

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition for Rulemaking to Amend the
Commission's Rules Governing
Retransmission Consent

MB Docket No. 10-71

**REPLY COMMENTS OF
DIRECTV, INC. AND DISH NETWORK L.L.C.**

DIRECTV, Inc. ("DIRECTV") and DISH Network L.L.C. ("DISH"), signatories to the Petition seeking much-needed reform to the Commission's retransmission consent regime, hereby replies to those opposing such reform.¹ The Petition lays out a strong case for reform that need not be reviewed at length here. However, DIRECTV and DISH do feel compelled to respond to three particularly erroneous claims made by opponents of reform: that reform would disturb an otherwise "free market," that consumers are not harmed by retransmission disputes because everybody can receive signals over the air, and that arbitration and standstill requirements would discourage parties from reaching agreement.

Each of these claims is demonstrably false. First, retransmission of broadcast signals is not a "free market" as that term is generally understood. It is a highly regulated environment in which the government has heavily favored broadcasters. Second,

¹ Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent (filed Mar. 9, 2010) ("Petition"); *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Public Notice, 25 FCC Rcd. 2731 (Med. Bur. 2010) ("Public Notice"). Unless otherwise specified, all references to documents in these reply comments are to MB Docket No. 10-71 and were filed on May 18, 2010.

according to the broadcasters themselves, a large percentage of viewers cannot receive broadcast signals over the air using existing equipment. And third, the Commission's experience with arbitration and standstill requirements to date strongly evidences that they have encouraged, not discouraged, agreement among parties.

It is long past time for the Commission to restore some balance to the retransmission consent rules it has helped create. It should therefore adopt the proposals contained in the Petition.

DISCUSSION

I. There Is No "Free Market" for Retransmission Consent

Broadcasters and networks claim that Petitioners wrongfully seek government intervention in "the free market retransmission consent process."² CBS, for example, intones: "In this country, the terms on which private companies will do business with each other are not prescribed by the state or its representatives."³ Quite the opposite is true. Practically every "term" under which multichannel video programming distributors ("MVPDs") retransmit broadcast programming is "prescribed by the state or its representatives." Nearly every one of those prescriptions, moreover, favors broadcasters.

A "free market" is what one finds when shopping for a loaf of bread. In Washington DC, for example, a consumer can find many varieties of bread in hundreds of different stores. If the price of (say) wheat bread is too high at one store, or the quality

² Opposition of the Broadcaster Associations at iv. ("Broadcaster Association Opposition"); *see also*, *e.g.*, Joint Comments on Behalf of the Named State Broadcasters Associations at i ("Named State Broadcaster Comments") (arguing that Petitioners seek to persuade the Commission "to radically change through governmental fiat the negotiating dynamics of the Congressionally-mandated, market-driven negotiation process by which television stations exercise their must carry/retransmission consent rights"); Comments of the Walt Disney Company at 2 (accusing Petitioners of seeking "regulatory hand-outs" where "Congress has so clearly directed the Commission to preserve the integrity of free market negotiations").

³ Comments of CBS Corporation at 9 ("CBS Comments").

is too low, she can go to another store. If she doesn't like the selection in Washington DC, she can go to Virginia or Maryland or even Pennsylvania and bring her bread back home. The government intervenes only minimally in this market, by, for example, preventing shopkeepers from increasing prices during snow storms or other periods of acute need.⁴

If bread were sold like broadcast television signals, things would look very different. There would be only one store in town for each variety of bread. The real estate would be given to the shopkeepers for free by the government. A consumer unhappy with her local store's bread could not buy bread elsewhere and bring it back to her home. The government could even fill her cart with types of bread she didn't want. While the government would allow price gouging during snow storms, it would prohibit consumers from declining to make their regular bread purchases during periods when the store was making its quarterly inventory assessment.

No one would argue that such a regime is a free market. And no one should be under the illusion that the retransmission consent regime is, either. The same broadcasters who now invoke the free market have argued for years that their product should be treated differently than other products bought and sold in the free market because it is of special importance to the "public interest." They do so again in this very proceeding.⁵ As a result of these claims, broadcasters now operate in a highly intrusive, and highly advantageous, regulatory regime:

⁴ D.C. Code §§ 28-4101, 28-4102 (prohibiting businesses from charging "more than the normal average price" for any merchandise or service during a natural disaster or declared state of emergency).

