No. 10-16666

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DISH NETWORK CORPORATION, et al.,

Plaintiffs - Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Nevada,
Case No. 2:10-CV-1075

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331. The court denied plaintiffs' motion for a preliminary injunction on July 30, 2010. ER 1-2.[1] Plaintiffs filed a timely notice of appeal on July 30, 2010. ER 8-9; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

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[1] "ER" refers to the excerpts of record filed by plaintiffs-appellants. "SER" refers to the supplemental excerpts of record filed by defendants-appellees. "DE" refers to district court docket entries. "CA" refers to court of appeals docket entries. "Pl. Br." refers to the opening brief filed by plaintiffs-appellants.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion in refusing to preliminarily enjoin a federal statute establishing the timetable on which satellite television providers must make local public television stations available in high-definition format in local markets in which the providers transmit any local programming in high-definition format.

STATEMENT OF THE CASE

The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521, provided satellite television providers with a compulsory copyright license that allows them to carry certain programming without obtaining authorization from the copyright holders. 17 U.S.C. § 122(a). The statute also requires carriers using the license to retransmit broadcasts of a local station to carry all other local television broadcast stations in the same market. 47 U.S.C. § 338(a)(1).

In 2008, the Federal Communications Commission promulgated rules under the statute that set out a four-year timetable for making all local stations equally available in high-definition ("HD") format. The rule requires that providers that carry any local stations' programming in HD format in a particular market must eventually provide all local programming in that market in that format. 47 C.F.R. § 76.66(k).

Section 207 of the Satellite Television Extension and Localism Act of 2010 ("STELA") accelerates that timetable with respect to qualified noncommercial educational television stations, with phased-in deadlines in December 2010 and December 2011. STELA, Pub. L. No. 111-175, § 207 (amending 47 U.S.C. § 338). Carriers may exempt themselves from the requirement by entering into a private carriage agreement with at least 30 qualified stations. See 47 U.S.C. § 338(a)(5), (k)(2).

Plaintiffs Dish Network, LLC and Dish Network Corporation (collectively,"DISH") have not challenged the timetable established by the 2008 regulation. In this action, however, they challenge the timetable established by STELA as a violation of their First Amendment rights. DISH indicates that it has entered into a carriage agreement with at least 30 qualifying public television stations, and thus is not subject to the STELA HD timetable. Pl. Br. 19; ER 11, 14-15. It urges, however, that it would have the right to terminate that contract if the statute were enjoined, and that a preliminary injunction is appropriate to effectuate that right. Pl. Br. 19; ER 11, 14.

After a hearing, the district court denied plaintiffs' request for a preliminary injunction, and plaintiffs have appealed from that order.

STATEMENT OF FACTS

A. Background.

Direct Broadcast Satellite ("DBS") providers deliver television programming by using the 12.2 to 12.7 GHz frequency band to transmit signals from satellites located at specific orbital locations in space directly to individual consumers' satellite dishes. 47 C.F.R. §§ 25.201, 25.202(a)(7). DBS space stations serving the United States are governed by the rules of the Federal Communications Commission, as well as international regulations administered by the International Telecommunication Union (ITU). Through agreements reached at Regional and World Radiocommunication Conferences, the ITU regulations apportion spectrum and orbital locations. See In the Matter of Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service, 21 F.C.C.R. 9443, ¶ 3 (2006). Currently, the United States has been assigned eight orbital locations for providing broadcast satellite service, each of which has an available spectrum that is divided into 32 DBS frequency channels. Id.; SER 16.

Transmissions from satellites in the same orbital location may result in signal interference. In the Matter of Policies and Rules for Direct Broadcast Satellite Service, 17 F.C.C.R. 11331, ¶¶ 119, 129 (2002) ("The close proximity of satellites located at the same orbital location increases the potential for

interference between adjacent channels."); id. ¶ 105 (DBS technical rules "ensur[e] protection of DBS systems from interference"); SER 18 (discussing such "harmful interference"). Accordingly, Congress has authorized the Commission to grant licenses to DBS service providers to use a specified number of DBS frequency channels at particular orbital locations. 47 U.S.C. § 307; 47 C.F.R. pt. 25; 21 F.C.C.R. 9443, ¶ 7.

B. Federal Licensing of Satellite Carriers.

1. FCC satellite licenses are limited in duration, 47 U.S.C. §§ 301, 304, 307(c); 47 C.F.R. § 25.121(a)(2), and create no ownership entitlement or rights beyond their terms and conditions, 47 U.S.C. §§ 301, 304. The Commission may grant or renew licenses only if "public interest, convenience, or necessity will be served thereby," id. § 307(a), (c)(1), and may modify them to promote those same purposes, id. § 316. As DISH recognizes, its discretion to apportion its licensed capacity may be limited as well by "new carriage obligation[s]" imposed by Congress or the Commission. ER 246, ¶ 9.

2. The current scheme of DBS regulation originated with the enactment of the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521 ("SHVIA"). As the Fourth Circuit explained in describing the genesis of the legislation, Congress sought to promote competition between cable carriers and the emerging satellite broadcast industry by

relieving satellite broadcasters of copyright restrictions that placed significant obstacles to the industry's growth. Satellite Broadcasting & Communications Ass'n v. FCC, 275 F.3d 337, 347-49 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002). In general, copyright law requires parties seeking to retransmit the signal of a broadcast television station to obtain authorization from those holding copyrights in each of the programs broadcast by that station. 17 U.S.C. § 106(4); Satellite Broadcasting, 275 F.3d at 345-46. Unlike satellite carriers, however, cable operators had not been required to obtain such copyright clearances. 17 U.S.C. § 111(c).

SHVIA amended the Copyright Act to create a statutory copyright license for satellite carriers similar to that enjoyed by cable operators, allowing satellite carriers to make secondary transmissions of a local broadcast station's signal into that station's local market without first obtaining authorization from the individual copyright holders. 17 U.S.C. 122(a). Satellite carriers that make use of this license pay no royalties to program copyright holders. Id. § 122(c); Satellite Broadcasting, 275 F.3d at 349.

The statutory compulsory copyright license is also subject to conditions imposed by statute and by implementing FCC regulations. Carriers using the license to retransmit broadcasts of a local station must also carry, on request, the signals of

all other television broadcast stations in the same local market. 47 U.S.C. § 338(a)(1). See Satellite Broadcasting, 275 F.3d at 352-66 (rejecting First Amendment challenge), cert. denied, 536 U.S. 922 (2002); see also CBS Broad., Inc. v. EchoStar Commc'ns Corp., 265 F.3d 1193, 1208-11 (11th Cir. 2001) (upholding "unserved household" condition on compulsory copyright license for DBS providers), cert. denied, 535 U.S. 1079 (2002).

