THE FUTURE OF VIDEO

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

JUNE 27, 2012

Serial No. 112–155

Printed for the use of the Committee on Energy and Commerce

energycommerce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

82–325 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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THE FUTURE OF VIDEO

WEDNESDAY, JUNE 27, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:06 a.m., in room 2123 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Terry, Stearns, Shimkus, Bono Mack, Blackburn, Bilbray, Bass, Scalise, Guthrie, Kinzinger, Barton, Upton (ex officio), Eshoo, Markey, Doyle, Matsui, Barrow, Christensen, Rush, DeGette, Dingell (ex officio), and Waxman (ex officio).

Staff present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Sean Bonyun, Communications Director; Andy Duberstein, Deputy Press Secretary; Neil Fried, Chief Counsel, Communications and Technology; Debbee Keller, Press Secretary; Peter Kielty, Associate Counsel; Nika Nour, NewMedia Specialist; Katie Novaria, Legislative Clerk; David Redl, Counsel, Communications and Technology; Charlotte Savercool, Executive Assistant; Tim Torres, Deputy IT Director; Lyn Walker, Coordinator, Admin/Human Services; Jean Woodrow, Director, Information Technology; Phil Barnett, Democratic Staff Director; Shawn Chang, Democratic Senior Counsel; Margaret McCarthy, Democratic Professional Staff; Roger Sherman, Democratic Chief Counsel; David Strickland, Democratic Counsel and FCC Detailee; and Kara van Stralen, Democratic Special Assistant.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. I call to order the Subcommittee on Communications and Technology, and certainly welcome our panelists, witnesses who are here today. We very much appreciate your willingness to come and share your thoughts on the future of video. This is one of a series of hearings that we have organized, the first being future of audio and now future of video, and I imagine we will do future of data as well, and later in July we will have all five FCC commissioners here now that it is up to full functioning status, and so we look forward to that hearing as well as we look at these various rules and laws that have been on the books for a long time, and in an era when the marketplace continues to evolve and change dynamically and in a very rapid way.

The FCC regulates traditional video providers based on a bygone era. When Congress passed the 1992 Cable Act, for example, cable operators controlled 98 percent of the pay TV distribution market and were affiliated with 53 percent of the national program networks.

That law was meant to spur competition. It worked. Nationwide satellite TV providers DISH and DirecTV now control approximately one-third of the market and are the second- and third-largest providers. Only 15 percent of national program networks are vertically integrated with a cable operator. Broadcast stations are going mobile and wireless carriers are streaming video. Programmers and pay-TV providers are filling smartphone and tablet screens with their content and services as fast as viewers are clamoring for them.

At the same time, new entities are flocking to the market. Within the last 10 years, YouTube, iTunes, Netflix, Amazon, Hulu, Roku, Sky Angel and many others have leapt to provide video over the Internet. Currently, the Communications Act does not apply to these players.

We therefore have some decisions to make. One option is to recognize the competitive landscape and start deregulating cable, satellite, and broadcast companies. The other is to expand the Communications Act to apply to the new technologies and services. I, for one, do not believe we should be expanding video regulation. Internet-distributed video is growing at a remarkable pace in the absence of regulation. Video represented more than half of global Internet traffic by 2011, according to Cisco. Video delivered over the Internet specifically to televisions doubled in 2011 and will increase six-fold by 2016, representing 11 percent of consumer Internet video traffic. By 2016, 1.2 million minutes of video will cross the network every second and it would take more than 6 million years to watch the amount of video that will cross global IP networks each month.

Existing cable, satellite, and broadcast providers and programmers are experimenting with Internet distribution. Internet-only providers and programmers are also springing up. Regulation is not only unnecessary in such a vibrant environment, it can harm this nascent competition. The creative chaos in the marketplace frankly is healthy as parties fight to out-innovate each other and win viewers. A vibrant marketplace benefits consumers and it generates new jobs. The last thing we want is to shackle everyone's entrepreneurial spirit with one-size fits all rules designed for another time.

And if we are not going to apply the old regime to the new participants, we must recognize the inequity of continuing to apply it to the traditional players. The rules were premised on a lack of video competition that just isn't the reality anymore. To impose the regulations in a disparate fashion is neither technologically nor competitively neutral. This is not only unfair to the parties, it does viewers a disservice. Cable operators, satellite providers and broadcasters should be allowed just as much flexibility to respond to competition from the Internet players as we would like the Internet players to have to respond to competition from the traditional players. This is how we will spur innovation.

[The prepared statement of Mr. Walden follows:]

Opening Statement of the Honorable Greg Walden
Subcommittee on Communications and Technology
Hearing on "The Future of Video"
June 27, 2012
(As Prepared for Delivery)

The FCC regulates traditional video providers based on a by-gone era. When Congress passed the 1992 Cable Act, for example, cable operators controlled 98 percent of the pay-TV distribution market and were affiliated with 53 percent of the national program networks. That law was meant to spur competition. It worked. Nationwide satellite TV providers DISH and DirecTV now control approximately one-third of the market and are the second and third largest providers. Only 15 percent of national program networks are vertically integrated with a cable operator. Broadcast stations are going mobile and wireless carriers are streaming video. Programmers and pay-TV providers are filling smartphone and tablet screens with their content and services as fast as viewers are clamoring for them.

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Mr. WALDEN. With that, I yield the balance of my time to the vice chair of the committee, Mr. Terry.

