**Written Testimony of**
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**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

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[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 72.5º 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.***

# APPENDIX II

## CONSTITUTIONAL ANALYSIS

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**MEMORANDUM**

**TO** DIRECTV and DISH Network

**FROM** E. Joshua Rosenkranz

**DATE** July 23, 2009

**RE** Analysis of the Constitutionality of H.R. 927

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# *H.R. 927's Must-carry Obligations Are Unconstitutional*

H.R. 927 would require satellite TV providers, like DIRECTV and DISH, to carry every single full-power local broadcast station in all 210 Designated Market Areas ("DMAs"). A burden of this magnitude is unwise, unjustified—and unconstitutional.

## *BECAUSE THE MUST-CARRY RULE INFRINGES ON SATELLITE TV PROVIDERS' FIRST AMENDMENT FREEDOMS, IT MUST SATISFY RIGOROUS JUDICIAL REVIEW.*

A statute triggers First Amendment concerns any time it directs a speaker what to say and what not to say—or otherwise burdens the speaker's editorial decisions. Likewise, a law triggers First Amendment concerns any time it dictates to a broadcaster what programs to carry, and any time it burdens the broadcaster's programming choices.

That is what H.R. 927 would do to satellite TV providers—in the most extreme possible way. For starters, H.R. 927 would force satellite TV providers to carry *hundreds* of local broadcast stations against their will, many of which have virtually no local audience. Because satellite TV service has limited channel capacity, that would mean that DISH and DIRECTV would have to drop programming that subscribers want to watch in order to broadcast channels that no one watches.

True, not every infringement on First Amendment freedoms or programming discretion is unconstitutional. More specifically, not every must-carry rule necessarily violates the First Amendment. The Supreme Court upheld the must-carry obligations that Congress imposed on cable, for example—but only by a razor-thin margin, after two trips to the Court, and after concluding that the rule would not prevent cable from carrying the

programs it wanted to carry. *See Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224-25 ("*Turner II*"). And the Fourth Circuit has upheld the so-called "carry-one, carry-all" rule that Congress imposed on satellite TV providers—a voluntary rule that is far less onerous than the crushing must-carry requirement embodied in H.R. 927. *See Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001) ("*SBCA*").

The important lesson to draw from those cases is that the courts will strike H.R. 927's must-carry obligation unless the government persuades them, based on solid evidence, that the justifications outweigh the burdens and that the infringement is sufficiently tailored to minimize the burdens on speech. This legal standard is called "heightened scrutiny."

Exactly how intense the heightened scrutiny will be is a matter of debate. There is a strong argument that the courts should apply the very highest level of scrutiny, called "strict scrutiny"—a standard that is almost always fatal to any law that raises First Amendment concerns. But at a bare minimum, the courts would have to apply "intermediate scrutiny" (as the Supreme Court did in the cable must-carry context). *See Turner I*, 512 U.S. at 641. That would require the government to bear two burdens. First, the government will have to justify the infringement on First Amendment freedom by demonstrating that the infringement is necessary to advance an "important" governmental interest. *United States v. O'Brien,* 391 U.S. 367, 377 (1968). This is no easy feat. The government may not just posit a reason for imposing the requirement; "it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I,* 512 U.S. at 664. It must also demonstrate that Congress "has drawn reasonable inferences based on substantial evidence," in concluding that the regulation will in fact alleviate the harms in a direct and material way. *Id.* at 666. Beyond that, the government would have to demonstrate that any "incidental restrictions on alleged First Amendment freedoms" are "*no greater than is essential* to the furtherance of that interest." *Id.* at 662. (emphasis added).

For purposes of the discussion that follows, we make the conservative assumption that the courts will apply the very demanding intermediate scrutiny, rather than the almost insurmountable strict scrutiny standard. So, at a minimum, the courts will study the specific terms of H.R. 927 and will conduct a full examination of the television market—and satellite TV's role within that market. If anything is clear from past precedent, it is that no court would accept the facile conclusion that just because a cable must-carry rule survived, and just because a far less onerous carry-one, carry-all rule has been upheld, the imposition of a very different must-carry obligation—on a very different market player with an entirely different technology—would also survive.

In sum, an assessment of whether H.R. 927 is likely to survive judicial scrutiny must start with an understanding of why the Supreme Court upheld cable's must-carry rules, and proceed with a point-by-point comparison of the justification, burdens, and tailoring of the cable must-carry rule as compared to H.R. 927. Each point is addressed, in turn, below.