DBS providers are also subject to requirements that pre-dated enactment of SHVIA, including a requirement since 1992 to set aside 4 to 7 percent of their channel capacity for "noncommercial programming of an educational or informational nature." 47 U.S.C. § 335(b); see Time Warner Entm't Co. v. FCC, 93 F.3d 957, 973-77 (D.C. Cir. 1996) (per curiam) (rejecting First Amendment challenge), reh'g en banc denied, 105 F.3d 723 (D.C. Cir. 1997).

C. Conditions Regarding Picture Quality.

1. In implementing SHVIA's requirements, the FCC has required that satellite carriers "treat all local television stations in the same manner with regard to picture quality." In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, 16 F.C.C.R. 1918, ¶ 118 (2000).

In 2008, the Commission applied this principle to high-definition signals, requiring "satellite carriers to carry each

station in the market in the same manner, including carriage of HD signals in HD format if any broadcaster in the same market is carried in HD." In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, 23 F.C.C.R. 5351, ¶ 5 (2008); 47 C.F.R. § 76.66(k).

Under the Commission's 2008 rule, satellite providers that carry any local stations in HD format in a particular market must thus carry all local stations in HD format. The 2008 regulation established a four-year timetable for compliance. Satellite providers must achieve compliance in 15% of the markets in which they carry local channels in HD by February 17, 2010; 30% by February 17, 2011; 60% by February 17, 2012; and 100% by February 17, 2013. 47 C.F.R. § 76.66(k)(2); 23 F.C.C.R. 5351, ¶ 8.

2. In 2010, through section 207 of STELA, Congress accelerated the FCC timetable with respect to "qualified noncommercial educational television stations." 47 U.S.C. § 338(a)(5). Under section 207, satellite carriers that use the statutory compulsory copyright license to provide local broadcasts in HD format must also provide "the signals in high-definition format of qualified noncommercial educational television stations located within that local market." Ibid. (applying only to carriers who retransmit local broadcasts "under section 122 of Title 17"). The statute gives carriers until December 31, 2010 to meet this requirement in 50% of the local

markets in which they provide HD programming, and until December 31, 2011 to comply in the remaining markets. Ibid. Congress sought to "ensure[] that satellite providers do not discriminate against noncommercial high definition signals," in order to promote "an even playing field" for local broadcast stations in satellite transmission, and "to protect the rights of consumers to receive federally funded programming." See 156 Cong. Rec. E849, E850 (daily ed. May 12, 2010) (Rep. Eshoo).

Reflecting Congress's preference for privately negotiated carriage agreements, H.R. Rep. No. 111-349, at 23 (2009), a satellite carrier is not subject to the statutory timetable if, by July 27, 2010, it entered into an agreement that "governs carriage of at least 30 qualified noncommercial educational television stations." See 47 U.S.C. § 338(k)(2) (defining "eligible satellite carrier").

D. Prior Proceedings.

1. DISH holds licenses to operate 82 DBS frequencies at three of the United States' orbital locations and leases capacity for an additional 32 DBS frequencies at another. See SER 17. In 2009, DISH generated annual revenues in excess of $11 billion through its use of these licenses. See SER 47.

DISH explains that it reached a carriage agreement with 30 qualified public television stations prior to July 27, 2010, and is therefore not subject to the statutory HD timetable. Pl. Br.

19; ER 11, 14-15. DISH notes that the agreement "includes a clause providing: 'To the extent any provisions of Section 207 of [STELA] are repealed, invalidated or enjoined, DISH reserves the right to withdraw from the Carriage Contract." ER 11; see ER 14.

2. On July 1, 2010, DISH filed this suit against the FCC, its Commissioners, and the United States, DE 1, and sought a temporary restraining order, requesting that defendants be preliminarily enjoined "from enforcing § 207 of [STELA]." DE 3 at 2, ¶ 1.

After expedited briefing and a hearing, the district court denied the request, explaining that section 207 does not restrict the content of speech, and was designed to make local public television stations "as attractive as other local stations." ER 67-68. The court noted that carriers were already required to offer local public television stations in standard-definition format ("SD"), and found no unconstitutional infringement in requiring carriers to offer these stations in HD format. See ER 30, 68. The district court issued its written order denying the preliminary injunction on July 30, 2010. ER 1-2.

DISH appealed. ER 8-9. This Court denied DISH's motion for an injunction pending appeal on August 25, 2010. CA 16.

SUMMARY OF ARGUMENT

DISH operates DBS frequencies by virtue of federal licenses and transmits programming without regard to certain copyright requirements by virtue of the compulsory copyright license made available to satellite providers by SHVIA. DISH has for years been subject to a variety of conditions imposed on these licenses. DISH is required to set aside 4 to 7 percent of its channel capacity for "noncommercial programming of an educational or informational nature." 47 U.S.C. § 335(b); see Time Warner, 93 F.3d at 973-77 (rejecting First Amendment challenge), reh'g en banc denied, 105 F.3d 723 (D.C. Cir. 1997). As the Supreme Court explained in Turner Broadcasting System, Inc. v. FCC, in sustaining a similar must-carry requirement upon cable operators for "qualified noncommercial educational television station[s]," such a requirement is content-neutral because the FCC and Congress have negligible influence over broadcast programming and may not use funding to the Corporation for Public Broadcasting to affect programming decisions. 512 U.S. 622, 651-52 (1994).

DISH must also carry, on request, the signals of all local broadcast television stations in any local market in which it has invoked the compulsory copyright license. 47 U.S.C. § 338(a)(1). See Satellite Broadcasting, 275 F.3d at 352-66 (rejecting First Amendment challenge), cert. denied, 536 U.S. 922 (2002). Under FCC regulations promulgated in 2008, which implement that

provision, DISH must transmit all stations in HD format in any market in which it uses the compulsory license to transmit in that format. 47 C.F.R. § 76.66(k). DISH did not challenge this regulation, which is phased in over four years. Ibid.

DISH nevertheless asserts that Congress violated its First Amendment rights through STELA section 207, which made minor alterations to the FCC timetable to require that qualifying public television stations be carried in HD format on a two-year schedule. DISH urges that the district court misunderstood the law and abused its discretion in denying a preliminary injunction.

As an initial matter, DISH cannot plausibly contend that an injunction is necessary to preserve the status quo. The statutory timetable is not applicable to satellite providers that have entered into carriage contracts with 30 or more public television stations, 47 U.S.C. § 338(a)(5), (k)(2), and DISH indicates that it has entered into such a contract. If so, it faces no deadlines under the statutory timetable, imminent or otherwise. A preliminary injunction, DISH explains, would allow it to consider whether to withdraw from the carriage contract. That order presents DISH with the option to upset the status quo pending a final resolution of the case, threatening immediate injury to the public television stations that are parties to the contract but not to this case, and to their viewers.