OPENING STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. TERRY. Thank you, Mr. Chairman.

A lot has changed in the video marketplace over the last 20 years. Content, distribution and consumers' preferences have all evolved. We are a society that wants what we want, when we want it, wherever we want it, and because of this, the communication sector has spent billions over the last two decades in order to meet that consumer appetite.

As we engage in discussions about the current stage of the video marketplace and get bogged down in the granule details of disputes and issues, it is imperative that we always keep one thing in mind: the consumer is and will always remain the most important component of the discussion.

It is appropriate to ask questions about whether the regulations of decades past are in fact still appropriate today. Do they inhibit competition or spur it? Do they create regulatory parity or uneven playing fields? And most importantly, do we still work to the betterment of the consumer or are consumers now caught in the middle? Consumers need to benefit from the great expansion in technologies and mobility of technology.

With that, I would like to submit for the record a CEA letter written to us in regards to the technology.

Mr. WALDEN. Without objection.

[The information follows:]

CEA.

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June 26, 2012

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
Committee on Energy & Commerce
2123 Rayburn House Office Building
Washington, DC 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications and Technology
Committee on Energy & Commerce
2123 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walden and Ranking Member Eshoo:

On behalf of the Consumer Electronics Association (CEA), thank you for holding a hearing on the future of video. We appreciate the opportunity to provide this letter summarizing CEA's views of the evolving video marketplace.

CEA's more than 2,000 member companies include the world's leading consumer electronics manufacturers. CEA members design, manufacture, distribute, and sell a wide range of consumer products including television receivers and monitors, computers, computer television tuner cards, digital video recorders ("DVRs"), game devices, navigation devices, music players, telephones, radios, and products that combine a variety of these features and pair them with services. CEA and its members have a vital interest in open and competitive markets for programming as well as for devices, software, interfaces, and applications.

In examining the future of video, we must first look at what devices consumers are using to view video content now and in the future. According to a recent CEA Market Research Report, "The Evolving Video Landscape (April 2012)," high definition televisions remains king, but consumers are moving to many other devices. HDTVs are used by two-thirds of consumers (66%), almost twice the share that views video from a basic (non-HDTV) television set (37%). Computers and portable devices are also widely used by consumers to watch video. In fact, computers are now used by more people for viewing video than a basic, non-HDTV.

A shift away from viewing on TVs is occurring among younger consumers. Viewers under age 45 are more likely than older consumers to watch video from portable computers and smartphones. However, the HDTV is still the most widely used device for video viewing by all groups except for 18-24 year olds (82% of these consumers use a portable computer, while 71% use a HDTV).

While we believe that the home television will always be the prime source of family viewing, access to video content is evolving. Consumers are now accessing video content through a range of specialized devices. The more common devices include a DVD player (63%), a video game console (45%), and a DVR (43%). Almost a third (30%) relies on a Blu-ray Disc player, and the same share relies on an HD receiver that allows the consumer to access high definition signals[i].

Innovation in display technology such as 3-D and OLED are providing consumers with better video quality and optimal viewing experience. Internet-enabled televisions are not only allowing consumers to access content from various sources, it allows consumers to surf the Internet, stream music and Skype with family members.

Due the increase availability of broadband, new Internet video distributors are emerging. Netflix, Hulu, and YouTube are leading the charge with over 55% of consumers streaming online video and 23% downloading online video. However, even with these new choices, the vast majority of consumers' source of content is through cable and satellite.

Multichannel video programming distributors' (MVPDs) market dominance of video distribution must continue to be examined to ensure that consumers have multiple sources of online video content. Further, as MVPDs also dominate home broadband service providers, policymakers must work to prevent discrimination of a competitor's online video, including blocking or downgrading consumers' access to competing content.

The availability of competitive new innovative devices to access subscription video services is a key element in ensuring a robust marketplace. In Section 629 of the Telecommunications Act of 1996, Congress directed the FCC to adopt technical standards and promote a competitive marketplace in compatible, third-party devices that can access the full range of MVPD services. Sadly, after a decade and a half of negotiations, rules, and waivers, we are still nowhere close to having a competitive marketplace for navigation devices.

We continue to urge the FCC to implement and enforce Section 629 by establishing a universal IP-based interface allowing a competitive retail device to connect to any video distribution service. Such an approach will ensure that the video programs and services offered by a MVPD can be accessed by consumer-owned devices that connect to and interact with the Internet. A universal interface will allow innovation to flourish across the range of home viewing devices and continue to protect the integrity and content provide by the MVPD.

As noted earlier, one positive development for video consumers has been the emergence of new Internet-based video platforms that compete with traditional media companies. These services are driven by consumer demand, and often showcase consumer-created and distributed content. One obvious example is YouTube, which today sees 48 hours of video uploaded every minute. The result has been an explosion in the amount of video content available to consumers. We suggest that Congress view this "disruptive innovation" as a positive and pro-consumer development.

This innovation is enabled by the broadband Internet, which is increasingly accessed wirelessly. We appreciate Congress' decision earlier this year to increase the amount of licensed and unlicensed wireless spectrum via voluntary incentive auctions. We ask that Congress encourage these auctions to go forward as quickly as possible.

