to-local households without ever negotiating for the rights to do so. (At a minimum, Congress should cease any new signups for distant signals in local-to-local markets, and establish appropriate transition provisions for existing customers who are (under current law) legally receiving distant network signals today.)

? No expansion of the distant-signal compulsory license. Congress should flatly reject any proposal to expand the distant-signal compulsory license, such as the irresponsible "distant digital" proposal discussed above. Since the compulsory license is intended only to address "hardship" situations in which viewers have no other means of viewing network programming, there is no policy basis for expanding the compulsory license to cover households that receive can view their local station's analog signals over the air. Still less would it make any sense to declare a household to be "unserved" when it already receives (or can receive with a phone call) a crisp, high-quality digitized retransmission of their local station's analog broadcasts from DirecTV or EchoStar.

The Committee not take seriously EchoStar's predictable claims that it lacks the technological capacity over time to offer local digital signals, since -- as discussed above -- EchoStar and DirecTV are notorious for "underpredicting" their ability to solve technological challenges. Moreover, it would be wholly inappropriate to reward companies such as EchoStar, which have knowingly violated the existing law and broken sworn promises to courts about compliance, by broadening the compulsory license they have abused.

? Five-year sunset. Congress should again provide that Section 119 will sunset after a five-year period, to permit it to evaluate at the end of that period whether there is any continuing need for a government "override" of this type in the free market for copyrighted television programming.

? Stopping the "two-dish" scam. As discussed above, Congress should -- if the FCC does not do so first -- bring a halt to EchoStar's two-dish gambit, which is thwarting Congress' intent to make all stations in each local-to-local market equally available to local viewers.

? Significantly-viewed stations. As an accommodation to the satellite industry, NAB does not oppose adoption of a provision allowing importation, in certain instances, of stations that are considered "significantly viewed" in the community to which they are delivered by the DBS firm -- provided that the amendment contains strong safeguards (and potent penalties) to ensure against damage to localism.

CONCLUSION

With the perspective available after 16 years of experience with the Act, Congress should adhere to the same principles it has consistently applied: that localism and free-market competition are the bedrocks of sound policy concerning any proposal to limit the copyright protection enjoyed by free, over-the-air local broadcast stations. If Congress makes any change to the existing distant-signal license, it should amend the Act to specify that a household that can receive its own local stations by satellite from the satellite carrier is not "unserved" (subject, perhaps, to limited transitional provisions). The Committee should flatly reject reckless bids by companies like EchoStar - which have scoffed at the law for years - to expand the distant-signal license.

Far from rewarding EchoStar for its indifference to congressional mandates, Congress should - if the FCC does not - make clear that EchoStar's flouting of "carry one, carry all" through its two-dish gambit must come to an end. And as it has done in the past, Congress should limit any extension of the distant-signal license to a five-year period, to enable a fresh review of the appropriateness of continuing this major governmental intervention in the free marketplace.

APPENDIX A

Recent Examples of Local TV Station Public Service

Helping People In Need

WXYZ 'Can Do' Raises 500,000 Pounds of Food for Food Banks

WXYZ-TV Detroit (E.W. Scripps-owned ABC affiliate) undertook its 22nd annual "Operation Can-Do" campaign this winter, bringing in more than 500 thousand pounds of canned and non-perishable food to help feed families and individuals through soup kitchens and food banks in the tri-county area. Since it began the program, WXYZ has collected more than six million pounds of food, providing more than 20 million meals to the hungry of Metropolitan Detroit. (Jan/Feb 2004)

WHSV-TV Builds a Habitat House

WHSV-TV Harrisonburg, VA (Gray Television-owned ABC affiliate) decided the best possible way to celebrate its October 2003 50th Anniversary would be to partner with Habitat for Humanity to raise \$50 thousand over the summer to build a house for a needy family. January 2003 marked the first time that the Staunton-Augusta-Waynesboro Habitat affiliate partnered with a television station to build a house and show the public the Habitat miracle. WHSV had several fundraisers, including production and distribution of a Shenandoah Valley cookbook commemorating the station's 50 years of service and the Habitat chapter's 10 years of service. In August, WHSV hosted a special benefit screening of "From Here to Eternity," which won the Academy Award in the same year WSVA-TV (now WHSV) sent

out its first broadcast. Community members who supported the screening were driven by limousine to the theater and entered on a red carpet. WHSV sent out calls for and coordinated volunteers throughout the fundraising and building process. The station met its goal, the house was built and a grateful family of four moved in. (Jan/Feb 2004)