DISH's arguments on the merits are no more persuasive. The modest alteration to the HD timetable effected by Congress survives scrutiny under any conceivably applicable standard. The statute concerns only the timing of a means of signal transmission and does not advance or suppress any message. Because public stations operate at a commercial disadvantage, Congress has repeatedly acted to ensure that they are made available and are not subordinated in the commercial marketplace, and those protections have uniformly been sustained. The requirement that public stations not be delayed in the queue for HD transmission directly advances that important legislative purpose. DISH would prefer to accelerate HD transmission of commercial stations because, as it acknowledges, doing so is more lucrative. DISH may dislike the timetable on commercial grounds, but the statute does not, as DISH suggests, constitute a serious infringement on its "editorial discretion."

In sum, the district court did not abuse its discretion and committed no legal error in denying a preliminary injunction.

STANDARD OF REVIEW

The district court's denial of a preliminary injunction is subject to review for abuse of discretion. See, e.g., Playmakers LLC v. ESPN, Inc., 376 F.3d 894, 896 (9th Cir. 2004); Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cnty., 550 F.3d 770, 774 (9th Cir. 2008). The district court abuses its discretion if it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact, Playmakers, 376 F.3d at 896, but not "simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case," Guzman v. Shewry, 552 F.3d 941, 948 (9th Cir. 2009). The underlying issues of law are reviewed de novo. Playmakers, 376 F.3d at 896-97.

ARGUMENT

DISH HAS NOT DEMONSTRATED THAT A PRELIMINARY INJUNCTION IS REQUIRED TO MAINTAIN THE STATUS QUO OR THAT DISH IS LIKELY TO PREVAIL IN ITS CONSTITUTIONAL CHALLENGE TO THE HD FORMAT TIMETABLE ESTABLISHED BY CONGRESS.

A plaintiff seeking a preliminary injunction "must demonstrate 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010) (quoting Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 374 (2008)).

Because DISH's constitutional challenge is insubstantial, and because a preliminary injunction would neither preserve the status quo nor serve the public interest, the district court acted well within its discretion in denying DISH's request for preliminary relief.

I. The Requested Injunction Would Not Preserve The Status Quo, Is Unnecessary To Avoid Irreparable Injury, And Would Result In Significant Harm To Public Television Stations That Have Already Entered Into A Carriage Contract With DISH.

A preliminary injunction "is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). Such an injunction is an "extraordinary and drastic remedy" that may not be granted absent a clear

entitlement to relief, Mazurek v. Armstrong, 520 U.S. 968, 972 (1997), and is "never awarded as of right," Winter, 129 S. Ct. at 376 (citing Munaf v. Geren, 128 S. Ct. 2207, 2218-19 (2008)).

DISH fails to meet the fundamental prerequisites for preliminary relief. The injunction it seeks would not preserve the status quo and is unnecessary to avoid irreparable injury.

Section 207 of STELA establishes a timeline on which satellite carriers that offer programming in HD format in local markets must also carry local public television stations in that format. 47 U.S.C. § 338(a)(5). The HD signal provision applies only to carriers who are not parties to a contract that "governs carriage of at least 30 qualified noncommercial educational television stations" by July 27, 2010. Id. § 338(k)(2).

DISH explains that it is, in fact, "a party to a carriage contract that governs carriage of 30 qualified non-commercial education television stations in high-definition format" as of that date. ER 11, ¶ 2; see Pl. Br. 20. If so, it is not subject to any of the deadlines contained in the statute.

DISH nevertheless asks that the government be preliminarily enjoined "from enforcing § 207 of [STELA]." DE 3 at 2, ¶ 1 (emphasis added). Because DISH is not subject to the statutory timetable, there is plainly no immediate prospect of its "enforcement."

DISH seeks, instead, an injunction that will allow it to consider whether to withdraw from its carriage contract, which contains a clause that would permit DISH to withdraw if any provisions of STELA section 207 "are repealed, invalidated or enjoined." ER 11, ¶ 3; ER 14. As DISH explains, the injunction would thus make its contractual obligations "evaporate," leaving it free to withdraw from the agreement or not as it deemed fit. Pl. Br. 3, 19.

Providing DISH with the option of withdrawing unilaterally from a contract does not preserve the status quo pending resolution of the case. To the contrary, it allows DISH to alter an existing state of affairs to the detriment of the public television stations that are signatories to DISH's "Master HDTV Carriage Contract," ER 14, without giving those non-parties the opportunity to defend their interests in court. See Sammartano v. First Judicial Court, 303 F.3d 959, 974 (9th Cir. 2002) ("The public interest inquiry primarily addresses impact on non-parties rather than parties. The potential for impact on nonparties is plainly present here."). Permitting DISH to withdraw could also disrupt its customers' access to their local public television stations in high definition, or even standard definition.[2] If the

[2] The contract purports to waive the signatory stations' "standard definition and high definition must carry rights on DISH for the current cycle." ER 14; see 47 U.S.C. § 338(a)(1). Because the contract does not address how DISH's unilateral

(continued...)

government then ultimately prevailed in the litigation, the agreement could not easily be reconstituted and the status quo could not be restored.

DISH does not explain why the opportunity to rescind its contract is necessary to avoid imminent, irreparable injury. DISH asserts that it would not have entered the contract except to avoid compliance with the statute that it challenges. Nevertheless, it entered into the contract voluntarily, and it cannot now claim that it is irreparably harmed by a statutory timetable to which it is not subject.

Indeed, it is not even clear that DISH would withdraw from the contract if it were free to do so. The preliminary relief would only give it the opportunity to do so. An interest in considering whether to withdraw from a contract is at several removes from the type of imminent, cognizable injury that warrants preliminary injunctive relief.

DISH makes virtually no attempt to identify any injury that would be avoided by an injunction. It offers the vague assertion that its "injury began the moment STELA was enacted causing DISH to delay its plans to expand its HD offerings," Pl. Br. 55, although it has not alleged that the claimed delay persisted

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[2](...continued)
withdrawal would affect this purported waiver, granting the requested injunction would introduce uncertainty as to the signatory stations' ongoing carriage.

after it entered into the carriage contract. See ER 11-12; ER 201, ¶ 14. Instead, plaintiffs merely state that they experience irreparable injury "with each passing day that DISH labors under the Government-coerced carriage agreement and with every day of uncertainty as to whether or not the FCC will conclude that DISH is subject to STELA's Full Burdens." Pl. Br. 55-56 (citing no part of the record in support). DISH has not indicated what aspect of the carriage agreement inflicts injury, let alone irreparable injury.