As an intellectual property (IP) industry, we support smart IP policies that protect creators while maintaining the dynamism of the Internet economy. While we had disagreed with some in the content industry over the approach taken in the Stop Online Piracy Act (SOPA), we continue to believe that we can reach a consensus on strategic and targeted ways to cut off funding to overseas "rogue" web sites. We also encourage content owners to aggressively offer licenses to legitimate video services that will compete effectively with unauthorized purveyors.

Finally, our industry is committed to ensuring that all consumers have access to new video devices and services. CEA is actively participating in the Federal Communication Commission's proceedings and advisory committees working to implement the 21st Century Communications and Video Act of 2010 (CCVA). We are striving to strike the right balance between ensuring accessibility while not stifling innovation. We urge this Committee to monitor the FCC implement of the CCVA to ensure that is consistent with Congressional intent and to examine the impact of compliance.

In conclusion, the video marketplace is forever evolving with new display technologies and an increasing array of content distributors. Policymakers must ensure that innovation is allowed to flourish by balancing the free market philosophy of "not picking winners and losers" while ensuring that marketplace dominance does not cut off consumer access to new exciting video devices and distribution services.

Sincerely,

Gary Shapiro
President & CEO
Consumer Electronics Association

cc: Members, Subcommittee on Communications and Technology

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[i] The Evolving Video Landscape, CEA Market Research Report, April 2012

Mr. TERRY. I thank my friend from Oregon and yield back.

Mr. WALDEN. The gentleman yields back the balance of his time. The chair now recognizes the ranking member of the subcommittee, my friend from California, Ms. Eshoo.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, and good morning to the witnesses, and thank you for being here, and thank you, Mr. Chairman, for having this hearing. I think it is a very important one, and certainly, when we look at the line outside, there is a great deal of interest.

Over the past 20 years, the video market has undergone a remarkable transformation. Today, consumers have access to more programming choices than ever before and have increasing control over where and when they watch these programs thanks to the DVR, to the Internet and to mobile devices like smartphones and tablets. While we have advanced in so many ways, there are also several key barriers that I am concerned have or could in the future curtail the exciting innovation that defines the next generation of video.

First, when Congress passed the 1996 Act, we required the FCC to establish rules to increase consumer choice and competition in the set box market. While we may never have imagined the benefits of Internet-connected devices like Roku and Boxee, consumers continue to have limited options when it comes to finding devices with features equivalent to the cable company-issued set-top box.

Second, consumers should not be held hostage when retransmission disputes break down. Since 2010, 10 different multichannel video programming distributors have experienced at least 34 blackouts in at least 76 media markets. Among the most high-profile disputes, which I think all of us recall, was a blackout that prevented millions of households from watching the first two games of the 2010 World Series.

And I would like to ask for unanimous consent to submit for the record, Mr. Chairman, the Broadcaster Retrans Blackouts 2010–2012.

Mr. WALDEN. Without objection.

[The information follows:]

BROADCASTER RETRANS BLACKOUTS 2010-2012
as provided by the American Television Alliance (ATVA)

DATE	STATION OWNER	MVPD	STATIONS	CITIES
March 6, 2010	Disney	Cablevision	ABC	New York, York New Jersey , Philadelphia, Connecticut
September 2 – September 16, 2011	Citadel Communications	Time Warner Cable	ABC	Lincoln, NE
October 15 -October 30 2010	Newscorp	Cablevision	FOX	New York, New Jersey, Philadelphia, Connecticut
Dec 15 – January 7, 2011	Smith Media LLC	Time Warner	NBC and CW-11	Burlington/Plattsburgh and Utica, VT and NY
Dec 16 2010- Dec 30 2010	Chambers	DISH	ABC	Oregon
Jan 1 2011 – Jan, 7 2011	KOMU	Mediacom	NBC & CW	Columbia, MO
Jan 1 - February 2, 2011	Northwest	DIRECTV	Fox	Yakima and Spokane WA, Medford, OR & Binghamton, NY
Jan 1 – Jan, 15 2011	Frontier Radio	DISH	Fox & ABC	Central Georgia (Macon)
March 7– March 14, 2011	LIN Media	DISH	CBS, FOX, NBC, CW and MyNetwork affiliates	17 markets: Albuquerque, N.M.; Austin, Texas; Buffalo, N.Y.; Columbus, Ohio; Dayton, Ohio; Fort Wayne, Ind.; Grand Rapids, Mich.; Green Bay, Wis.; Indianapolis; Lafayette, Ind.; Mobile, Ala.; New Haven, Conn.; Norfolk, Va.; Providence, R.I.; Springfield, Mass.; Terre Haute, Ind.; and Toledo, Ohio
March – May 2011	WUNI-TV	Full Channel	Univision	Rhode Island viewers of Worcester, MA station
May 2 – June 21, 2011	WCOV Fox20	DISH	Fox	Montgomery – Selma, AL
July 1 – October 14, 2011	ComCorp	DISH	Fox	Evansville, IN
August 31 – October 15, 2011	LIN Media	Mediacom	ABC, CBS, Fox, NBC, CW affiliates	Mobile-Pensacola; Grand Rapids – Kalamazoo – Battle Creek; Green Bay – Appleton; Ft. Wayne; Lafayette; Terre