Children

WFAA-TV Collects 82,000 Toys in Four-Week Campaign

WFAA-TV Dallas/Fort Worth (Belo-owned ABC affiliate) in 2003 ran its most successful Santa's Helpers campaign in the 34-year history of this program. WFAA was able to collect more than 82,000 toys over the course of the four-week campaign, allowing the station to help more than 50,000 children in the North Texas area. In 2002 the station collected 76,000 toys. Santa's Helpers is promoted on air through numerous promos and PSAs, and also by WFAA's chief weathercaster, Troy Dungan, who has served as Santa's Helpers spokesman for 28 years. Each year, the highlight of the campaign is a "drive-thru" event that is held in front of the station, where WFAA anchors and reporters greet viewers as they drop off toys. After all of the toys have been collected, they are distributed to needy children by more than 40 nonprofit organizations in the Dallas/Fort Worth area. (Jan/Feb 2004)

Healthy Communities

KTTC-TV: 50 Years On-Air, 50 Years Fighting Cancer

KTTC-TV Rochester, MN (QNI Broadcasting-owned, NBC) celebrated its 50th anniversary in July and nearly 50 years of partnership with the local Eagles Lodge producing and airing a 20-hour telethon to raise money for cancer research. Fifty years ago young Rochester television sportscaster Bernie Lusk was searching for a way to use the powerful new medium of television to make a difference. At a time when the battle with polio garnered much attention, Bernie wanted to tackle another disease that claimed many lives - cancer. Bernie shared his idea with fellow Eagles Lodge members, and the now 50-year-old, totally local telethon was born.

In its first year, the 1954 KTTC/Eagles Cancer Telethon raised \$3,777. In 2003, \$702,900 was raised for the Mayo Clinic, the University of Minnesota, and the Hormel Institute of Research. To date the telethon has raised more than \$9 million dollars. (Nov/Dec 2003)

KLAS-TV Promotes Breast Cancer Awareness

KLAS-TV Las Vegas (Landmark Broadcasting, CBS) runs the Buddy Check 8 program asking viewers to call a buddy on the 8th day of the month to remind her to do a breast self-examination. KBLR-TV (Telemundo) also produces the same messages in Spanish. (September 2003)

Helping Animals

KEYE Raises \$172,000 for Humane Society

KEYE-TV Austin, TX (Viacom, CBS) hosted the Austin Humane Society's 6th Annual Pet Telethon June 20 and 22, raising \$172,000 and resulting in the adoption of 104 animals. The society runs a no-kill shelter, where animals accepted into the adoption program are kept for as long as it takes to find them a loving home. The society has saved approximately 2,700 animals in the past year alone. (July 2003)

Drug Prevention

Hawaii TV Stations Forego New Network Shows to Blanket Islands with Drug Documentary

Television stations in the Hawaiian Islands simultaneously aired an unprecedented, commercial-free drug documentary at 7 p.m. on September 24, with network affiliates pre-empting the first hour of primetime during the networks' debut of their new fall shows. The stations were honoring their commitment to help battle Hawaii's biggest drug problem. "Ice: Hawaii's Crystal Meth Epidemic," produced by Edgy Lee's FilmWorks Pacific, details the epic proportions of crystal meth abuse, with grassroots reaction and views. Originally conceived as a 30-minute show, it was expanded to an hour because of the magnitude of the epidemic and originally was to air in August to avoid the fall network season. The commercial-free airing agreement did not come without a cost. It meant thousands of dollars in lost ad revenues for the stations and the canceling or delayed airing of the season premieres of "Ed," "60 Minutes II," "My Wife and Kids" and "Performing As." KITV-TV (Hearst Argyle, ABC) general manager Mike Rosenberg estimated the loss was as much as \$10 thousand per station. Stations that simulcast the program included: Honolulu stations KITV-TV (Hearst Argyle, ABC), KBFJ (Independent), Raycom Media stations KHNL (NBC) and KFVE (WB), KIKU (International Media Group, Independent), Emmis Communications stations KHON (Fox) and KGMB (CBS) and KWHE (Independent). Some stations even added additional ice programming to follow Lee's film. Among them were KHON, which showed an hour-long panel including Governor Linda Lingle and Lt. Governor James Aiona; and KFVE, which aired a half-hour program focusing on teen drug usage. (October 2003)

Broadcasters Without Borders

Roanoke Station's Viewers Come Through for Troops

A six-day promotion at WDBJ-TV Roanoke, VA (Schurz Communications, CBS) to gather items such as toiletries and snack foods for American troops serving in the Iraq war resulted in more than two tons of welcome supplies. Viewers overwhelmed the station and collection points at several Roanoke area automobile dealerships with more than 4,000 pounds of Packages from Home to be sent overseas. The American Red Cross local chapter helped get the goods to

the Middle East. "Thursday and Friday afternoons, the cars were bumper to bumper at our front door," said WDBJ President and General Manager Bob Lee. "We filled up the lobby, and then the packages started to spill over into other areas of the building." Red Cross and station volunteers sorted the DOD-approved personal items. Said Lee, "Who would have thought we would end up with more than two tons of merchandise! We were beginning to think we'd need our own C-130 for the delivery." (April 2003)

