

Reauthorizing the Satellite Home Viewing Provisions in the Communications Act and the Copyright Act: Issues for Congress

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Summary

To further the longstanding U.S. media policy goal of localism, the current statutory framework for satellite and cable multichannel video programming distribution services distinguishes between the retransmission of local broadcast signals—the signals of stations located in the same local market as the subscriber—and of distant signals. Some statutory provisions block or restrict the retransmission of distant broadcast signals in order to protect local broadcasters from competition from those signals, with the intent of fostering local programming. At the same time, Congress has recognized the value of subscribers receiving certain distant signals—for example, if they are unable to receive broadcast network programming from a local station. Key copyright and retransmission provisions in the 2004 Satellite Home Viewer Extension and Reauthorization Act, and extended by the Department of Defense Appropriations Act, 2010 (P.L. 111-118), that make it possible for satellite operators to provide their subscribers those distant broadcast signals, expire on February 28, 2010. If these provisions are not reauthorized, it would be much more difficult, if not impossible, for satellite operators to provide most of those signals to their subscribers. In addition, a number of statutory provisions, and many Federal Communications Commission and Copyright Office rules adopted to implement statutory provisions, are based on the transmission of analog broadcast signals, but during 2009 the required transition to digital broadcast signals will largely be achieved. As a result, some of the existing statutes and rules may no longer be effective in attaining the objectives for which they were enacted, unless they are modified.

The Senate Judiciary Committee, House Judiciary Committee, Senate Commerce Committee, and House Commerce Committee all have reported bills (S. 1670, H.R. 3570, S. 2764, and H.R. 2994, respectively) that address the provisions requiring reauthorization, the transition to digital transmission, and several policy issues involving satellite retransmission of broadcast programming of local interest. One issue is that satellite operators are allowed, but not required, to offer subscribers the signals of all the broadcast stations in their local market. DirecTV and DISH Network have chosen not to offer such "local-into-local" service in small markets representing about 3% of U.S. television households. They argue that it would cost more to provide such service than they could recover in revenues and that their limited capacity could be better used providing high definition and other services in more densely populated areas. H.R. 927 would have made satellite provision of local-into-local service mandatory in all 210 markets, but its sponsor withdrew it during the House Commerce Committee markup of H.R. 2994, when DISH Network indicated it would voluntarily serve all 210 markets in exchange for provisions in H.R. 2994 and H.R. 3570 mandating relief from a court injunction now in effect prohibiting it from retransmitting distant broadcast signals using a statutory copyright license. The Senate Judiciary Committee bill includes less direct incentives for DISH Network to serve all 210 local markets. Another issue involves those situations where counties in one state are assigned to a local market for which the primary city (and the local broadcast stations) are in another state. Under current rules, satellite and cable operators are prohibited or restricted from providing to subscribers in these "orphan counties" the signals of in-state, but non-local broadcast stations; thus subscribers in those counties may not be receiving news and sports programming of state-specific interest. But allowing the retransmission of out-of-market signals into those counties could harm the local broadcast stations. Several bills have been introduced to address this issue either generically or in specific states or geographic areas, but none of those bills has been incorporated into the bills reported by the committees. This report will be updated as warranted.

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Introduction

Congress has constructed a regulatory framework for the retransmission of broadcast television signals by satellite television operators through a series of laws—the 1988 Satellite Home Viewer Act (SHVA),[1] the Satellite Home Viewer Act of 1994,[2] the 1999 Satellite Home Viewer Improvement Act (SHVIA),[3] and the 2004 Satellite Home Viewer Extension and Reauthorization Act (SHVERA).[4] These laws have fostered satellite provision of multichannel video programming distribution (MVPD) service and, as satellite has become a viable competitor to cable television, have attempted to make the regulatory regimes for satellite and cable more similar. Today, the regulatory framework for satellite exists alongside an analogous, but in some significant ways different, regulatory framework for cable.

The various provisions in these satellite acts created or modified sections in the Copyright Act[5] and the Communications Act of 1934.[6] Under current law, in order to retransmit a broadcaster's signals to its subscribers, a satellite operator or a cable operator, with certain exceptions, must obtain a license from the copyright holders of the content contained in the broadcast for use of that *content* and also must obtain the consent of the broadcaster for retransmission of the broadcast *signal*. The statutory provisions addressing copyright are in the Copyright Act and are administered by the Copyright Office in the Library of Congress; those provisions addressing signal retransmission are in the Communications Act and are administered by the Federal Communications Commission (FCC). But in several cases, the provisions in one act are conditioned on meeting conditions prescribed in the other act or meeting rules adopted by the agency that administers the other act.

SHVERA includes several provisions that would have expired on December 31, 2009, unless they were reauthorized. An amendment to the Department of Defense Appropriations Act, 2010 (P.L. 111-118), extended those provisions through February 28, 2010, at which point they will expire unless they are reauthorized. Most significantly,

- Section 119 of the Copyright Act[7] provides satellite operators that retransmit certain "distant" (non-local) broadcast television signals to their subscribers with an efficient, relatively low cost way to license the copyrighted works contained in those broadcast signals—a statutory per subscriber, per signal, per month royalty fee. If the law expired, it would be very difficult (and perhaps impossible) for satellite operators to offer the programming of broadcast networks[8] to that subset

[1] P.L. 100-667.

[2] P.L. 103-369.

[3] P.L. 106-113.

[4] P.L. 108-447, passed as Division J of Title IX of the FY2005 Consolidated Appropriations Act.

[5] 17 U.S.C. §§ 111, 119, and 122.

[6] 47 U.S.C. §§ 325, 335, 338, 339, 340, and 341.

[7] 17 U.S.C. §119.

[8] A network is defined as an entity that offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states. (17 U.S.C. § 119(d)(2)(A) and 47 U.S.C. § 339(d)(2)(A)) In addition to the four major television networks—ABC, CBS, Fox, and NBC—that provide national news as well as entertainment programming aimed at a general audience, there are several networks—Univision, Telefutura, and Telemundo—that offer news and entertainment targeted to ethnic communities, as well as smaller networks that provide entertainment or religious programming to their affiliates. Section 119(d)(2)(B) of the Copyright (continued...)

of subscribers who currently cannot receive that programming from local broadcast stations that are affiliated with those networks.[9] It also would be difficult for satellite operators to offer their subscribers the signals of distant stations that are not affiliated with broadcast networks, such as "superstations."[10] In addition, section 119 provides those satellite operators that retransmit to their subscribers the signals of "significantly viewed" stations—stations that are located outside the local market in which the subscriber is located but have been determined to be "significantly viewed" by those households in the local market that do not subscribe to any MVPD provider—a royalty-free license for the copyrighted works contained in those broadcast signals.[11] If section 119 expired, it would be very difficult (and perhaps impossible) for satellite operators to offer their subscribers the signals of significantly viewed stations.

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Act defines "network station" to also include noncommercial broadcast stations.

[9] This would include subscribers who are not able to receive network programming because either (1) the satellite operator does not offer the signals of the local broadcast stations and the subscribers are located too far from the transmitter to receive the signals of the local network-affiliated stations over-the-air or (2) there is no network-affiliated station in the local market. The specific household eligibility requirements for receiving distant signals are very complex, and include certain grandfathered exceptions, but as a general rule households that can receive the signals of local broadcast television stations either over-the-air or as part of local-into-local satellite service are not eligible to receive distant network signals and would not be affected by the expiration of this provision.

[10] The provisions in the two acts have sometimes created confusion because they define "superstations" differently. The Communications Act identifies a class of "nationally distributed superstations" (47 U.S.C. § 339(d)(2)) that is limited to six stations that were in operation prior to May 1, 1991. These are independent broadcast television stations whose broadcast signals are picked up and redistributed by satellite to local cable television operators and to satellite television operators all across the United States. These nationally distributed superstations in effect function like a cable network rather than a local broadcast television station or a broadcast television network. The nationally distributed superstations are WTBS, Atlanta; WOR and WPIX, New York; WSBK, Boston; WGN, Chicago; KTLA, Los Angeles; and KTVT, Dallas. All of these nationally distributed superstations carry the games of professional sports teams. It has become common in FCC proceedings and discussions to refer to these nationally distributed superstations as simply "superstations." In addition to these independent nationally distributed superstations, there also are many independent television stations that are not nationally distributed superstations. This distinction is important because under section 325(b)(2)(B) of the Communications Act, satellite operators may retransmit the signals of "superstations" without obtaining the consent of the stations if they abide by the FCC's network non-duplication and syndicated exclusivity rules (which are discussed later in this report), but this exemption from the retransmission consent requirement does apply to the retransmission of the signals of other independent stations. On the other hand, the Copyright Act defines "superstation" as "a television station, other than a network station, licensed by the Federal Communications Commission, that is secondarily transmitted by a satellite carrier." (17 U.S.C. § 119(d)(9)) Thus, under the Copyright Act, all independent stations are superstations and the copyright provisions apply the same way to all independent stations. The House Judiciary Committee bill, H.R. 3570, and the Senate Judiciary Committee bill, S. 1670, would eliminate the current definitional inconsistency between the acts by replacing the word "superstation" with "non-network station" throughout the Copyright Act.

[11] The specific threshold viewing level for a "significantly viewed" station are, for a network affiliate station, a market share of at least 3% of total weekly viewing hours in the market and a net weekly circulation of 25%; for independent stations, 2% of total weekly viewing hours and a net weekly circulation of 5%. The share of viewing hours refers to the total hours that households that do not receive television signals from MVPDs viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the week. Net weekly circulation refers to the number of households that do not receive television signals from MVPDs that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total households that do not receive television signals from MVPDs in the survey area. A satellite operator can retransmit the signals of these significantly viewed stations only with the retransmission consent of the station.

- Section 325(b)(2)(C) of the Communications Act[12] allows a satellite operator to retransmit the signals of distant network stations, without first obtaining the retransmission consent of those distant stations, to those subscribing households that cannot receive the signals of local broadcast television network affiliates.[13] If it expired, a satellite operator would have to negotiate compensation terms with those distant network stations whose signals it retransmitted to those "unserved" subscribers.
- Section 325(b)(3)(C)(ii) of the Communications Act[14] prohibits a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith. Section 325(b)(3)(iii)[15] prohibits an MVPD from failing to negotiate in good faith for retransmission consent. If these provisions expired, a broadcaster or an MVPD could choose to employ a "take it or leave it" strategy rather than to negotiate retransmission consent terms in good faith, increasing the risk of an impasse that results in subscribers losing access to the broadcast station's programming.

The satellite and cable regulatory frameworks attempt to balance a number of longstanding, but potentially conflicting, public policy goals—most notably, localism, competitive provision of video services, support for the creative process, and preservation of free over-the-air broadcast television. They also attempt to balance the interests of the satellite, cable, broadcast, and program content industries. Congress incorporated the sunset provisions in SHVERA because of its concern that market changes could affect these balances.

The statutory provisions distinguish between the retransmission of *local* signals—the broadcast signals of stations located in the same local market as the subscriber—and of *distant* signals. Provisions block or restrict the retransmission of many distant broadcast signals in order to protect local broadcasters from competition from distant signals and to provide them with a stronger negotiating position vis-à-vis the satellite and cable operators, with the intention of fostering local programming. But the regulatory framework also recognizes that U.S. households benefit from the receipt of certain distant broadcast signals and includes explicit retransmission and copyright rules for these.

The regulatory framework for satellite sets the parameters within which industry players must conduct business. It provides answers to four fundamental business questions:

- may—or must—the satellite operator retransmit some or all local broadcast signals?[16]
- may the satellite operator retransmit certain categories of distant (non-local) broadcast signals?

[12] 47 U.S.C. § 325(b)(2)(C).

[13] See footnote 9.

[14] 47 U.S.C. § 325(b)(3)(C)(ii).

[15] 47 U.S.C. § 325(b)(3)(C)(iii).

[16] This is formally referred to in the statute as "secondary transmission" of the broadcast signals. The initial transmission of the signals by the broadcast station is the "primary transmission."

- is retransmission of those signals contingent on the satellite operator receiving the prior retransmission consent of—and providing compensation to—the broadcaster? and
- is use of the content on those signals subject to specific copyright license terms?

Industry players also must conduct business within the context of the longstanding industry practice of broadcast program suppliers—both broadcast networks and owners of non-network, syndicated programming—contractually granting individual broadcast television stations the exclusive broadcast rights to that programming in a geographic area and restricting those broadcast stations from allowing other parties to retransmit the station signals carrying that programming beyond the area of exclusivity. Thus, in some situations where the regulatory framework allows satellite (or cable) operators to retransmit the signals of a distant broadcast station, subject to obtaining the permission of the broadcast station, that station may be—and, in practice, often is—contractually prohibited from granting the MVPD retransmission consent.

Although satellite and cable operators compete directly with one another in most markets, there are significant differences in the regulatory frameworks under which they operate. (These differences are presented in greater detail in **Table 1** later in this report.) These differences largely reflect the different origins of the cable and satellite industries—cable beginning as a business and technology focused on serving narrow geographic areas and satellite beginning as a business and technology serving broad geographic areas. To this day, the cable network architecture and technology can more efficiently accommodate local programming than can satellite. Some observers have proposed that the retransmission, copyright, and other rules under which these competing multichannel video programming distributors operate should be rationalized to eliminate artificial competitive advantages or disadvantages. For example, the Copyright Office, in a report to Congress required by SHVERA,[17] has proposed that the gross receipts royalty system for cable retransmission of distant broadcast signals in section 111 of the Copyright Act be replaced by a flat fee per subscriber system of the sort for satellite retransmission of distant broadcast signals in section 119 of the Copyright Act. The Copyright Office also has proposed[18] that the provisions defining satellite subscriber eligibility for receiving distant signals in section 119 (the "unserved household" provisions) be replaced by the imposition on satellite operators of the FCC's network non-duplication[19] and syndicated exclusivity rules[20] (but not its sports

[17] *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, A Report of the Register of Copyrights, June 2008, at pp. ix-xi and 94-180.

[18] *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, A Report of the Register of Copyrights, June 2008, at pp. 167-168.

[19] 47 C.F.R. §§ 76.92, 76.93, 76.106, 76.120, and 76.122. Commercial television station licensees that have contracted with a broadcast network for the exclusive distribution rights to that network's programming within a specified geographic area are entitled to block a local cable system from carrying any programming of a more distant television broadcast station that duplicates that network programming. Commercial broadcast stations may assert these non-duplication rights regardless of whether or not the network programming is actually being retransmitted by the local cable system and regardless of when, or if, the network programming is scheduled to be broadcast. This rule applies to cable systems with more than 1,000 subscribers. Generally, the zone of protection for such programming cannot exceed 35 miles for broadcast stations licensed to a community in the FCC's list of top 100 television markets or 55 miles for broadcast stations licensed to communities in smaller television markets. The non-duplication rule does not apply when the cable system community falls, in whole or in part, within the distant station's Grade B signal contour. In addition, a cable operator does not have to delete the network programming of any station that the FCC has previously recognized as "significantly viewed" in the cable community. With respect to satellite operators, the network non-duplication rule applies only to network signals transmitted by superstations, not to network signals transmitted by other distant network affiliates.

blackout[21] rules), which currently are used to limit the retransmission of distant broadcast signals by cable operators. But, to date, there has been little discussion of a major modification of the regulatory framework. The proposals attracting the most legislative interest more narrowly address reauthorization of the provisions that will expire on February 28, 2010, updating the statutory language to reflect the transition from analog to digital technology, and ways to foster wider satellite retransmission of broadcast programming of local and state-wide interest.

Issues in the Current Public Policy Debate

The current policy debate is motivated by, but not limited to, the need to address the statutory copyright and retransmission provisions that will expire on February 28, 2010. Copyright is within the jurisdiction of the judiciary committees; retransmission of broadcast signals is within the jurisdiction of the commerce committees. The Senate Judiciary Committee, House Judiciary Committee, Senate Commerce Committee, and House Commerce Committee all have reported bills (S. 1670, H.R. 3570, S. 2764, and H.R. 2994, respectively) that address reauthorization by extending the expiring provisions (with some minor modifications) for five years, as well as a number of related policy issues. There has been no opposition to the reauthorization of the expiring provisions in the Communications Act and Copyright Act.

Revising Existing Rules That Are Based on Analog Technology

A number of statutory provisions, and many FCC and Copyright Office rules adopted to implement statutory provisions, are based on the transmission of analog broadcast signals, but

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[20] 47 C.F.R. §§ 76.101, 76.103, 76.106, 76.120, and 76.123. Cable systems that serve at least 1,000 subscribers may be required, upon proper notification, to provide syndicated protection to broadcasters who have contracted with program suppliers for exclusive exhibition rights to certain programs within specific geographic areas, whether or not the cable system affected is carrying the station requesting this protection. However, no cable system is required to delete a program broadcast by a station that either is significantly viewed in the cable community or places a Grade B or better contour over the community of the cable system. With respect to satellite operators, the syndicated exclusivity rule applies only to syndicated programming transmitted by superstations, not to syndicated programming transmitted by other distant broadcast stations.

[21] 47 C.F.R. §§ 76.111, 76.120, 76.127, and 76.128. A cable system located within 35 miles of the city of license of a broadcast station where a sporting event is taking place may not carry the live television broadcast of the sporting event on its system if the event is not available live on a local television broadcast station, if the holder of the broadcast rights to the event, or its agent, requests such a blackout. The holder of the rights is responsible for notifying the cable operator of its request for program deletion at least by the Monday preceding the calendar week during which the deletion is desired. If no television broadcast station is licensed to the community in which the sports event is taking place, the 35-mile blackout zone extends from the broadcast station's licensed community with which the sports event or team is identified. If the event or local team is not identified with any particular community (for instance, the New England Patriots), the 35-mile blackout zone extends from the community nearest the sports event which has a licensed broadcast station. The sports blackout rule does not apply to cable television systems serving fewer than 1,000 subscribers, nor does it require deletion of a sports event on a broadcast station's signal that was carried by a cable system prior to March 31, 1972. The rule does not apply to sports programming carried on non-broadcast program distribution networks such as ESPN. These networks, however, may be subject to private contractual blackout restrictions. Similarly, the sports blackout rule applies to satellite operators only if a local television broadcast station is not carrying the local sports event. If a local broadcast station does not have permission to carry the local game, then no other broadcaster's signal displaying the game can be shown in the protected local blackout zone. The sports blackout rule applies to a satellite operator's retransmission of nationally distributed superstations and network affiliated stations. The rule exempts satellite operators with fewer than 1,000 subscribers in the protected area.

during 2009 the transition to digital broadcast signals will largely be achieved. As a result, statutes and rules that explicitly refer to analog technology may no longer be effective in attaining the objectives for which they were initially enacted, unless they are modified. A number of parties have stated that it is timely to make such modifications. Marybeth Peters, Register of Copyrights, has proposed five modifications to Section 111 of the Copyright Law and four modifications to Section 119 of the Copyright Act "to accommodate the conversion from analog to digital broadcasting."[22] For example, under current law, satellite subscribers who are not able to receive a grade B quality analog television signal[23] (and are thus considered "unserved") are allowed to receive distant signals if their satellite operator is not offering local-into-local service, and some unserved subscribers are allowed to receive distant signals even if their operator does offer local-into-local service. Although the definition of unserved is based on analog technology, those households also are considered unserved for digital service and thus may in some circumstances be allowed to receive distant digital signals by satellite.

The House Commerce Committee bill, H.R. 2994, and the Senate Commerce Committee bill, S. 2764, both include specific proposed changes to current language in the Communications Act intended to address this problem. They also include provisions directing the FCC to develop a predictive model for the reception of digital signals within six months of enactment in order to determine which households are "unserved" and therefore eligible to receive digital network signals. Similarly, the House Judiciary Committee bill, H.R. 3570, and the Senate Judiciary Committee bill, S. 1670, include specific proposed changes to current language in the Copyright Act intended to replace existing references to analog technology with relevant references to digital technology and also instruct the FCC to establish a predictive model for the reception of digital signals.[24] The bills also include provisions that address the period before the new predictive model has been implemented.

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[22] Marybeth Peters, Register of Copyrights, written statement before the House Judiciary Committee, hearing on "Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses," at Appendix 1, February 25, 2009. The proposed modifications to section 111 include revising section 111, and its terms and conditions, to expressly address the retransmission of digital broadcast signals; amending the definition of "local service area of a primary transmitter" to include references to digital station "noise limited service contours" for purposes of defining the local/distant status of noncommercial educational stations (and certain UHF stations) for statutory royalty purposes; amending the statutory definition of "distant signal equivalent" (DSE) to clarify that the royalty payment is for the retransmission of the copyrighted content without regard to the transmission format; amending the definitions of "primary transmission" and "secondary transmission," as well as the "station" definitions in section 111(f) so they comport to the amended definition of DSE; and clarifying that each multicast stream of a digital television station shall be treated as a separate DSE for section 111 royalty purposes. The proposed modifications to section 119 include replacing the existing Grade B analog standard with the new noise-limited digital signal intensity standard; adopting the Individual Location Longley Rice (ILLR) predictive digital methodology for predicting whether a household can receive an acceptable digital signal from a local digital network station; mandating that the FCC adopt digital signal testing procedures for purposes of determining whether a household is actually unserved by a local digital signal; and deleting various references in section 119 to "analog" unless that reference is to low power television stations that have not yet converted to digital broadcasting.