November 2, 2011 – settled	Sarkes Tazian	DISH	NBC, CBS	Chattanooga; Reno
Dec 12, 2011 – May 25, 2012	Cordillera Communications	Time Warner Cable	NBC, Telemundo, CW South Texas	Corpus Christi
Dec 15 – Dec 21, 2011	Heritage Broadcasting	DISH	CBS, Fox	Traverse City, MI
January 1, 2012 (Settled)	Jackson/Lingard/ Southern	DISH	ABC, Fox, NBC	Columbus-Tupelo, Mississippi
January 1, 2012 – May 1, 2012	Wyomedia/Silver ton/Mark III	DISH	Fox, ABC, and CBS	Casper, WY
January 1, 2012 – May 1, 2012	Wyomedia/Silver ton/Mark III	DISH	Fox, ABC	Cheyenne, WY
January 1, 2012 –	**KNBN**	**DISH**	**NBC**	**Rapid City, SD**
January 1, 2012 –	**Allbritton**	**Shentel**	**ABC**	**Suburban Washington, DC**
Jan 5 – Feb 17, 2012	Hoak Media	Golden West	ABC	Sioux Falls, SD
Jan 13 – January 26, 2012	Sunbeam Television Corp	DirecTV	Fox, NBC	Miami; Boston
Jan 13 – Jan 15, 2012	Newport Television	Verizon FiOS	CBS, CW Television, My Network, ABC, Fox	Harrisburg, Pa; Syracuse, NY; Albany, NY
Jan. 27, 2012 –	**Turner Broadcasting System**	**DISH**	**Independent**	**Atlanta**
Jan. 31 – Feb 21, 2012	Louisiana Media	DISH	Fox	New Orleans
February 29 – March 9, 2012	Bayou City Broadcasting	DISH	Fox	Abilene, TX and San Angelo, TX
March 16 – March 17, 2012	Murphy Media	DISH	CBS, ABC, My Network	Yakima – Spokane, WA; LaCrosse – Eau Claire, WI; Madison, WI
March 31 – April 5, 2012	Tribune	DirecTV	independent stations, Fox, ABC and The CW affiliates	*19 Markets:* Los Angeles – Sacramento – San Diego, CA; Denver; Hartford, CT; Miami – Fort Lauderdale, FL; Chicago; Indianapolis; New Orleans; Grand Rapids, MI; St. Louis, MO; New York, NY; Harrisburg – Philadelphia, PA; Portland, OR; Dallas – Houston, TX; Seattle, WA; Washington D.C.
April 1 – April 13, 2012	Pappas Telecasting	DirecTV	Fox, ABC, CW, Azteca	Lincoln, NE; Omaha, NE; Des Moines, IA;

				Yuma, AZ
April 9, 2012 – May 16, 2012	Prime Cities Broadcasting, Inc.	Midcontinent Communications	Fox	Bismarck, ND
May 31, 2011 – June 6, 2012	Block Communications	Time Warner Cable	Fox, MyNetworkTV	Louisville, KY
June 5, 2012	**Diversified Communications**	**DirecTV**	**CBS, CW, ABC**	**Bangor ME; Gainesville, FL**
June 7, 2012	**Hoak Media**	**DISH**	**ABC, CBS, Fox, NBC**	**Grand Junction, CO; Fargo, ND; Panama City, FL; North Platte, NE; Lincoln, NE; Sioux Falls, SD; Monroe, LA; Alexandria, LA**

Total Markets in 2012: 53
Total Markets since FCC NPRM (March 2011): 82

Updated June 13, 2012

Ms. ESHOO. Thank you.

Third, I am concerned about the potential impact of data caps on the growth of the streaming video market. Just 2 weeks ago, it was widely reported that the Department of Justice had begun looking into whether data caps unfairly limit online video competition. While we don't know the extent of this inquiry, it falls on this subcommittee to thoroughly examine the issue and ensure future innovation is not curtailed.

Finally, there are joint agreements involving Verizon and several of the Nation's largest cable companies that are an example of the changing video landscape. Last week, I once again called for the subcommittee to have a hearing to review the proposed transaction, and I hope Chairmen Upton and Walden will agree to this request. I haven't taken a position on these proposed changes or what's in the works but I do think that we would all benefit from an examination of them.

I want to welcome again all of our witnesses that are here this morning, and most especially to the two that have traveled probably the farthest that are Silicon Valley constituent companies, Netflix of Los Gatos and Roku of Saratoga.

So thank you again, Mr. Chairman, and I yield back the balance of my time.

Mr. WALDEN. The gentlelady yields back the balance of her time.

The chair recognizes the full committee chairman, the gentleman from Michigan, Mr. Upton.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman.

The beauty of the free market is that it harnesses the laws of economics to spur competition. Especially in the communications sector, if you are not using technology to offer new services or cheaper prices, you are not going to last very long.

Unlike the laws of Congress, the laws of economics are exceedingly nimble. If new technologies or new competitors arise, the marketplace begins to adjust almost immediately. Legislators and regulators, by contrast, operate at a glacial pace relative to the speed of technology. Even the FCC's data on video competition is 6 years out of date, let alone the regulations.

The laws of economics also encourage diversity. Companies that can't provide the same services or content at cheaper prices strive to offer different services or content. That is what we call innovation.

Many regs, by contrast, drive everything to the lowest common denominator. If everyone is entitled to whatever content is popular at the moment, why would anyone risk investing in something brand new? And if everyone is entitled to the fruits of your labor, whether that is your distribution platform or your content, you are less likely to invest as much. Indeed, differentiation is often a leading driver of competition. So for example, many attribute the exclusive availability of the Football Sunday Ticket on DirecTV as a prime source of that satellite TV provider's growth. This in turn forces other players to invest in different content, develop better services, or lower prices.