Education

KTLA Student Scholarships

KTLA-TV Los Angeles (Tribune-owned WB affiliate) is launching its sixth Annual Stan Chambers Journalism Awards competition - a partnership with area county departments of education and member school districts. The station has invited more than 300 high schools to have their seniors submit essays on "What Matters Most," for the opportunity to receive scholarships to further their education. Five winners will receive \$1,000 and a chance to experience work in the KTLA Newsroom. Winners will produce videos of their entries, with guidance from KTLA News writers, producers and reporters. The program honors KTLA's veteran reporter and journalist Stan Chambers for his contributions to the community. (Jan/Feb 2004)

KRON-TV's 'Beating the Odds'

KRON-TV San Francisco's "Beating the Odds" is a series of news stories and specials reported by anchorwoman Wendy Tokuda and other KRON News reporters. Tokuda's "Beating the Odds" series features extraordinary high school students who are rising above tough circumstances. Some are growing up without parents, others are homeless and some are raising siblings. All of them want to go to college. The stories are tied to a scholarship fund established by KRON and the Peninsula Community Foundation to help low-income, high-risk Bay Area high school students pay for college. Following each "Beating the Odds" report, viewers are encouraged to donate to the fund. Since 1997, the fund has raised more than \$1.5 million for students profiled in the series. The Foundation waives all its fees, so 100% of the tax-deductible donations go to the students. KRON is an independent station owned by Young Broadcasting. (March 2003)

Belo/Phoenix Launches Statewide Education Initiative

Belo Broadcasting/Phoenix has launched a six-month, statewide initiative on education to address major issues affecting students and schools. Running through March, "Educating Arizona's Families" involves monthly topics ranging from early brain development and learning readiness to literacy, accountability, dropout, post-secondary education, the teaching profession and the economic impact of education on the state. The stations focus on each initiative for one month, producing two dozen stories per topic. Weekly public affairs programming is directed toward the specific issues being covered each month and guests on mid-day newscasts, three times weekly, offer insight to parents, caregivers and other viewers. KTVK-TV Phoenix (Independent) is driving the initiative through news and daily promotional announcements that also air in Tucson on Belo's KMSB-TV (Fox) and KTTU-TV (UPN). Promotion spots change monthly and individual 30-second sponsor announcements address education interests of each sponsor. (Nov/Dec 2003)

Protecting the Environment/Endangered Species

Emmis Makes \$90,000 Grant to Indianapolis Zoo For Endangered Species

Radio and television station owner Emmis Communications will donate \$90,000 to the Indianapolis Zoo for a multi-year conservation research project aimed at saving one of the planet's most endangered species, the ring-tailed lemur. A portion of the donation will be used to research potential problems that could occur from the re-introduction of the animals into the wild from zoos around the world, paving the way for future reintroduction of the species into their native range. (January 2002)

APPENDIX B

Recent Examples of Misconduct by EchoStar

1. The owners of the ABC, CBS, Fox, and NBC television networks, along with the ABC, CBS, Fox, and NBC Affiliate Associations, sued EchoStar in 1998 in the Southern District of Florida for violations of the Copyright Act relating to delivery of distant network stations. The case was tried to the Hon. William Dimitrouleas for ten days in April 2002. The Court's Findings of Fact and Conclusions of Law are reported at *CBS Broadcasting Inc. v. EchoStar Communications Corporation*, 276 F. Supp. 2d 1247 (S.D. Fla. 2003). The Court found that EchoStar had failed to meet its burden of proving that any of its 1.2 million subscribers to distant network stations met the statutory standard. Id. 82. Rejecting testimony provided by EchoStar CEO Charles Ergen, U.S. District Court William Dimitrouleas found that "[n]o credible evidence was presented to the Court to support the contention that EchoStar turned off distant

signals for compliance reasons" Id. 45.

2. The Court also found that EchoStar had knowingly broken a sworn promise to the Court to turn off ineligible subscribers. The Court stated:

It appears that EchoStar executives, including Mr. Ergen and David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, elected instead to break Mr. Ergen's promise to the Court.

Id. 46.

The Court also found that "when Mr. Moskowitz, an EchoStar executive who worked closely on SHVA compliance, was questioned during his deposition about the 1999 Decisionmark ILLR analysis, he paused for an unusually long period of time and then answered the questions concerning the ILLR analysis in a vague manner, unable or unwilling to give any details on the results of the analysis or EchoStar's actions following the analysis." Id., 47.