[23] The Grade B contour around a station's transmitter identifies the geographic area in which the quality of picture is expected to be satisfactory to the median observer at least 90% of the time for at least 50% of the receiving locations within the contour, in the absence of interfering co-channel and adjacent channel signals. (See Warren Communications News, *Television & Cable Factbook 2009,* at p. A-16.

[24] At the October 7, 2009, hearing on "Reauthorization of the Satellite Home Viewing Extension and Reauthorization Act of 2004," of the Subcommittee on Communications, Technology, and the Internet of the U.S. Senate Committee on Commerce, Science, and Technology (Senate Commerce subcommittee hearing), Robert Gabrielli, senior vice president for program operations at DirecTV, claimed that the current predictive model used by the FCC significantly understates the number of households that are unserved, relative to a model employed by the National Association of Broadcasters (NAB). He argued that reliance on the current FCC model would result in many households neither (continued...)

The Retransmission of In-State, but Non-Local, Broadcast Signals into Counties Assigned to Local Markets in Other States ("Orphan Counties")

The current regulatory frameworks for both satellite and cable distinguish between the retransmission of local and distant signals and require that local markets be defined by the Designated Market Areas (DMAs) constructed and published by Nielsen Media Research.[25] The viewing patterns that underlie these Nielsen markets are primarily the result of the physical locations of the various broadcast television stations and the reach of their signals. (They also reflect the boundaries of the exclusive broadcast territories that each of the three original television broadcast networks—ABC, CBS, and NBC—had incorporated into their contracts with their local affiliate stations decades ago.) DMAs do not take into account state boundaries. As a result, under current statutes and rules, a number of counties are assigned to local markets for which the principal city (from which all or most of the local television signals originate) is outside their state.[26] Satellite subscribers (and many cable subscribers) in these "orphan counties" may not be receiving signals from in-state broadcast stations and as a result may not be receiving news, sports, and public affairs programming of interest in their state.

Some observers therefore have proposed that the statutory framework be modified to remove prohibitions or impediments on satellite operators retransmitting to their subscribers in these counties the signals of broadcast stations in in-state, but non-local, markets. (SHVERA selectively removed these impediments through four "exceptions" that allow satellite operators to retransmit to their subscribers in particular orphan counties in New Hampshire, Vermont, Oregon, and Mississippi—but not in other locations—the signals of in-state but out-of-market broadcast stations.[27]) Broadcasters, however, have voiced concern that allowing such retransmission could undermine their financial viability by reducing their audience share and thus reducing their advertising revenues. They also assert such retransmission would weaken the local broadcasters' negotiating position with the satellite and cable operators, who could turn to the programming of an in-state but out-of-market affiliate of a particular network if they failed to reach retransmission consent with the local affiliate of that network. Broadcasters claim this would harm their ability to provide quality local programming, which is expensive to produce.[28]

Although a number of bills have been introduced that would address this issue (either generically or for specific states or geographic areas) by allowing satellite operators to retransmit to

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getting signals over-the-air or by satellite. But Paul Karpowicz, president of Meredith Broadcasting Group and representing the NAB at the hearing, disputed this claim.

[25] The statutory provisions for satellite explicitly require the use of Nielsen's DMAs. (17 U.S.C. § 122(j)(2)(A) and (C).) The statutory provisions for cable instructed the FCC to make market determinations "using, where available, commercial publications which delineate television markets based on viewing patterns." (47 U.S.C. § 534(h)(1)(C).) Nielsen had already delineated such television markets, assigning geographic areas to markets based on predominant viewing patterns in order to construct ratings data for advertisers, and the FCC therefore adopted Nielsen's market delineations.

[26] A complete state-by-state list of these counties, their populations, and the full power television stations located in the counties is provided in **Table A-1** in the **Appendix** to this report.

[27] 17 U.S.C. §§ 119(a)(2)(c)(i)-(iv) and 47 U.S.C. § 341.

[28] See, for example, John Eggerton, "Affiliate Associations Warn Legislators Against Allowing Imported Signals from In-State, Distant Markets," *Broadcasting & Cable,* March 30, 2009.

subscribers in orphan counties the signals of certain in-state, but non-local broadcast stations,[29] the bills reported out of the House Commerce, House Judiciary, Senate Commerce, and Senate Judiciary committees do not include any provisions that would address this issue directly. During the markup of the Senate Judiciary Committee bill (S. 1670), reportedly several Senators proposed amendments that would have narrowly addressed the orphan county issue in their states, but then agreed to withdraw their amendments when other Senators voiced concern that the provisions would delay passage of the legislation because of unresolved issues among broadcasters and satellite operators. At the markup reportedly there was discussion of imposing a deadline on the industry to reach a negotiated solution, such as a proposal by Senator Coburn that, if there is no industry agreement by the time the legislation reaches the Senate floor, a trigger provision be inserted in the bill that would impose a statutory solution for the orphan counties issue if no negotiated compromise is reached after two years.[30]

The House Commerce Committee bill includes a provision instructing the FCC to prepare within one year a report containing analysis of (1) the number of households in each state that receive local broadcast signals from stations of license located in a different state; (2) the extent to which consumers have access to in-state broadcast programming; and (3) whether there are alternatives to the use of DMAs to define local markets that would provide more consumers with in-state broadcast programming. In addition, a savings clause in the House Commerce Committee bill—stating that nothing in that legislation, in the Communications Act, or in any FCC regulation shall limit the ability of a satellite operator to retransmit a performance or display of a work pursuant to an authorization granted by the copyright owner—is intended to clarify that a satellite operator always has the opportunity to negotiate a copyright license outside the section 119 statutory license. As is explained later in this report, this clarification is not likely to result in the satellite retransmission into orphan counties of the sports and network programming on in-state, but out-of-market stations, but could encourage the retransmission of those stations' locally produced news programming. The various elements of the orphan county issue are discussed in greater detail later in this report.

Discretionary vs. Mandatory Provision of Local-into-Local Service

Currently, satellite operators are allowed, but not required, to offer subscribers the signals of all the broadcast stations in their local market. If a satellite operator chooses to retransmit the signal of a local broadcast station and to take advantage of a royalty-free statutory copyright license for the content carried on that signal, it must retransmit the primary signals of all the full power stations in that local market, subject to obtaining local station permission. The satellite operators

[29] Representative Ross has introduced H.R. 3216, which would allow multichannel video programming distributors (MVPDs)—satellite operators and cable operators (including telephone companies)—serving an orphan county to retransmit to their subscribers in that county the signals of television broadcast stations located in an adjacent in-state market. In addition, the Four Corners Television Access Act of 2009 has been introduced in both the House (H.R. 1860, by Representatives Salazar and Coffman) and the Senate (S. 771, by Senators Bennet and Udall) to allow satellite operators to retransmit the signals of certain in-state broadcast stations to subscribers located in two Colorado counties that are assigned to the Albuquerque, NM, local market and to allow cable operators located in those counties to retransmit the signals of certain in-state stations without having to obtain retransmission consent from the stations. Also, Representative Boren has introduced H.R. 505, which would allow satellite operators to retransmit to any subscriber in the state of Oklahoma—not just those in orphan counties—the signals of any broadcast station located in that state.

[30] See Anandashankar Mazundar, "Senate Judiciary Committee Votes Out Satellite Television Reauthorization Bill," *BNA Daily Report for Executives*, September 25, 2009.

have chosen not to offer this "local-into-local" service in many small markets, preferring to use their satellite capacity to provide additional high definition and other programming to larger, more lucrative markets than to use the capacity to serve very small numbers of customers. In some cases, those small markets may not generate enough revenues to cover the costs of providing local-into-local service.[31] As a result, approximately 3% of all U.S. households do not have access to local broadcast signals if they subscribe to satellite video service.[32]

Early in the 111th Congress, Representative Stupak introduced H.R. 927, which would, in effect, require satellite operators to offer local-into-local service in all markets; if a satellite operator wished to use the royalty-free statutory copyright license to rebroadcast the content on a broadcast signal in *any* local market, it would have to provide local-into-local service in *every* market. But during markup of the House Commerce Committee bill, H.R. 2994, Representative Stupak agreed to withdraw his bill (which he had introduced in the form of an amendment), when DISH Network indicated that it would voluntarily provide local-into-local service in all 210 markets within two years in exchange for statutory relief (provided in provisions in H.R. 2994 and H.R. 3570) from a current court injunction prohibiting it from providing its subscribers distant signals using the section 119 copyright license.[33]

Specifically, as a result of repeated violations of section 119 of the Copyright Act, DISH Network currently is subject to a permanent court injunction barring it from using the section 119 statutory copyright license to retransmit distant signals to its subscribers; it therefore must employ an arms-length agreement with National Programming Service for that entity to deliver distant signals to its subscribers. The relevant provisions in H.R. 3570 and H.R. 2994 would waive the injunction if DISH Network provides local-into-local service in all 210 local markets in the United States, creating a process by which DISH Network could be found qualified to obtain a certification for a section 119 copyright license and by which parties could challenge that certification. The steps in this process as well as the arguments in the debate over discretionary vs. mandatory provision of local-into-local service are presented in greater detail in a later section of this report.

The Senate Judiciary Committee bill includes provisions intended to indirectly encourage DISH Network to offer local-into-local service in currently unserved markets. Many of those unserved markets are "short markets" that have less than the full complement of local network affiliates for the four major national broadcast networks—ABC, CBS, FOX, and NBC. Currently, satellite operators can use the statutory copyright license for distant signals in section 119 of the

[31] Paul Gallant, an analyst with Stanford Washington Research Group, reportedly stated that mandatory provision of local-into-local service in all markets "would impose significant new costs on Dish Network and DirecTV and generate virtually no new revenue" because the markets in question are so small. See Todd Shields, "DirecTV, Dish May Face Requirement for More Local TV (Update1)," Bloomberg.com, February 23, 2009, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayQ_vo3nJImo, viewed on April 27, 2009.

[32] According to the written testimony of Charles W. Ergen, chairman, president, and chief executive officer of DISH Network Corporation, submitted for the hearing on "Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act," before the Subcommittee on Communications, Technology, and the Internet, Committee on Energy and Commerce, U.S. House of Representatives, February 24, 2009, at p. 2, "DISH provides local service in 178 markets today, reaching 97 percent of households nationwide." According to the written testimony of Bob Gabrielli, senior vice president, broadcasting operations and distribution, DIRECTV, Inc., before the House Judiciary Committee, February 25, 2009, at p. 10, "DIRECTV today offers local television stations by satellite in 150 of the 210 local markets in the United States, serving 95 percent of American households. (Along with DISH Network, we offer local service to 98 percent of American households.)"

[33] See John Eggerton, "DISH: Local Into Local Within Two Years—No. 2 DBS Provider Said It Will Deliver Local TV Stations to All 210 DMAs During that Time Frame," *Multichannel News*, October 15, 2009.

Copyright Act to retransmit to their subscribers the content on the broadcast signals of (1) local low power stations, (2) significantly viewed stations, (3) the in-state but out-of-market stations in the four states that satellite operators were allowed to import into orphan counties under the exceptions in SHVERA, and (4) distant network stations affiliated to national networks for which there is no affiliate in the local (short) market. But DISH Network is enjoined from using the section 119 copyright license. The Senate Judiciary Committee bill would change the license required to retransmit the content of those four categories of broadcast signals from the section 119 license to the section 122 statutory copyright license for local signals, thus providing DISH Network with an efficient and inexpensive license and that might encourage it to serve the currently unserved markets.

The Senate Commerce Committee bill (S. 2764) would require each satellite carrier to submit a semi-annual report to the FCC setting forth (1) each market in which it offers local-into-local service; (2) detailed information regarding the use of satellite capacity for the provision of local-into-local service; (3) each local market in which it has commended offering local-into-local service in the six-month period covered by the report; and (4) each local market in which it has ceased to offer local-into-local service in the six-month period. The FCC would be required to submit to the Senate and House Commerce committees within a year a report containing the findings, conclusions, and recommendations of a study of (1) incentives that would induce a satellite carrier to offer local-into-local service in markets the carrier has not been serving; and (2) the economics and satellite capacity conditions affecting delivery of local signals by satellite carriers to these markets.

Which Broadcast Signals Satellite Operators May Offer in Those Markets That Lack a Network Affiliate ("Short Markets")

Currently, in local markets that are not served by an affiliate of a particular broadcast network, satellite operators may retransmit the distant signals of up to two distant stations affiliated with that network.[34] This provision applies to all network stations, but in practice it primarily involves the retransmission of distant signals into "short markets" that do not have local broadcast stations affiliated with each of the four major national broadcast networks—ABC, CBS, FOX, and NBC. The current statutory framework has been criticized by some for being too lenient and by others for being too restrictive.

Some observers have proposed that, rather than allowing satellite operators to import the signals of any distant network affiliates, such importation of distant network affiliate signals into a market be limited to the signals of affiliates in an adjacent, in-state market, to maximize the likelihood that the programming provided would contribute to localism.[35] The Senate Judiciary Committee bill would allow a satellite operator to retransmit into a short market the signal of a station located in an adjacent market that is affiliated with a network for which there is no affiliated local station, subject to obtaining the retransmission consent of the broadcast station.

At the same time, under current rules, in areas where a network-affiliated broadcast station is located near the DMA boundary, so that its signal extends into a portion of a neighboring DMA

[34] 47 U.S.C. § 339.

[35] See, for example, Cheryl Bolen, "Boucher Advises Broadcasters to Negotiate Performance Royalty," *BNA Daily Report for Executives,* April 1, 2009.

that does not have a local station affiliated with the same network, households in that neighboring market who can receive that signal at a Grade B level are not considered to be "unserved" for that network; a satellite operator can neither offer that overlapping signal to those households as part of local-into-local service (since it is a distant signal) nor provide to those households the signal of a distant station affiliated with the same network, because those households are not considered unserved. The satellite operators have proposed that current rules be modified to eliminate this so-called "Grade B bleed" problem by modifying the test for a subscriber being unserved to apply only to the strength of the signal from an in-market station or by defining unserved in terms of whether the viewer can get local service from the satellite spot beam, rather than in terms of over-the-air reception.[36]

The House Judiciary Committee and Senate Judiciary Committee bills would address this issue by defining as "unserved" those households that do not receive an over-the-air signal with the network programming from their *local affiliate*. The broadcasters and programmers have opposed such a change. As explained in the next section of this report, they believe the short market issue can best be addressed by taking advantage of the multicasting capabilities of digital technology.

The Senate Judiciary Committee bill indirectly addresses the short market problem by moving from section 119 of the Copyright Act to section 122 the copyright license provision for the retransmission of the content on the signals of a distant network station affiliated with a network for which there is no local affiliated station. This would allow DISH Network, which is under a court injunction prohibiting it from retransmitting signals under section 119 of the Copyright Act, to do so using the section 122 statutory license.

Multicasting and Unserved Households in Short Markets

Broadcasters and programmers indicate that with the digital transition, the existing broadcast stations in short markets have multicasting capabilities and therefore can—and often do—carry the programming of a second and perhaps even third network. Thus, they claim, there are fewer and fewer markets in which households cannot receive the signals of all four major broadcast networks, and these few can be addressed by allowing or requiring satellite operators to carry all the network signals carried by a local broadcaster, even if they are not the local broadcast station's primary signal.[37]

But the current statutory language does not explicitly address the situation where a digital station in a short market is broadcasting multiple video streams—the programming of its primary affiliated network and also the programming of one or more other networks. Section 119(d)(10)(A) of the Copyright Act defines an "unserved household" as "a household that cannot receive, through the use of a conventional, outdoor rooftop antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity," where a "primary network station" is "a network station that broadcasts or rebroadcasts the basic programming

[36] See, for example, the written testimony of Derek Chang, executive vice president, content strategy and development, DirecTV, Inc., before the House Committee on Energy and Commerce, Subcommittee on Communication Technology, and the Internet, June 16, 2009, at pp. 5-6.

[37] See, for example, the written statement of Paul A. Karpowicz, president, Meredith Broadcasting Group, on behalf of the Television Board of the National Association of Broadcasters, before the Subcommittee on Communications, Technology, and the Internet, House Committee on Energy and Commerce, "Hearing on Discussion Draft of Legislation to Reauthorize the Satellite Home Viewer Act," June 16, 2009, at p. 8.

service of a particular national network." One possible interpretation of this broad definition of a primary network station is that a single broadcast station multicasting more than one broadcast network represents more than one primary network station. This, in turn, would suggest that if a local broadcast station in a short market were broadcasting multiple video streams that included both the programming of its primary network affiliation on its primary video stream and the programming of another national network on a secondary video stream, households receiving those multiple video streams at a Grade B level would be considered served both with respect to the primary network and the secondary network. Presumably, then, a satellite operator would not be able to import to subscribers in that market the signals of a distant broadcast station affiliated with that second network and, if it were offering local-into-local service, would have to include retransmission of the broadcaster's second video stream (if it obtained retransmission consent from the broadcast station).[38] But currently there is no explicit statutory language to that effect.

At the October 7, 2009, Senate Commerce subcommittee hearing, the panelist from DirecTV claimed that the non-primary "multicast channels do not now 'count' for purposes of determining eligibility for distant signals under the Copyright Act."[39] Moreover, if the public policy rationale for limiting satellite retransmission of distant signals is to foster localism, a single station multicasting the programming of multiple national networks would not be fostering localism unless it offered unique locally-produced programming on each of its video streams (though the limitation might strengthen the local broadcaster financially by restricting competition).[40] It therefore is conceivable that the FCC or a court could conclude that the holder of a single broadcast license at a particular location should not be considered to have multiple primary network stations; in that case, households would be considered unserved with respect to the network signals carried by the local broadcaster's secondary video stream and the satellite operator would be allowed to retransmit a distant network signal to its subscribers.

The House Judiciary Committee bill (H.R. 3570) addresses this issue, but does not treat all secondary video streams the same as primary ones. Under the bill, if a local broadcaster has a video stream, other than its primary video stream, that provides the programming of a national network and was carried by a satellite operator on July 1, 2009, and if the broadcaster continues to carry that network's programming on that video stream, then that video stream would be considered a "qualified multicast video" and households in that local market would be considered served with respect to the broadcast network whose programming was carried on that video stream; a satellite carrier could not bring in the distant signal of another broadcast station affiliated with the streamed network. Presumably, if the satellite operator were offering local-into-

[38] This is in contrast to the must carry provision in section 534(b)(3)(A) of the Communications Act, which requires a cable operator to carry the *primary video* of each local broadcast television station. The FCC has interpreted the primary video to be only the video stream of the broadcast station's primary network affiliate, not any secondary video streams.

[39] Written Testimony of Robert Gabrielli, senior vice for program operations, DirecTV, before the Senate Committee on Commerce, Science, and Transportation, October 7, 2009, at p. 4.

[40] In his written testimony for the October 7, 2009, Senate Commerce subcommittee hearing, at p. 4, Robert Gabrielli of DirecTV claimed that "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." At that same hearing, Paul A. Karpowicz of Meredith Broadcasting Group and the NAB, at p. 7 of his written testimony (Testimony of Paul A. Karpowicz, president, Meredith Broadcasting Group, before the Subcommittee on Communications and Technology, Committee on Commerce, Science and Transportation, U.S. Senate), states that "KBAK-TV, the CBS affiliate in Bakersfield, California, now carries Fox network programming on a multicast channel and presents separately originated local news and other localized program services on that channel as well. With the switch to digital last June, this trend will continue and the number of short markets should be substantially and rapidly reduced."

local service in that market, it would have to include that multicast video stream if it reached retransmission agreement with the broadcaster. Also, under the bill, if a local broadcaster has a video stream, other than its primary video stream, that provides the programming of a national network and that exists on January 1, 2013, and if the broadcaster continues after that date to carry that network's programming, then that video stream also would be considered a "qualified multicast video" and households in that local market would be considered served with respect to the broadcast network whose programming was carried on that video stream; a satellite carrier could not bring in the distant signal of another broadcast station affiliated with the streamed network. Again, presumably, if the satellite operator were offering local-into-local service in that market, it would have to include that multicast video stream if it reached retransmission agreement with the broadcaster. Language in H.R. 3570 also would clarify that copyright fees should be established for each digital stream of programming in the event of a multicast transmission. Under the bill, however, if a local broadcaster were to begin multicasting another broadcast network signal after July 1, 2009, then between that date and January 1, 2013, the signal would not be deemed a qualified multicast video and a satellite carrier could import into the local market the signal of a broadcaster affiliated with the same network.

In contrast, the Senate Judiciary Committee bill (S. 1670) would not modify the definition of unserved households to address the non-primary video streams of multicasting stations. It would continue to define unserved households in terms of their inability to receive the signals of "primary network stations."

Both the House Commerce Committee bill (H.R. 2994) and the Senate Commerce Committee bill (S. 2764) would allow a satellite subscriber who was lawfully receiving the distant signal of a network station on the day before enactment of the new legislation to receive both that distant signal and the local signal of a network station affiliated with the same network until the subscriber chooses to no longer receive the distant signal from its satellite operator. Thus, if in a short market a local broadcaster began to multicast on a non-primary video stream the programming of the network for which there has been no local affiliate, and the satellite operator chose to retransmit that non-primary video stream, a subscriber who has been receiving the distant network signal could continue to receive that distant signal as well as the local network signal, as long as it did not discontinue its distant service. A household in that short market would not be allowed to receive a distant network signal, however, if it received from the satellite operator the programming of that same network from the non-primary video stream of a local broadcaster but was not a subscriber lawfully receiving the distant signal on the day before enactment of the new legislation.[41]

[41] H.R. 2994 and S. 2764 also include a savings clause stating that the legislation would not affect the current definitions of "program related" and "primary video" in FCC rules, which explicitly limit cable operators' must-carry responsibilities to the primary video stream. Cable operators do not have to carry the multicast non-primary video streams of local broadcasters.