Regulations in that space will only decrease economic activity. If particular behavior were economic, there would be no need to compel it. While such mandates might be warranted in a world of only three broadcast networks or where cable operators serve close to 100 percent of the pay-TV market, that is not the world that we live in anymore. Cable share of the subscription TV market has dropped from 98 percent at the time Congress passed the 1992 Cable Act to 68 percent in 2006, and it is probably about 55 percent today. That means almost one out of every home gets their programming from some other source, like a satellite operator or a phone company. The number of national program networks grew from 106 in 1994 to 565 in 2006, and the percentage of networks affiliated with a cable operator has shrunk from 53 percent when the Cable Act passed to 15 percent in 2006.

So if we want to spur investment, innovation and jobs, the time may have come to pull back on the laws of Congress and let the laws of economics do more of the work. Viewers across the country, not to mention our economy, would be better for it.

I yield to Mr. Stearns.

[The prepared statement of Mr. Upton follows:]

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The laws of economics also encourage diversity. Companies that can't provide the same services or content at cheaper prices strive to offer different services or content. This is what we call innovation.

Many regulations, by contrast, drive everything to the lowest common denominator. If everyone is entitled to whatever content is popular at the moment, why would anyone risk investing in something new? And if everyone is entitled to the fruits of your labor, whether that's your distribution platform or your content, you are less likely to invest as much. Indeed, differentiation is often a leading driver of competition. For example, many attribute the exclusive availability of the Football Sunday Ticket on DirecTV as a prime source of that satellite television provider's growth. This, in turn, forces other players to invest in different content, develop better services, or lower prices.

Regulations in this space will only decrease economic activity. If particular behavior were economic, there would be no need to compel it. While such mandates might be warranted in a world of only three broadcast networks or where cable operators serve close to 100 percent of the pay-TV market, that's not the world we live in anymore. Cable share of subscription television has dropped from 98 percent at the time Congress passed the 1992 Cable Act to 68 percent in 2006. By some estimates, it is now 57 percent. That means close to one out of every two homes get their programming from some other source, like a satellite operator or a phone company. The number of national program networks grew from 106 in 1994 to 565 in 2006, and the percentage of networks affiliated with a cable operator has shrunk from 53 percent when the Cable Act passed to 15 percent in 2006.

If we want to spur investment, innovation and jobs, the time may have come to pull back on the laws of Congress and let the laws of economics do more of the work. Viewers across the country—not to mention our economy—would be better for it.

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Mr. WALDEN. Yes, we have three on our side I think would like time. Mr. Stearns.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Thank you, Mr. Chairman, and I think, as Ms. Eshoo pointed out, a little nudge from this committee with legislation will create a nudge of billions of dollars out there in the audience.

I think, as you pointed out, the 1992 Cable Act, Mr. Chairman, when it was passed, everything has changed dramatically since then. I hope today is the first step towards all of us coming together with a process to modernize the 1992 Cable Act, and as you pointed out, Cisco recently released a study revealing that in 2016, over two-thirds, 68 percent of the U.S. mobile data traffic will be video. The current rollout of mobile DTV by broadcasters and dish push to enter into the wireless market are important examples of industry that are simply responding to consumer demand.

As many of our witnesses know who will testify today, consumers have access to more content, higher quality programming and a greater variety of devices than perhaps ever before. So I look forward to learning what is working and what the government can do to advance the future of video even further.

Mr. WALDEN. I now recognize the gentlelady from Tennessee, Ms. Blackburn.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Mr. Chairman.

Welcome to all of our witnesses today. I think that from the opening statements, you can see we can agree that the constant in the video arena is change, change in innovation, and I was thinking through my nearly 20 years of work in both the private and public sector on this issue and going from big box TVs to home theaters and then watching the analog to digital. Now you can carry pretty much whatever you want on an iPad and plug it into a screen and there you go.

Going forward, I hope we are going to focus on end use. I think consumers are the best at deciding what they want in content and also in their delivery mechanisms, so I look forward to the discussion we are going to have about how we insert free-market principles into the good work and innovation you do. Yield back.

Mr. WALDEN. The gentlelady yields back.

I recognize the ranking member of the full committee, Mr. Waxman, for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Chairman Walden, for holding this hearing to examine the future of video, and I want to thank you for working with us to assemble an interesting and diverse panel of witnesses.

Digital technology and broadband Internet access are dramatically altering how video content is produced, delivered and consumed, promising more choices and greater value for consumers and new avenues for the creative community to distribute its work. Our challenge is to ensure a diversity of voices, robust competition, and greater access to these new platforms.

The panel of witnesses before us illustrates the many ways Americans can access video programming today: free over-the-air broadcasting, pay-television service from cable, satellite, and even traditional telephone companies, or video delivered through a broadband connection. Video programming is no longer the exclusive province of the television set. Consumers can now use tablets and smartphones to watch their preferred content. Innovative products and services are increasingly putting viewers in control of what, when, where and how they watch video.

Even as we marvel at the incredible advances in technology, we must be mindful that policy choices we make today will impact the video landscape we see tomorrow. We should examine whether the legal framework created 20 years ago still works for a video market filled with choices that did not exist even 2 or 3 years ago. And we should remember that old challenges can persist in the face of new opportunities. Competitors need a fair shot at gaining access to content, and independent creators need rules that prevent discrimination against carriage of their programming.