⁵ *E.g.*, Broadcaster Associations Opposition at 24 (describing retransmission consent regime as "an essential component of America's unique system of free, over-the-air television stations licensed to serve local communities"); Comments of LIN Television Corp. at 4 ("LIN Television Comments") (accusing Petitioners of initiating this proceeding "to combat . . . free television"); Opposition of the

- Broadcasters were given billions of dollars of spectrum for free.
- A broadcaster, no matter how bad its programming may be, can force cable and satellite operators to carry the programming against their will and at the expense of other, more attractive programming.⁶
- The government provides additional, special protection beyond that of copyright law to broadcasters who negotiate exclusive rights⁷—and, with respect to satellite, protects broadcasters even if they fail to negotiate such rights.⁸
- The Commission allows withholding of broadcast programming immediately prior to “marquee” events such as the Super Bowl, when broadcasters’ leverage is at its highest.⁹ Yet it flatly prohibits MVPDs from deleting broadcast stations during “sweeps,” when *their* leverage is at its highest.¹⁰

Broadcasters are thus not like other sellers of products.¹¹ In a free market, for example, DIRECTV and DISH could choose not to carry unpopular broadcast stations in

Local Television Broadcasters at 2 (“Local Television Opposition”) (claiming that the retransmission consent regime helps “ensure the viability of local broadcasting as a competitor to MVPDs, and one that provides a unique and important source of local news and public affairs programming . . . critical to an informed electorate”) (internal citations omitted).

- ⁶ 47 U.S.C. § 534(a) (carriage of commercial television stations by cable operators); 47 U.S.C. § 338(a) (carry-one, carry-all rule for satellite operators).
- ⁷ See 47 C.F.R. § 76.92 *et seq.* (setting forth network nonduplication, syndicated exclusivity, and sports blackout rules).
- ⁸ The Copyright Act’s “unserved household” requirement, 17 U.S.C. § 119(a)(2), and the Communication Act’s “no distant where local” rules, 47 U.S.C. § 339(a)(2), generally prohibit the importation of duplicating signals even where the local television station in question does not possess exclusive rights.
- ⁹ *E.g., Mediacom Comm’s Corp. v. Sinclair Broadcast Group, Inc.*, 22 FCC Rcd. 35, 47 (Med. Bur. 2007) (suggesting that withholding of broadcast signals prior to the NFL Playoffs is consistent with the requirement to negotiate in “good faith”).
- ¹⁰ 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601 Note 1. The plain language of this prohibition states that “no deletion . . . shall occur” during sweeps, and does not otherwise limit this mandate. Broadcasters claim that this prohibition nonetheless allows the *broadcaster* to withhold programming during sweeps, a position that appears contrary to Commission precedent. *Northland Cable TV, Inc.*, 23 FCC Rcd. 7865, ¶ 8 (2008) (finding that a cable operator “would have been in violation for removing programming during a sweeps period, *even if* the retransmission consent agreement had lapsed *during* that period”) (citing *Time Warner Cable*, 15 FCC Rcd. 7882, ¶ 7 (2006)). The prohibition appears in provisions governing cable operators, and the Commission has not yet definitively stated that it applies to satellite carriers.
- ¹¹ They are not even like “any other content owner[s].” Disney Comments at 1; *see also id.* at 14 (erroneously describing the retransmission consent regime as “granting new intellectual property protections”); Named State Broadcasters Associations Comments at 3 (erroneously claiming that “[r]etransmission consent is ultimately a product of copyright law, and copyright matters are firmly

some markets, which would allow them to serve more markets with programming their subscribers actually watch.¹² In a free market, out-of-market and in-market broadcasters would compete—allowing subscribers, not “the state or its representatives,” to determine the true value of local broadcast programming. But that is certainly not the case under the current regime. Broadcasters cannot invoke a non-existent “free market” as a reason not to reform retransmission consent.

II. Broadcast Signals Are Not Available Everywhere

According to the broadcasters, reform is not needed to protect viewer access to local television programming because “[e]ach television station’s signal is available *at all times to all consumers* over the air and for *free*.”¹³ Yet the broadcasters’ own advocacy states otherwise and their website confirms the magnitude of the problem.