## *THE JUSTIFICATION FOR THE SATELLITE MUST-CARRY REQUIREMENT IS CONSTITUTIONALLY INADEQUATE.*

### *The Compelling And Well Documented Justification For The Cable Must-Carry Rule.*

The cable must-carry rule that the Court upheld in the *Turner* cases basically required cable providers to set aside a maximum of one-third of their channel capacity to carry local commercial television stations, and to carry local public broadcast television stations. Superficially, that requirement sounds similar to the satellite must-carry rule embodied in H.R. 927. But the justification for imposing such a requirement on satellite TV pales in comparison to the justification that the Court narrowly upheld in *Turner II*.

The Court observed that "Congress' overriding objective in enacting the [cable] must-carry rules was . . . to preserve access to free television programming for the 40 percent of Americans without cable." *Id.* at 646. The Court found that there was a real prospect that broadcast stations—particularly less popular independent stations—would die, in the absence of must-carry rules. The point of the law was to ensure that viewers who *do not subscribe* to cable, would still have a menu of programming options to watch when they put up their rabbit-ear antennas. Specifically, the fear was that if cable did not carry local broadcast stations, the local stations would lose their audiences, causing their advertising revenues to evaporate. *Id.* This, in turn, would mean broadcast stations would go out of business, and viewers who opt not to pay for cable would have fewer channels to watch. *Id.*

The Court considered this objective important. But it did not uphold the justification on the first trip to the Supreme Court. It sent the case back to put the government through its paces of actually proving, with concrete evidence, that the fears that motivated Congress were real. *Turner I*, 512 U.S. at 667 ("Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants.") Three years later, when the case came back to the Court with a much more extensive factual record, a bare majority of the Court was satisfied that the evidence did support Congress's conclusion that the structure of the cable industry gives cable operators "an incentive to drop local broadcasters and to favor affiliated programmers." *Turner II*, 520 U.S. at 198-200. The reason is simple: Cable companies compete with local broadcasters for audience and advertising dollars—giving them strong incentive to drop local broadcast stations in favor of their own affiliates. This incentive gave rise to an enormous problem that was national in scope: a threat to the survival of a diverse network of free, over-the-air broadcast stations. Specifically, the Court found the evidence compelling on the following points:

Cable Had the Market Power To Harm Local Broadcasters:

- "Cable operators possess a local monopoly over cable households. Only one percent of communities are served by more than one cable system." *Id.* at 197.

- That meant that if they could eliminate broadcast competition, their monopoly would be complete—and they did not need to fear that some other competitor would gain market share by picking up local broadcasts. *Id.*

- Cable served "at least 60% of American households in 1992." *Id.*

Cable Had The Ability To Deprive Local Broadcasters of their Local Audiences:

- Cable operators exercised "control over most (if not all) of the television programming that is channeled into the subscriber's home" and "can thus silence the voice of competing speakers with a mere flick of the switch." *Id.*

Evidence Demonstrated Cable Was Harming Local Broadcasters:

- "A television station's audience size directly translates into revenue." *Id.* at 208.

- Some broadcast stations have "fallen into bankruptcy, curtailed their business operations, and suffered serious reductions in operating revenues" after cable systems stopped carrying the stations. *Id.* at 209.

- Stations without cable carriage "encountered severe difficulties obtaining financing for operations." *Id.*

In sum, the Court, by a very narrow margin, found that there was an important justification for the cable must-carry rule: cable's abuse of its market power posed a real threat to the survival of local broadcast stations.

### *The Weak And Unprovable Justification For A Satellite Must-Carry Rule.*

Nowhere in the text of H.R. 927 is there any statement of congressional purposes or explanation of what evils this must-carry provision is aimed at curing. Nor does the bill offer any factual findings to justify the infringement on speech. We can surmise that the government will try to justify the satellite must-carry rule on the same basis on which it defended the cable version. But the government will not be able to carry its burden of proving that satellite TV could kill local broadcasting.

*First*, satellite TV providers advertise nationally. They simply do not compete with local broadcasters for local advertising dollars. So satellite TV providers do not have the incentive cable companies have to drop local broadcast stations.

*Second*, for that reason, satellite TV providers already carry local stations in an overwhelming majority of markets. The objection here is to the burden of having to carry *all* of them, regardless of whether the cost of doing so is at all justified by the demand of viewers.

*Third, s*atellite TV providers are nowhere near the dominant force that cable was when the Court decided *Turner II:*

- In contrast to cable operators, which "possessed a local monopoly over cable households," each satellite TV provider—DISH and DIRECTV—competes vehemently against the other, *and* faces competition from cable and telephone companies now offering TV service. *Id.* at 197.