Which Households Are Eligible to Receive Distant Signals: Grandfathered Subscribers, Other Subscribers, and Households that Are Not Subscribers When Legislation is Enacted ("Future Applicability")

The primary mechanism for limiting satellite retransmission of distant network signals has been to restrict such retransmission to "unserved" households that cannot receive the programming of a particular network because either (1) the satellite operator is not offering local-into-local service in that market and the households cannot receive a signal of a threshold quality level over-the-air from the local network affiliate, or (2) there is no local affiliate offering the programming of that network. But current rules also include certain grandfathered exceptions to those eligibility restrictions; as a result, many households that are able to receive a network signal from a local broadcast station are allowed to continue to receive the distant signal of a broadcast station affiliated with the same network.

All four committee bills would retain these grandfathered exceptions and in some ways expand on them. On one hand, it may not be much of a burden on the satellite operators to continue to offer the distant signals to grandfathered subscribers if they would be using capacity on their broad beams and satellites to uplink and downlink those signals anyway. On the other hand, such grandfathering of the importation of distant signals (primarily from New York and Los Angeles) undermines the policy of fostering localism, even if only on the margin.

Section 339 of the Communications Act sets the rules for carriage of distant television station signals by satellite operators. Section 339(a)(2) addresses the replacement of distant signals with local signals, enumerating four different sets of rules: for grandfathered subscribers to analog distant signals, for other subscribers to analog distant signals, for households that are not subscribers at the time the legislation is enacted (future applicability), and for subscribers to distant digital signals. Both the House Commerce Committee bill (H.R. 2994) and the Senate Commerce Committee bill (S. 2764) would change some of these rules.

- Under both the House and the Senate Commerce bills, section 339(a)(2)(A), the current grandfathering provision that allows certain households that historically had been receiving distant network signals illegally and therefore otherwise would not have qualified to receive certain distant signals to continue to receive those signals, would be retained, with the language updated only to reflect the date of enactment of the new legislation and to eliminate reference to analog technology. All these households would continue to be grandfathered to receive distant network signals despite being able to receive the signals of local stations with the same network affiliation.
- The House Commerce bill would eliminate references to analog signals, but otherwise retain section 339(a)(2)(B), which currently addresses "rules for other [non-grandfathered] subscribers to analog signals." The revised provision in H.R. 2994, like the current provision, has two parts. Under the first part, if a household's satellite operator had made a local network station available on January 1, 2005 as part of local-into-local service, the operator would nonetheless be allowed to provide to that household a distant signal of a station affiliated with the same network if the operator had submitted to the television network no later than March 1, 2005 a list of households receiving that distant

signal that included that household. This continues the grandfathering of households that had been legally receiving a distant network signal and were allowed to continue to receive that signal when they also had access to the signal of a local broadcast station affiliated with the same network. Under the second part, if the satellite operator had not made available a local network station on January 1, 2005 as part of local-into-local service, the operator would be allowed to offer the household the distant network signal only if (a) the household seeks to subscribe to the distant signal before the date on which the operator begins to offer local-into-local service, and (b) the operator submits to each television network within 60 days of commencing such service the households subscribing to the distant signal. Here, a household that had legally sought to receive a distant network signal would be allowed to continue to receive that signal after the signal of a local broadcast station affiliated with the same network was available..

- The Senate Commerce bill would eliminate current section 339(a)(2)(B), "rules for other subscribers to analog signals," and thus, unlike the House Commerce bill, would not explicitly allow these two categories of households to continue to receive distant network signals when the signals of local broadcast stations affiliated with the same network were available.
- However, under both the House and Senate Commerce bills, a subscriber who was lawfully receiving from a satellite operator the distant signal of network station on the day before enactment of the new law would be allowed to receive both the distant signal and the local signal of the same network until the subscriber chooses to no longer receive the distant signal from the satellite operator (whether or not the subscriber elects to subscribe to local-into-local service). Thus, all the households legally receiving distant network signals under section 339(a)(2)(B) of current law would continue to be allowed to receive those distant signals under both the House Commerce and Senate Commerce bills.
- Under both the House Commerce bill and the Senate Commerce bill, a satellite operator would *not* be allowed to provide a distant network signal to a household that (1) is not a subscriber legally receiving that distant signal on the date of enactment of the new law, *and* (2) either (a) at the time the household seeks to receive the distant signal it resides in a local market where the satellite operator offers local-into-local service that includes a local station affiliated to the same network and the household can receive that local-into-local service, or (b) the household receives from the satellite operator the non-primary video stream of a multicasting local station that has the same network programming as the distant network station.
- Under the House Commerce bill, a subscriber would be eligible to receive a distant signal of a network station affiliated with the same network as a local station if the household is determined, based on a test conducted in accordance with the current model or any successor regulation based on an improved predictive model and on-location testing, not to be able receive the signal of the local station with an intensity that exceeds the standard. Any eligible subscriber who is a lawful subscriber for such a distant signal as of the date of enactment of the new legislation would be allowed to continue to receive that distant signal. This would appear to allow a household that currently fails to meet the signal intensity test for analog service for the signal of a local network station to be

grandfathered for the receipt of a distant network signal carrying the same network, even if it could receive the digital signal of the local network station.

- Under the Senate Commerce bill, a subscriber (1) whose household is not predicted by the new predictive model to receive a local network signal at sufficient intensity to be considered served, or (2) who is determined to be an unserved household by the definition in section 119(d)(10)(A) of the Copyright Act (which is based on the old analog signal quality measure), would be eligible to receive the distant signal of a broadcast station affiliated with the same network, subject to a modified testing and waiver process intended to improve on the existing process. This, too, appears to allow a household that does not meet the signal intensity test for analog service for the signal of a local network station to be grandfathered for the receipt of a distant network signal carrying the same network, even if it could receive the digital signal of the local network station.

Provisions in section 119 of the Copyright Act define "unserved households" and set the copyright rules that apply to the secondary transmission of distant signals to those unserved households. Both the House Judiciary Committee bill (H.R. 3570) and the Senate Judiciary Committee bill (S. 1670) would modify some of those provisions.

- The House Judiciary bill would modify the definition (and in so doing narrow the scope) of unserved households to take into account multicasting. If a local station is multicasting and is offering a second network's programming on one of its non-primary video streams, but a household cannot receive that non-primary video stream using a conventional, stationary, outdoor rooftop receiving antenna, then the household would be deemed unserved with respect to the network whose programming is being broadcast on that non-primary stream, but only if that non-primary stream was carried by the satellite carrier on July 1, 2009 and remains affiliated with the same network *or* if it exists on January 1, 2013 and remains affiliated with the same network.[42] That is, households would not be deemed served by network programming introduced on non-primary video streams between July 1, 2009 and January 1, 2013.
- The House Judiciary bill also would modify the definition of unserved household by adding a provision grandfathering, as unserved, any subscribing household that was legally receiving a distant network signal on the day before the enactment of the new legislation because at that time it was not able to receive a local signal for the same network—even if the household subsequently was able to receive the signal of the local network station.
- In contrast, although the Senate Judiciary bill would modify the current definition of unserved household to take into account the transition to digital service, it would not take into account multicasting. Nor would it grandfather all households that are unserved at the time the new legislation is enacted.

Just as section 339(a)(2) of the Communications Act has separate rules for four categories of subscribers when addressing the replacement of distant signals with local signals, section 119(a)(4) of the Copyright Act has separate rules for the same four categories of subscribers when addressing the statutory license where retransmission of distant signals is available into local

[42] The significance of this definitional change is addressed below in the discussion of "short markets."

markets: rules for grandfathered subscribers to analog signals, rules for other (non-grandfathered) subscribers to analog signals, rules for future applicability, and special rules for distant digital signals.

- The House Judiciary bill would eliminate references to analog signals, but otherwise retain the rules for grandfathered households receiving distant signals currently in section 119(a)(4)(A).
- The Senate Judiciary bill would eliminate section 119(a)(4)(A), covering grandfathered recipients of distant analog signals, but would include a provision stating that the applicability of the statutory license to unserved households, including those grandfathered households included in the definition of unserved households, remains unaffected.
- The House Judiciary bill would eliminate the provisions relating to non-grandfathered households receiving analog distant signals, households receiving digital distant signals, and households not yet receiving distant signals (future applicability), and create a new provision entitled "Rules for Other Subscribers." Under this provision, a statutory license would not apply to the satellite retransmission of a distant network station to a household that *either* (1) is not a subscriber lawfully receiving that distant signal as of the date of enactment of the new legislation, *or* (2) at the time the household seeks to subscribe to receive that distant signal, its satellite operator is offering local-into-local service that includes a local station affiliated to the same network and the household is able to receive that local-into-local service.
- The Senate Judiciary bill also would eliminate the provisions relating to non-grandfathered households receiving analog distant signals, households receiving digital distant signals, and households not yet receiving distant signals (future applicability), and create a new provision entitled "Future Applicability." Under this provision, however, the statutory license would not apply to the satellite retransmission of a distant network station to a household that *both* (1) is not a subscriber lawfully receiving that distant signal as of December 31, 2009, *and* (2) at the time household seeks to subscribe to receive that distant signal, its satellite operator is offering local-into-local service that includes a local station affiliated to the same network and the household is able receive that local-into-local service.
- It would appear that use of the statutory license would be more restricted under the House Judiciary bill than the Senate Judiciary bill, since households would be excluded if they met either criterion under the House bill but would be excluded only if they met both criteria under the Senate bill. But, as mentioned earlier, the House Judiciary bill would include such a broad definition of unserved households—in effect grandfathering all households deemed unserved at the time the new legislation is enacted—that in practice the difference between the bills with respect to this provision might not be significant.

Expanded Satellite Carriage of Low Power Television Stations

Low power television service was created by the FCC in the 1980s to serve small communities (rural or urban) with low cost, limited geographic range facilities that used available spectrum between full power stations. It is a "secondary service" that is not guaranteed protection from

interference or displacement by full service stations. Low power stations that produced at least two hours per week of local programming, maintained a production studio within their Grade B contour, and complied with many of the requirements placed on full service stations were given a one-time opportunity to obtain "Class A" status that gave them primary status, that is, protected their channel status.

Currently, no local low power station can demand carriage by the satellite operator serving its market area, even if that satellite operator is providing local-into-local service.[43] Satellite operators may retransmit the signals of low power stations only to subscribers within certain geographic limitations—to subscribers located within 20 miles of the station transmitter for network-affiliated stations located in the 50 largest markets, within 35 miles of the station transmitter for network-affiliated stations located in other markets, and within the same designated market area as non-network-affiliated stations.[44] Satellite operators have no copyright royalty obligation for retransmission of the low power station content within those same mileage limits; beyond those limits, satellite operators are subject to the statutory copyright license fees for distant signals outlined in section 119 of the Copyright Act.[45]

Some observers have argued that these rules unduly restrict the reach of low power stations. The House Judiciary Committee bill would eliminate the current geographic limitations on satellite retransmission, allowing a satellite operator to obtain a statutory copyright license under section 119 to retransmit the signals of a low power station to all subscribers who reside within the same designated market area as the station and who take local-into-local service. But, under the bill, the satellite operator would have to pay copyright license fees on the content for those subscribers in the DMA who are located beyond the mileage limits listed above. Under the Senate Judiciary Committee bill, satellite retransmission of low power television signals would be subject to the royalty-free statutory copyright license for local broadcast signals in section 122 of the Copyright Act, rather than the statutory license for distant signals, and the license would apply for all subscribers within the DMA. No low power station would be entitled to insist on carriage, even if the satellite operator were offering local-into-local service in the low power station's local market. Moving the satellite copyright license provision for low power signals from section 119 to section 122 would allow DISH Network, which currently is under court injunction prohibiting it from using the section 119 license, to retransmit the content on the signals of low power stations to its subscribers.

Satellite Carriage of Noncommercial Educational Television Stations

By statute, providers of direct broadcast satellite service (DirecTV and DISH Network) must reserve between 4% and 7% of their channel capacity exclusively for noncommercial programming of an educational or informational nature.[46] Although they are not specifically required to retransmit the signals of local broadcast television stations, they are allowed to do so on condition of carrying the primary signals of all local stations (and must obtain the retransmission consent of the commercial, but not of the noncommercial, stations). With the

[43] 47 U.S.C. § 338(a).

[44] 17 U.S.C. § 119(a)(15)(B).

[45] 17 U.S.C. § 119(a)(15)(D).

[46] 47 U.S.C. § 335(b)(1).

digital transition, broadcasters now are able to broadcast high definition signals and multiple digital programming streams over their licensed spectrum, and the public television stations are seeking to expand satellite carriage of their high definition and multicast signals.

The public broadcasters have reached retransmission consent agreements with DirecTV, the cable industry (through both the National Cable and Telecommunications Association representing large cable operators and the American Cable Association representing small cable operators), and Verizon for the retransmission of most of their high definition and multicast video streams. The agreement with DirecTV incorporated "creative solutions that recognized [DirecTV's] capacity limitations; ultimately ensuring that subscribers have access to the myriad of content and services provided by the local stations while accommodating their capacity concerns."[47]

The public broadcasters have not yet achieved retransmission agreement with DISH Network, but negotiations are continuing. The broadcasters prefer to obtain a private carriage agreement and state that DISH Network has been negotiating in good faith, but if an agreement is not successfully concluded they would support a government mandate within the context of satellite legislation.[48] Representative Eshoo has expressed concern about the slow pace of the negotiations, especially as they relate to the retransmission of high definition signals. The House Commerce Committee bill includes an amendment she offered that would require a satellite operator that (1) uses the section 122 copyright license to retransmit local broadcast signals, and (2) does not have a current carriage contract with the public television stations, to carry the high definition signals of the local noncommercial educational stations in at least 50% of the markets in which it offers local-into-local service by December 31, 2010, and in all such markets by December 31, 2011, and to carry the high definition signals of all the noncommercial stations in those markets for which it introduces new local-into-local service.

The Senate Commerce Committee bill would require any satellite carrier that has not yet negotiated a carriage contract covering at least 30 noncommercial educational television stations (that is, DISH Network) (1) by the end of 2011 to offer subscribers the high definition signals of qualified noncommercial educational television stations in all the local markets in which the carrier currently offers local television broadcasts in high definition (and by the end of 2010 to half of those markets) and (2) when initiating the provision of high definition local broadcast television in a market, to include the high definition signals of all qualified local television stations.

At the October 7, 2009, Senate Commerce subcommittee hearing, the public broadcasters identified another problem for which they seek a legislative solution. Most states have developed state public television networks intended to serve the entire state, but in 16 states those networks do not have public stations transmitting signals in each DMA in the state; under current law, satellite carriers are not allowed to use a royalty-free statutory copyright license to retransmit the signals of the in-state, but out-of-market public broadcasting stations to their subscribers in those DMAs.[49] Both the House Judiciary Committee bill (H.R. 3570) and the Senate Judiciary Committee bill (S. 1670) would modify the provisions for the royalty-free statutory copyright

[47] Written Testimony of Bill Acker, Director of Broadcasting and Technology, West Virginia Public Broadcasting, before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, Technology and the Internet, October 7, 2009, at p. 3.

[48] Ibid. at pp. 4-6.

[49] Ibid. at pp. 8-10.

license in section 122 of the Communications Act to allow, where there is a public educational network of three or more noncommercial educational broadcast stations in a state, a satellite operator to use the royalty-free license to retransmit the programming on those stations' signals to subscribers in any county in the state whose households are otherwise ineligible to receive retransmissions of those signals.

Satellite Carriage of State Public Affairs Networks

Cable franchise authorities are allowed, by law, to require cable operators to set aside some of their capacity for the carriage of public, educational, and governmental (PEG) programming. This programming is not broadcast to the public; it is sent directly to the cable system's head-end for retransmission. Satellite operators are not required to offer PEG programming, though they have the obligation to allocate between 4 and 7 percent of their channel capacity exclusively to noncommercial programming of an educational or informational nature. In order to foster PEG programming on cable systems, a number of states have created state public affairs networks that produce non-broadcast programming of state-wide interest. Although this programming is available to satellite operators, those operators are not widely offering it to subscribers.

The Senate Commerce Committee bill (S. 2764) includes a provision intended to encourage satellite operators to carry these state public affairs networks. Under the provision, a satellite carrier that provides the retransmission of the state public affairs networks of at least 15 different states, under reasonable prices, terms, and conditions, and does not delete any of the noncommercial educational or informational programming on those networks, would only have to allocate 3.5% of its channel capacity to the retransmission of educational or informational noncommercial programming, rather than 4%. This provision might encourage satellite operators to offer state public affairs networks to subscribers in orphan counties or in short markets.

Which Statutory Copyright License Should Be Applied to the Content on the Signals of Significantly Viewed and "Exception" Broadcast Stations

The current statutory framework is based on a distinction between local and distant signals. The signals of significantly viewed stations and the signals of in-state, out-of-market stations in the four states that satellite operators were allowed to import into orphan counties under the exceptions in SHVERA, originate outside the market into which they are imported—and thus clearly are distant signals. But since they are presumed to be providing programming of local or state-wide interest to counties in that market, arguably that content could be viewed as local to the counties into which they are imported.

Under current law, the signals of both the significantly viewed stations and the "exception" stations may be retransmitted by a satellite operator to subscribers in those counties identified as eligible in statute or by the FCC, using the distant signal statutory copyright license in section 119 (which provides that the content on the significantly viewed stations, but not on the exception stations, would be subject to the royalty-free copyright license in section 122). Such retransmission is subject to the satellite operator obtaining the retransmission consent of the

originating broadcaster, but not to the FCC's network non-duplication and syndicated exclusivity rules.[50]

The House Judiciary Committee bill would move satellite retransmission of significantly viewed stations from section 119 to section 122 in the Copyright Act. Since significantly viewed stations already are subject to the royalty-free license in section 122, there would be no change in copyright treatment. But it would allow DISH Network, which currently is under a court injunction prohibiting it from using the section 119 statutory copyright license to retransmit the content of broadcast signals, to use the section 122 statutory copyright license to do so.

The Senate Judiciary Committee bill would make satellite retransmission of both significantly viewed stations and the exception stations subject to the local signal statutory copyright license in section 122 rather than the distant signal statutory license in section 119, but would require the satellite operator to continue to pay the statutory copyright license fees under section 119 for the retransmission of the exception stations. Thus, this bill would have the same consequence as the House bill with respect to copyright payments made. But, by moving the copyright license for the exception stations to section 122, it would allow DISH Network to escape the court injunction on its use of the section 119 copyright license for the retransmission of the content on these exception stations as well as the significantly viewed stations.

Neither bill would affect the retransmission consent requirement or the exemption from the FCC's network non-duplication and syndicated exclusivity rules. The Senate Judiciary Committee bill includes a provision stating that the satellite operator would not be required to carry the significantly viewed stations or exception stations if they offered local-into-local service.

Allowable Signal Formats for the Retransmission of Significantly Viewed Stations

The satellite operators state that although both cable and satellite operators may offer significantly viewed stations, only satellite operators are subject to an "equivalent bandwidth" provision that, as interpreted by the FCC, requires the satellite operator to carry the signals of a significantly viewed station that is affiliated to the same network as a local station in the same format as that local station every moment of the day. Thus, for example, if the local station is not transmitting its programming in high definition format, the satellite carrier is not allowed to retransmit into the market the signals of the significantly viewed station in high definition format. According to satellite operators, this is infeasible and the requirement should be repealed.[51] Both the House Commerce Committee bill (H.R. 2994) and the Senate Commerce Committee bill (S. 2764) include provisions that would clarify that a significantly viewed signal may only be provided in high definition format if the satellite carrier is passing through all of the high definition programming of the corresponding local station in high definition format as well; if the local station is not providing programming in high definition format, then the satellite operator is not restricted from providing the significantly viewed station's signal in high definition format.

[50] See 47 U.S.C. §§ 340(a),(d),(e) and 341 and 17 U.S.C. §§ 119(a)(2)(C)(i)-(iv) and (a)(3).

[51] See, for example, the written testimony of Derek Chang, executive vice president, content strategy and development, DirecTV, Inc., before the House Committee on Energy and Commerce, Subcommittee on Communication Technology, and the Internet, June 16, 2009, at pp. 6-7.