To begin with, the broadcasters have spent much of the last two years negotiating with the broadcasters for reauthorization of the Satellite Home Viewer Act, which is largely about service to households that cannot receive an over-the-air signal.¹⁴ As organizations familiar with and partially responsible for this legislation, they cannot now reasonably claim that “all consumers” can receive off-air signals.¹⁵

outside the Commission’s jurisdiction”). The Named State Broadcasters also erroneously describe the television stations themselves as the copyright holders, which (apart from locally developed programming such as news) is also incorrect. In any event, copyright owners themselves are the beneficiaries of government-granted copyright monopolies. 17 U.S.C. § 501 *et seq.*

¹² DIRECTV and DISH are constrained in this regard by provisions ancillary to a statutory copyright license, which could be thought of as government intervention in the free market. *See* 47 U.S.C. § 338 (Communications Act); 17 U.S.C. § 122 (Copyright Act). But the statutory copyright license is an intervention that, in many ways, benefits broadcasters. While cable programmers must clear their own copyrights in the programming they sell, the government has cleared copyright for programming that broadcasters sell for redistribution.

¹³ Broadcaster Associations Opposition at vii (emphasis in original).

¹⁴ *E.g., id.* at 17-19.

¹⁵ Indeed, the hundreds of thousands of subscribers in unserved households currently receiving broadcast signals from satellite carriers are almost assuredly an undercount of those without access to an over-

Moreover, the tools provided on NAB's own website show not only that millions cannot receive off-air signals, but that as many as 45 percent of those predicted to receive such signals by the legally-prescribed test actually cannot do so.¹⁶ All of this does not take into account subscribers who lack antennas or digital televisions or otherwise cannot receive signals over the air. When broadcasters withhold signals from MVPDs, many MVPD subscribers lose access to that programming. The Commission should ignore the broadcasters' suggestions to the contrary.

III. Arbitration and a Standstill Will Not Hinder Agreements

Broadcasters suggest that two of the Petition's proposals—"best offer" arbitration and "standstill" carriage—would hinder rather than promote agreements. They claim that the proposals would "ensnarl the Commission in thousands of disputes—disputes that the parties would have resolved, more quickly and at less cost, on their own—had the Commission only allowed the competitive market to function."¹⁷

DIRECTV and DISH disagree. The 35 television stations owned and operated by News Corporation were subject to a similar condition for five and a half years, yet not a single matter came before the Commission for resolution.¹⁸ Similarly, the regional sports networks affiliated with News Corporation, Comcast, and Time Warner Cable have been

the-air signal. For example, satellite carriers are no longer allowed to sign up new subscribers to distant signals in markets where the carrier provides local broadcast signals.

¹⁶ See Written Testimony of Robert Gabrielli, Senior Vice President, Program Operations, DIRECTV, Inc., Before the Senate Committee on Commerce, Science, and Transportation (Oct. 7, 2009), available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=6c1bf04a-bbb5-4ced-8e80-737da650eba7, attached hereto as Exhibit A.

¹⁷ Broadcasters Association Opposition at viii.

¹⁸ The arbitration condition remained in effect until June 2009. See *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 24 FCC Rcd. 8674 App. F. § IV (2009) ("News/Hughes").

subject to such conditions for several years,¹⁹ yet a total of only two arbitrations initiated by an MVPD have come before the Commission for review.²⁰ The hundreds of other negotiations involving these programming assets apparently were resolved by the parties.

For their own part, DIRECTV and DISH have found that the availability of arbitration acts as something of a regulator on the conduct of the parties, giving both sides strong incentives to propose more reasonable terms for fear of losing the arbitration. Indeed, DIRECTV and DISH have found that the exercise of preparing for arbitration (combined with the expense and the lack of a certain outcome) serves to encourage, not discourage, private dispute resolution—all without disruption or the threat of disruption, and without Commission intervention.

Other broadcasters claim that standstill and arbitration would encourage disputes by allowing MVPDs to pay “old” (presumably lower) rates while a dispute is pending.²¹ But there is no such thing as a free ride during arbitration. All arbitration and standstill provisions imposed to date by the Commission have included retroactive payment language, which protects viewers while ensuring that broadcasters (or MVPDs) will be made whole.²²

* * *

¹⁹ *News/Hughes*, App. F. § III; *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, App. B § B (2006) (“*Adelphia-Comcast-TWC*”).