Two decades ago, the actions of this committee and others in Congress helped once-nascent industries like cable and satellite to offer new choices to consumers. Today, we must continue to ensure innovation in the video marketplace can continue to flourish. As consumers increasingly watch video through broadband, an open Internet that is accessible to all becomes even more important. We need to carefully examine whether practices like broadband data usage caps are restricting consumer choice or being employed in an anti-competitive manner.

Also deserving of our scrutiny is whether major providers of video and broadband services will continue to have the incentives to compete in light of joint agreements and consolidation in the marketplace, and I join Ranking Member Eshoo in requesting hearings to examine the proposed transactions between Verizon and four of the Nation's largest cable companies, including an examination of the joint marketing agreements that would allow the companies to cross-market each others' services. I hope the committee will convene a hearing so that members can consider the impact of these deals not only on the video and broadband markets, but also on wireless competition.

I appreciate all the witnesses for participating in today's hearing. I look forward to your testimony, and I want to yield time to Ms. DeGette.

Ms. DEGETTE. Thank you very much, Mr. Waxman.

I just want to add my greetings to my constituent, Charlie Ergen from DISH Network, who came almost as far as Ms. Eshoo's constituents to be with us today. Thank you for coming.

I yield back.

Mr. WAXMAN. I join you in welcoming Mr. Ergen and all of our panelists, whether they came all the way from California or down the street from K Street. Welcome to you all.

I yield back my time.

Mr. WALDEN. The gentleman yields back the balance of his time.

We will get on with our witnesses now, and again, thank you all for being here. We are going to start with Mr. Robert Johnson, the CEO of Sky Angel U.S. LLC. Mr. Johnson, thank you for being here. We appreciate reading through your testimony and look forward to your comments.

Just for all the panelists, if you haven't used these microphones, you really need to get pretty close to them, and make sure the light is on.

STATEMENTS OF ROBERT W. JOHNSON, CHIEF EXECUTIVE OFFICER, SKY ANGEL U.S., LLC; GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE; DAVID HYMAN, GENERAL COUNSEL, NETFLIX, INC.; JIM FUNK, VICE PRESIDENT, PRODUCT MANAGEMENT, ROKU; MICHAEL K. POWELL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE AND TELECOMMUNICATIONS ASSOCIATION; DAVID BARRETT, PRESIDENT AND CHIEF EXECUTIVE OFFICER, HEARST TELEVISION, INC.; CHARLIE ERGEN, CHAIRMAN, DISH NETWORK, AND CHAIRMAN, ECHOSTAR; AND MICHAEL P. O'LEARY, SENIOR EXECUTIVE VICE PRESIDENT, GLOBAL POLICY AND EXTERNAL AFFAIRS, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

STATEMENT OF ROBERT W. JOHNSON

Mr. JOHNSON. Chairman Walden, Ranking Member Eshoo and members of the Subcommittee on Communications and Technology, it is my pleasure to have this opportunity to testify at your hearing today on the Future of Video, and thank you for inviting me to participate. My name is Rob Johnson. I am one of the founders of Sky Angel and its Chief Executive Officer.

Sky Angel was founded for the purpose of providing American families with a high-quality and affordable video distribution service in their homes that would offer exclusively family-friendly programming. Today it offers more than 80 channels that are live, linear programming networks, many of which are familiar in American households such as the Hallmark Channel, Fox News, the NFL Channel, Bloomberg and the Weather Channel, to name a few. Also, we will be adding a new African American family channel started by Magic Johnson.

Sky Angel was the first American video-programming distributor to provide a service which uses Internet Protocol Television technology, or IPTV, and a set-top box. Subscribers cannot access Sky Angel's encrypted programming without a set-top box, which has broadband Internet inputs including home wireless router access and video outputs that connect directly to their television sets. Sky Angel is not a web-based service and no external computer is needed to subscribe to or receive Sky Angel programming. All any American family needs for Sky Angel is a television set and a broadband Internet service of modest capability. Our set-top boxes look and act just like the ones that consumers ordinarily use at home. Here is one of them. A Sky Angel subscriber selects programming with the use of a typical remote control. A subscriber simply uses our remote to scroll up and down the screens of live channel choices and then clicks on the selection he or she wants to watch.

From the consumer's perspective, the Sky Angel service is functionally identical to typical cable or satellite video distribution. Sky Angel offers consumers a competitive alternative to other MVPD systems at affordable rates. Currently, our complete package of more than 80 live video and audio programming channels costs $32.99 a month and includes unlimited access to a large VOD library of movies, which are also family friendly. We have recently rebranded the package as FAVE TV. We have a less expensive inspirational package of programming, which is also available to the iPad.

Our goal is to offer a safe haven for families and children to enjoy as large a selection as possible of live video and audio programming and recorded video programming without fear of exposure to graphic sexual or other highly objectionable content. We are the proud recipient of the seal of approval from the Parents Television Council.

American families can have Sky Angel in their homes as an exclusive source of wholesome video entertainment, or they can subscribe and have Sky Angel in addition to another MVPD. The choice is theirs.

Our business model is not complicated. We enter into written agreements with programmers for distribution of programming to Sky Angel subscribers via our IPTV system. We pay the programmers monthly fees for a Sky Angel subscriber, who receives a programmer's channel. Sky Angel enters into subscription relationships with consumers for multiple live, linear channels of programming. We downlink our channels at our state-of-the-art facility located outside of Chattanooga. We provide our subscribers with set-top boxes which are necessary to receive the programming from Sky Angel, and we directly and remotely control the programming to the set-top box at all times.