DISH's reference to uncertainty about FCC action refers to the fact that the government's opposition to DISH's motion for injunction pending appeal stated that "DISH asserts" that it has entered into a carriage agreement with 30 public stations. Pl. Br. 19 (quoting CA 12 at 2). This wording reflects only the fact that DISH attached an unsigned master contract to its motion for injunction pending appeal and has not indicated what stations are signatories to the agreement. ER 14-15. If DISH had genuine uncertainties about whether it fits into section 207's safe harbor, it could pursue their resolution by filing an administrative petition for a declaratory ruling by the Commission. 47 C.F.R. § 1.2.

In any event, DISH's claims of harm ring hollow. By February 2013 (and in stages along the way), DISH will be required under the 2008 FCC regulation to provide all local

television stations in HD in any market where it provides HD. 47 C.F.R. § 76.66(k); 23 F.C.C.R. 5351, ¶¶ 5, 8 (2008). DISH has admitted that the regulation will require it to expand its capacity, ER 246, ¶ 7, but it declined to challenge the regulation, which issued two years ago.

In the absence of any cognizable injury, DISH suggests that its claimed First Amendment injury is sufficient to establish entitlement to an injunction. This Court's decision in Sammartano, on which DISH relies, held that "serious First Amendment questions compel[] a finding that there exists 'the potential for irreparable injury.'" Sammartano, 303 F.3d at 973 (emphases added). DISH has demonstrated neither a serious First Amendment question or irreparable injury, which, as the Supreme Court has now clarified, must be likely (not merely potential). Winter, 129 S. Ct. at 375; see also Alliance for the Wild Rockies v. Cottrell, 613 F.3d 960, 968 (9th Cir. 2010) (holding that even plaintiffs who show "serious questions going to the merits . . . must also satisfy the other Winter factors, including the likelihood of irreparable harm" (internal quotation marks omitted)), amended by No. 09-35756 (9th Cir. Sept. 22, 2010). See also Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009) (even "raising a serious [First Amendment] claim is not enough to tip the hardship scales").

In sum, plaintiffs have demonstrated no basis for a grant of preliminary relief.

II. DISH Has Failed To Show A Likelihood Of Success, Or Even Serious Questions, On The Merits.

A. DISH's License To Transmit DBS Signals And Its Use Of The SHVIA Compulsory Copyright License Are Subject To Reasonable Conditions Established By Congress And The FCC.

1. DISH transmits DBS frequencies by virtue of a federal license and carries programming without regard to copyright requirements by invoking the compulsory copyright license created by SHVIA in 1999. These licenses are subject to a variety of conditions to serve the public interest and, as DISH recognizes, its discretion to apportion its licensed capacity may be limited as well by "new carriage obligation[s]" imposed by Congress or the Commission. ER 246, ¶ 9.

Since 1992, DBS providers have been required to set aside 4 to 7 percent of their channel capacity for "noncommercial programming of an educational or informational nature." 47 U.S.C. § 335(b); see Time Warner, 93 F.3d at 973-77 (rejecting First Amendment challenge), reh'g en banc denied, 105 F.3d 723 (D.C. Cir. 1997). Carriers who use the compulsory copyright license created by SHVIA to retransmit a local broadcast station must also carry, on request, the signals of all other television broadcast stations in the same local market. 47 U.S.C.

§ 338(a)(1); see Satellite Broadcasting, 275 F.3d at 352-66 (upholding SHVIA against First Amendment challenge), cert. denied, 536 U.S. 922 (2002).

FCC regulations issued in 2008, implementing the SHVIA requirement, established a timetable under which satellite providers that carry HD signals for any station in a local market must make all stations in that market available in HD format. 47 C.F.R. § 76.66(k)(1); 23 F.C.C.R. 5351, ¶ 5. Satellite providers must achieve compliance in 15% of the markets in which they carry local channels in HD by February 2010; 30% by February 2011; 60% by February 2012; and 100% by February 2013. 47 C.F.R. § 76.66(k)(2); 23 F.C.C.R. 5351, ¶ 8.

Plaintiffs have not challenged the timetable established by the 2008 FCC regulation, and any such challenge would be implausible. As the FCC recently noted, satellite broadcast "subscribers do not consider SD programming to be an acceptable substitute for HD programming." In the Matter of Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, 25 F.C.C.R. 746, ¶ 54 (2010).[3] The "level

[3] See Brian Stelter, Crystal-Clear, Maybe Mesmerizing, N.Y. Times, May 24, 2010, at B4, available at http://www.nytimes.com/2010/05/24/business/media/24def.html?ref=digital_and_highdefinition_television (stating, shortly before STELA's passage, that "[f]ully half of the United States is now watching television in high definition . . . . HD may limit the number of channels that viewers turn to, because once they can watch programs in HD, they have little desire to watch anything of a lower quality").

playing field," Satellite Broadcasting, 275 F.3d at 364, contemplated by SHVIA and sought by STELA, would be illusory if satellite carriers could offer some stations a competitive advantage by offering to carry some, but not other stations, in the signal format favored by consumers. 156 Cong. Rec. E849, E850 (daily ed. May 12, 2010) (Rep. Eshoo) (seeking to promote through STELA "an even playing field" for local broadcast stations in satellite transmission).

2. Plaintiffs urge, however, that Congress impermissibly burdened their speech in enacting section 207 of STELA, which alters the timetable with respect to carriage of federally funded, noncommercial stations. Section 207 requires that satellite providers carry such stations in HD format in 50% of the local markets in which they provide HD format by December 31, 2010, and in all markets in which they provide HD format by December 31, 2011. 47 U.S.C. § 338(a)(5). As discussed, the timetable does not apply to providers that entered into a carriage contract with at least 30 eligible public stations by July 27, 2010, id. § 338(a)(5), (k)(2), and is therefore apparently inapplicable to DISH.

Plaintiffs devote much of their brief to contending that the modification to the HD format timetable should be subject to strict scrutiny. As discussed below, that assertion seriously

misapprehends governing precedent and the nature of the challenged requirement.

The more pertinent question is whether DISH has asserted any burden whatsoever on its First Amendment interests. As noted, because DISH entered into a carriage contract, it is not subject to the challenged timetable at all. Even assuming that DISH can plausibly characterize the contract as the product of statutory "coercion," it has not asserted that its decisions regarding when to provide HD signal for certain stations are expressive, Texas v. Johnson, 491 U.S. 397, 403 (1989) (First Amendment protects only expressive conduct); Rumsfeld v. FAIR, 547 U.S. 47, 66 (2006) (same), and it has not explained how those HD timing decisions are "inten[ded] to convey a particularized message" that DISH's customers would likely understand. Johnson, 491 U.S. at 404 (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)); see Pl. Br. 22; ER 200, ¶ 10 (describing DISH's purely commercial motives for choosing which stations' HD signals to transmit). Nor does section 207 affect DISH's selection of "the menu of channels [it] offer[s] to [its] subscribers." Satellite Broadcasting, 275 F.3d at 353; see City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986) (addressing a cable operator's decisions about which stations to "include in its repertoire," i.e., which stations' content to transmit to

customers). Section 207 affects only when a particular signal resolution format will be used.

