



---

---

*The Committee on Energy and Commerce*  
Memorandum

February 11, 2013

To: Members and Staff, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Hearing on "Satellite Video 101"

The Subcommittee on Communications and Technology will hold a hearing on Wednesday, February 13, 2013, at 10:30 a.m. in 2322 Rayburn House Office Building entitled "Satellite Video 101."

**I. Witnesses**

One panel of witnesses will testify:

Eloise Gore  
Associate Bureau Chief, Enforcement Bureau  
Federal Communications Commission

R. Stanton Dodge  
Executive Vice President and General Counsel  
DISH  
Jane Mago  
Executive Vice President and General Counsel, Legal and Regulatory Affairs  
National Association of Broadcasters

Lonna Thompson  
Executive Vice President, Chief Operating Officer and General Counsel  
Association of Public Television Stations

Michael O'Leary  
Senior Executive Vice President, Global Policy and External Affairs  
Motion Picture Association of America

## **II. Overview**

Communications and copyright law govern how satellite companies offer broadcast television programming. The Communications Act addresses how the satellite companies redistribute the broadcast signals and falls within the jurisdiction of the Energy and Commerce Committee. The Copyright Act addresses if and how the satellite companies pay the owners of the content in those signals, and falls within the jurisdiction of the Judiciary Committee. Some of the communications and copyright provisions confer benefits. Others impose obligations. A few of the provisions contain sunset clauses and so would have expired except that Congress periodically has renewed them. The House Energy and Commerce Committee and Judiciary Committee typically pass legislation governing the provisions within their jurisdiction, which they marry on the House floor. The Senate Commerce and Judiciary committees advance similar legislation. The chambers then reconcile the bills. Some provisions next sunset December 31, 2014. Congress must decide whether to reauthorize the provisions, revise them, or let them expire. This hearing, the first in a series the Subcommittee plans to hold on the subject, will focus on the current state of the law.

## **III. Background**

### *A. Distant Signal Service*

Households far from broadcast stations or that are blocked by natural or man-made obstacles may not be able to receive television signals over the air from their local ABC, CBS, FOX, or NBC broadcast affiliate. To help address this, as well as aid the fledgling satellite television business, Congress passed the Satellite Home Viewer Act of 1988 (SHVA). SHVA allowed satellite operators to redistribute the distant signals of out-of-market broadcast network affiliates to “unserved” households in locations that cannot receive the signals, called “white areas.” Conversely, satellite operators ordinarily may not provide network signals from distant affiliates to subscribers who can receive an adequate signal over the air. Instead, the operators may only provide such subscribers the signals of the local affiliates, if the operators carry them.

Each satellite operator has only a few satellites to serve the nation and every broadcast station it carries must be on those few satellites. Consequently, the operators did not have sufficient capacity to carry each of the approximately 1,700 local broadcast stations throughout the country, especially when they first launched service. What they did, instead, was carry the network affiliates for New York, Chicago, Denver, and Los Angeles, making it possible to offer unserved households the national network news and primetime lineup for each time zone.

To determine whether a satellite subscriber cannot receive an adequate over-the-air signal from a local affiliate, and is therefore eligible to receive a distant signal from the satellite, the FCC uses a predictive model. If the predictive model concludes that a subscriber can receive an adequate signal, thereby disqualifying the subscriber from distant signal service, the customer may challenge that prediction by requesting an on-location signal-strength test.

To facilitate distant signal service, the Communications Act exempts satellite providers from the ordinary obligation of obtaining retransmission consent from the distant broadcast affiliate to carry the signal. Similarly, the Copyright Act exempts the satellite providers from the

ordinary obligation of obtaining the permission of the content owner to use the content in the signal and grants the satellite provider a compulsory license at a rate overseen by the government. These provisions are codified in section 339 of the Communications Act and section 119 of the Copyright Act.

Congress reauthorized distant signal service in the Satellite Home Viewer Act of 1994, the Satellite Home Viewer Improvement Act of 1999 (SHVIA), the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), and the Satellite Television Extension and Localism Act of 2010 (STELA). STELA also included provisions updating the satellite law for the DTV transition, including provisions concerning how to measure whether a subscriber is unserved. The distant signal provisions next expire December 31, 2014, unless Congress reauthorizes them again. By some estimates, between 1 and 1.5 million U.S. television households still receive distant signal service. Altogether, the United States has 114.7 million U.S. television households. DirecTV serves 19.2 million of those households and Dish serves 14.1 million, making them the second and third largest pay-TV providers, falling between Comcast and Time Warner. The satellite providers' combined 33.3 million households represent 29 percent of the U.S. television market and one-third of the pay-TV market.