Unfortunately, we have been faced with significant problems in obtaining access to family-friendly programming channels. One shocking example is C–SPAN, which is supposed to be a public service but C–SPAN refuses to deal with us. About 3 years ago, C–SPAN entered into an agreement with us for distribution of C–SPAN channels on the Sky Angel system. However, C–SPAN cut its service off only 3 days after we started carrying it, and we had a signed contract. C–SPAN officials told us that they "made a mistake" in permitting Sky Angel to carry its channels without any other explanation. As everyone knows, C–SPAN is offered on the Internet as a free public service to all, but as perhaps fewer people know, C–SPAN is controlled by the cable television industry.

In addition to the shocking decision of C–SPAN to cut us off, a number of large programmers have refused to deal with Sky Angel for the distribution of must-have family-oriented programming saying or implying that they want to avoid conflicts with the big players in the video distribution industry, and unlike C–SPAN, which is supposed to be a public service, commercial programmers that refuse to deal with us are passing up the higher subscriber rates Sky Angel typically pays because we are too small to have any real bargaining power.

Discovery Communications is the most obvious example of a large programmer that refuses a lucrative distribution agreement with Sky Angel in order to stifle competition. My written statement describes our problems with Discovery in some detail, but basically, Discovery cut us off from receiving their channels 2 years into a 7-year distribution agreement. Discovery has never offered a coherent explanation for its actions, which did not make economic sense. We are positive that it was anti-competitive in nature trying to deter a new startup company using IPTV technology.

Trying to right a wrong, we filed a program access complaint with the FCC against Discovery in March of 2010. To date, the FCC has never made a substantive ruling on that case even though the FCC's own decisions say that they will decide program access complaints within 5 months, and the DC Circuit Court of Appeals is scrutinizing the FCC's delay in acting on our program access complaint. Nonetheless, 27 months have passed without substantive action by the FCC, so tiny Sky Angel remains injured by the unfair programming decisions of multibillion-dollar Discovery Communication and its affiliated program distribution interest.

We believe that our experience with starting and operating an innovative new family-oriented video distribution shows that there is anti-competitive conduct in the industry and significant problems with the manner in which the FCC is failing to enforce program access laws and regulations so that a valuable new competitive interest is facing unfair discrimination. The program access requirements under the 1992 Cable Act require fair treatment of competitors such as Sky Angel but those requirements are not being enforced.

The will of Congress is being ignored and competition by Sky Angel and likely others is being stifled. We believe that the public interest in supporting competition in video distribution, expanded use of the Internet, diversity in programming sources and affordable choices for American families requires the attention of the Congress to ensure that the existing legal framework is fairly and properly enforced.

Thank you again for the opportunity to testify, and I would be pleased to answer any questions that you may have or provide you with any additional information.

[The prepared statement of Mr. Johnson follows:]

SUMMARY OF STATEMENT OF ROBERT W. JOHNSON, SKY ANGEL U.S., LLC

Sky Angel provides an exclusively family-friendly, affordable service of about eighty linear channels of programming. The encrypted programming can only be accessed via a set-top box connected to a subscriber's broadband Internet connection. Because the set-top box connects directly to a TV set and subscribers select a desired channel through an on-screen guide, the service is functionally identical to traditional MVPDs. Like any new entrant, Sky Angel's ability to compete rests in large part on being able offer a variety of popular programming options. Recognizing this fact in 1992, Congress enacted the program access requirements, which prohibit a programmer affiliated with a cable operator from unreasonably refusing to deal with, or otherwise discriminating against, rival MVPDs. Unfortunately, the video distribution marketplace remains willing to engage in anti-competitive tactics in order to harm emerging competitors, as Sky Angel's ongoing experience clearly demonstrates.

Although Sky Angel had timely paid all fees to Discovery Communications for two years, Discovery suddenly informed Sky Angel that it planned to terminate their contract. Because Discovery refused to explain or retract its threat, Sky Angel filed a program access complaint with the FCC. In response, Discovery argued that Sky Angel fails to qualify as an MVPD. Sky Angel fits squarely within the express terms of the MVPD definition, is functionally identical to traditional MVPDs from a consumer perspective, and provides the exact competition Congress sought to encourage, but the FCC still has not ruled on the complaint twenty-seven months later, during which time Sky Angel has lost subscribers, and failed to gain new subscribers, due to the absence of Discovery programming. Anti-competitive conduct, and the FCC's failure to enforce the program access rules, continue to prevent the full realization of the public interest benefits Congress sought to achieve – increased competition, Internet use and consumer choice, affordable rates, innovation, and expanded programming diversity. Congress should act to ensure a level playing field for new entrants in the video distribution marketplace.

STATEMENT OF ROBERT W. JOHNSON, CEO OF SKY ANGEL U.S. LLC
June 25, 2012

Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee on Communications and Technology, it is my pleasure to have this opportunity to testify at your hearing today on The Future of Video and thank you for inviting me to participate. We think our experience with starting and operating an innovative new family-oriented video distribution service demonstrates significant problems with the manner in which the FCC is failing to enforce program access laws and regulations, so that a valuable new competitive entrant, such as Sky Angel, faces anticompetitive conduct from incumbent operators in the industry. We believe that the public interest in supporting competition in video distribution, expanded use of the Internet, diversity in programming sources, and affordable choices for American families requires the attention of the Congress.