Proposals to Eliminate the Statutory Licensing System for Satellite and Cable Retransmission of Distant Broadcast Signals

The United States Copyright Office has proposed that Congress abolish sections 111 and 119 of the Copyright Law, arguing that the statutory licensing systems created by these provisions result in lower payments to copyright holders than would be made if compensation were left to market negotiations.[52] According to the Copyright Office, the cable and satellite industries no longer are nascent entities in need of government subsidies, have substantial market power, and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. One possible approach would be to enact a statutory "trigger" mechanism, by which once a broadcast station successfully demonstrated that it had obtained the rights to negotiate for all the holders of copyrighted materials on its programming, so that a satellite carrier did not have to negotiate with multiple copyright holders, the statutory license for that station would sunset and the satellite operator would have to undertake private negotiations. This is strongly opposed by satellite operators, who question how voluntary licensing arrangements and sublicensing would work in practice.[53] Other parties argue that the current licensing systems are efficient and that the purpose of copyright law is to balance the potentially conflicting goals of fostering the dissemination of copyrighted material and allowing the copyright holder to be compensated by giving the copyright holder a *limited* monopoly over its material; they oppose a rule that allows the copyright holder to fully exploit its monopoly power to receive whatever the market would bear.[54]

The Senate Judiciary Committee bill would require the Copyright Office, after consultation with the FCC, to submit to the House and Senate Judiciary Committees, within one year, a report containing proposed mechanisms, methods, and recommendations on how to implement a phase-out of the current statutory license requirements in sections 111, 119, and 122 of the Copyright Act, including recommendations for legislative or administrative actions. In the interim, both the Senate Judiciary Committee bill and the House Judiciary Committee bill would reauthorize section 119 of the Copyright Act until December 31, 2014.

The Senate Commerce Committee bill would require the Comptroller General to prepare and submit a report within 12 months that analyzes and evaluates the changes to the cable and satellite carriage requirements in the Communications Act and in FCC rules that would be required if Congress implemented a phase-out of the current section 111, 119, and 122 statutory licensing requirements in the Copyright Act. It instructs the Comptroller General to consider the impact of such a phase-out on consumer prices and access to programming. The report should include any recommendations for legislative or administrative actions.

Retransmission of Programming for National Emergencies

In times of national emergency, the federal government may seek the widest possible dispersal of information to aid in monitoring and responding to the situation. But current copyright licensing

[52] *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, A Report of the Register of Copyrights, June 2008, at p. xiv.

[53] See, for example, the Written Testimony of Robert Gabrielli, senior vice president for program operations, DirecTV, Inc., before the Senate Committee on Commerce, Science, and Transportation, October 7, 2009, at p. 8.

[54] See, for example, the website of Public Knowledge at http://www.publicknowledge.org/issues/copyright.

rules may place restrictions on what content on broadcast signals cable and satellite operators may retransmit. For example, a satellite or cable operator may not have a copyright license to retransmit the content of an emergency broadcast from a distant station. The House Judiciary Committee bill therefore includes provisions that would modify sections 111 and 119 of the Copyright Act to permit cable and satellite operators to retransmit programming that would otherwise be unavailable under their copyright license, when deemed necessary by the Secretary of Homeland Security. The bill would require the Secretary of Homeland Security to issue regulations governing these retransmission requests and provide an annual report to Congress.

Providing Digital Service on a Single Dish

Under section 338(g) of the Communications Act, a satellite operator must provide to a subscriber the analog signals of all broadcast stations on a single roof-top dish. It may use a second dish for the provision of digital signals, but there is no requirement that all digital signals be provided on the same dish. Both the House Commerce Committee bill and the Senate Commerce Committee bill would modify section 338(g) to require a satellite operator, if it offers local-into-local service in a market, to provide to a subscriber the digital signals of all the local broadcast stations on a single dish.

Modification of the Methodology for Setting Copyright Royalty Rates

Various interested parties have proposed changes to the current methodology for setting copyright royalty rates for the satellite or cable retransmission of content on broadcast signals. With respect to copyright licenses for satellite operators, the House Judiciary Committee bill would, among other things, modify the procedure for determining royalty rates, allowing them to be set either by voluntary negotiations or by proceedings before the Copyright Royalty Judges; eliminate the automatic reductions in royalty rates prescribed in the current statute; modify the methodology for the annual cost of living adjustment to be applied by the Copyright Royalty Judges; and clarify that fees should be established for each digital stream of programming included in multicast transmission.

With respect to copyright licenses for cable operators, the House Judiciary Committee bill would, among other things, make alterations to the royalty structure, including setting initial rates that would slightly increase the royalty rate that cable operators must pay to content owners (to levels that have been negotiated by industry stakeholders); delay from 2010 to 2015 the date of the next inflation adjustment, to take into account statutory increases in royalty rates that would take place upon enactment of the bill; and update the definition of "distant signal equivalent" to reflect the digital transition and existence of multicasting when calculating royalty payments. It also would clarify that when a cable operator retransmits a distant broadcast signal to a service area comprised of multiple communities, in which some communities are permitted to receive that signal and other communities are prohibited to do so, the royalty calculation should not include payments for the households that are not allowed to receive the signal (the so-called "phantom signal" issue).

With respect to copyright licenses for satellite operators, the Senate Judiciary Committee bill would make a number of technical changes intended to simplify the process for setting royalty fees and would eliminate the 22.5% reduction in royalty fees currently set in statute. With respect

to copyright licenses for cable operators, the Senate Judiciary Committee bill would update and clarify the royalty calculation methodology, making the same structural changes and setting the same initial rates as in the House Judiciary Committee bill, delaying the date of the inflation adjustment to 2015, modifying treatment of distant signal equivalents to reflect multicasting, and directly addressing the phantom signal issue.

Modification of Copyright Administrative Procedures and Requirements

Various interested parties have proposed changes to the current administrative procedures and requirements relating to the various satellite and cable copyright licenses. With respect to copyright licenses for satellite operators, the House Judiciary Committee bill would, among other things, create a filing fee, to be set by the Copyright Office, to help recoup administrative costs of distributing royalty fees; grant an audit right for copyright holders to verify the statements of account and royalty fees submitted by satellite providers; and increase the penalty for violations of territorial restrictions in the 119 license and for individual violations of the 122 license terms by increasing the maximum damages from $5 to $250 per subscriber per month during which the violation occurred, and by increasing the maximum statutory damages for regional or large-scale violations (that do not trigger a permanent injunction) from $250,000 to $2.5 million.

With respect to copyright licenses for cable operators, the House Judiciary Committee bill would, among other things, create a filing fee, to be set by the Copyright Office, to help recoup the administrative costs of distributing royalty fees; grant an audit right for copyright holders to verify the statements of account and royalty fees submitted by the cable operators; and instruct the Register of Copyrights to issue regulations that structure the audit process to reflect the particular requirements of auditing gross receipts.

The Senate Judiciary Committee bill would make a number of technical changes to copyright administrative procedures, including making the same increases in the penalties for violations of the terms of the 119 and 122 licenses as are included in the House Judiciary Committee bill.

Severability

The Senate Commerce Committee bill (S. 2764) includes a "severability" provision stating that if any provision of the new law, amendment made by the new law, or applications of such provision or amendment is held to be unconstitutional, the remainder of the law, amendments, and applications would not be affected.

Differences in the Current Retransmission and Copyright Rules for Satellite and Cable

The four statutes that created and modified the regulatory framework for satellite sought to foster satellite provision of MVPD service as a competitive alternative to cable service and, as satellite became a viable competitor, to make the satellite and cable regulatory regimes more similar. But many differences remain. For example,

- A cable operator must abide by the retransmission consent/must carry elections of the broadcast stations located in its DMA and therefore must retransmit to its subscribers the primary signal of every local station (except for the signals of any stations that do not grant retransmission permission). While a satellite operator must retransmit the signal of each full power local broadcast station (except for the signals of any stations that do not grant retransmission permission) if it chooses to use the royalty-free statutory copyright license for the content on those signals, it can choose not to offer any local signals by not offering local-into-local service in a DMA.[55]
- Both satellite and cable operators are subject to restrictions on the distant signals that they can offer their subscribers. The primary regulatory mechanisms for restricting cable retransmission of distant signals are the FCC's network non-duplication and syndicated exclusivity rules that require the cable operator to black out distant programming that duplicates local programming. The primary mechanisms for restricting satellite retransmission are a complex array of rules that confine the retransmission of distant network signals to those subscribers deemed "unserved."
- Although both satellite and cable operators are subject to statutory copyright licensing for the retransmission of distant non-network station and network station signals, the license fees for satellite operators are set on a flat per subscriber, per distant station carried basis, while the license fees for cable operators are based on the cable operator's gross revenues.
- Cable operators are required to retransmit to their subscribers the signals of stations that are located outside the DMA in which the cable system is located but that are "significantly viewed" by those households in the cable service area that do not subscribe to any MVPD provider, if the significantly viewed station gives retransmission permission. In contrast, satellite operators are permitted, but not required, to retransmit to their subscribers the signals of significantly viewed stations, but if there is a local station with the same network affiliation as the significantly viewed station, the satellite operator also must retransmit that local station's signals; the satellite operator must obtain the retransmission consent of the significantly viewed station (though such consent is not required if there is no local station affiliated to the same network as the significantly viewed station).

Table 1 compares some key signal retransmission and copyright provisions for satellite and cable to identify similarities and differences.[56] It is noteworthy that, although the satellite and cable carriage provisions are found in the Communications Act and the satellite and cable copyright provisions are found in the Copyright Act, several of these provisions—both in the Communications Act covering carriage and in the Copyright Act covering a statutory copyright

[55] It would appear that a satellite operator could selectively offer local broadcast signals if it negotiated a copyright license for the content on those signals outside the royalty-free provisions in section 122 of the Copyright Act, but it is unlikely that a satellite operator would ever have the incentive to do this since it would then face the costs of the license fees and of negotiating with potentially multiple copyright holders, and would have to employ a spot beam to uplink and downlink the limited number of local broadcast signals it chose to carry.

[56] The table does not present an exhaustive list of retransmission and copyright rules. Nor does it present the detailed eligibility requirements for a subscriber to be considered "unserved"; the eligibility rules are replete with exceptions and many pages long.

license—do not stand on their own, but rather are contingent either on a party meeting a requirement in a different act or meeting a requirement of the FCC.[57]

Table 1. Current Retransmission and Copyright Rules for Satellite and Cable Operators

Issue	Satellite Operators	Cable Operators
Local Signals: Retransmission	A satellite operator is allowed, but not required, to retransmit to its subscribers the signals of broadcast television stations in their local market (the DMA in which the subscriber is located); if a satellite operator chooses to offer such "local-into-local" service and use the royalty-free copyright license provision in section 122 of the Copyright Act for the content on those local broadcast signals, it must provide the primary signals of all the full-power stations in that local market, subject to obtaining local station permission. (47 U.S.C. 338(a)(1)) If the signals of two commercial stations in the DMA are substantially duplicative, the satellite operator need not carry both signals, unless they originate in different states. (47 U.S.C. 338(c)) The satellite operator may include in its local-into-local service the signals of local low power stations. (47 U.S.C. 338(a)(3)) A satellite operator that chooses to offer its subscribers the signals of some but not all the local broadcast signals in a market could do so by negotiating copyright licenses for the content on the signals it carried, but this is unlikely to be a viable option.	A cable operator is required to retransmit to its subscribers the primary signals of all the full-power commercial broadcast television stations, qualified noncommercial educational television stations, and qualified low-power television stations located in the DMA in which the cable operator is located, up to a certain percentage of its capacity, and subject to obtaining local station permission; a cable operator may retransmit the signals of other (non-qualified noncommercial and low power stations) local stations, subject to obtaining the permission of those stations. (47 U.S.C. 534(a) and (b) and 535(a) and (b) and 325(b))
Local Signals: Copyright	Secondary transmission of a local broadcast signal by a satellite operator is subject to statutory copyright licensing with no royalty fee, if the satellite operator is in compliance with the FCC's signal carriage rules. (17 U.S.C. 122(a) and (c))	Secondary transmission of a local broadcast signal by a cable operator is not considered an infringement of copyright. (17 U.S.C. 111(b) and 47 U.S.C. 534(a) and (b) and 535(a) and (b))

[57] Thus section 339(a)(1)(A) of the Communications Act states: "Subject to section 119 of title 17, United States Code [the Copyright Act], any satellite carrier shall be permitted to provide the signals of no more than two network stations in a single day for each television network to any household not located within the local markets of those network stations." Similarly, sections 111(b)(1), (2), and (3) of the Copyright Act state it is not an infringement of copyright if (1) the primary transmission is made by a broadcast station licensed by the FCC; and (2) the carriage of the signals comprising the secondary transmission is required under the rules of the FCC; and (3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter. A cable provider that meets these three requirements then qualifies for a royalty-free copyright license for the retransmission of local broadcast signals. Also, section 338(a)(1) of the Communications Act requires those satellite operators who retransmit to their subscribers the signals of local broadcast station using the royalty-free copyright license in section 122 of the Copyright Act to carry upon request the signals of all television broadcast stations located within that local market. In turn, section 122(a)(2) of the Copyright Act makes the royalty-free copyright license available only if the satellite operator is in compliance with the broadcast signal carriage rules, regulations, and authorizations of the FCC.

Issue	Satellite Operators	Cable Operators
Distant Signals: Retransmission	A satellite operator is allowed to retransmit (1) the signals of distant non-network stations (both "nationally distributed superstations" and other independent stations) to all of its subscribers, (2) the signals of distant "significantly viewed" stations to subscribers located in the markets for which those stations qualify as significantly viewed, and (3) the signals of up to two distant stations affiliated with a network, to that subset of subscribers who are deemed "unserved" by any local affiliate of that network—subscribers who cannot receive the signals of a local network-affiliated station because either (a) the satellite operator does not offer local-into-local service in the local market and the subscribers are located too far from the transmitter to receive signals of a certain quality over-the-air, or (b) the network does not have a local network-affiliated station in their market; a satellite operator also may retransmit distant network signals in a small number of grandfathered situations in which subscribers who do have access to local-into-local service continue to be eligible to receive distant signals from their satellite operator. (47 U.S.C. 339(a) and (c) and 340(b)(3)) A satellite operator does not need to obtain consent to retransmit the signal of a nationally distributed superstation if it complies with the FCC's network non-duplication, syndicated exclusivity, and sports blackout rules. (47 U.S.C. 325(b)(2)(B)) To retransmit the signals of a distant network station to "unserved" subscribers, a satellite operator does not need to obtain the consent of that distant network station nor comply with the FCC's network non-duplication and syndicated exclusivity rules. (47 U.S.C. 325(b)((2)(C) and 340(e)(2)) To retransmit the signals of a significantly viewed station, a satellite operator must obtain the retransmission consent of the station but does not have to comply with the FCC's network non-duplication and syndicated exclusivity rules. (47 U.S.C. 340(d)(2) and 340(e)(1)) Where a satellite operator offers local-into-local service, it may retransmit the signals of significantly viewed stations only to those subscribers who take local-into-local service. (47 U.S.C. 340(b)(1) and (2)) An MVPD does not need to obtain consent to retransmit the signal of a noncommercial television broadcast station. (47 U.S.C. 325(b)(2)(A)) Depending on the interpretation of 47 U.S.C. 339(a)(1)(A), a satellite provider may or many not be allowed to retransmit distant signals other than those listed above by negotiating a license with the copyright holders of the content on those distant signals.[a]	A cable operator is allowed to retransmit the signals of all distant broadcast television station signals subject to complying with the FCC's network non-duplication, syndicated exclusivity, and sports blackout rules and subject to obtaining the consent of those distant stations (except that cable operators do not need to obtain retransmission consent from nationally distributed superstations). (47 U.S.C. 325(b)(1) and 325(b)(2)(D) and 47 CFR 76.92-76.111) An MVPD does not need to obtain consent to retransmit the signal of a noncommercial television broadcast station. (47 U.S.C. 325(b)(2)(A))

Issue	Satellite Operators	Cable Operators
Distant Signals: Copyright	For the three categories of distant signals identified above in the "Distant Signals: Distribution" cell in this table, there is a statutory copyright license available to a satellite operator for the public performance of the copyrighted works on the broadcast signals: there is a royalty-free license for the public performance of the copyrighted works on the signals of significantly viewed stations; for the signals of distant network stations and distant non-network stations there are separate royalty fees calculated on a flat per subscriber, per distant station carried basis; these royalty fees also differ stations for analog and digital signals. (17 U.S.C. 119(a)(1), (2), and (3)) A satellite operator always may negotiate a copyright license agreement, outside the statutory copyright license available in section 119 of the Copyright Act, with the copyright holders of the content on a distant broadcast signal, but depending on the interpretation of section 339(a)(1)(A) of the Communications Act, the satellite operator may or may not be allowed to retransmit that distant signal.[a]	A cable operator must pay a statutory copyright license royalty fee for the public performance of the copyrighted works on all distant signals carried except those of significantly viewed stations. Royalty fees are based on a percentage of the cable operator's gross revenues. (17 U.S.C. 111(d))
Exceptions	Satellite operators are allowed to retransmit, to subscribers located in certain counties or states (in Vermont, New Hampshire, Oregon, and Mississippi) that are assigned to DMAs whose local broadcast stations are in another state, certain in-state but non-local market signals; retransmission of these distant signals is subject to obtaining the permission of the stations and making royalty payments under the compulsory copyright license for the secondary transmission of distant broadcast signals, but not subject to meeting the requirements of the network non-duplication and syndicated exclusivity rules. (17 U.S.C. 119(a)(2)(C)(i)-(iv) and 47 U.S.C. 341) The geographic areas in Alaska that are not in any Nielsen DMA are assigned by satellite carriers to one of the DMAs in that state in order to allow the carriers to offer subscribers in those areas the local-into-local service for the DMA to which they are assigned. (17 U.S.C. 19(a)(16)) Satellite carriers with more than 5,000,000 subscribers who offer service in Alaska/Hawaii must retransmit to subscribers in those states all of the analog broadcast signals originating in Alaska/ Hawaii; these signals must be made available to substantially all of the subscribers in their DMAs and the signals from at least one of the local markets in the state must be made available to substantially all of the subscribers in the state not located in a DMA; the cost to subscribers of such transmissions shall not exceed the cost of retransmission of local television stations in other states. (47 U.S.C. 338(a)(4))	A cable operator may elect to retransmit to subscribers in Umatilla, Grant, Malheur, and Wallowa counties in Oregon the broadcast signals of any television broadcast station in Oregon that any cable operator was retransmitting to subscribers in those four counties on January 1, 2004. (47 U.S.C. 341)

Source: Statutory and regulatory citations are provided within the table.

a. The possible interpretations of section 339(a)(1)(A) of the Communications Act, and the implications of those interpretations, are presented in the next section of this report.

Providing the Signals of Non-Local but In-State Stations to Orphan Counties

The Overall Issue

Under current statutes and rules, 43 states have one or more counties that are assigned to local markets for which the principal city (from which all or most of the local television signals originate) is outside their state. Satellite (and, in many situations, cable) subscribers in these orphan counties may not be receiving signals from in-state broadcast stations and may not be receiving news, sports, and public affairs programming of interest in their state, though (as will be discussed below) in some cases they are receiving such programming. Many households and local and state elected officials in counties that currently are not being well served have contacted their Members of Congress to request that satellite operators be allowed (and cable operators, who currently are allowed, be encouraged) to retransmit to subscribers in the counties the signals of broadcast stations in in-state, but non-local, markets.

Proponents of the retransmission of non-local but in-state broadcast signals to MVPD subscribers located in orphan counties cite the following programming benefits:

- **Sports programming**—Many subscribers have a strong allegiance to the sports teams of their home state universities, whose games are more likely to be broadcast by in-state broadcast stations than by stations located in another state. Similarly, many subscribers have a strong allegiance to professional sports teams located in the state, whose games are more likely to be broadcast by in-state broadcast stations than by stations located in another state.[58] Stations located in bordering states are especially unlikely to broadcast these sporting events of interest to the subscribers in orphan counties if the state universities in those bordering states belong to different sports conferences or if those bordering states have their own professional sports teams. There is ample market evidence, in the form of cable sports networks being able to command by far the highest per subscriber fees, that many MVPD subscribers highly value sports programming and therefore allowing MVPDs to offer non-local but in-state sports programming would increase the well-being of those subscribers.
- **Weather and related public safety programming**—There tend to be prevailing weather patterns in terms of the general direction that storms, tornadoes, and other inclement weather take, for example from west to east or from south to north. Public safety is fostered if MVPD subscribers are able to receive the broadcast signals of stations that experience and report on the same weather patterns the subscribers experience. Subscribers located in orphan counties that do not experience the same weather patterns as the principal city in which their local stations are located would benefit from receiving weather information provided by non-local but in-state stations that do experience and report on the

[58] Some professional sports leagues divide the country into geographic zones for which particular teams are given the rights to be the exclusive team to have their games broadcast. Those geographic zones are more likely to follow the boundaries of DMAs than of states.

same weather patterns. Typically, however, orphan counties are located closer to the principal city of their own DMA than to the principal city of any in-state DMA and therefore the weather programming of their local broadcast stations generally is more relevant to orphan county households.

- **State news programming**—Typically, broadcast television stations provide more local news than state news. Frequently, however, orphan counties are located quite far away from both the local stations in their DMAs and from the closest non-local, but in-state stations. As a result, neither the local nor the in-state stations are likely to provide much coverage of local news in those orphan counties. Television stations, however, typically do provide some news coverage of state-wide elections and other state-wide issues. Proponents of the retransmission of in-state broadcast signals to orphan counties claim that the public interest, as well as the private interest of subscribers, would benefit from the retransmission of such state news programming to households in orphan counties.
- **State and local political advertising**—Candidates for elective office at both the state and local level often try to communicate with voters through broadcast television advertising. To the extent that candidates, to reach households located in orphan counties, must purchase advertising time on television stations originating in other states and that primarily reach viewers who live in those other states, the efficiency of political advertising is reduced and the cost increased. If MVPDs could retransmit to subscribers located in orphan counties the signals of in-state broadcast stations, political candidates might be able to save in advertising purchases made to out-of-state stations and still reach households located in those counties.