²⁰ See Notice of Appeal and Appellate Brief, *National Cable Telecommunications Cooperative, Inc. v. The News Corporation c/o Fox Cable Networks Group* (Nov. 24, 2008); *Fox Sports Net Ohio, LLC’s Petition for De Novo Review of Arbitration Award, Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.* (Sep. 21, 2007).

²¹ See, e.g., *Named State Broadcasters Comments* at 6.

²² *Adelphia-Comcast-TWC*, App. B § B.3.h (“Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement.”); see also, e.g., *News-Hughes*, App. F.III (same).

DIRECTV and DISH believe the time has come for the Commission to reform the retransmission consent regime. Broadcasters are, of course, free to disagree. But the Commission should dismiss opposition to reform based on myths about the “free market,” inflated claims about availability of off-air signals, or the supposed negative incentives of the arbitration and standstill proposals. The Petition’s proposals can stand on their own, and the Commission should adopt them.

Respectfully Submitted,

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EXHIBIT A

**Written Testimony of
Robert Gabrielli
Senior Vice President, Program Operations
DIRECTV, Inc.
Before the Senate Committee on Commerce, Science, and Transportation
October 7, 2009**

Thank you for inviting DIRECTV to discuss the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”). I sit before you today on behalf of more than eighteen million of your constituents who subscribe to DIRECTV. Many live in rural areas that broadcasters and cable operators do not reach. These are some of our best customers, and they have no better friend than DIRECTV. Since the day we opened our doors, we have offered rural Americans the same national programming we provide our subscribers in big cities. Those who for years had no television options at all, can now get the best television experience in America.

But the innovative technology that allows us to deliver all our *national* programming to rural Americans cannot easily deliver thousands of *local* broadcast stations—containing largely duplicative programming—throughout the country. We have spent billions of dollars to address this issue. We now offer local channels to 95 percent of Americans and are adding new markets every year. In doing so, we try to balance our desire to carry local broadcasters wherever possible with the need to protect our subscribers where local carriage is not yet possible.

Congress seeks to achieve this same balance with each SHVERA reauthorization. We respectfully offer the following four consumer-oriented principles to guide the Committee in this endeavor.

First, customers should always be able to get programming from at least the “big four” networks by satellite. Consumers prefer local service and the law rightly reflects this. But we cannot yet deliver all of the thousands of local broadcast stations in every market. Where our subscribers cannot receive local service, the law should let us give them distant signals instead. What the law should *not* do is require subscribers to rely on expensive rotating rooftop antennas to get intermittent over-the-air reception. Broadcasters will tell you that subscribers ineligible for distant signals can always get local signals over the air, but we all know this is not true. In fact, the broadcasters’ own website designed to help consumers choose “the proper outdoor antenna to receive [their] local television broadcast channels” shows that as many as 45 percent of those now ineligible for distant signals cannot really get local signals over the air.¹

Second, Congress should not take away customers’ programming. Congress from time to time has changed the eligibility criteria for distant signals, and will do so again here in light of the digital transition. In the past, however, it has always “grandfathered” then-existing subscribers so that they would not lose their programming.

Third, satellite customers should not be ineligible to receive broadcast stations offered by cable. The law should no longer allow incumbent cable operators to offer more local and significantly viewed channels than their satellite competitors.

Fourth, prices for broadcast programming should be reasonable. We pay broadcasters and content providers fair compensation for their programming, and hope they, in turn, recognize the value of our distribution network. But neither market power

¹ For more details, please see Appendix I.

nor government fiat should give those entities the ability to raise prices excessively, particularly in economic times like these.

These four principles inform DIRECTV's perspective on all SHVERA-related issues. In the balance of my testimony, I'd like to discuss four important issues before the Committee: changes to the "significantly viewed" rules, questions concerning multicast signals, proposals to mandate carriage in all 210 markets; and a "market trigger" proposal championed by copyright holders.

I. Fixing the "Significantly Viewed" Rules Will Rescue Congress's Good Idea From the FCC's Implementation Mistakes.

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

Satellite operators (unlike cable operators) must offer local stations the "equivalent bandwidth" offered to significantly viewed stations. The FCC has interpreted this to mean that DIRECTV must carry local stations in the same format as significantly viewed stations every moment of the day. This is infeasible. DIRECTV cannot monitor the format of hundreds of station pairs around the clock. Nor can DIRECTV black out

signals when, for example, a high-definition ballgame runs late on one station while the other offers standard definition hourly fare.