- In contrast to cable, which served "at least 60% of American households in 1992," *id.*, in 2007 DISH and DIRECTV combined served only about 26% of American households. Motion Picture Association of America, Inc., *Entertainment Industry Market Statistics* (2007), at pp. 19-20, http://www.mpaa.org/USEntertainmentIndustryMarketStats.pdf.

*Fourth,* unlike cable companies, satellite TV providers do *not* exercise "control over most . . . of the television programming that is channeled into the subscriber's home" and cannot "silence the voice of competing speakers with a mere flick of the switch." *Id.* In the few markets where satellite TV providers are unable to provide local service, satellite TV subscribers can seamlessly receive both over-the-air broadcast signals and satellite programming with the consumer set-top box used to receive satellite signals and an antenna that integrates into satellite programming with the flick of switch. The difference is that the customer has control over the switch. Indeed, in enacting the 1999 carry-one,carry-all rules, Congress recognized that "subscribers who receive no broadcast signals at all from their satellite service may install antennas or subscribe to cable service in addition to satellite service . . ." (Appellate Brief for Respondents, the Federal Communications Commission and the United States of America in *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001), 2001 WL 34386914 (C.A.4) (citing H.R. Conf. Rep. No. 106-464, at 102.).

In short, satellite TV providers have no incentive to block local broadcasters from their local audiences, do not do so as a practical matter, and would not threaten the survival of local broadcasters, even if they did. So local broadcasters simply do not need a satellite must-carry rule to stay alive. Thus, any infringement on satellite TV providers' First Amendment rights is unjustifiable.

## *THE BURDENS OF THE SATELLITE MUST-CARRY REQUIREMENT ARE UNCONSTITUTIONALLY HEAVY.*

Perhaps the most important distinction between the cable must-carry rule and H.R. 927 is that cable's carriage obligation for commercial broadcast stations is capped at one-third of channel capacity. H.R. 927 imposes an unlimited carriage obligation on satellite TV providers. This greatly alters the relative burdens of the two rules.

### *The Very Light Burden Of The Cable Must-Carry Rule.*

Critical to the Supreme Court's decision to uphold cable's must-carry requirement was the conclusion that the "actual effects" of the must-carry rule were "modest." *Turner II*, 520 U.S. at 214. "[S]ignificant evidence indicates that *the vast majority of cable operators have not been affected in a significant manner by must-carry*." *Id.* (emphasis added).

- Compliance with must-carry obligations did not force cable operators to drop a significant amount of programming. "Cable operators ha[d] been able to satisfy their must-carry obligations 87 percent of the time using previously unused channel capacity." *Id.* This minor burden, the Court accurately predicted, would diminish as cable channel capacity expanded. *Id.*

- "94.5 percent of the 11,628 cable systems nationwide have not had to drop any programming in order to fulfill their must-carry obligations," and "the remaining 5.5 percent had to drop an average of only 1.22 services from their programming." *Id.*

- Nationwide, cable operators "carry 99.8 percent of the programming they carried before enactment of must-carry." *Id.*

- "Only 1.18 percent of the approximately 500,000 cable channels nationwide is devoted to channels added because of must-carry" obligations. *Id.*

### *The Onerous Burden Of H.R. 927.*

In contrast to the "modest" burdens on cable, there is no way the government will ever be able to prove satellite carriers will not have "been affected in a significant manner by must-carry" obligations. *Id.* Congress opted to enact the less restrictive carry-one, carry all rules in 1999 in recognition of the capacity constraints faced by cable. *See SBCA*, 275 F.3d at 350 (summarizing testimony to Congress regarding the capacity limits faced by satellite and explaining that carry-one, carry-all rules reflected "the technological dissimilarities between cable and satellite."). Despite innovations in satellite technology, there are only so many channels that can be carried on a satellite spot-beam, and satellite spectrum is limited.. Even where spectrum is available, developing, constructing and launching additional satellites is not only expensive, it takes many years of planning and preparation. *Satellite HD Carriage Order*, FCC 08-86, CS Docket 00-96, ¶ 11 (recognizing that "satellite construction and launch is a lengthy process, generally taking approximately four years."). As the FCC

recognized in 2008, "satellite carriers face unique capacity, uplink, and ground facility construction issues" in connection with offering local service. *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking Order, FCC 08-86, CS Docket 00-96, ¶ 7 (March 27, 2008) ("Satellite HD Carriage Order"). As the FCC concluded, Cable just does not face the same capacity constraints. *Id.*, ¶ 9.