Broadcasters respond that the potential public interest gains from allowing the retransmission of distant in-state programming would be outweighed by decreases in the quality and quantity of local programming local stations could offer. They say they would be financially harmed by the importation of the distant signals, unless perhaps the retransmitted programming was limited to locally-produced news programming.[59] Broadcast network affiliates claim that, in addition to broadcast advertising revenues falling, MVPDs could play hardball in their retransmission negotiations with the local stations, fail to reach a retransmission consent agreement, and then simply carry the signals of a distant in-state network affiliate at a lower price. With lower (or totally lost) retransmission consent revenues, broadcasters argue, they would have to cut back on local news programming, which is expensive to produce.

The actual impact—both on public policy objectives such as localism and on local broadcast station revenues—of allowing MVPDs to retransmit in-state signals to their subscribers in orphan counties is likely to be sensitive to the specific new retransmission and copyright rules that are

[59] See, for example, the written statement of David K. Rehr, president and CEO, the National Association of Broadcasters, submitted to the United States House of Representatives Committee on the Judiciary, "Hearing on Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses," February 25, 2009, and the written statement of Paul A. Karpowicz, president, Meredith Broadcasting Group, on behalf of the Television Board of the National Association of Broadcasters, before the Subcommittee on Communications, Technology, and the Internet, House Committee on Energy and Commerce, "Hearing on Discussion Draft of Legislation to Reauthorize the Satellite Home Viewer Act," June 16, 2009.

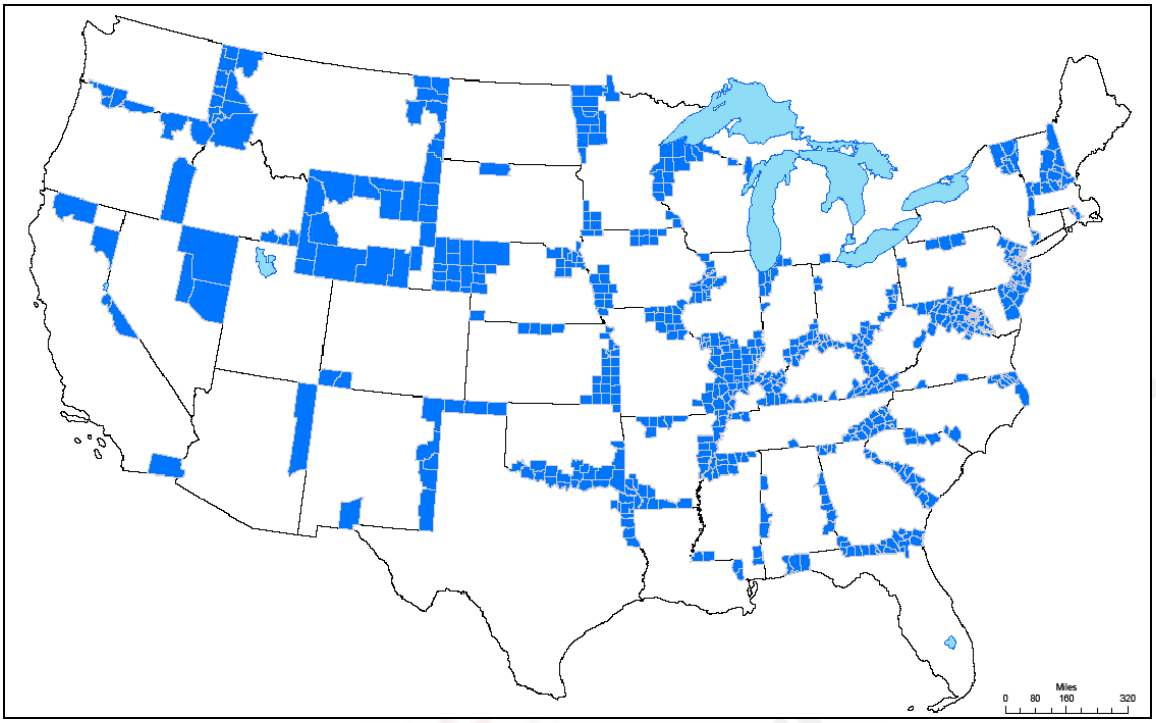
adopted. Moreover, whatever those rules may be, the actual impact is likely to vary significantly from market to market.

There is no single model orphan county. Allowing MVPDs to retransmit distant in-state signals to a sparsely populated rural county that is geographically distant from both its local broadcast stations and from the distant in-state stations (for example, to Montezuma and La Plata counties in southwestern Colorado, which are assigned to the Albuquerque, NM DMA) will likely have a different market impact than allowing MVPDs to retransmit distant in-state signals to a highly urbanized county that is geographically close to its local stations, but across the state line (for example, to Dona Ana county in southern New Mexico, which includes the city of Las Cruces and is just across the state line from, but assigned to the DMA of, El Paso, TX). It is unlikely that the Albuquerque broadcast stations, which have 677,740 television households in their DMA, provide much programming (or advertising) that addresses the local needs and interests of the 27,540 television households in Montezuma and La Plata counties.[60] It also is unlikely that the distant in-state stations in Denver would provide programming or advertising that addresses the local needs and interests (including weather information) of households in Montezuma and La Plata counties, though those stations are likely to provide some Colorado sports, news, and political programming of state-wide interest. In contrast, the El Paso broadcast stations, which have 302,470 television households in their DMA, may well provide programming and advertising that addresses the local needs and interests of the 68,330 television households in Dona Ana county. The in-state stations in Albuquerque are unlikely to provide local programming (including weather reports or local advertising) of interest to the households in Dona Ana county, but they are likely to provide some New Mexico sports, news, and political programming of state-wide interest.

The **Appendix** to this report provides detailed information on orphan counties, listing, for each state, the number of television households in the state, the DMAs in the state for which the primary city is outside the state, each orphan county in those DMAs, the number of television households in each orphan county, the percentage of television households in the state that are located in orphan counties, and the full power commercial and public/educational television stations located in the orphan counties (despite the principal city of the DMA being located in another state). **Figure 1** is a map of the continental United States that shows all of the orphan counties. (There are no orphan counties in Alaska or Hawaii, although some portions of Alaska are outside any DMA.) The detailed data and map, in conjunction, help illustrate on one hand how ubiquitous orphan counties are and on the other hand how heterogeneous orphan counties are, with television households in some counties (but not in others) having reasonable access to programming of local and state-wide interest.

[60] Statistics in this paragraph are from *Nielsen DMA Market Atlas*, Nielsen Media Research, 2008, reproduced in Warren Communications, *Television and Cable Factbook 2009*, Stations Volume 2.

Figure 1. Counties Assigned to Designated Market Areas for Which the Primary City Is Outside the State ("Orphan Counties"), 2009



Sources: Prepared by CRS based on Designated Market Areas defined by Nielsen Media Research, as reported in Television & Cable Factbook 2009, Warren Communications; Census TIGER/Line boundaries, 2008.

Consider, for example, the Washington, DC DMA. By definition, all the counties in the DMA other than Washington, DC itself are orphan counties, since the principal city is outside their state borders. But the access of television households in those counties to programs of state and local interest varies significantly. The Washington, DC television stations tend to offer news, weather, and sports programming of both local and state-wide interest to households in close-in suburban Maryland and Virginia counties, such as Fairfax and Arlington counties in Virginia and Montgomery and Prince George's counties in Maryland. In addition, WFDC is a Univision affiliate located in Arlington County and WPXW is an Ion affiliate located in close-in Manassas, VA. But the Washington, DC DMA also includes counties far more distant from Washington, DC—such as Fulton County, PA, seven counties in West Virginia (Grant, Mineral, Hardy, Hampshire, Morgan, Berkeley, and Jefferson), Allegheny and Washington counties in Maryland, and Shenandoah and Page counties in Virginia—for which the Washington, DC stations do not provide programming of local interest (nor, in the case of the West Virginia and Pennsylvania counties, programming of state-wide interest). But these distant counties may be served by smaller broadcast stations located in the periphery of the Washington, DC DMA. For example, WHAG-TV is an NBC-affiliated station located in Hagerstown, MD, and WJAL is an independent station located in Hagerstown, and these stations may provide programming of local interest to counties in Maryland, West Virginia, and Pennsylvania that are located in the northwestern portion of the Washington, DC DMA. In addition, some out-of-market stations have been designated as significantly viewed in these distant counties and satellite and cable operators may retransmit them to households in those counties. For example, WJAC, an NBC affiliate in Johnstown, PA, and WTAJ, a CBS affiliate in Altoona, PA, have been designated significantly viewed stations in Fulton County, PA; WHSV, an ABC affiliate in Harrisonburg, VA, and WTVR, a CBS affiliate in Richmond, VA, have been designated significantly viewed stations in Page

County, VA.[61] At the same time, the most current FCC list of significantly viewed counties does not include any significantly viewed stations located in West Virginia for the seven West Virginia counties in the Washington, DC DMA.[62]

It is difficult to project what the impact on the retransmission consent revenues of local broadcasters would be from the importation of in-state signals into orphan counties, or if that impact would be greater in rural or urban orphan counties. There are potentially conflicting market forces at work. For example, on one hand, since the populations of Montezuma and La Plata counties are small, and the local programming of the Albuquerque stations is not likely to be responsive to the needs or interests of, or highly demanded by, the residents of those counties, it is unlikely that the retransmission consent revenues that Albuquerque stations receive from MVPDs serving Montezuma and La Plata counties represent a significant portion of those stations' revenue streams. In contrast, because the local programming of the El Paso stations is likely to be responsive to the needs and interests of the residents of Dona Ana county, which has a substantial population, it is possible that the retransmission consent revenues that El Paso stations receive from MVPDs serving Don Ana county do represent a significant portion of those stations' revenue streams. On the other hand, given that small cable companies serving rural communities (such as those serving Montezuma and La Plata counties) tend to be in less favorable retransmission consent negotiating positions than larger cable companies serving more populous areas (such as Comcast, which serves Las Cruces, the major city in Dona Ana county), on a per subscriber basis more retransmission consent revenues may be generated in more rural counties.

Currently, cable operators may retransmit to their subscribers in orphan counties the signals of any non-local station located in the state, subject to meeting the FCC's network non-duplication, syndicated exclusivity, and sports blackout rules, obtaining the permission of those distant stations, and paying a copyright royalty fee. In many cases, the in-state stations are prohibited from granting retransmission consent by provisions in their network-affiliate contracts—though data are not available to shed light on how common such contractual prohibitions are or how often (if at all) cable companies have sought such retransmission consent. In his written testimony submitted for the June 16, 2009, House hearing, Preston Padden of the Walt Disney Company identified several cable operators that have negotiated copyright agreements to import the local news programming of broadcast stations located in another market.[63] But this does not appear to be common, suggesting that retransmitting only a broadcast station's locally-produced news programming may not be a particularly attractive option for cable operators.

Currently, satellite operators explicitly have the authority to retransmit the in-state signals of stations that the FCC has determined are "significantly viewed" and of stations affiliated with networks for which subscribers in the orphan county cannot receive the over-the-air signal of a local network-affiliated station; they must pay a copyright fee for retransmitting the signals of

[61] The FCC's current list of significantly viewed stations, based on FCC actions through February 19, 2009, is available at http://www.fcc.gov/mb/significantlyviewedstations022509.pdf. The listing is an update of the initial list adopted on November 2, 2005, *In the Matter of Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, Federal Communications Commission, MB Docket No. 05-49, Report and Order, Appendix C, "Significantly Viewed List," released November 3, 2005.

[62] *Ibid.*

[63] Written Testimony of Preston R. Padden, executive vice president, worldwide government relations, the Walt Disney Company, before the Subcommittee on Communications, Technology, and the Internet, House Committee on Energy and Commerce, "Hearing on Discussion Draft of Legislation to Reauthorize the Satellite Home Viewer Act," June 16, 2009, at p. 6.

network-affiliated stations, but not significantly viewed stations. It may be open to interpretation whether the language in section 339(a)(1) of the Communications Act relating to which distant signals a satellite carrier may carry allows a satellite operator to retransmit to orphan counties the programming (including local news programming) of any *other* in-state but non-local broadcast stations. If they are allowed to do so, they would not be allowed to use the statutory copyright license provided in section 119 of the Copyright Act, but rather would have to negotiate a copyright agreement with all of the relevant program copyright holders.[64] It does not appear that any satellite operator currently is retransmitting programming to subscribers in orphan counties through a negotiated copyright agreement.

Regulatory Parameters Available to Address Orphan Counties

If Congress decides to foster MVPD retransmission of programming of state-wide interest to subscribers in orphan counties, it would have a number of regulatory parameters available in considering modification of current retransmission and copyright rules. These include:

- **which in-state stations' signals the MVPDs may retransmit:** The more non-local, but in-state stations that an MVPD may negotiate with to retransmit their signals to subscribers in orphan counties, the greater the potential availability of programming of state-wide interest to those subscribers (though many of these stations might not be airing programming of local interest in the orphan counties). At the same time, the greater the number of potential broadcast signals available to the MVPD, the greater the opportunity for the MVPD to take a hard line when negotiating retransmission consent with local broadcasters. The broadest option would allow MVPDs to retransmit to their subscribers in orphan counties the signals of *any* station located in the state;[65] this would maximize both the potential availability of programming of state-wide interest and the potential negative impact on local broadcasters. A second option would allow MVPDs to retransmit to their subscribers in orphan counties the signals of any station located in the state capital.[66] This option appears to implicitly assume that the broadcast stations in state capitals are most likely to carry news and public affairs programming of state-wide interest. Critics have indicated that state capitals may be located very far from orphan counties, and thus be unlikely to provide programming of local interest, such as weather forecasts, to households in the counties. They have proposed that if the retransmission of non-local in-state signals is allowed at all, it should be limited to the signals of stations that are in markets adjacent to the orphan counties. H.R. 3216 would limit retransmission to the signals of stations in markets adjacent to (or, if there were no such markets, the market closest to) orphan counties; a broadcast station's signals could be retransmitted within an adjacent DMA, but (1) only if that adjacent DMA covers more than one state, (2) only to counties in the DMA that

[64] As explained below, the House Commerce Committee bill includes a provision stating that nothing in the law would limit the ability of a satellite operator and the copyright holders (or their licensees) for the content on a broadcast signal from negotiating contractual arrangements for the retransmission of the programming on that signal.

[65] For example, H.R. 505, introduced by Representative Boren, would allow satellite operators to retransmit to any subscriber in the state of Oklahoma the signals of any broadcast station located in the state.

[66] In effect, S. 771 and H.R. 1860 would do this by classifying any station in the DMA of a state capital is significantly viewed for purposes of carriage and retransmission.

are within the same state as the broadcast station, and (3) only if those counties have no home-state affiliate of the same network.[67]

- **whether to limit the programming on those stations that can be retransmitted by applying the FCC's network non-duplication, syndicated exclusivity, and sports blackout rules to such retransmission**: Whichever in-state stations' signals may be retransmitted, MVPDs will find it less attractive to retransmit these signals if such retransmission is subject to the FCC's network non-duplication and syndicated exclusivity rules, which allow the local station to require the MVPD to black out all network and syndicated programming on the retransmitted signal even if the local station was not being carried by the MVPD.[68] Although these rules only apply within a 35- to 55-mile radius of the broadcast station, and many orphan counties are farther away from the local broadcast stations than that, many counties, or parts thereof, do lie within those mileage limits.
- **whether there should be any modifications to the retransmission consent requirements in Section 325 of the Communications Act to explicitly address the retransmission of signals into orphan counties**: Since most broadcasters oppose the retransmission of distant signals into their markets, they may not be willing to grant MVPDs permission to retransmit their signals to other markets. Under current rules, MVPD retransmission of non-local signals is usually, but not always, subject to obtaining the retransmission consent of the broadcast station. Thus, even if an MVPD wants to retransmit a non-local, in-state signal to its subscribers in an orphan county it may not be able to do so. One of the provisions in the Four Corners Television Access Act of 2009 would exempt MVPDs from the requirement to obtain retransmission consent from in-state broadcasters in order to retransmit their signals to the two orphan counties. By contrast, under H.R. 3216, MVPDs would be required to obtain retransmission consent from in-state broadcast stations in order to retransmit their signals to orphan counties—but this retransmission consent requirement would not apply if the station is prohibited, under provisions of its network-affiliate contract, from granting retransmission consent to MVPDs to retransmit their signals beyond their local markets. At the same time, under H.R. 3216 a local broadcast station could not attempt to block MVPDs from retransmitting non-local, in-state station signals into orphan counties by conditioning MVPD retransmission of its own signal on the MVPD not retransmitting non-local, in-state signals.

[67] Under H.R. 3216, an "adjacent market" would be defined as any local market adjacent to, and partially but not entirely in the same state as, the local market in which a station's community of license is located; an "adjacent underserved county" would be defined as a county within the station's adjacent market that is both (a) located in the same state as the station's community of license, and (b) not within the local market of any other station that is both affiliated with the same network and located in the same state as such other station's community of license. In addition, a county that is in a local market containing no in-state network stations, but which is not located in the adjacent market of any in-state network station, would be considered to be in the adjacent market of the nearest local market located in whole or in part within the state in which the county is located.

[68] H.R. 3216 explicitly would not make the retransmission of in-state signals into adjacent underserved counties subject to the FCC's network non-duplication and syndicated exclusivity requirements. It is worth noting that, with respect to the four state-specific exceptions in SHVERA, which allowed satellite providers to retransmit to their subscribers the signals of certain non-local, in-state broadcast stations in New Hampshire, Vermont, Mississippi, and Oregon, the statute does not explicitly require the satellite operators to abide by the FCC's network non-duplication and syndicated exclusivity rules and the FCC, using its discretion, chose not to apply those rules.

- **whether existing provisions in network-affiliate contracts that prohibit affiliates from granting retransmission rights to their signals outside their local markets should be pre-empted to ensure that in-state programming is available to subscribers in orphan counties**: Although systematic data are not available, it appears that many current network-affiliate contracts include provisions that prohibit the affiliates from granting MVPDs permission to retransmit their signals beyond the local market. These contractual provisions could render ineffective rules allowing MVPDs to retransmit in-state signals, if such retransmission were contingent on obtaining the retransmission consent of the broadcast station. If it is the intention of Congress to maximize the likelihood that residents of orphan counties who subscribe to MVPD service receive non-local, in-state broadcast signals, it may be necessary to pre-empt the restrictive provisions in the network-affiliate contracts. Such action would, however, represent intrusive government intervention into the contractual relationship between private parties. One possible approach would be to exempt MVPDs that want to retransmit in-state signals to their orphan county subscribers from the requirement that they obtain the retransmission consent of the broadcaster. This might or might not be effective, depending on the exact wording of the relevant provisions in the network-affiliate contracts. If the provisions only prohibit stations from granting retransmission consent, but do not restrict the stations from allowing the signals to be retransmitted, then it might be sufficient to add a provision to section 325(b)(2) of the Communications Act, which lists the exceptions to the retransmission consent requirements. This, in effect, is what H.R. 3216 would do; it would modify section 325(b)(2) to not require the MVPD to obtain the retransmission consent of the in-state, out-of-market broadcast station whose signal it wanted to retransmit into the orphan county if the station were under a legal obligation restricting its ability to grant retransmission consent. If the provisions in the network-affiliate contract include broader restrictions, however, it might be necessary to prohibit certain contractual relationships. There is not sufficient publicly available information on those contractual provisions to be certain what statutory language would be needed to pre-empt current restrictive provisions.
- **whether MVPDs should be required to retransmit the signals of all local broadcast stations in an orphan county as a precondition for the right to retransmit non-local, in-state signals to subscribers in the orphan county**: One way to constrain the negotiating leverage that an MVPD could gain if it were allowed to retransmit the signals of non-local, in-state stations to its orphan county subscribers might be to condition such retransmission on the MVPD reaching retransmission consent with, and carrying the signals of, all the local stations in the county. H.R. 3216 includes this condition.
- **what the copyright treatment should be for the retransmission of distant in-state signals to subscribers in orphan counties**: The greater the copyright license fee that an MVPD must pay to retransmit non-local, in-state signals to orphan county subscribers, the less the incentive for the MVPD to retransmit those signals. Currently, satellite and cable providers must pay royalty fees for the retransmission of superstation and distant network signals, but no fee for the retransmission of the signals of significantly viewed stations. H.R. 3216 would allow both satellite and cable operators to retransmit non-local, in-state signals to orphan county subscribers on a royalty-free basis. The Four Corners Television

Access Act of 2009 would deem each television broadcast station broadcasting in the DMA of a state capital as a "significantly viewed" station. Because under current rules the signals of significantly viewed stations can be retransmitted on a royalty free basis, MVPDs would be allowed to retransmit the Denver stations to the two orphan counties in Colorado without making copyright payments.