3. In a lawsuit filed by EchoStar claiming antitrust violations for alleged conspiracy and boycott by an insurance company, a United States District Judge imposed a \$30,000 sanction on EchoStar under the Court's inherent authority to punish discovery misconduct. Order, *EchoStar Satellite Corp. v. Brockbank Ins. Servs., Inc.*, No. 00-N-1513 (D. Colo. Feb. 5, 2004). The Court found that EchoStar's action "rose to the level of conscious wrongdoing." Id. at 23. With respect to testimony by EchoStar's General Counsel, David Moskowitz, who was required to present knowledgeable testimony as EchoStar's designated spokesperson, the Court found that "either Mr. Moskowitz was not knowledgeable or he was not candid." Id. at 22. The Court also found that Mr. Moskowitz' testimony was "evasive[.]" Id. at 22 n.16.

4. In a 2002 proceeding, the FCC's Media Bureau found that EchoStar had, in numerous respects, violated the SHVIA through its practices relating to delivery of certain local television stations in a manner requiring subscribers to obtain a second satellite dish. Declaratory Ruling & Order, *In re National Ass'n of Broadcasters and Ass'n of Local Television Stations: Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, Docket No. CSR-5865-Z, 17 FCC Rcd 6065 (2002). See id. 12 ("EchoStar's 'two-dish' plan, as implemented, violates both the Act and the Commission's rules."); id. 25 ("EchoStar's 'two-dish' plan violates the contiguous channel placement requirement of the statute . . ."); id. 34 ("We cannot consider or grant a waiver insofar as EchoStar's actions directly violate the statute."); id. 35 ("Given our concerns about EchoStar's violations, and the severe impact they have on certain local stations and subscribers, EchoStar is required to submit a Compliance Report and Plan within 30 days after release of this Order.")

5. Since the Commission's 2002 ruling, EchoStar has, on many occasions, violated even the minimal requirements imposed by the FCC for carriage of some (but not all) local stations through use of a second dish. Among other things, EchoStar has discouraged subscribers from obtaining a second dish, falsely told subscribers they would have to pay for a second dish, and falsely stated that customers could not have a second dish installed at the time of their original installation. *In re University Broadcasting, Inc. v. EchoStar Communications Corp.*, Mem. Op. & Order, Dkt. No. CSR-6007-M (Feb. 20, 2003); *In Re Entravision Holdings, LLC*, Mem. Order & Op., Dkt. No. CSC-389 (April 15, 2002); *In Re Tri-State Christian, Inc.*, Mem. Op. & Order, Dkt. No. CSR-5751 (Feb. 5, 2004).

6. In its April 2002 Declaratory Ruling & Order, the FCC Media Bureau provided the following summary of earlier instances in which the Commission had sanctioned EchoStar for illegal or improper conduct:

"EchoStar has previously been fined by the Commission for rule violations and admonished for its 'disingenuous' behavior and lack of candor. In June 1998, the Commission fined EchoStar, and its subsidiary Directsat, the maximum forfeiture amount permitted under the Commission's rules for operating satellites from non-authorized locations. . . . The FCC justified the forfeiture amount based on EchoStar's degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules. In November 1999, EchoStar tried to disregard its public interest programming requirements by placing all of its public interest programming on secondary satellites in violation of the Commission's DBS rules. See *American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint*, Declaratory Ruling and Order, 14 FCC Rcd 19976 (1999). In this instance, the Commission assessed a forfeiture against EchoStar, finding that it had willfully violated the Communications Act and the Commission's rules, that it had been 'disingenuous' in its legal interpretations, and that none of the circumstances EchoStar presented supported mitigation of the forfeiture. In the *Matter of EchoStar Satellite Corporation*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 5557, 5558-59 (EB 2000). In August 2001, the Commission found that 'EchoStar failed in its duty of candor' by withholding information from the Commission. See *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070, 15075 (CSB 2001)."

Id. 37, n.116.

7. In 2001, EchoStar Satellite Corporation filed a complaint at the FCC alleging that Young Broadcasting has

"breached its obligation to negotiate in good faith terms for EchoStar's local retransmission" of Young's ABC and NBC affiliates. In a decision in that proceeding, the Commission found that:

"EchoStar failed in its duty of candor to the Commission. EchoStar began publicly disclosing on March 19, 2001, portions of the documents for which it sought confidentiality in their entirety, yet failed to apprise the Commission of this fact for 23 days until it filed its request for modification."

EchoStar Satellite Corp. v. Young Broadcasting, Inc., 16 FCC Rcd. 15070 (Cable Services Bureau 2001).

The Commission also found that EchoStar's conduct "constituted an abuse of the Commission's processes." *Id.*

8. In March 1999, the United States District Court for the District of Colorado (Nottingham, J.) granted a request by broadcaster parties to transfer to Florida a lawsuit that EchoStar had filed in Colorado, finding that EchoStar had engaged in "flagrant forum-shopping." Hearing Transcript, EchoStar Communications Corp. v. CBS Broadcasting Inc., No. 98-2285 at 21 (D. Colo. Mar. 24, 1999).