3. Even assuming that DISH has identified any burden on its First Amendment interests, two aspects of the regulatory scheme command particular deference to Congress's judgment.

First, as the D.C. Circuit explained in Time Warner, in regulating DBS providers, Congress confronts concerns similar to those raised in regulation of over-the-air broadcasting by "the limited availability of the radio spectrum for broadcast purposes." 93 F.3d at 975. As the D.C. Circuit noted, in cases involving broadcast regulation, "the [Supreme] Court applies a 'less rigorous standard of First Amendment scrutiny,'" recognizing that in light of the "'inherent physical limitation on the number of speakers who may use the . . . medium,'" it is necessary to make "'some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.'" Time Warner, 93 F.3d at 975 (quoting Turner Broad. Sys., Inc. v FCC (Turner I), 512 U.S. 622, 637-38 (1994)). See also Turner I, 512 U.S. at 638 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388, 390 (1969)); accord FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1806 (2009) ("'A licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain

[and] when he accepts that franchise it is burdened by enforceable public obligations.'").

Satellite broadcasting is similarly constrained by the number of satellite orbital locations and of electromagnetic frequencies that can be transmitted from each location without triggering debilitating signal interference. 21 F.C.C.R. 9443, ¶ 3; 17 F.C.C.R. 11331, ¶¶ 105, 119, 129. As the D.C. Circuit explained, "[b]ecause the United States has only a finite number of satellite positions available for DBS use, the opportunity to provide such services will necessarily be limited." Time Warner, 93 F.3d at 975. The court thus concluded that regulation of satellite carriers "should be analyzed under the same relaxed standard of scrutiny that the Court has applied to the traditional broadcast media." Ibid.[4] The same is true here.

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[4] DISH incorrectly suggests that "[t]he key difference" that led the Supreme Court to apply a more rigorous standard to cable operators was the number of channels that could be transmitted by cable as compared to broadcast. Pl. Br. 21, 41-42. In fact, as the D.C. Circuit has recognized, Time Warner, 93 F.3d at 975, Turner I made clear that it rested upon another, more important difference: that cable "eliminates the signal interference sometimes encountered in over-the-air broadcasting and thus gives viewers undistorted reception of broadcast stations." 512 U.S. at 628; see id. at 637 (further describing "[t]he justification" for its conclusion as being the "physical limitations" of broadcast, i.e., scarce frequencies due to signal interference). The number of channels currently available via satellite is irrelevant when satellite still has "more would-be broadcasters than frequencies available," Turner I, 512 U.S. at 637, and--like broadcast and unlike cable--requires resort to an inherently physically limited public resource to provide or expand its channel capacity, id. at 637-38, 627-29.

Second, satellite carriers are the beneficiaries of the compulsory copyright license established by SHVIA that has been crucial to the success of providers such as DISH. As the Fourth Circuit explained in Satellite Broadcasting, "[t]he license enables satellite carriers to make secondary transmissions of a broadcast station's signal into that station's local market without obtaining the authorization of those holding copyrights in the individual programs broadcast by that station." 275 F.3d at 349 (citing 17 U.S.C. § 122(a)). Congress can place reasonable conditions on the use of that license without transgressing the First Amendment, and it is difficult to conceive of a more modest condition than the timetable for carrying HD signals.

4. In any event, the STELA HD timetable is "[a]t most . . . a content-neutral measure that imposes incidental burdens on speech and is therefore subject to intermediate First Amendment scrutiny." Satellite Broadcasting, 275 F.3d at 355 (citing United States v. O'Brien, 391 U.S. 367 (1968)). The timetable concerns only the resolution format used to transmit the signals of a category of stations--that is, the technological manner by which signals must be transmitted. See Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding a city's sound-amplification guideline as "a reasonable regulation of the place and manner of expression"). It is plainly not "'a regulation of

speech because of [agreement or] disagreement with the message it conveys.'" Turner I, 512 U.S. at 642 (quoting Ward, 491 U.S. at 791). Indeed, even a statute that facially distinguishes a category of speech or speakers is content-neutral if it is justified by interests that are "unrelated to the suppression of free expression." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43, 48-50 (1986) (upholding zoning restrictions on adult movie theaters); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 79-80 (1976) (same). As explained below, STELA section 207 seeks to support expression, not suppress it.

DISH urges that the STELA HD timetable favors certain speech based on its content because of Congress's concern to ensure that stations eligible for funding by the Corporation for Public Broadcasting ("CPB") be made available in HD format before the end of the timetable established by the FCC. Pl. Br. 13-14. The government has long supported public television stations not because they broadcast any particular content, but because their unique structure insulates them from the pressures that motivate the programming choices of commercial broadcast stations.[5]

[5] See, e.g., H.R. Rep. No. 90-572, at 10-11 (1967), reprinted in 1967 U.S.C.C.A.N. 1799, 1801 ("[T]he economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."); see also Minority Television Project Inc. v. FCC, 649 F. Supp. 2d 1025, 1034 (N.D. Cal. 2009) (relying on expert report describing "how public broadcasting addresses certain programming voids that exist in commercial broadcasting due to its financial incentive

DISH's argument is foreclosed by the Supreme Court's decision in Turner, in which the challenged statute required cable operators to carry "qualified noncommercial educational television station[s],"[6] using a definition which, for all relevant purposes, is identical to the definition of the term used in STELA section 207. (The definition in STELA omits certain noncommercial municipal stations, a difference that is neither meaningful nor relied upon by DISH. Compare 47 U.S.C. § 338(k)(6), with id. § 535(*l*)(1).)

Holding that the requirement was content-neutral, Turner emphasized that the FCC and Congress have negligible influence over broadcast programming, even via the funding to the CPB, because the government may not use its support to gain leverage over any programming decisions. Turner I, 512 U.S. at 651-52 (citing 47 U.S.C. §§ 396(g)(1)(D), 398(a)); see 47 U.S.C. § 398(c). See also Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 224-25 (1997). As Turner I made clear, congressional references to the value of particular programming

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structure").

[6] The statute in Turner imposed at least one carriage obligation that required more of cable operators for qualified noncommercial educational television stations than for commercial stations. Compare 47 U.S.C. § 534(b)(1)(A), with id. § 535(b)(2)(A) (exempting a set of smaller cable operators entirely from mandatory carriage of commercial stations, but not carriage of qualified noncommercial educational stations).

do not render the statute content-based or evince any illicit purpose under the First Amendment. 512 U.S. at 648.