- **whether it should be permissive or mandatory for MVPDs serving orphan counties to retransmit the signals of non-local, in-state stations to subscribers in those counties**: Even if in-state broadcast stations gave their permission for an MVPD to retransmit their signals to subscribers in orphan counties, the MVPD might not have the incentive to retransmit those signals if it did not perceive sufficient demand to justify using some of its (satellite or cable) capacity to carry those signals. On one hand, if an in-state broadcast station is carrying popular sports programming that the MVPD's subscribers are likely to demand—such as the games of an in-state university or in-state professional team—the MVPD is very likely to want to retransmit that station's signals because carrying the sports programming might be a significant marketing tool. Indeed, in a market with more than one MVPD provider, if one provider in the market is able to retransmit popular sports programming that some significant portion of households in the market view as "must have" programming, then other MVPDs will be at a competitive disadvantage in that market if they cannot retransmit that sports programming. For that reason, the cable and satellite industries each has been concerned that it have the same right to retransmit distant broadcast stations to subscribers in orphan counties as the other has.[69] On the other hand, if an in-state broadcast station is not carrying popular sports programming, but does offer news and public affairs programming of state-wide interest, though not of local interest to households in an orphan county, then the demand in the orphan county for that programming might not be that substantial. In that case, an MVPD serving that orphan county might not want to use some of its scarce system capacity to retransmit the station's signals. If ensuring that all households in a state have access to state-wide news and public affairs programming from a variety of sources is viewed as an important public policy goal, then one might consider requiring MVPDs to retransmit to their subscribers in orphan counties the signals of non-local, in-state stations. But such a requirement might not be consistent with the viewing preferences of the households in the orphan counties or in the business interest of either the broadcasters or the MVPDs.

[69] As will be explained below, however, if one MVPD has exclusive access to popular sports programming, it is likely to oppose any action that would give some of its providers alternative sources of that programming. DirecTV is the exclusive provider of the NFL Sunday Ticket package of out-of-market National Football League football games, and as such the only provider of certain in-state, out-of-market NFL games to households in orphan counties. DirecTV thus would not want to allow other MVPDs to retransmit those games in the orphan counties.

Current Obstacles to Serving Orphan Counties

During the June 16, 2009, House hearing and in the general public policy debate, there has been discussion about which distant signals satellite operators currently have the legal authority to retransmit to subscribers in orphan counties, how they could obtain a license for the public performance of the copyrighted works on the retransmitted signals, and under what conditions it would be financially feasible to retransmit those signals. In particular, what current legal and market limitations exist on the ability of a satellite operator to import in-state, non-local news and public affairs programming and in-state, non-local sports programming into an orphan county?

Section 339(a)(1)(A) of the Communications Act, which addresses the distant broadcast signals that a satellite operator is permitted to carry, states "Subject to section 119 of title 17, United States Code, any satellite carrier shall be permitted to provide the signals of no more than two network stations in a single day for each television network to any household not located within the local markets of those network stations." The basic legal question, for which there does not appear to have been any definitive ruling by an administrative agency or court, is: Since section 339(a)(1)(A) is entitled "Carriage permitted," does the phrase "Subject to section 119" limit the scope of a satellite operator's right to carry distant signals to *only* those signals for which a satellite operator can obtain a statutory copyright license for secondary transmission under section 119?[70] Or does a satellite operator always have the right to carry the signals of any and all programming on distant broadcast signals for which it succeeds in negotiating a copyright agreement with the copyright holders, with the reference to section 119 *only* intended to reinforce that if a satellite operator chooses to use the statutory copyright license it must abide by all the terms and conditions of that license in order to be able to carry a distant network signal? A savings clause in the House Commerce Committee bill, stating that nothing in that legislation, in the Communications Act, or in any FCC regulation shall limit the ability of a satellite operator to retransmit a performance or display of a work pursuant to an authorization granted by the copyright owner (or, if within the scope of its authorization, its licensee) is intended to clarify that a satellite operator always has the opportunity to negotiate a copyright license outside the section 119 statutory license.

Beyond this legal question of statutory interpretation, there are questions about how a satellite operator would be able to negotiate a license with the copyright holders and the extent to which a satellite operator is likely to have a market incentive to do so. In this regard, it is useful to address separately news programming of state-wide interest and sports programming of state-wide interest, since both the supply characteristics and the demand characteristics are different for these two programming categories.

News Programming of State-Wide Interest

The discussion at the June 16, 2009, House hearing focused on the retransmission to subscribers in an orphan county of locally-produced news programming of an in-state station located in a different DMA. The witnesses representing the broadcasting and program production industries stated that many broadcasters have offered to make their locally-produced news programming—but not their network programming—available to satellite operators who seek to serve orphan

[70] There may be yet one other question. Section 339 addresses the "*carriage* of distant television stations by satellite operators." Does "carriage" in any way connote something different from "retransmission" or "secondary transmission" of distant signals?

counties and that a satellite operator could negotiate a copyright license and retransmission consent agreement with an in-state station for the rights to carry that station's local news programming. These witnesses indicated that although locally-produced news programs are likely to include clips from the national network, for which the network holds the copyright, when the clips are included in a locally-produced news program the major networks generally give the affiliate the right to negotiate a copyright agreement with an MVPD that includes those clips, so a satellite operator would not have to negotiate separately with the network. The satellite operators responded that they still would have to negotiate with whomever held the copyright for the advertising segments of the locally-produced news program. The broadcasters argue that advertisers are unlikely to place any barriers before the wider distribution of their advertising messages and thus copyright negotiations with them should be simple. While this probably is true, in some cases the copyright holder might be a musician, not the advertiser, though there is a well-defined process involving BMI and ASCAP for obtaining a music copyright license.

More significantly, satellite operators claim that it would rarely be economically feasible for them to retransmit only the two hours per day of an in-state broadcaster's locally-produced news programming. They say that this would require them to allocate a channel for only two hours of programming per day. They claim they could not readily fill the remaining 22 hours with other programming because they uplink and downlink locally-produced broadcast programming using spot beams whose footprints cover narrow geographic areas, and uplink and downlink national or regional programming networks using broad beams whose footprints cover the entire United States or large regions within the United States. (More generally, the satellite operators have claimed that, even if a non-local, but in-state broadcaster made available to them for retransmission to their orphan county subscribers its network programming as well as its locally-produced programming, they would be able to retransmit the programming only if both the broadcast station and the orphan county were located within the footprint of the same spot beam.) The satellite operators have the incentive to fill the capacity of their spot beams (as well as broad beams) with the programming (or other service) that would generate the most revenues. Unless a satellite operator has unused capacity on a spot beam—and to the extent possible it will try not to construct excess capacity—it is unlikely to allocate a channel of that capacity to two hours of programming per day. This is especially true if that programming includes some coverage of news stories of state-wide interest, but a larger amount of programming that is of limited interest to subscribers in the orphan county because it focuses on news of local interest in the community of the (distant) station. (The satellite operators also have argued that they would not want to have a channel that is dark 22 hours per day because subscribers do not like to have to "click" past dark channels, but given the number of channels that satellite operators assign to pay-per-view service that appears as dark channels to most subscribers, this is not a convincing argument.) All this suggests that under current rules, if satellite operators are allowed to negotiate for the retransmission to subscribers in orphan counties of only the signals of the locally-produced news programming of non-local, in-state broadcast stations, in most cases they are unlikely to have an incentive to do so.

Sports Programming of State-Wide Interest

In most situations, satellite operators are likely to have a stronger incentive to retransmit to orphan counties the sports programming of state-wide interest of non-local, in-state broadcasters. Demand for such programming may be substantial. Some households view certain sports programming as "must have" programming that, if available from one MVPD but not a competitor, would lead the household to subscribe to the MVPD that offered the programming. More basically, if sports programming for which some households have a strong intensity of

demand becomes available from a satellite provider and is not available over-the-air, some of those households might be motivated to subscribe to the satellite service in order to obtain the programming. Thus, in some orphan counties a satellite operator might have the incentive to negotiate a copyright agreement just for the sports programming, even if the remainder of that channel's schedule remained dark, while in other orphan counties the satellite operator might not have the incentive to do so.

But it may not be possible for a satellite operator to negotiate such a copyright agreement. In responding to a question at the October 7, 2009, Senate Commerce subcommittee hearing, Paul Karpowicz of Meredith Broadcasting Group stated that broadcasters can only grant consent for programming whose copyright they control—local news, but not network programming or sports franchises. If the sports programming covers the games of an in-state (or the most closely located out-of-state) team in a professional sports league, such as the National Football League (NFL), then almost certainly the league has retained its copyright over the programming and any negotiations would have to be between the satellite operator and the league (or perhaps the local team). Some professional leagues have set very strict geographic boundaries for where each team's games can be transmitted or retransmitted—and have chosen not to make exceptions to those boundaries—in order to assure any broadcast station affiliated with the network that has obtained the broadcast transmission rights remains the exclusive broadcaster of that league's games during that particular time of day and to maximize league revenues by protecting against the cannibalization of revenues from other programming packages. For example, the NFL seeks to maximize revenues by selling broadcast and cable networks the rights to certain local and regional games, but also by separately marketing to DirecTV an exclusive NFL Sunday Ticket package that offers live coverage of up to 14 NFL games each Sunday for avid football fans. Allowing satellite or cable subscribers in certain areas to receive the local or regional games from another source is likely to reduce demand for NFL Sunday Ticket.

In fact, because it has paid a huge amount of money to the NFL for the exclusive rights to carry NFL Sunday Ticket, as part of its strategy of branding itself the MVPD of choice for sports fans, DirecTV has an incentive to oppose the retransmission of broadcast NFL football games into orphan counties. According to news reports, in March 2009 DirecTV signed a contract with NFL valued at $4 billion a year for four years for the exclusive rights to sell the Sunday Ticket package.[71] Currently, DirecTV charges its subscribers $59.95 per month, for the five-month season, for the Sunday Ticket package; it would have to sell many such packages to recoup its payments for the exclusive programming. Many of the subscribers for the Sunday Ticket package are residents of orphan counties who therefore cannot receive the games of their home NFL team either over-the-air or by cable or satellite retransmission of broadcast station signals. Allowing cable and satellite operators to retransmit into those orphan counties the signals of stations carrying those games would cannibalize the demand for Sunday Ticket. During the markup of the Senate Judiciary Committee bill, when he was discussing an amendment to allow satellite operators to retransmit the signals of certain in-state, out-of-market stations to households in orphan counties in Wisconsin, Senator Feingold reportedly indicated that the MVPD that exclusively offered Sunday Ticket opposed the amendment because it would allow die-hard Green Bay Packer fans in distant parts of the state to see Packers games without subscribing to the package.[72] Perhaps this partially explains why the four exceptions created in SHVERA, which

[71] See, for example, Matthew Futterman, "NFL, DirecTV Extend Pact in $4 Billion Deal," *The Wall Street Journal,* March 24, 2009, at p. B5.

[72] See Tim Warren, "Senate Judiciary Okays Satellite Reauthorization Bill," *Communications Daily*, September 25, (continued...)

allowed satellite operators to retransmit distant signals into orphan counties in New Hampshire, Vermont, Oregon, and Mississippi, did not cover any states that have an NFL team.

Television households in orphan counties also often seek sports programming that covers the games of the football, basketball, or baseball teams of their state university. Their local broadcast stations, broadcasting from a neighboring state, are likely to be transmitting the games of that neighboring state's university. Broadcasters claim that, under current rules, it is possible for non-local, in-state broadcasters to obtain a copyright license for the home state university games that extends to the orphan counties and then to negotiate retransmission consent and a copyright license with the satellite and cable operators to allow them to retransmit the home university games to their subscribers in the orphan counties.

As an example, Preston Padden of the Disney Company attached to his written testimony for the June 16, 2009, House hearing a letter from KATV, the ABC affiliate in Little Rock, to DirecTV, offering "to negotiate retransmission terms for KATV-produced news, sports, and public affairs programming" to DirecTV subscribers located in orphan counties in Arkansas.[73] Although the letter is not explicit about KATV's sports programming, in the policy debate broadcasters have inferred that it includes the University of Arkansas football and basketball games, for which KATV has negotiated a copyright license and which as a result legally should be treated as if it were KATV's locally-produced programming. It would appear that KATV could seek to negotiate a retransmission agreement with DirecTV or any other MVPD, but there could be one legal risk. As explained earlier, there has not been a legal ruling on the proper way to interpret section 339(a)(1)(A) of the Communications Act. If it were interpreted to limit the scope of a satellite operator's right to retransmit distant signals to *only* those signals for which a satellite operator can obtain a statutory copyright license for secondary transmission under section 119, then a broadcaster operating in the DMA to which the orphan counties are assigned (for example, the local broadcaster in the Shreveport, Louisiana DMA that is carrying in orphan Arkansas counties the Louisiana State games that probably are aired at the same time as the Arkansas games) could challenge the retransmission of KATV's signals through a complaint before the FCC, claiming such retransmission is not allowed under the Communications Act and that it has been harmed to the extent its audience has migrated to the Arkansas games. Since the University of Arkansas and Louisiana State are in the same collegiate athletic conference, it might be possible that the conference, which may have been the original copyright holder that had negotiated with KATV, would be willing to help broker a compromise among the parties that would allow the University of Arkansas games to be retransmitted to the orphan counties in Arkansas.

But sometimes state boundaries also represent boundaries between collegiate athletic conferences. For example, the University of Arkansas and the University of Missouri are in different athletic conferences. In this case, the local television station in the Springfield, Missouri DMA that broadcasts the University of Missouri games might object to the retransmission of University of Arkansas games to satellite subscribers in the orphan Arkansas counties located in its local market, and there would not be a collegiate athletic conference to act as an intermediary.

(...continued)

2009.

[73] Letter from L. Dale Nicholson, president and general manager, KATV, to Derek Chang, executive vice president for content strategy and development, DirecTV, Inc., dated March 25, 2009, attached to the written Testimony of Preston R. Padden, executive vice president, worldwide government relations, the Walt Disney Company, before the Subcommittee on Communications, Technology, and the Internet, House Committee on Energy and Commerce, "Hearing on Discussion Draft of Legislation to Reauthorize the Satellite Home Viewer Act," June 16, 2009.

If there is any likelihood that a local station could file a suit in court or a complaint at the FCC that gets traction, it could create a legal and financial risk that might discourage a satellite operator from negotiating to carry the non-local, in-state signals. The savings clause in the House Commerce Committee bill stating that nothing in the law or in FCC rules shall limit the ability of a satellite carrier to retransmit a performance or display of work pursuant to an authorization granted by the copyright owner (or, if within the scope of its authorization, its licensee), is intended to bar a local broadcaster from taking such actions.

The Senate Commerce Committee bill (S. 2764) includes a provision intended to encourage satellite operators to carry these state public affairs networks. Under the provision, a satellite carrier that provides the retransmission of the state public affairs networks of at least 15 different states, under reasonable prices, terms, and conditions, and does not delete any of the noncommercial educational or informational programming on those networks, would only have to allocate 3.5% of its channel capacity to the retransmission of educational or informational noncommercial programming, rather than 4%.This provision might encourage satellite operators to offer state public affairs networks to subscribers in orphan counties.

Requiring Satellite Operators to Offer Local-into-Local Service in All Markets

Currently, satellite operators are allowed, but not required, to offer subscribers the signals of all full power broadcast stations in their local market. If a satellite operator chooses to retransmit the signal of a local broadcast station, and to use the section 122 royalty-free copyright license for the content provided over that signal, it must retransmit the primary signals of all the stations in that local market, subject to obtaining local station permission. The satellite operators have chosen not to offer this "local-into-local" service in many small markets, preferring to use their satellite capacity to provide additional high definition and other programming to larger, more lucrative markets than to use the capacity to serve very small numbers of customers. In some cases, those small markets may not generate enough revenues to cover the costs of providing local-into-local service.[74] The 20 smallest DMAs each have at most 65,000 households; the smallest has only 4,000 households. At the October 7, 2009, Senate Commerce subcommittee hearing, Robert Gabrielli of DirecTV claimed that it costs approximately $2.5 million to bring local-into-local service to a new market.

As a result approximately 3% of all U.S. households do not have access to local broadcast signals if they subscribe to satellite video service.[75] Early in the 111th Congress, Representative Stupak

[74] Paul Gallant, an analyst with Stanford Washington Research Group, reportedly stated that mandatory provision of local-into-local service in all markets "would impose significant new costs on Dish Network and DirecTV and generate virtually no new revenue" because the markets in question are so small. See Todd Shields, "DirecTV, Dish May Face Requirement for More Local TV (Update1)," Bloomberg.com, February 23, 2009, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayQ_vo3nJImo, viewed on April 27, 2009.

[75] According to the written testimony of Charles W. Ergen, chairman, president, and chief executive officer of DISH Network Corporation, submitted for the hearing on "Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act," before the Subcommittee on Communications, Technology, and the Internet, Committee on Energy and Commerce, U.S. House of Representatives, February 24, 2009, at p. 2, "DISH provides local service in 178 markets today, reaching 97 percent of households nationwide." According to the written testimony of Bob Gabrielli, senior vice president, broadcasting operations and distribution, DIRECTV, Inc., before the House Judiciary Committee, February 25, 2009, at p. 10, "DIRECTV today offers local television stations by satellite in 150 of the 210 local (continued...)

introduced H.R. 927, which would require a satellite operator that uses the royalty-free copyright license for the content of local broadcast signal in *any* market to offer local-into-local service in *every* market. This, in effect, would require satellite operators to offer local-into-local service in all markets since they would not want to lose use of the royalty-free copyright license in those markets in which they currently offer local-into-local service. Although this requirement is not mandatory in the sense that a satellite operator could choose not to provide local-into-local service in some markets if it agreed to forgo access to the royalty-free copyright license, its effect would be to mandate local-into-local service in all markets.

The broadcasters support mandatory local-into-local service, arguing that in markets where satellite operators are not offering such service satellite subscribers are unlikely to be able to receive local news, weather, and sports programming since those subscribers probably no longer maintain roof-top antennas to receive broadcast signals. The broadcasters claim this undermines the "principles of localism and universal service for all Americans."[76] It is in the interest of broadcasters to have their signals carried by as many MVPDs as possible; moreover, making such carriage mandatory may help broadcasters in their retransmission consent negotiations with MVPDs.

The satellite operators oppose a statutory requirement that they offer local-into-local service in all markets.[77] They claim that, in just ten years, they have built out their networks to provide local programming to 98% of U.S. households, while cable and broadcast, despite being in business much longer, actually offer local service to a smaller percentage of U.S. households. At the October 7, 2009, Senate Commerce subcommittee hearing, Robert Gabrielli of DirecTV claimed that his company currently retransmits approximately 500 national cable networks and 30 standard definition and 30 high definition pay-per-view channels, primarily on its broad beams, and approximately 2,500 local broadcast channels, primarily on its spot beams. He claimed it would be unfair to require the satellite carriers to allocate an even greater portion of their capacity to carry the approximately 100 additional local broadcast television stations in the small markets they do not currently serve; since available frequencies are limited, adding these broadcast signals would require them to remove other programming. The satellite carriers therefore suggest that, if local-into-local service is made mandatory, the requirement be constrained as follows:

- It should be subject to a one-third capacity cap, analogous to the constraint on the must carry rules for cable, which require a cable operator to carry local commercial stations only up to one-third of the aggregate number of usable activated channels in the operator's system;
- It should be limited to the carriage of the signals of those stations that provide their viewers with a minimum of 20% locally-produced programming;

(...continued)

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.)"

[76] Written statement of Paul A. Karpowicz, president, Meredith Broadcasting Group, on behalf of the Television Board of the National Association of Broadcasters, before the Subcommittee on Communications, Technology, and the Internet, House Committee on Energy and Commerce, "Hearing on Discussion Draft of Legislation to Reauthorize the Satellite Home Viewer Act," June 16, 2009, at p. 7.

[77] See, for example, the written testimony of Derek Chang, executive vice president, content strategy and development, DirecTV, Inc., before the House Committee on Energy and Commerce, Subcommittee on Communication Technology, and the Internet, June 16, 2009, at pp. 6-14, which describes in detail the industry position on the issue of mandatory local-into-local service.

- Local broadcasters should share in the costs of providing local service in the smallest markets by providing a good quality signal at one of the satellite operator's centralized uplink centers rather than at the local collection facility in the broadcaster's market, thereby imposing some of the backhaul costs on the local broadcaster; and
- Local broadcasters should not charge satellite operators retransmission consent fees for retransmitting their signals to subscribers in the smallest markets.

It may not be simple to measure capacity usage in satellite networks, since local broadcast signals are retransmitted over spot beams while national and regional networks are retransmitted over broad beams. But some formula presumably could be constructed. Historically, despite the longstanding U.S. media policy goal of fostering localism, the FCC has avoided setting specific requirements on the amount or proportion of broadcast programming that must be locally-produced. Broadcasters strongly oppose any restrictions on the retransmission consent property rights they were given by Congress in the 1992 Cable Act. At the June 16, 2009, House hearing, Representative Boucher asked the representative for the National Association of Broadcasters to meet with its membership and report back the extent to which they would be willing to share in the costs of providing local-into-local service in the smallest markets.

