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United States Government Accountability Office
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Congressional Committees

Subject: To Date, DISH Network Is Cooperating with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License

This report responds to the requirement, enacted in the Satellite Television Extension and Localism Act of 2010 (STELA),¹ mandating that the Comptroller General monitor and periodically report on the degree to which DISH Network (DISH)² is complying with the Special Master's³ examination of its compliance with the royalty payment and household eligibility requirements of the Section 119 statutory license.⁴ To respond to this mandate, we interviewed the Special Master and representatives of DISH, the National Association of Broadcasters (NAB), and the U.S. Copyright Office, and analyzed documents provided by these individuals. We found that, to date, DISH is complying with the Special Master's examination. In particular, DISH provided the Special Master with information on its subscribers and royalty payments, and is cooperating with NAB on a survey of all major network-affiliated television stations nationwide.

Background

The television broadcast industry provides free over-the-air programming to the public through local television stations; this is known as the primary transmission of the programming. However, more than 30 million U.S. households have access to broadcast programming through subscriptions to direct broadcast satellite (DBS) service.⁵ When a DBS operator provides its subscribers with access to broadcast programming, it is providing a secondary transmission of the programming. Because the broadcast programming is copyright protected, a license is required to secure the public performance rights for the secondary transmission of these works.⁶ Under existing law, two statutory licenses permit DBS operators, such as DISH or

¹Public L. No. 111-175, § 105, 124 Stat. 1218, (2010) amending title 17, U.S.C. by adding § 119(g)(4)(B)(vii).

²From 1996 through 2008, DISH Network was the media and entertainment arm of EchoStar Communications Corporation. In 2008, EchoStar divested DISH Network. In this report, we refer to DISH Network and its predecessor as DISH.

³A Special Master is appointed by a judge to carry out the duties set out in the order appointing him.

⁴The Special Master's examination and reporting requirements are set out at 17 U.S.C. § 119(g)(4)(B).

⁵In addition to DBS service, over 55 million households have access to broadcast programming through subscriptions to cable service.

⁶This is the right to show the copyright-protected work in public. 17 U.S.C. § 106(4).

DIRECTV®, to “clear” these copyrights, allowing them to offer secondary transmissions of broadcast programming.⁷ To take advantage of the statutory licenses, DBS operators must deposit with the U.S. Copyright Office a government-set royalty, which is later distributed to copyright owners.⁸

Congress has viewed localism as a primary legislative objective, with television broadcast stations serving as important sources of local news and public affairs programming. To protect local broadcast television stations and further the objective of localism, the Copyright Act,⁹ Communications Act of 1934,¹⁰ and Federal Communications Commission (FCC) regulations restrict the ability of cable and DBS operators to import broadcast signals from outside the local area. Two key regulations include the following:

- *Network nonduplication*: This rule protects local commercial and noncommercial broadcast television stations’ rights to be the exclusive distributor of network programming within their local area.¹¹
- *Syndicated exclusivity*: This rule protects the distribution rights for distributors of syndicated programming,¹² including local broadcast stations within a designated zone.¹³

The four major broadcast networks—ABC, CBS, Fox, and NBC—own or have affiliate television broadcast stations in most local television markets, known as designated market areas (DMA),¹⁴ throughout the nation. However, some local television markets lack access to one or more of the four major broadcast networks; these markets are referred to as short markets. Further, some households are unable to receive an adequate over-the-air signal from one or more of the local stations owned by or affiliated with the four major broadcast networks, typically because these households reside a significant distance from the television station’s broadcast tower; these households are also “unserved households.”¹⁵

To broaden service to unserved households, the Section 119 statutory license allows DBS operators to provide distant, out-of-market television broadcast signals to subscribers in short markets and to other unserved households;¹⁶ this is referred to as distant-into-local service. For

⁷17 U.S.C. §§ 119 and 122.

⁸The statutory licenses permit the public performance of the copyright-protected works in exchange for payment of royalties established using processes defined by statute.

⁹Title 17 of the United States Code.

¹⁰Act of June 19, 1934, ch. 652, 38 Stat. 1064, as amended (codified as title 47 of the United States Code).

¹¹47 C.F.R. §§ 76.92 and 76.122.

¹²Syndicated programming is non-network programming or postnetwork programming (a rerun) that is licensed directly to individual broadcast stations in more than one market.

¹³47 C.F.R. §§ 76.101, 76.103, and 76.123(b).

¹⁴Nielsen Media Research defines the DMAs. According to Nielsen, a DMA identifies an exclusive geographic area of counties in which the home market television stations hold a dominance of total hours viewed. There are 210 DMAs in the United States.

¹⁵FCC categorizes television broadcast signals by grades of signal strength, with Grade A being the strongest. An unserved household is unable to receive a signal of Grade B strength or better. Unserved households include homes of all types, including recreational vehicles and commercial trucks.