DISH notes that public broadcast stations seeking CPB support must meet certain criteria independently established by the CPB, including that a substantial majority of the station's programming be "general audience programming," which does not include programs designed to "further the principles of particular political or religious philosophies." Pl. Br. 14; ER 187-88. These criteria seek to ensure that the CPB grants are made to stations in a viewpoint-neutral manner and without being dominated by special interests. Cf. 127 Cong. Rec. 13,145 (June 22, 1981) (Rep. Gonzalez) (describing the need to "insulate public broadcasting from special interest influences - political, commercial, or any other kind" that would otherwise dictate specific viewpoints); H.R. Rep. No. 97-82, at 16 (1981) (similarly emphasizing the risk of "influence of special interests – be they commercial, political, or religious"). The government is forbidden from exercising any "direction, supervision, or control" over the CPB (other than to enforce equal opportunity in employment). 47 U.S.C. § 398(a). And CPB provides financial incentives for stations to "differentiate their programming" in order to "expand[] the choices available to viewers," for example, by encouraging "non-duplicative content acquired from sources other than PBS." ER 186.

5. Even if DISH had shown STELA section 207 to be content-based (which, as explained, it has not), at most intermediate scrutiny should apply. The Supreme Court has recognized that, even when a restriction concerns broadcast speech that "lies at the heart of First Amendment protection"--i.e., a ban on editorializing by noncommercial broadcasters--the government's interest need only be "substantial" and the restriction need only be "narrowly tailored" to further that interest, not the least restrictive available. FCC v. League of Women Voters of Cal., 468 U.S. 364, 380, 381 (1984). And, as explained, DISH has not asserted that its HD timing decisions express any message, let alone that they lie at the heart of First Amendment protection.

B. The HD Format Timetable Directly Advances The Substantial Government Interest In Protecting Access To Federally Funded Public Television.

Intermediate scrutiny requires that the statute be "narrowly tailored to serve a significant governmental interest." Ward, 491 U.S. at 796 (internal quotation marks omitted). Because the challenged timetable easily survives scrutiny under the standards for content-neutral regulations outside the broadcasting context (or content-based regulations of core broadcast speech), the Court need not reach the question of whether a more deferential standard of review is appropriate. See Satellite Broadcasting, 275 F.3d at 355 (concluding that the court need not determine

whether "the rule should be evaluated under a more lenient standard").

1. In enacting the STELA HD timetable, Congress sought to "protect the rights of consumers to receive federally funded programming," and to "ensure[] that satellite providers do not discriminate against noncommercial high definition signals." See 156 Cong. Rec. E849, E850 (daily ed. May 12, 2010) (Rep. Eshoo). Congress was concerned that failure to provide public stations in HD format would impair those stations' ability to "compete for viewers with commercial stations favored by satellite contracts." Ibid. STELA aims to promote "an even playing field" for local broadcast stations when their signals are distributed by satellite providers. Ibid. See also H.R. Rep. No. 111-349, at 23 (2009) (noting that "millions of consumers do not have access to public broadcasting in high definition format" and that this failure of satellite carriers "constitutes discriminatory treatment" that required legislative response).[7]

[7] See also Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act: Hearing Before the Subcomm. on Commc'ns, Tech., and the Internet of the H. Comm. on Energy and Commerce, 111th Cong. 52 (Feb. 24, 2009) (preliminary transcript), available at http://energycommerce.house.gov/index.php?option=com_content&task=view&id=1501&Itemid=95 [hereinafter STELA February 2009 Hearing] (statement of Willard D. Rowland, Jr., Ph.D., Association of Public Television Stations) (explaining the necessity of STELA section 207 "to ensure that Dish's 14 million customers have access to the full benefits of their local public television stations' digital offerings"); 155 Cong. Rec. H13442 (daily ed. Dec. 2, 2009) (Rep. Boucher) (STELA section 207 "will result in more high-definition

The legislation promotes the First Amendment goal of encouraging "widespread dissemination of information from a multiplicity of sources." Turner I, 512 U.S. at 662-64 (recognizing this goal as "a governmental purpose of the highest order, for it promotes values central to the First Amendment"). And courts have recognized the importance of the government's interest in preserving an even playing field for local broadcast stations in satellite and cable transmission. See Satellite Broadcasting, 275 F.3d at 364 ("interest in preserving a level playing field" is "at least as significant as many interests which the Supreme Court has found to be important or substantial"); Turner I, 512 U.S. 662-64 (government interest in "fair competition" in television programming market "is always substantial").

Moreover, the longstanding existence and importance of Congress's interest in protecting access to federally funded noncommercial stations should be beyond dispute. Over forty years ago, Congress found that it is "in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution

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carriage of public broadcasting television").

technologies." 47 U.S.C. § 396(a)(9). It has adhered to this policy ever since,[8] as has the Commission.[9]

As discussed, to further that interest, Congress in 1992 required "DBS providers to reserve a small portion of their channel capacity for such programs as a condition of their being allowed to use a scarce public commodity." Time Warner, 93 F.3d at 976. The HD format timetable enacted by Congress, like the requirement enacted in 1992, "represents nothing more than a new

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[8] See, e.g., 47 U.S.C. §§ 390-393a (establishing a program of federal aid to be used in the construction of public telecommunication facilities); id. §§ 396-399b (creating the Corporation for Public Broadcasting); id. § 394 (establishing the National Endowment for Children's Educational Television); id. § 396(a)(1) (declaring that it is "in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational and cultural purposes"); id. § 535 (requiring cable operators to carry the signals of "qualified noncommercial educational television station[s]"); id. § 335 (requiring satellite carriers to reserve 4-7% of their channel capacity "exclusively for noncommercial programming of an educational or informational nature"); 138 Cong. Rec. H7271 (daily ed. Aug. 4, 1992) (Rep. Swift) ("[T]he public has the right to noncommercial programming . . . . To extend this public right to new communications technologies as they come on line is a most appropriate extension of the goals of the 1934 Communications Act . . . .").

[9] S. Rep. No. 93-123, at 3 (1973) (noting that, as early as 1945, the Commission had allocated 20 FM radio channels for use by noncommercial educational stations); S. Rep. No. 87-67, at 3 (1961) (noting that, in 1952, the Commission reserved 242 television channels, 12% of the total, for noncommercial educational use, see Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952)); In the Matter of Advanced Television Systems, 7 F.C.C.R. 3340, 3350 (1992) (noting the "important role noncommercial stations play in providing quality programming to the public" in making spectrum allocations, even as the technology of delivering video programming advances).

application of a well-settled government policy of ensuring public access to noncommercial programming." Ibid.