The House Judiciary Committee and House Commerce Committee bills include provisions that would address this issue by creating an incentive for DISH Network to voluntarily serve all 210 markets. As a result of repeated violations of section 119 of the Copyright Act, DISH is subject to a permanent court injunction barring it from using a section 119 statutory copyright license to retransmit distant signals to its subscribers. It therefore must employ an arms-length agreement with National Programming Service for that entity to obtain the copyright license to deliver distant signals to the DISH subscribers. The bills would waive the injunction if DISH provides local-into-local service in all 210 local markets in the United States, though they would not lift or alter the penalties provisions that exist elsewhere in the statute that would apply to DISH Network going forward. The bills outline the procedure by which DISH could obtain permission to use the license on a temporary basis to offer local-into-local service in all 210 markets and by which DISH would demonstrate it was actually offering that service in order to receive a full waiver of the injunction. The limited temporary waiver could only be issued once and would expire within 120 days of its issuance unless the court found good cause to extend the temporary waiver. Once DISH was providing local-into-local service in all 210 markets, it would file a statement of eligibility with the court that imposed the injunction. The statement must include a certification issued by the FCC stating that DISH was providing a good quality signal to 90% of the households in each DMA. The bills also outline the mechanism by which DISH's claim that it had established service in all 210 markets could be challenged. They set out penalties that the court would impose for willful noncompliance, including the revocation of the license and substantial monetary penalties. The bills set forth what the burden of proof would be in initial and subsequent compliance proceedings. During the markup of H.R. 2994, DISH indicated that it would voluntarily introduce local-into-local service in all 210 markets within two years in exchange for the statutory relief from the court injunction. When DISH agreed to this, Representative Stupak withdrew his proposed amendment, based on H.R. 927, to effectively make it mandatory for satellite operators to serve all markets.[78]

[78] See John Eggerton, "DISH: Local Into Local Within Two Years—No. 2 DBS Provider Said It Will Deliver Local TV Stations to All 210 DMAs During that Time Frame," *Multichannel News*, October 15, 2009.

The Senate Judiciary Committee bill includes provisions intended to indirectly encourage DISH Network to offer local-into-local service in currently unserved markets. Many of those unserved markets are short markets that have less than the full complement of local network affiliates for the four major national broadcast networks—ABC, CBS, FOX, and NBC. Currently, satellite operators can use the statutory copyright license for distant signals in section 119 of the Copyright Act to retransmit to their subscribers the content on the broadcast signals of (1) local low power stations, (2) significantly viewed stations, (3) the in-state but out-of-market stations in the four states that satellite operators were allowed to import into orphan counties under the exceptions in SHVERA, and (4) distant network stations affiliated to national networks for which there is no affiliate in the local (short) market. But DISH Network is enjoined from using the section 119 copyright license. The Senate Judiciary Committee bill would change the license required to retransmit the content of those four categories of broadcast signals from the section 119 license to the section 122 statutory copyright license for local signals, thus providing DISH Network with an efficient and inexpensive license and encouraging it to serve the currently unserved markets.

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Appendix. "Orphan Counties"

Table A-1. Counties and Television Households in Each State That Are Located in Designated Market Areas (DMAs) for Which the Primary City Is Outside the State

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
Alabama	1,860,130	Atlanta, GA	Cleburne	6,040		Atlanta, GA DMA: no station with city of license in AL;
			Randolph	8,750		
		Columbus, GA	Barbour	9,910		Columbus, GA DMA: one commercial station with city of license in Opelika, AL and one public/educational station transmitting from Louisville, AL;
			Chambers	14,120		
			Lee	54,960		
			Russell	20,700		
		Columbus-Tupelo-West Point, MS	Lamar	5,930		Columbus-Tupelo-West Point, MS DMA: no station with city of license in AL;
		Meridian, MS	Choctaw	5,790		Meridian, MS DMA: no station with city of license in AL.
			Sumter	5,230		
				131,430	**7.07%**	
Alaska	212,980	None		**0**	**0.00%**	
Arizona	2,394,980	Albuquerque-Santa Fe, NM	Apache (N)	14,350		Albuquerque-Santa Fe, NM DMA: no station with city of license in AZ.
				14,350	**0.60%**	

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
Arkansas	1,127,320	Memphis, TN	Crittenden	19,590		Memphis, TN DMA: no station with city of license in AR;
			Cross	7,150		
			Lee	3,430		
			Mississippi	17,430		
			Phillips	7,870		
			Poinsett	9,800		
			St. Francis	9,180		
		Springfield, MO	Baxter	19,150		Springfield, MO DMA: one commercial station with city of license in Harrison, AR;
			Boone	15,440		
			Carroll	11,010		
			Fulton	4,880		
			Marion	7,000		
			Newton	3,500		
		Shreveport, LA	Columbia	9,480		Shreveport, LA DMA: no station with city of license in AR;
			Hempstead	8,700		
			Howard	5,270		
			Lafayette	3,160		
			Little River	5,290		
			Miller	16,780		
			Nevada	3,650		
			Sevier	5,730		

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
		Monroe, LA-El Dorado, AR	Ashley	8,750		Monroe, LA-El Dorado, AR DMA: one NBC-affiliated commercial station with city of license in El Dorado, AR and one other commercial station with city of license in El Dorado, AR.
			Union	17,080		
				219,320	**19.45%**	
California	12,369,370	Reno, NV	Alpine	460		Reno, NV DMA: no station with city of license in CA;
			Lassen	9,570		
			Mono	5,040		
		Medford-Klamath Falls, OR	Siskiyou	18,620		Medford-Klamath Falls, OR DMA: no station with city of license in CA;
		Yuma, AZ-El Centro, CA	Imperial	46,980		Yuma, AZ-El Centro, CA DMA: one Fox-affiliated commercial station with city of license in El Centro, CA, one Univision-affiliated commercial station with city of license in El Centro, and one Telefutura-affiliated commercial station with city of license in Calipatria, CA.
				80,210	**0.65%**	
Colorado	1,896,020	Albuquerque, NM	La Plata	19,750		Albuquerque, NM DMA: one CBS-affiliated commercial station with city of license in Durango, CO that is a satellite of an Albuquerque, NM station and one Telemundo-affiliated commercial station with city of license in Durango, CO that is a satellite of an Albuquerque, NM station.
			Montezuma	10,190		
				29,940	**1.58%**	
Connecticut	1,340,730	New York City, NY	Fairfield	325,740		New York City, NY DMA: one commercial station with city of license in Bridgeport, CT, and one public/ educational station transmitting from Bridgeport, CT.
				325,740	**24.30%**	

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
Delaware	337,290	Philadelphia, PA	Kent	59,980		Philadelphia, PA DMA: one commercial station with city of license in Wilmington, DE and one public/educational station transmitting from Wilmington;
			New Castle	200,070		
		Salisbury, MD	Sussex	77,240		Salisbury, MD DMA: one public/educational station transmitting from Seaford, DE.
				337,290	**100%**	
DC	257,650	None		**0**	**0.00%**	
Florida	7,439,250	Mobile, AL-Pensacola-Fort Walton Beach, FL	Escambia	120,340		Mobile, AL-Pensacola-Fort Walton Beach, FL DMA: three commercial stations with city of license in Fort Walton Beach, FL, three commercial stations (including one ABC affiliate) with city of license in Pensacola, FL, and one public/educational station transmitting from Pensacola, FL.
			Okaloosa	78,970		
			Santa Rosa	54,430		
				253,740	**3.40%**	
Georgia	3,586,760	Greenville-Spartanburg-Anderson, SC-Asheville, NC	Elbert	8,160		Greenville-Spartanburg-Anderson, SC-Asheville, NC DMA: one CBS-affiliated commercial station with city of license in Toccoa, GA;
			Franklin	8,590		
			Hart	9,960		
			Stephens	10,050		
		Jacksonville, FL	Brantley	6,050		Jacksonville, FL DMA: one commercial station with city of license in Brunswick, GA and one public/educational station transmitting from Waycross, GA;
			Camden	16,940		
			Charlton	3,470		
			Glynn	30,640		
			Pierce	7,180		
			Ware	13,930		

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
		Chattanooga, TN	Catoosa	24,840		Chattanooga, TN DMA: one commercial station with city of license in Dalton, GA and one public/educational station transmitting from Chatsworth-Dalton, GA;
			Dade	6,100		
			Murray	15,010		
			Walker	25,590		
			Whitfield	32,190		
		Dothan, AL	Early	4,560		Dothan, AL DMA: no station with city of license in GA;
		Tallahassee, FL-Thomasville, GA	Brooks	6,360		Tallahassee, FL-Thomasville, GA DMA: one FOX-affiliated commercial station with city of license in Bainbridge, GA, one CBS-affiliated commercial station with city of license in Thomasville, GA, and one CBS-affiliated commercial station with city of license in Valdosta, GA.
			Clinch	2,680		
			Decatur	10,600		
			Echols	1,380		
			Grady	9,530		
			Lanier	2,970		
			Lowndes	38,260		
			Miller	2,470		
			Seminole	3,470		
			Thomas	17,750		
				318,730	**8.89%**	

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
Hawaii	429,940	None		**0**	**0.00%**	
Idaho	561,020	Salt Lake City, UT	Bear Lake	1,990		Salt Lake City, UT DMA: no station with city of license in ID;
			Franklin	3,780		
			Oneida	1,470		
		Spokane, WA	Benewah	3,580		Spokane, WA DMA: one CBS-affiliated commercial station (affiliated with a station in Yakima, WA) with city of license in Lewiston, ID, one public/educational station transmitting from Couer d'Alene, ID, and one public/ educational station transmitting from Moscow, ID.
			Bonner	16,370		
			Boundary	4,030		
			Clearwater	3,080		
			Idaho	5,850		
			Kootenai	53,100		
			Latah	13,000		
			Lewis	1,460		
			Nez Perce	16,010		
			Shoshone	5,570		
				129,290	**23.05%**	
Illinois	4,759,150	St. Louis, MO	Bond	6,450		St. Louis, MO DMA: one commercial station with city of license in East St. Louis, IL;
			Calhoun	2,090		
			Clay	5,540		
			Clinton	13,550		
			Fayette	8,020		
			Greene	5,350		
			Jersey	8,660		

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
			Macoupin	19,150		
			Madison	108,570		
			Marion	15,780		
			Monroe	12,430		
			Montgomery	11,160		
			Randolph	11,960		
			St. Clair	101,790		
			Washington	5,600		
		Evansville, IN	Edwards	2,790		Evansville, IN DMA: no station with city of license in IL;
			Wabash	4,870		
			Wayne	6,900		
			White	6,260		
		Terre Haute, IN	Clark	6,970		Terre Haute, IN DMA: one public/educational station transmitting from Olney, IL;
			Crawford	7,470		
			Jasper	3,770		
			Lawrence	5,930		
			Richland	6,420		

State	Number of TV Households in the State	DMAs in State for which Primary City Is Outside the State	Counties Assigned to DMA for which Primary City Is Outside the State (Orphan Counties)	Number of TV Households in Orphan County	Percentage of TV Households in State Located in Orphan Counties	Full Power Broadcast TV Stations in DMAs for which Primary City Is Outside the State (in Orphan Counties)
		Paducah, KY-Cape Girardeau, MO-Mount Vernon, IL	Alexander	3,280		Paducah, KY-Cape Girardeau, MO-Mount Vernon, IL DMA: one commercial station with city of license in Marion, IL, one ABC-affiliated commercial station with city of license in Harrisburg, IL, one commercial station with city of license in Mt. Vernon, IL, and one public/ educational station transmitting from Carbondale, IL;
			Franklin	16,750		
			Gallatin	2,580		
			Hamilton	3,270		
			Hardin	1,880		
			Jackson	24,550		
			Jefferson	15,600		
			Johnson	4,450		
			Massac	6,260		
			Perry	8,440		
			Pope	1,690		
			Pulaski	2,470		
			Saline	10,720		
			Union	7,360		
			Williamson	27,310		
		Davenport, IA-Rock Island-Moline, IL	Bureau	14,220		Davenport, IA-Rock Island-Moline, IL DMA: one CBS-affiliated commercial station with city of license in Rock Island, IL, one ABC-affiliated commercial station with city of license in Moline, IL, and one public/educational station transmitting from Moline, IL.
			Carroll	6,550		
			Henderson	3,100		
			Henry	19,750		
			Jo Daviess	9,610		
			Knox	20,350		

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			Mercer	6,480		
			Rock Island	60,920		
			Warren	6,580		
			Whiteside	23,440		
				695,090	**14.61%**	
Indiana	2,480,150	Chicago, IL	Jasper	11,820		Chicago, IL DMA: one commercial station with city of license in Gary, IN, one commercial station with city of license in Hammond, IN, and one public/educational station transmitting from Gary, IN;
			Lake	186,930		
			LaPorte	42,100		
			Newton	5,150		
			Porter	62,990		
		Cincinnati, OH	Dearborn	18,770		Cincinnati, OH DMA: no station with city of license in IN;
			Franklin	8,470		
			Ohio	2,290		
			Ripley	10,320		
			Switzerland	3,790		
			Union	2,770		
		Louisville, KY	Clark	45,080		Louisville, KY DMA: one commercial station with city of license in Salem, IN;
			Crawford	4,230		
			Floyd	29,110		
			Harrison	14,430		
			Jackson	16,720		
			Jefferson	12,800		

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			Jennings	10,560		
			Orange	7,910		
			Scott	9,420		
			Washington	10,730		
		Champaign & Springfield -Decatur, IL	Warren	3,260		Champaign & Springfield-Decatur, IL DMA: no station with city of license in IN.
				519,650	**21.00%**	
Iowa	1,198,410	Omaha, NE	Cass	5,780		Omaha, NE DMA: one public/educational station transmitting from Council Bluffs, IA and one public/ educational station transmitting from Red Oak, IA;
			Crawford	6,280		
			Fremont	3,080		
			Harrison	6,070		
			Mills	5,680		
			Montgomery	4,480		
			Page	6,130		
			Pottawattamie	35,390		
			Shelby	4,880		
		Sioux Falls, SD	Lyon	4,080		Sioux Falls, SD DMA: no station with city of license in IA;
			Osceola	2,480		
		Rochester, MN-Mason City, IA-Austin, MN	Cerro Gordo	18,430		Rochester, MN-Mason City, IA-Austin, MN DMA: one CBS-affiliated commercial station with city of license in Mason City, IA and one public/ educational station transmitting from Mason City, IA;
			Floyd	6,680		
			Hancock	4,460		
			Howard	3,770		

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			Mitchell	4,270		
			Winnebago	4,490		
			Worth	3,180		
		Quincy, IL-Hannibal, MO-Keokuk, IA	Lee	14,130		Quincy, IL-Hannibal, MO-Keokuk, IA DMA: no station with city of license in IA.
				143,740	**12.00%**	
Kansas	1,080,320	Kansas City, MO	Anderson	3,030		Kansas City, MO DMA: one commercial station with city of license in Lawrence, KS;
			Atchison	6,270		
			Douglas	44,330		
			Franklin	10,180		
			Johnson	210,650		
			Leavenworth	25,240		
			Linn	3,870		
			Miami	11,620		
			Wyandotte	57,580		
		Tulsa, OK	Chautauqua	1,470		Tulsa, OK DMA: no station with city of license in KS;
			Montgomery	14,130		
		Lincoln and Hastings-Kearney, NE	Jewell	1,390		Lincoln and Hastings-Kearney, NE DMA: no station with city of license in KS;
			Phillips	2,180		
			Republic	2,080		
			Smith	1,690		

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		St. Joseph, MO	Doniphan	2,990		St. Joseph, MO DMA: no station with city of license in KS;
		Joplin, MO-Pittsburg, KS	Allen	5,350		Joplin, MO-Pittsburg, KS DMA: one CBS-affiliated commercial station with city of license in Pittsburg, KS and one Fox-affiliated commercial station with city of license in Pittsburg, KS.
			Bourbon	5,830		
			Cherokee	8,250		
			Crawford	15,700		
			Labette	8,800		
			Neosho	6,370		
			Wilson	3,880		
			Woodson	1,360		
				454,240	**42.05%**	
Kentucky	1,724,070	Nashville, TN	Allen	7,450		Nashville, TN DMA: no station with city of license in KY;
			Christian	29,170		
			Clinton	4,100		
			Cumberland	2,700		
			Logan	10,960		
			Monroe	4,760		
			Simpson	6,860		
			Todd	4,610		
			Trigg	5,750		

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		Cincinnati, OH	Boone	43,370		Cincinnati, OH DMA: one Fox-affiliated commercial station with city of license in Newport, KY, one public/ educational station transmitting from Covington, KY, and one public/educational station transmitting from Owenton, KY;
			Bracken	3,490		
			Campbell	35,050		
			Gallatin	2,970		
			Grant	9,430		
			Kenton	63,860		
			Mason	7,240		
			Owen	4,430		
			Pendleton	5,480		
			Robertson	790		
		Knoxville, TN	Bell	11,970		Knoxville, TN DMA: one commercial station with city of license in Harlan, KY;
			Harlan	13,010		
			McCreary	6,800		
		Charleston-Huntington, WV	Boyd	19,830		Charleston-Huntington, WV DMA: one commercial station with city of license in Ashland, KY, one public/ educational station transmitting from Ashland, KY, and one public/educational station transmitting from Pikeville, KY;
			Carter	11,010		
			Elliott	2,930		
			Floyd	17,690		
			Greenup	15,410		
			Johnson	9,730		
			Lawrence	6,510		
			Lewis	5,530		
			Martin	4,550		

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			Pike	27,500		
		Tri-Cities (Kingsport-Johnson City, TN-Bristol, VA)	Leslie	4,780		Tri-Cities (Kingsport-Johnson City, TN-Bristol, VA) DMA: no station with city of license in KY;
			Letcher	9,960		
		Evansville, IN	Daviess	38,250		Evansville, IN DMA: one commercial station with city of license in Madisonville, KY, one public/educational station transmitting from Madisonville, KY, and one public/ educational station transmitting from Owensboro, KY.
			Hancock	3,460		
			Henderson	18,820		
			Hopkins	19,140		
			McLean	3,960		
			Muhlenberg	12,370		
			Ohio	9,420		
			Union	5,580		
			Webster	5,420		
				535,310	**31.05%**	
Louisiana	1,659,410	None		**0**	**0.00%**	
Maine	553,220	None		**0**	**0.00%**	
Maryland	2,122,440	Washington, DC	Allegany	28,630		Washington, DC DMA: one NBC-affiliated commercial station with city of license in Hagerstown, MD, one other commercial station with city of license in Hagerstown, MD, one public/educational station transmitting from Hagerstown, MD, and one public/educational station transmitting from Frederick, MD;
			Calvert	30,940		
			Charles	50,670		
			Frederick	82,740		
			Montgomery	345,720		
			Prince George's	295,210		
			St. Mary's	37,400		

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			Washington	56,950		
		Pittsburgh, PA	Garrett	11,400		Pittsburgh, PA DMA: one public/educational station transmitting from Oakland, MD.
				939,660	**44.27%**	
Massachusetts	2,492,190	Albany-Schenectady-Troy, NY	Berkshire	54,410		Albany-Schenectady-Troy, NY DMA: one ABC-affiliated commercial station with city of license in Adams, MA that is a satellite of an Albany, NY station;
		Providence, RI-New Bedford, MA	Bristol	211,320		Providence, RI-New Bedford, MA DMA: one ABC-affiliated commercial station with city of license in New Bedford, MA and one other commercial station with city of license in New Bedford, MA.
				265,730	**10.66%**	
Michigan	3,881,920	Green Bay-Appleton, WI	Menominee	10,350		Green Bay-Appleton, WI DMA: no station with city of license in MI (one CBS-affiliated commercial station with city of license in Escanaba, MI is in the Marquette, MI DMA but is a satellite of a Green Bay, WI station);
		Toledo, OH	Lenawee	37,510		Toledo, OH DMA: no station with city of license in MI;
		South Bend-Elkhart, IN	Berrien	62,520		South Bend-Elkhart, IN DMA: no station with city of license in MI;
			Cass	19,880		
		Duluth, MN-Superior, WI	Gogebic	6,560		Duluth, MN-Superior, WI DMA: no station with city of license in MI.
				136,820	**3.52%**	

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Minnesota	2,042,050	Sioux Falls, SD	Lincoln	2,490		Sioux Falls, SD DMA: one public/educational station transmitting from Worthington, MN;
			Murray	3,480		
			Nobles	7,550		
			Pipestone	3,860		
			Rock	3,760		
		Fargo-Valley City, ND	Becker	13,020		Fargo-Valley City, ND DMA: one FOX-affiliated commercial station with city of license in Thief River Falls, MN that is a satellite of a Fargo, ND station;
			Clay	20,940		
			Clearwater	3,300		
			Kittson	1,790		
			Lake of the Woods	1,760		
			Mahnomen	1,990		
			Marshall	3,980		
			Norman	2,680		
			Pennington	5,660		
			Polk	12,120		
			Red Lake	1,680		
			Roseau	6,120		
			Wilkin	2,490		
		La Crosse-Eau Claire, WI	Houston	7,750		La Crosse-Eau Claire, WI DMA: no station with city of license in MN.
			Winona	18,870		
				125,290	**6.14%**	

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Mississippi	1,093,690	New Orleans, LA	Hancock	16,130		New Orleans, LA DMA: no station with city of license in MS;
			Pearl River	22,330		
		Memphis, TN	Alcorn	15,010		Memphis, TN DMA: one commercial station with city of license in Holly Springs, MS and one public/educational station transmitting from Oxford, MS;
			Benton	3,080		
			Coahoma	9,220		
			DeSoto	58,400		
			Lafayette	16,790		
			Marshall	13,170		
			Panola	12,940		
			Quitman	3,050		
			Tate	9,710		
			Tippah	8,380		
			Tunica	3,890		
		Mobile, AL-Pensacola-Fort Walton Beach, FL	George	7,720		Mobile, AL-Pensacola-Fort Walton Beach, FL DMA: no station with city of license in MS;
			Greene	4,160		
		Baton Rouge, LA	Amite	5,230		Baton Rouge, LA DMA: no station with city of license in MS.
			Wilkinson	3,630		
				212,840	**19.46%**	