¹⁶With a statutory license, the DBS operator does not need to obtain the copyright holder’s permission for the secondary transmission as long as it follows the regulations and pays the Copyright Office the required royalty.

example, using the Section 119 statutory license, a DBS operator can provide its subscribers in Harrisonburg, Virginia, which lacks CBS and NBC affiliates, CBS and NBC stations from another television market, such as Washington, D.C. In addition to the Section 119 statutory license, a separate license found at Section 122 of title 17 of the United States Code allows DBS operators to provide local television broadcast signals to subscribers in the same local area; this is referred to as local-into-local service. For example, the Section 122 statutory license allows a DBS operator to provide its subscribers in Washington, D.C., with the broadcast programming from Washington, D.C., stations.

During the mid-1990s, DISH started providing satellite transmission of broadcast programming to its subscribers. Shortly thereafter, the four major broadcast networks and others filed suit alleging that DISH provided distant, out-of-market television broadcast signals to served households, which were ineligible for such service. In 2006, following a decision by the Eleventh Circuit Court of Appeals, DISH was found to have engaged in a pattern or practice in violation of Section 119 by improperly transmitting distant network signals to ineligible households and was permanently enjoined from providing distant-into-local transmission of all programming originating on stations affiliated with the four major broadcast networks.¹⁷

In 2010, Congress, through STELA, amended 17 U.S.C. § 119 to provide a remedy permitting DISH to seek relief from the injunction issued under Section 119. By providing local-into-local service in all 210 DMAs, DISH became eligible for recognition as a “qualified carrier” and to then request that the court waive its injunction. On June 30, 2010, DISH filed an Application for Certification with FCC requesting qualified carrier status under Section 119, which FCC granted on September 1, 2010. However, as a further condition for approval, Congress directed the court to appoint a Special Master to conduct a compliance examination of DISH. On November 24, 2010, in accord with 17 U.S.C. § 119(g)(4)(B), the District Court for the Southern District of Florida appointed a Special Master under rule 53 of the Federal Rules of Civil Procedure to perform the required examination and report his findings to the court. The Special Master is required to examine and file a report on DISH’s compliance with the household eligibility requirements associated with the Section 119 license and the royalty payments to the Copyright Office. The Special Master commenced his examination in accordance with the statute in October 2011 and must file his report by July 24, 2012. If the qualified carrier (DISH) is found to have willfully made a secondary transmission in violation of the statute, the waiver will be lifted and the permanent injunction will be reinstated.

To Date, DISH Is Cooperating with the Special Master’s Examination

DISH is cooperating with the Special Master’s examination, which consists of examining DISH’s compliance with the royalty payment and household eligibility requirements of the license under Section 119. Since beginning his examination, the Special Master has been holding regular meetings with representatives of DISH and NAB, which represents the four major networks and their affiliates. The Special Master requested, and DISH provided, information on DISH’s royalty calculations and payments to the Copyright Office.¹⁸ The Special Master told us that he is satisfied with the information provided by DISH to date and is currently in the process of reviewing the methodology DISH used for its royalty payments. To determine whether any problems exist with DISH’s services to eligible subscribers, and whether a more detailed

¹⁷*CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 450 F.3d 505 (11th Cir. 2006).

¹⁸DISH also provided the Special Master with a report on its recreational vehicle and commercial truck subscribers.

examination of DISH's records may be needed, DISH and NAB are collaborating on a survey of all major network-affiliated television broadcast stations nationwide. According to the parties, the survey is to be distributed twice: once in February 2012 and again in May 2012, to ensure that affiliated stations are not having issues with DISH's services. The Special Master has been kept apprised of the development of this survey and expects to discuss the findings of the survey in his July 24, 2012, report.

According to the Special Master and officials representing the broadcast networks, DISH is complying with the royalty payment and household eligibility requirements. As of January 30, 2012, DISH had submitted four royalty payments to the Copyright Office for distribution to the copyright owners. The Copyright Office officials said that there have been no objections filed regarding DISH's royalty payments. In addition, DISH expanded its local-into-local service to include all 210 DMAs. DISH officials told us that the company is providing distant signals only to subscribers in short markets and eligible recreational vehicles and commercial trucks. Officials from NAB noted that they have not heard any complaints from local television stations regarding DISH's provision of distant signals, in contrast to the situation prior to the litigation and STELA.

Agency and Third-Party Comments

We provided a draft of this report to DISH Network, the Federal Communications Commission, and the Special Master for review and comment. The Special Master noted that the draft report correctly represented the results he has found so far in his investigation and analysis. DISH Network provided technical comments that we incorporated as appropriate. The Federal Communications Commission did not have comments.

We conducted this performance audit from October 2011 to March 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We are sending copies of this report to DISH Network; the Chairman, Federal Communications Commission; and the Special Master. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staffs have questions about this report, please contact me at (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Mike Clements (Assistant Director), Martha Chow, and Bert Japikse.



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