Because of the nature of public television funding, a delay in carrying public television stations in the same preferred format as other stations would compromise the financing mechanism on which they depend. Through grants to the independent Corporation for Public Broadcasting, Congress provides support for public television stations. ER 178, ¶ 11 (Thompson Decl.). Most support, however, is derived from other sources, ER 178, ¶¶ 11, 12, and the stations' "daily operations are directly funded by donations from local viewers." ER 178, ¶ 10. Dependence on local viewers' contributions helps to ensure that local public stations' programming is responsive "to the interests of their communities." ER 177-79, ¶¶ 7-17; S. Rep. No. 108-396, at 3, 11 (2004).[10] Access to their communities is thus the "lifeblood" of public stations. ER 179, ¶ 16.

The STELA section 207 timetable, like other measures designed to protect public broadcasting, reflects the financial considerations facing providers in determining whether to carry

[10] DISH's claim that local public television stations "carry almost exclusively PBS-produced content," Pl. Br. 14-15, is supported only by its own paralegal's observation of just five local public television stations over one twenty-four hour period during the summer of 2010, ER 135, ¶¶ 1-3, and is contradicted by the Interim President and CEO of the Association of Public Television Stations, who declared that "[m]uch of [local public television stations'] content is locally produced," ER 178, ¶ 15.

public stations or, in this case, when to carry them in HD format. Carrying noncommercial stations is generally not as lucrative as carrying commercial stations, and market forces provide insufficient incentive to ensure that satellite providers treat public stations the same as their commercial competitors. Cf. H.R. Rep. No. 102-628, at 69 (1992) (describing cable operators' economic incentives to disadvantage noncommercial stations, and data documenting that practice); ER 182, ¶ 27 (noting that "noncommercial educational media" do not benefit from "the pleasure of commercial sponsors"). Indeed, the gravamen of DISH's complaint is that requirements regarding noncommercial programming "adversely affect our financial results" by "displac[ing] programming for which [DISH] could earn commercial rates." SER 18 (DISH 2009 Form 10-K); see ER 201, ¶ 15 (admitting that, prior to STELA, DISH did not plan to include public stations in an HD launch it had planned for June 2010); ER 200, ¶ 10 (describing DISH's purely commercial considerations in choosing which stations' HD signals to transmit); ER 78-124 (demonstrating that in the local markets in which DISH currently offers HD, the HD signals transmitted are, with few exceptions, only those of commercial network stations). See also H.R. Rep. No. 111-349, at 21-22 (2009) (noting that, at the time of the report, DISH only carried HD signals of local public stations in Alaska and Hawaii, the two markets in which DISH was legally

obligated to do so under 47 C.F.R. § 76.66(b)(2))); ER 179-80, ¶¶ 19-20 (describing DISH's ongoing reluctance to provide public television stations in HD); STELA February 2009 Hearing, supra note 7, at 51-52 (statement of Willard D. Rowland, Jr., Ph.D., Association of Public Television Stations) (situation before STELA left "no choice but to conclude that there is market failure").

2. The timetable established by section 207 of STELA is narrowly tailored to advance the government's important interests. FCC regulations, promulgated in 2008, require satellite providers that carry any local stations in HD format in a particular market to thus carry all local stations in HD format. 47 C.F.R. § 76.66(k)(1). Those requirements are phased in over four years. Id. § 76.66(k)(2) (establishing February deadlines in 2010, 2011, 2012, and 2013). The 2010 legislation does no more than alter the regulation's timetable with respect to a small number of stations. 47 U.S.C. § 338(a)(5). Neither the FCC regulations nor the challenged legislation affect content. Both timetables concern only when channels will be carried in HD format.

Congress further tailored the legislation to provide that satellite carriers are not subject to the statutory timetable if they have entered into a carriage agreement with at least 30

qualifying noncommercial educational stations, see 47 U.S.C. § 338(k)(2), an option of which DISH has availed itself.

DISH nevertheless suggests that congressional action was unnecessary because the public can obtain access to public broadcasting in HD by taking the "simple" step of "hooking up rabbit ears and flicking a switch." Pl. Br. 51. Arguments of this type have repeatedly been rejected by the courts, and for good reason. DISH subscribers that receive most of their programming in HD format are unlikely to purchase additional hardware of uncertain effectiveness. As the Fourth Circuit explained in Satellite Broadcasting, in rejecting a challenge to the SHVIA carriage requirements, "[f]or subscribing households, satellite becomes the primary source of television programming, and it follows that satellite subscribers will be less likely to watch non-carried broadcast stations even if they have antennas that can capture a clear signal from those stations." 275 F.3d at 360 n.8. Such subscribers are also unlikely to obtain or maintain antennas to expand their reception range. Ibid.

In any event, as DISH's declarant acknowledged, attempting to obtain over-the-air HD is an option only if "the HD signal is strong enough to reach the owners' residence." ER 76, ¶ 5; see ER 220 (admitting that over-the-air HD is not available in "locations where local geography inhibits signal reception"). Many residents of rural or mountainous areas, or areas with weak broadcast signal

or signal interference, cannot receive over-the-air transmission in HD or otherwise. This, of course, is why they seek out satellite providers like DISH in the first place,[11] a fact of which DISH is well aware in its marketing. See Dish Network Press Release, supra note 11 (quoting DISH's CEO as stating that DISH offers its services to "particularly those [consumers] living in smaller and rural communities" because they "deserve access" to programming).[12] Even when HD signals can be received over the air, significant effort, time, and cost can be involved in installing and maintaining an antenna, which may involve a rooftop antenna and/or converter box rather than only "rabbit ears," ER 76, ¶ 5; ER 57, and for DISH customers would also require an over-the-air tuner, ER 77, ¶ 7.

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[11] Dish Network Press Release (May 27, 2010), http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=474211 (DISH "serv[es] the many rural markets that lack vital local TV signals"); 155 Cong. Rec. H13443 (daily ed. Dec. 2, 2009) (Rep. Lummis) ("For a rural State like Wyoming, satellite sometimes represents the only viable option to receiving television programming."); STELA February 2009 Hearing, supra note 7, at 6 (Rep. Boucher) (describing households that "cannot receive local signals over the air . . . because of terrain issues," such as mountainous regions); id. at 28 (Rep. Blackburn) (describing how satellite is "the only game in town for some" because their areas "are limited to a weak or nonexistent broadcast signal").

[12] See also CH Communications (DISH authorized retailer), Dish Network Special Deals, http://dishtv.dishnetworktalk.com/dish-network-special-deals-.html (last visited Sept. 24, 2010) ("Because satellite technology is not limited by geographic area or land-based cable lines, you can receive Dish Network service no matter where in the nation you live. In fact, if you live in a rural area or on an RV, satellite TV is probably your only option." (emphasis added)).