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Missouri	2,345,310	Omaha, NE	Atchison	2,570		Omaha, NE DMA: no station with city of license in MO;
		Paducah, KY-Cape Girardeau-Harrisburg, MO-Mount Vernon, IL	Bollinger	4,660		Paducah, KY-Cape Girardeau-Harrisburg, MO-Mount Vernon, IL DMA: one FOX-affiliated commercial station with city of license in Cape Girardeau, MO, one CBS-affiliated commercial station with city of license in Cape Girardeau, MO, and one commercial station with city of license in Poplar Bluff, MO that is a satellite of a Harrisburg, IL station;
			Butler	17,140		
			Cape Girardeau	29,720		
			Carter	2,300		
			Dunklin	12,640		
			Madison	4,950		
			Mississippi	5,380		
			New Madrid	7,080		
			Pemiscot	7,410		
			Perry	7,360		
			Scott	16,000		
			Stoddard	12,220		
			Wayne	5,330		
		Quincy, IL-Hannibal, MO-Keokuk, IA	Clark	2,980		Quincy, IL-Hannibal, MO-Keokuk, IA DMA: one CBS- and ABC-affiliated commercial station with city of license in Hannibal, MO;
			Knox	1,650		
			Lewis	3,770		
			Marion	11,140		
			Monroe	3,680		
			Ralls	3,890		
			Shelby	2,580		

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		Ottumwa, IA-Kirksville, MO	Adair	9,520		Ottumwa, IA-Kirksville, MO DMA: one ABC-affiliated commercial station with city of license in Kirksville, MO.
			Macon	6,400		
			Putnam	2,080		
			Schuyler	1,690		
			Scotland	1,760		
			Sullivan	2,560		
				188,460	**8.04%**	
Montana	383,090	Spokane, WA	Lincoln	7,850		Spokane, WA DMA: no station with city of license in MT;
		Minot-Bismarck-Dickinson, ND	Daniels	690		Minot-Bismarck-Dickinson, ND DMA: no station with city of license in MT;
			Fallon	1,060		
			McCone	,690		
			Richland	3,870		
			Roosevelt	3,350		
			Sheridan	1,380		
			Wibaux	390		
		Rapid City, SD	Carter	490		Rapid City, SD DMA: no station with city of license in MT.
				17,510	**4.57%**	

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Nebraska	701,680	Denver, CO	Arthur	100		Denver, CO DMA: one public/educational station transmitting from Alliance, NE;
			Banner	300		
			Box Butte	4,390		
			Cheyenne	4,180		
			Dawes	3,440		
			Deuel	800		
			Garden	790		
			Grant	190		
			Hooker	290		
			Keith	3,380		
			Kimball	1,490		
			Sheridan	2,270		
			Sioux	590		
		Wichita-Hutchinson, KS	Dundy	790		Wichita-Hutchinson, KS DMA: one NBC-affiliated station with city of license in McCook, NE that is a satellite of a Wichita, KS station;
		Sioux Falls, SD	Cherry	2,380		Sioux Falls, SD DMA: one public/educational station transmitting from Merriman, NE;
		Sioux City, IA	Cedar	3,180		Sioux City, IA DMA: one public/educational station transmitting from Norfolk, NE;
			Dakota	6,990		
			Dixon	2,390		
			Knox	3,450		
			Madison	12,820		

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			Pierce	2,680		
			Stanton	2,280		
			Thurston	2,190		
			Wayne	3,190		
		Rapid City, SD	Morrill	1,980		Rapid City, SD DMA: no station with city of license in NE;
		Cheyenne, WY-Scottsbluff, NE	Scotts Bluff	14,770		Cheyenne, WY-Scottsbluff, NE DMA: one ABC-affiliated commercial station with city of license in Scottsbluff, NE that is affiliated with a Rapid City, SD station, one CBS-affiliated commercial station with city of license in Scottsbluff, NE that is a satellite of a Cheyenne, WY station, and one other commercial station with city of license in Scottsbluff, NE.
				77,450	**11.04%**	
Nevada	991,230	Salt Lake City, UT	Elko	15,990		Salt Lake City, UT DMA: one NBC-affiliated commercial station with city of license in Elko, NV and one NBC-affiliated commercial station with city of license in Ely, NV that is a satellite of a Las Vegas, NV station.
			Eureka	570		
			White Pine	3,450		
				19,440	**1.96%**	
New Hampshire	512,040	Portland-Auburn, ME	Carroll	20,100		Portland-Auburn, ME DMA: no station with city of license in NH;
			Coos	13,940		
		Burlington, VT-Plattsburgh, NY	Grafton	32,590		Burlington, VT-Plattsburgh, NY DMA: one public/educational station transmitting from Littleton, NH;
			Sullivan	17,870		

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		Boston, MA-Manchester, NH	Belknap	25,000		Boston, MA-Manchester, NH DMA: one ABC-affiliated commercial station with city of license in Manchester, NH, one Telemundo-affiliated commercial station with city of license in Merrimack, NH, one commercial station with city of license in Derry, NH, one commercial station with city of license in Concord, NH that is a satellite of a Boston, MA station, one public/educational station transmitting from Durham, NH, and one public/ educational station transmitting from Keene, NH.
			Cheshire	29,950		
			Hillsborough	153,330		
			Merrimack	57,430		
			Rockingham	114,740		
			Strafford	47,090		
				512,040	**100%**	
New Jersey	3,159,830	New York City, NY	Bergen	333,540		New York City, NY DMA: one Telefutura-affiliated commercial station with city of license in Newark, NJ, one Univision-affiliated commercial station with city of license in Paterson, NJ, one Telemundo-affiliated commercial station with city of license in Linden, NJ, one commercial station with city of license in Secaucus, NJ, one commercial station with city of license in Newton, NJ, one public/educational station transmitting from Montclair, NJ, one public/educational station transmitting from West Milford, NJ, one public/educational station transmitting from New Brunswick, NJ, and one public/ educational station transmitting from New ark, NJ;
			Essex	273,970		
			Hudson	221,690		
			Hunterdon	46,520		
			Middlesex	278,160		
			Monmouth	235,940		
			Morris	177,440		
			Ocean	224,690		
			Passaic	159,650		
			Somerset	117,740		
			Sussex	54,700		
			Union	183,420		
			Warren	41,750		

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		Philadelphia, PA	Atlantic	102,780		Philadelphia, PA DMA: one Telemundo-affiliated commercial station with city of license in Atlantic City, NJ, one other commercial station with city of license in Atlantic City, NJ, one Univision-affiliated commercial station with city of license in Vineland, NJ, one NBC-affiliated commercial station with city of license in Wildwood, NJ, one commercial station with city of license in Burlington, NJ, one public/educational station transmitting from Camden, NJ, and one public/educational station transmitting from Trenton, NJ.
			Burlington	166,510		
			Camden	189,960		
			Cape May	40,210		
			Cumberland	51,790		
			Gloucester	105,440		
			Mercer	128,740		
			Salem	25,190		
				3,159,830	**100%**	
New Mexico	745,730	Amarillo, TX	Curry	17,170		Amarillo, TC DMA: one ABC-affiliated commercial station with city of license in Clovis, NM that is a satellite of an Amarillo, TX station and one public/educational station transmitting from Portales, NM;
			Quay	3,750		
			Roosevelt	6,780		
			Union	1,550		
		Odessa-Midland, TX	Lea (S)	1,990		Odessa-Midland, TX DMA: one commercial station with city of license in Hobbs, NM;
		El Paso, TX-Las Cruces, NM	Dona Ana	69,660		El Paso, TX-Las Cruces, NM DMA: one Telemundo-affiliated commercial station with city of license in Las Cruces, NM and one public/educational station transmitting from Las Cruces, NM.
				100,900	**13.53%**	

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New York	7,094,620	Burlington, VT-Plattsburgh, NY	Clinton	31,080		Burlington, VT-Plattsburgh, NY DMA: one NBC-affiliated commercial station with city of license in North Pole, NY and one public/educational station transmitting from Plattsburgh, NY.
			Essex	15,030		
			Franklin	18,050		
				64,160	**0.90%**	
North Carolina	3,636,710	Atlanta, GA	Clay	4,800		Atlanta, GA DMA: no station with city of license in NC;
		Norfolk-Portsmouth-Newport News, VA	Camden	3,980		Norfolk-Portsmouth-Newport News, VA DMA: one commercial station with city of license in Manteo, NC and one public/educational station transmitting from Edenton, NC;
			Chowan	5,900		
			Currituck	9,630		
			Dare	14,790		
			Gates	4,560		
			Hertford	8,870		
			Pasquotank	15,800		
			Perquimans	5,430		
		Chattanooga, TN	Cherokee	11,920		Chattanooga, TN DMA: no station with city of license in NC;
		Myrtle Beach-Florence, SC	Robeson	45,180		Myrtle Beach-Florence, SC DMA: one public/educational station transmitting from Lumberton, NC;
			Scotland	13,690		

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		Greenville-Spartanburg-Anderson, SC-Asheville, NC	Buncombe	95,860		Greenville-Spartanburg-Anderson, SC-Asheville, NC DMA: one ABC-affiliated station with city of license in Asheville, NC that is affiliated with a station in Anderson, SC, one other commercial station with city of license in Asheville, NC, and one public/educational station transmitting from Asheville, NC.
			Graham	3,380		
			Haywood	24,920		
			Henderson	44,190		
			Jackson	15,080		
			Macon	14,410		
			Madison	8,370		
			McDowell	17,660		
			Mitchell	6,740		
			Polk	8,310		
			Rutherford	25,810		
			Swain	5,620		
			Transylvania	13,320		
			Yancey	7,830		
				436,050	**11.99%**	
North Dakota	264,630	None		**0**	**0.00%**	

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Ohio	4,550,660	Charleston-Huntington, WV	Gallia	12,320		Charleston-Huntington, WV DMA: one commercial station with city of license in Portsmouth, OH and one public/educational station transmitting from Portsmouth, OH;
			Jackson	13,070		
			Lawrence	25,800		
			Meigs	9,390		
			Scioto	30,210		
			Vinton	5,220		
		Fort Wayne, IN	Paulding	7,510		Fort Wayne, IN DMA: no station with city of license in OH;
			Van Wert	11,570		
		Parkersburg, WV	Washington	24,810		Parkersburg DMA: no station with city of license in OH;
		Wheeling, WV-Steubenville, OH	Belmont	27,800		Wheeling, WV-Steubenville, OH DMA: one NBC-affiliated commercial station with city of license in Steubenville, OH.
			Harrison	6,460		
			Jefferson	28,490		
			Monroe	5,690		
				208,340	**4.58%**	
Oklahoma	1,428,630	Shreveport, LA	McCurtain	12,850		Shreveport, LA DMA: no station with city of license in OK;
		Fort Smith-Fayetteville, Springdale-Rogers, AR	Le Flore	18,530		Fort Smith-Fayetteville-Springdale-Rogers, AR DMA: no station with city of license in OK;
			Sequoyah	15,700		
		Amarillo, TX	Beaver	1,970		Amarillo, TX DMA: no station with city of license in OK;
			Cimarron	970		
			Texas	6,820		

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		Joplin, MO-Pittsburg, KS	Ottawa	12,280		Joplin, MO-Pittsburg, KS DMA: no station with city of license in OK;
		Wichita Falls, TX-Lawton, OK	Comanche	41,370		Wichita Falls, TX-Lawton, OK DMA: one ABC-affiliated commercial station with city of license in Lawton, OK;
			Cotton	2,490		
			Jackson	9,420		
			Jefferson	2,480		
			Stephens	17,760		
			Tillman	3,080		
		Sherman, TX-Ada, OK	Atoka	5,350		Sherman, TX-Ada, OK DMA: one NBC-affiliated commercial station with city of license in Ada, OK.
			Bryan	15,910		
			Carter	19,040		
			Choctaw	6,050		
			Coal	2,170		
			Johnston	4,070		
			Love	3,560		
			Marshall	6,140		
			Pontotoc	14,750		
			Pushmataha	4,630		
				226,420	**15.85%**	

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Oregon	1,469,220	Spokane, WA	Wallowa	2,910		Spokane, WA DMA: no station with city of license in OR;
		Boise, ID	Malheur	9,840		Boise, ID DMA: no station with city of license in OR:
		Yakima-Pasco-Richland-Kennewick, WA	Umatilla	25,270		Yakima-Pasco-Richland-Kennewick, WA DMA: one FOX-affiliated commercial station with city of license in Pendleton, OR.
				38,020	**2.59%**	
Pennsylvania	4,876,070	New York City, NY	Pike	22,870		New York City, NY DMA: no station with city of license in PA;
		Washington, DC	Fulton	6,220		Washington, DC DMA: no station with city of license in PA;
		Buffalo, NY	McKean	16,990		Buffalo, NY DMA: no station with city of license in PA;
			Potter	6,350		
		Youngstown, OH	Mercer	45,840		Youngstown, OH DMA: no station with city of license in PA;
		Elmira, NY	Tioga	15,730		Elmira, NY DMA: no station with city of license in PA.
				114,000	**2.34%**	
Rhode Island	411,260	0 None		**0**	**0.00%**	

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South Carolina	1,765,850	Charlotte, NC	Chester	12,600		Charlotte, NC DMA: one commercial station with city of license in Rock Hill, SC and one public/educational station transmitting from Rock Hill, SC;
			Chesterfield	17,170		
			Lancaster	29,860		
			York	83,330		
		Savannah, GA	Beaufort	59,580		Savannah, GA DMA: one FOX-affiliated commercial station with city of license in Hardeeville, SC and one public/educational station transmitting from Beaufort, SC;
			Hampton	7,700		
			Jasper	7,680		
		Augusta, GA	Aiken	59,940		Augusta, GA DMA: one public/educational station transmitting from Allendale, SC.
			Allendale	3,660		
			Bamberg	5,900		
			Barnwell	9,180		
			Edgefield	8,660		
			McCormick	3,880		
				309,140	**17.51%**	
South Dakota	313,560	Sioux City, IA	Union	5,660		Sioux City, IA DMA: no station with city of license in SD;
		Minot-Bismarck-Dickinson, ND	Corson	1,280		Minot-Bismarck-Dickinson, ND DMA: no station with city of license in SD.
				6,940	**2.21%**	

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Tennessee	2,492,660	Paducah, KY-Cape Girardeau-Harrisburg, MO-Mount Vernon, IL	Lake	2,080		Paducah, KY-Cape Girardeau-Harrisburg, MO-Mount Vernon, IL DMA: no station with city of license in TN;
			Obion	13,020		
			Weakley	13,210		
		Huntsville-Decatur, AL	Lincoln	13,380		Huntsville-Decatur, AL DMA: no station with city of license in TN.
				41,690	**1.67%**	
Texas	8,586,370	Shreveport, LA	Bowie	34,670		Shreveport, LA DMA: one NBC-affiliated commercial station with city of license in Texarkana, TX.
			Cass	12,280		
			Harrison	24,090		
			Marion	4,570		
			Morris	5,300		
			Panola	9,090		
			Shelby	9,970		
			Titus	10,010		
				109,980	**1.28%**	
Utah	859,650	None		**0**	**0.00%**	
Vermont	249,410	Boston, MA-Manchester, NH	Windham	17,930		Boston, MA-Manchester, NH DMA: no station with city of license in VT;
		Albany-Schenectady-Troy, NY	Bennington	14,780		Albany-Schenectady-Troy, NY DMA: no station with city of license in VT.
				32,710	**13.11%**	

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Virginia	3,004,970	Washington, DC	Arlington	155,200		Washington, DC DMA: one commercial station with city of license in Manassas, VA, one Telefutura-affiliated commercial station with city of license in Arlington, VA, one public/educational station transmitting from Front Royal, VA, one public/educational station transmitting from Fairfax, VA, and one public/educational station transmitting from Goldvein, VA;
			Clarke	6,010		
			Culpeper	17,410		
			Fairfax	382,320		
			Fauquier	24,630		
			Frederick	40,160		
			King George	8,770		
			Loudoun	103,700		
			Page	10,140		
			Prince William	146,460		
			Rappahannock	2,860		
			Shenandoah	17,120		
			Spotsylvania	53,570		
			Stafford	41,010		
			Warren	13,950		
			Westmoreland	7,120		
		Raleigh-Durham, NC	Mecklenburg	13,370		Raleigh-Durham, NC DMA: no station with city of license in VA;
		Greensboro-High Point-Winston Salem, NC	Patrick	8,190		Greensboro-High Point-Winston Salem NC DMA: no station with city of license in VA;
		Bluefield, Beckley-Oak Hill, WV	Tazewell	18,570		Bluefield-Beckley-Oak Hill, WV DMA: no station with city of license in VA;

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		Tri-Cities (Kingsport-Johnson City, TN-Bristol, VA)	Buchanan	9,460		Tri-Cities (Kingsport-Johnson City, TN-Bristol, VA) DMA: one NBC-affiliated commercial station with city of license in Bristol, VA, one commercial station with city of license in Grundy, VA, one public/educational station transmitting from Marion, VA, and one public/educational station transmitting from Norton, VA.
			Dickenson	6,930		
			Lee	10,120		
			Russell	12,070		
			Scott	10,070		
			Smyth	13,600		
			Washington	30,420		
			Wise	17,990		
				1,181,220	**39.31%**	
Washington	2,500,030	Portland, OR	Clark	153,210		Portland, OR DMA: one commercial station with city of license in Vancouver, WA.
			Cowlitz	38,290		
			Klickitat	7,570		
			Skamania	4,060		
			Wahkiakum	1,600		
				204,730	**8.19%**	

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West Virginia	753,390	Washington, DC	Berkeley	40,920		Washington, DC DMA: one commercial station with city of license in Martinsburg, WV;
			Grant	5,030		
			Hampshire	9,090		
			Hardy	5,780		
			Jefferson	20,580		
			Mineral	10,770		
			Morgan	6,880		
		Pittsburgh, PA	Monongalia	35,040		Pittsburgh, PA DMA: one public/educational station transmitting from Morgantown, WV;
			Preston	12,420		
		Harrisonburg, VA	Pendleton	3,040		Harrisonburg, VA DMA: no station with city of license in WV;
		Roanoke-Lynchburg, VA	Pocahontas	3,430		Roanoke-Lynchburg, VA DMA: no station with city of license in WV.
				152,980	**20.31%**	
Wisconsin	2,248,370	Minneapolis-St. Paul, MN	Barron	18,740		Minneapolis-St. Paul, MN DMA: one public/educational station transmitting from Menomonie, WI;
			Burnett	7,090		
			Dunn	15,830		
			Pierce	14,640		
			Polk	18,140		
			St. 'Croix	31,950		
			Washburn	7,000		
		Marquette, MI	Florence	2,190		Marquette, MI DMA: no station with city of license in WI;

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		Duluth, MN-Superior, WI	Ashland	6,570		Duluth, MN-Superior, WI DMA: one NBC-affiliated commercial station with city of license in Superior, WI.
			Bayfield	6,450		
			Douglas	18,410		
			Iron	3,090		
			Sawyer	7,110		
				157,210	**6.99%**	
Wyoming	211,220	Denver, CO	Albany	13,260		Denver, CO DMA: one ABC-affiliated commercial station with city of license in Rawlins, WY that is a satellite of a Casper, WY station and one public/educational station transmitting from Laramie, WY;
			Campbell	15,930		
			Carbon	6,420		
			Johnson	3,600		
			Niobrara	980		
			Platte	3,480		
		Salt Lake City, UT	Lincoln	6,230		Salt Lake City, UT DMA: one CBS-affiliated station with city of license in Rock Springs, WY that is an satellite of a Casper, WY station;
			Sublette	3,380		
			Sweetwater	15,530		
			Uinta	7,350		
		Idaho Falls-Pocatello, ID	Teton	8,480		Idaho Falls-Pocatello, ID DMA: one NBC-affiliated commercial station with city of license in Jackson, WY that is a satellite of a Pocatello, ID station and one other commercial station with city of license in Jackson, WY that is a satellite of a Pocatello, ID station;

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		Billings, MT	Big Horn	4,190		Billings, MT DMA: no station with city of license in WY;
			Park	11,230		
		Rapid City, SD	Crook	2,650		Rapid City, SD DMA: one ABC-affiliated commercial with city of license in Sheridan, WY that is a satellite of a Rapid City, SD station and one other commercial station with city of license in Sheridan WY that is a satellite of a Casper, WY station.
			Sheridan	12,010		
			Weston	2,810		
				116,550	**55.18%**	

Sources: DMA definitions by A.C. Nielsen Data as presented in Warren Communications News, *Television & Cable Factbook 2009*, station volumes 1 and 2; television households by states and counties, as of September 2008, from A.C. Nielsen Data, household estimates compiled by Market Statistics Inc., as reprinted in Warren Communications News, *Television & Cable Factbook 2009*, station volume 2; commercial and public/educational station data from Warren Communications News, *Television & Cable Factbook 2009*, station volume 2.

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