The House Commerce Committee has addressed this issue, and we ask the Senate Commerce Committee to do the same.

II. Preserving the *Status Quo* With Respect to Multicast Signals Will Ensure That All Subscribers Receive Network Service.

Second, we ask the Committee to preserve the *status quo* with respect to “multicast” broadcast video streams. Every broadcaster has one “primary” video stream. Digital television allows some broadcasters to also offer second, third, or fourth multicast streams. In so-called “short” markets lacking one or more of the big national networks, some broadcasters have begun to offer the “missing affiliate(s)” as multicast streams.

But these multicast streams are not really “new” local channels. Rather a station will buy the rights to out-of-town network and syndicated programming, and (at most) repeat the local news already carried on its primary video stream. We have reviewed the programming of network-affiliated multicast streams throughout the country, and could not find a single one anywhere that offers any new local content.

The FCC has twice decided that multicast streams do not have “must carry” rights, in part because of the obvious constitutional problems this would raise. Moreover, multicast channels do not now “count” for purposes of determining eligibility for distant signals under the Copyright Act. On both questions, existing law treats multicast streams differently than primary video streams.

The law gets both questions exactly right. From DIRECTV’s perspective, one problem with treating multicast streams like primary streams is that they simply aren’t

new local channels. Another, more important problem is that we frequently lack room on our crowded spot beam satellites to carry them. When we have room, we typically carry network-affiliated multicast streams. But where we lack room, we simply cannot accommodate them.

The broadcasters want all multicast signals everywhere to “count” for purposes of distant signal eligibility, starting on the date of enactment. If this proposal were to become law, thousands of our subscribers who have lawfully received distant signals for years would lose them. Moreover, we would have to immediately shut off distant signals whenever a new network-affiliated multicast stream appeared. And if we lacked room to carry the multicast stream, many subscribers would get *no* network programming from us—even if they have had it via legal distant signals for years. We know this will be unacceptable to our customers. It should be to the Committee as well.

III. Unfunded Carriage Mandates Would Unfairly Burden Satellite Subscribers.

Third, we ask the Committee *not* to adopt huge unfunded carriage mandates. SHVERA ultimately represents a compromise among satellite carriers, copyright holders, and broadcasters. DIRECTV is concerned, however, that some might seek to alter the very essence of this compromise with a mandate to immediately serve every local market. Such a mandate would be technically infeasible, hugely expensive, unfair to satellite subscribers, and unconstitutional.

DIRECTV today offers local television stations by satellite in 152 of the 210 local markets in the United States, serving 95 percent of American households. (Along with DISH Network, we offer local service to 98 percent of American households.)

DIRECTV also offers HD local service in 133 markets, serving more than 91 percent of American households. By the FCC's calculations, over **80** percent of DIRECTV's satellite capacity is now devoted to local service – nearly triple the amount cable operators can be required by law to carry.² We have devoted several billions of dollars to this effort. And we are working every day to serve more markets.

Some, however, would require satellite carriers to serve all remaining local markets by satellite – perhaps as soon as within a year. Very respectfully, while expanding the reach of broadcast service might be a worthy goal, this the wrong approach.

Such an approach would upset the delicate balance that has guided Congressional policy in this area for decades. In enacting SHVIA's statutory copyright license for local broadcast signal carriage, Congress specifically recognized that the capacity limitations faced by satellite operators were greater than those faced by cable operators.³ In light of those limitations, Congress adopted a “carry-one, carry-all” regime in which satellite operators can choose whether to enter a market, and only then must carry the primary video of qualifying stations in that market.⁴ This regime was carefully crafted to balance

² *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Rcd. 5351, ¶ 11 n.48 (2008) (“*Satellite HD Carriage Order*”) (using hypothetical local and national programming carriage figures to estimate that a satellite operator would dedicate 91 percent of its capacity to local programming). With DIRECTV's actual figures, this number is closer to 80 percent.