DISH questions the efficacy of the means chosen by Congress, citing the "undisputed" opinion of DISH's expert. Pl. Br. 23, 50, 51, 56. DISH mistakenly believes that the government, in opposing plaintiffs' motion for a temporary restraining order and preliminary injunction, was required to offer directly competing expert testimony. See Preminger v. Principi, 422 F.3d 815, 823 n.5 (2005) (burden of proof lies on party seeking preliminary injunction). The premises of the HD format timetable are clear, and DISH merely seeks to replace the predictive judgment of Congress with that of its witness. As the Supreme Court has stressed, "[t]he question is not whether Congress, as an objective matter, was correct to determine" that a particular statute "is necessary to prevent" some anticipated threat, but instead whether Congress's determination was reasonable. Turner II, 520 U.S. at 211 (emphasis added); id. at 195 ("[C]ourts must accord substantial deference to the predictive judgments of Congress."). And, as the Court has also made clear, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." Turner I, 512 U.S. at 666 (plurality opinion).

DISH fares no better in asserting that it was "targeted" by the statute because its chief competitor had already contracted to carry public television stations in HD format. Pl. Br. 12. As DISH notes, "[t]here are only two major 'satellite carriers' in

the country — DISH and DIRECTV." Ibid. DISH is thus one of the two primary gatekeepers that determine what programming is received by satellite subscribers. One of these two gatekeepers was implementing its obligations under FCC regulations without discriminating against public stations. See H.R. Rep. No. 111-349, at 23 (2009). DISH, which controls the delivery of high-definition public television signals to approximately 40% of satellite subscribers,[13] took a different path. Id. at 22-23; see ER 179-80, ¶¶ 19-20. The statute "targets" DISH only insofar as no other provider was engaging in comparably problematic conduct.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

[13] DISH's market share extends to 40% or more of the satellite pay-TV market. See SER 10 (DISH 2009 Form 10-K) (DISH's subscribers are "15% of pay-TV subscribers in the United States" and cable subscribers are "62% of pay-TV subscribers," leaving at most 23% of the pay-TV market attributable to DirecTV ("19% of pay-TV subscribers") and other satellite operators (assuming that very few individuals pay for both cable and satellite); thus DISH's 15% of pay-TV subscribers translates to at least 39.4% of the satellite pay-TV market).

Respectfully submitted,

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SEPTEMBER 2010

STATEMENT OF RELATED CASES

Counsel for the government is aware of no related cases.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1, I certify that the attached Brief for the Appellees is monospaced, has 10.5 or fewer characters per inch, and contains 9,174 words (excluding the cover, tables of contents and authorities, statement of related cases, certificates of service and compliance, and statutory addendum), according to the count of this office's word processing system.

s/ Dina B. Mishra
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2010, I caused to be filed an electronic copy of the foregoing brief with the United States Court of Appeals for the Ninth Circuit, by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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STATUTORY AND REGULATORY ADDENDUM

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Section 207 of the Satellite Television Extension and Localism Act of 2008 (STELA), Pub. L. No. 111-175.

SEC. 207. NONDISCRIMINATION IN CARRIAGE OF HIGH DEFINITION DIGITAL SIGNALS OF NONCOMMERCIAL EDUCATIONAL TELEVISION STATIONS.

(a) IN GENERAL.--Section 338(a) is amended by adding at the end the following new paragraph:

"(5) NONDISCRIMINATION IN CARRIAGE OF HIGH DEFINITION SIGNALS OF NONCOMMERCIAL EDUCATIONAL TELEVISION STATIONS.--

"(A) EXISTING CARRIAGE OF HIGH DEFINITION SIGNALS.--If, before the date of enactment of the Satellite Television Extension and Localism Act of 2010, an eligible satellite carrier is providing, under section 122 of title 17, United States Code, any secondary transmissions in high definition format to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, then such satellite carrier shall carry the signals in high-definition format of qualified noncommercial educational television stations located within that local market in accordance with the following schedule:

"(i) By December 31, 2010, in at least 50 percent of the markets in which such satellite carrier provides such secondary transmissions in high definition format.

"(ii) By December 31, 2011, in every market in which such satellite carrier provides such secondary transmissions in high definition format.

"(B) NEW INITIATION OF SERVICE.--If, on or after the date of enactment of the Satellite Television Extension and Localism Act of 2010, an eligible satellite carrier initiates the provision, under section 122 of title 17, United States Code, of any secondary transmissions in high definition format to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, then such satellite carrier shall carry the signals in high-definition format of all qualified noncommercial educational television stations located within that local market.".

(b) DEFINITIONS.--Section 338(k) is amended--

(1) by redesignating paragraphs (2) through (8) as paragraphs (3) through (9), respectively;

(2) by inserting after paragraph (1) the following new paragraph:

"(2) ELIGIBLE SATELLITE CARRIER.--The term 'eligible satellite carrier' means any satellite carrier that is not a party to a carriage contract that--

"(A) governs carriage of at least 30 qualified noncommercial educational television stations; and

"(B) is in force and effect within 150 days after the date of enactment of the Satellite Television Extension and Localism Act of 2010.";

(3) by redesignating paragraphs (6) through (9) (as previously redesignated) as paragraphs (7) through (10), respectively; and

(4) by inserting after paragraph (5) (as so redesignated) the following new paragraph:

"(6) QUALIFIED NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.--The term 'qualified noncommercial educational television station' means any full-power television broadcast station that--

"(A) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational broadcast station and is owned and operated by a public agency, nonprofit foundation, nonprofit corporation, or nonprofit association; and

"(B) has as its licensee an entity that is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B) of this title.".

47 C.F.R. 76.66(k)
(FCC 2008 HD Timetable Regulation)

§ 76.66 Satellite broadcast signal carriage.

(k) Material degradation.

(1) Each local television station whose signal is carried under mandatory carriage shall, to the extent technically feasible and consistent with good engineering practice, be provided with the same quality of signal processing provided to television stations electing retransmission consent, including carriage of HD signals in HD if any local station in the same market is carried in HD. A satellite carrier is permitted to use reasonable digital compression techniques in the carriage of local television stations.

(2) Satellite carriers must provide carriage of local stations' HD signals if any local station in the same market is carried in HD, pursuant to the following schedule:

(i) In at least 15% of the markets in which they carry any station pursuant to the statutory copyright license in HD by February 17, 2010;

(ii) In at least 30% of the markets in which they carry any station pursuant to the statutory copyright license in HD no later than February 17, 2011;

(iii) In at least 60% of the markets in which they carry any station pursuant to the statutory copyright license in HD no later than February 17, 2012; and

(iv) In 100% of the markets in which they carry any station pursuant to the statutory copyright license in HD by February 17, 2013.