*B. Local-into-Local Service and Carry-One, Carry-All*

When Congress reauthorized distant signal service in 1999 with SHVIA, it also adopted provisions allowing satellite operators to carry local broadcast stations into the stations' own local markets. Under these "local-into-local" provisions, codified in section 338 of the Communications Act, a satellite operator may only carry a local broadcast station into a local market if it carries all the local broadcast stations in that market. This satellite version of the cable must-carry laws is referred to as the "carry-one, carry all" requirement. And just like with the cable must-carry rules, a broadcaster with popular content typically forgoes mandatory carriage in order to seek compensation from the satellite operator for the broadcaster's retransmission consent, whereas a broadcaster with unpopular content elects mandatory, free carriage under the carry-one, carry-all rules to avoid having to pay compensation to the satellite operator for carriage.

Because a satellite operator must carry all the local broadcast stations in a market if it carries any, providing local broadcast signals in a market can use significant capacity. The satellite operator could otherwise use that capacity to carry national, non-broadcast programming that may have a larger nationwide audience than the local broadcast stations would, especially in less populated markets. As a result, the satellite operators rolled out local-into-local service gradually, starting with the largest of the 210 Nielsen markets and working down.

DirecTV currently offers local-into-local service in 195 markets, with 194 of them in high-definition format. DISH reached all local markets in June 2010 as part of a deal implemented in STELA reinstating its authority to provide distant signal service under the compulsory license. Because DISH had been providing distant signal service to ineligible households that could receive a local signal over the air, a court took that authority away in 2006, invoking a penalty in the satellite law. As of August 2010, DISH was offering local broadcast signals in high-definition format in 170 markets. While both DirecTV and DISH provide at least some local public broadcast stations in high-definition, DISH has asked the Supreme Court to review on First Amendment grounds a requirement in STELA that satellite operators carry all public broadcast stations in a local market in high-definition format if they carry any commercial

or non-commercial broadcast stations in that market in high-definition format. The U.S. Court of Appeals for the Ninth Circuit ruled in 2011 that the requirement was not unconstitutional.

Unlike with distant broadcast signals, satellite operators can provide local broadcast signals to consumers regardless of whether the consumers can receive those signals over the air, but is not exempt from receiving the retransmission consent of the local broadcast station and may need to pay such broadcaster if the station does not elect mandatory carriage. Section 122 of the Copyright Act grants the satellite operator a compulsory license to carry the content in that signal at a rate of zero. Neither section 338 nor section 122 contains a sunset provision.

*C. No-Distant-Where-Local*

Local affiliates generally disfavor satellite importation of distant signals into their markets because it potentially dilutes their viewing audience and thus can hurt the value of the station. Some broadcast stations even dislike being imported, since the satellite law allows such importation without their consent. Consequently, broadcasters fought for and obtained in SHVERA in 2004 a provision prohibiting satellite operators from providing a distant signal even to a subscriber who cannot receive a local signal over the air if the satellite operator is carrying the local affiliate on the satellite. In such circumstances, the subscriber is only eligible to receive the local signal.

*D. Significantly Viewed Signals, Out-of-State Programming, and Short Markets*

Whether a broadcast station is “local” for purposes of satellite carriage is based on Nielsen’s “designated market areas” (DMA). Because broadcast signals follow laws of physics and not DMAs, however, some households can receive a signal over the air from stations outside the DMA. Originally, satellite operators were not permitted to provide a subscriber such a signal under a compulsory license. Cable operators, by contrast, are allowed to carry such signals if they are viewable over the air by a “significant” number of households in the DMA, as determined by the FCC. To create parity, SHVERA added section 340 to the Communications Act giving satellite operators similar authority.

Section 340 is also intended to ameliorate “out-of-state programming” and “short market” issues. Because neither broadcast signals nor DMAs necessarily abide by State borders, some communities fall within DMAs outside their State. This means that a satellite subscriber’s “local” station may be broadcasting from another State and not carrying news, sports, or other content that the subscriber considers truly local. Also, in some DMAs, particularly in less populous parts of the country, one or more networks do not have a local affiliate. These DMAs with missing affiliates are referred to as “short markets.” In out-of-state programming and short market circumstances, the satellite operator may be able to carry a significantly viewed station to offset the market’s shortcomings. STELA took two additional steps to address these issues. First, it clarified that restrictions on carrying out-of-state programming do not apply if the satellite operator negotiates carriage for the programming, rather than rely on a compulsory license. Second, it encourages local affiliates in a short market to carry on their multicast streams the signals of missing networks.