Satellite carriers' must-carry obligations are also far broader than the ones the Court previously upheld. Unlike the cable rule which capped the must-carry requirement for commercial stations at one-third of a cable company's channels, H.R. 927 has *no limit* on the number of channels satellite TV providers must devote to carrying local broadcast stations. Indeed, satellite providers already devote much more than one-third of their channel capacity to local broadcast stations under the existing carry-one, carry-all rules. This is due in part to the national scope of satellite providers business. Because cable companies serve a limited geographic area, they can easily satisfy their limited obligation to carry the local broadcast stations in that area—typically five to ten stations. On that same platform, cable companies offer hundreds of national channels and provide data and voice services. Satellite providers in contrast operate a single, national system on which they already carry over 1,000 local broadcast stations. In other words, satellite providers already devote more channel capacity to local broadcast stations than cable does under its must-carry rules. *See Satellite HD Carriage Order*, FCC 08-86, CS Docket 00-96, ¶ 11.

Even without the onerous requirements of H.R. 927, satellite TV providers' carriage obligations will continue to grow because the current carry-one, carry-all rules require satellite providers to carry all high-definition signals of broadcast stations electing must-carry by 2013 in markets where they provide high definition signals ("HD"). HD requires much more channel capacity, and in some markets, satellite carriers' technology requires them to carry both standard and high-definition channels, thus doubling the carriage requirements for each station. As the FCC explained, "satellite carriers realize a net loss in the total number of program streams they may carry in a given bandwidth as they transition from standard definition to high definition signals." *Satellite HD Carriage Order*, FCC 08-86, CS Docket 00-96, ¶ 8. H.R. 927 saddles satellite providers with added burden of carrying every local broadcast station in the country at the same time the industry struggles to comply with the phased-in HD must-carry rules.

Simply put, to satisfy H.R. 927's requirements, satellite carriers would likely have to drop programming altogether and forego adding additional non-broadcast programming, such as international and foreign-language programming that is a critical source of news and information for many communities. *See Satellite HD Carriage Order*, FCC 08-86, CS Docket 00-96, ¶ 8 (adopting four-year phase in for HD carriage rules due to "serious technical difficulties" faced by satellite and finding that immediate implementation would harm subscribers if satellite carriers were forced to drop other programming to free capacity). Moreover, compliance would cost satellite providers hundreds of millions of dollars to connect local broadcast stations across the country to regional satellite uplink facilities, and to develop, build and launch additional satellites to increase channel capacity.

***The Fourth Circuit's Decision Upholding The More Limited Carry-One, Carry-All Obligations Does Not Support H.R. 927.***

In *SBCA*, the Fourth Circuit applied the principles of the *Turner* cases to satellite TV 's carry-one, carry-all rule, which was enacted as part of the 1999 Satellite Home Viewer Improvement Act ("SHVIA"). The carry-one, carry-all rule provides that satellite carriers that use their statutory copyright license to retransmit a single broadcast station within a DMA must carry only those qualifying full-power local broadcast stations that are in that DMA. 47 U.S.C. § 338(a)(1). The rule does not apply if the satellite carrier does not use the statutory copyright license to secure the right to retransmit the broadcast station, but instead negotiates a license directly with the station.

The Fourth Circuit upheld this far more modest rule. We disagree with aspects of that ruling, which is not, in any event, binding outside the Fourth Circuit. But for present purposes suffice it to say that an opinion upholding the much more limited carry-one, carry-all requirement does not come close to supporting a sweeping extension of the principle to every local station in every DMA. In this regard, one aspect of the Fourth Circuit's logic is especially relevant. One critical reason that the Fourth Circuit upheld the rule was that the rule did not impose an excessive burden on satellite carriers. The court held that the carry-one, carry-all rule "leaves them with the choice of when and where they will become subject to the carry one, carry all rule." 275 F.3d at 365. The same cannot be said of H.R. 927, which imposes what might be called a "carry-one, carry-the-universe requirement." Obviously, there is a big difference between a rule prohibiting discrimination among local broadcasters, and a rule that for all intents and purposes requires a satellite TV provider to carry every single local broadcast station in the country.

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***Conclusion***

Under controlling Supreme Court precedent, H.R. 927 is unconstitutional. It should not become law. But if it does, the courts are sure to strike it. The cable must-carry rule's "modest" burdens came within a hair's breadth of being struck. *See Turner II*, 520 U.S. at 214. In the intervening years, the Court has grown even more protective of First Amendment rights in the business context and less tolerant of burdensome regulations. Given these realities, H.R. 927 will be practically dead on arrival.