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

⁴ 47 U.S.C. § 338(a)(1).

the interests of broadcasters and satellite carriers alike. Indeed, both Congress and the courts concluded that the carry-one, carry-all regime was constitutional largely because it gave satellite carriers the choice of whether not to serve a particular market.⁵ (We have attached as Appendix B to this testimony a White Paper by Joshua Rosenkranz, a noted constitutional law expert, discussing the grave constitutional difficulties with such a mandate.)

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

IV. Imposing a “Market Trigger” for Elimination of the Statutory Licenses Would Lead to Higher Prices and an Inferior Product.

Fourth, we ask the Committee to examine any “market trigger” proposal in the context of the Communications Act’s carriage rules. By combining a “private market” copyright approach with the more regulatory approach found in the Communications Act,

⁵ See Conference Report at *H11795 (“Rather than requiring carriage of stations in the manner of cable’s mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license.”); *SBCA v. FCC*, 275 F.3d 337, 354 (4th Cir. 2001) (holding that the carry-one, carry-all rule was content-neutral because “the burdens of the rule do not depend on a satellite carrier’s choice of content, but on its decision to transmit that content by using one set of economic arrangements [*e.g.*, the statutory license] rather than another”).

this proposal would lead to marketplace confusion and, ultimately, higher prices and an inferior product for our subscribers.

Some of the largest copyright holders contend that the statutory licenses upon which millions of satellite and cable subscribers now depend are things of the past. They argue that there could be other ways for multichannel video programming distributors to provide broadcast programming to their customers—hypothesizing “market mechanisms,” “voluntary licensing arrangements,” “sublicensing” and the like. Nobody really thinks such alternatives will actually work, particularly for distant signals. But copyright holders now suggest that, *if* a private copyright licensing mechanism could be developed, the statutory licenses should then sunset.

Whatever the merits of this suggestion under the Copyright Act, it completely ignores the must-carry and retransmission consent rules found in the Communications Act. Disney, for example, has argued that its ABC broadcast programming should be sold just like its ESPN cable programming. But the “market trigger” proposal wouldn’t do that at all. The government doesn’t force us to carry ESPN Classic but, under the market trigger proposal, it would still force us to carry even the lowest-rated broadcast stations. By the same token, the government doesn’t require us to obtain non-copyright “consent” to carry ESPN but, under the market trigger proposal, we would have to separately acquire both copyright and retransmission consent from broadcast stations.

From where we sit, copyright holders don’t really propose a “free market” for broadcast programming. Rather, they propose *those parts* of the “free market” that benefit them as copyright holders, while preserving those aspects of the existing regulatory structure that benefit their broadcast subsidiaries. The natural result would be

marketplace chaos. The government would force us to negotiate twice, not once, for broadcast programming that our subscribers want. And it would force us to carry programming that our subscribers don't want. Our subscribers would pay higher prices and receive lower quality programming in exchange. This strikes us as patently unfair.

* * *

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

APPENDIX I OVER-THE-AIR CARRIAGE METHODOLOGY

DIRECTV is in the process of moving the local channels in several markets from a “wing” satellite located at 72.5° W.L. to one of its more centrally located satellites. Subscribers in those markets will no longer require a second satellite dish to receive local signals. The spot beams on our central satellite, however, cover slightly different areas than do those on the wing satellite. Accordingly, several thousand subscribers who had been able to receive local channels from the wing satellite will not be able to do so from the central satellite.

Naturally, we are looking for alternative ways to provide network programming to those subscribers. To determine what options these customers might have, we contracted with TitanTV to evaluate each address.

TitanTV evaluated each address in two ways. It first evaluated each address for SHVERA distant signal eligibility using its standard digital predictive model. It next evaluated those same addresses using a different model—that used by the antennaweb.org mapping program, which describes itself as being “provided by the Consumer Electronics Association (CEA) and the National Association of Broadcasters (NAB),” and designed to “locate[] the proper outdoor antenna to receive your local television broadcast channels.”

When we received the results, we noticed that fully 45 percent of the addresses predicted to get an off-air signal by the SHVERA model were predicted *not* to get an off-air signal by the antennaweb.com model. Surprised by these results, we then took a wider set of addresses and manually entered each of them into both models. We obtained similar results.

In other words, according to NAB itself, nearly half of subscribers who cannot get a viewable signal over the air are nonetheless ineligible for distant signals under the existing SHVERA methodology.