Introduction: The Goal of Sky Angel

Sky Angel was founded for the purpose of providing American families with a high-quality and affordable video distribution service in their homes that would offer family-friendly programming exclusively. I am one of the founders of Sky Angel. Our deep Christian roots guide the company. Sky Angel separately offers packages of Christian and secular video programming, as well as a combination package of all programming. Sky Angel is not a religious or proselytizing organization. Its goal is to offer a safe haven for families, and children, to enjoy as large a selection as possible of live video and audio programming, and recorded video programming, without fear of exposure to graphic sexual or similar content. Now operating under the brand FAVE TV, Sky Angel carefully selects all of its programming to ensure high-quality and strong family values. Our service is a proud recipient of the Seal of Approval from the Parents Television Council.

Starting in 2008, Sky Angel began distribution of exclusively family-friendly video programming, on a nationwide basis, at affordable subscriber rates. Today, it offers more than 80 channels that are live, linear programming networks, many of which are familiar in American households, such as The Hallmark Channel, Fox News, the NFL Channel, Bloomberg and the Weather Channel, to name a few. Sky Angel was the first American video programming distributor to provide a service which uses Internet Protocol Television ("IPTV") technology and a set-top box. Subscribers cannot access Sky Angel's encrypted programming without the set-top box, which has broadband Internet inputs and video outputs that connect directly to their television sets. No external computer or software is necessary to subscribe to, or receive, Sky Angel programming.

What Sky Angel Does and How It works

Sky Angel offers consumers a competitive alternative to other MVPD systems at affordable rates. Currently, the complete package of more than 80 live video and audio programming channels, as well as access to a large VOD library of exclusively family-friendly movies, costs $32.99 a month. American families can have Sky Angel in their homes as an exclusive source of wholesome video entertainment or they can subscribe and have Sky Angel in addition to another MVPD. The choice is theirs. All any American family needs for Sky Angel is a television set and a broadband Internet service of modest capability.

Although distribution of video programming through the use of IPTV technology is fairly well known in Europe, and other parts of the world, Sky Angel was the first to offer a true IPTV video programming distribution system throughout the United States using this technology. Sky

Angel's IPTV system does not distribute programming on the World Wide Web, but rather relies on a combination of its own facilities, and in part, on subscribers' broadband Internet connections as a partial path in its distribution system. In summary, this is how Sky Angel provides its video service:

- Sky Angel enters into definitive written agreements with program providers/rights holders for distribution of programming to Sky Angel subscribers via its IPTV system under which Sky Angel pays the programmers monthly fees per Sky Angel subscriber who receives its channel.
- Sky Angel enters into subscription relationships with consumers for multiple, live linear channels of programming, who are sent Sky Angel set-top boxes, which are necessary to receive programming from Sky Angel and which Sky Angel directly and remotely controls at all times.
- Sky Angel receives content from programmers' satellite locations, and then processes and encrypts it.
- Sky Angel transmits the encrypted programming to its two headends via fiber optic cable which it controls.
- The encrypted programming then is distributed to Sky Angel subscribers, in part through Internet connections which those subscribers have contracted for from ISPs.
- The programming is received by the Sky Angel set-top boxes, decrypted, and then transmitted to subscribers' television sets with industry-standard copy protections.
- At no time is the World Wide Web, or home computers, part of the Sky Angel service.
- Sky Angel exclusively controls the origination, distribution, and reception of all programming, and at no time may anyone receive the programming except authorized subscribers via their authenticated set-top boxes.

To a consumer, Sky Angel is functionally identical to traditional cable and satellite video distribution services. All programming is available via a typical set-top box, which is controlled by the consumer using a standard remote control. The consumer simply scrolls across a menu of channel choices, and "clicks" the one he or she wants to watch. Sky Angel provides closed captioning, high definition and similar services on much the same basis as MVPDs do generally.

Sky Angel Should Benefit from Statutory Program Access Protections

Congress enacted a broad definition of MVPD in the 1992 Cable Act, which the FCC implemented. That definition provides:

> ...the term "multichannel video programming distributor" means a person such as, **but not limited to**, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming... (47 U.S.C. §522(13) (Section 602)) (emphasis added).

Of course, in 1992 Congress did not envision video distribution partially using the Internet, because it did not exist, which is a perfect example of why Congress wisely did not limit the MVPD definition to existing 1992 technology. To qualify as an MVPD, and have statutory program access protections, an entity simply must offer multiple programming channels, for purchase, to subscribers or customers. By implication, there would be some similarity to traditional cable or satellite offerings, but this broad definition clearly is not specific to any particular technology or requires ownership or operation of specific kinds of facilities. Even a cursory look at how Sky Angel provides its service shows that it falls squarely under this definition of MVPD. And just as clearly, web-based, video-on-demand or non-subscription video offerings do not fall under the definition.

Sky Angel Faces Anti-Competitive Obstacles

Unfortunately, Sky Angel has encountered serious difficulties in the marketplace, primarily in its ability to acquire programming for its subscribers and to make the Sky Angel system more attractive and competitive. To be sure, Sky Angel does not attempt to attract viewers who insist upon access to salacious programming sources. But among the providers of must-have family-friendly programming, there is considerable resistance to entering into distribution contracts with Sky Angel. Sky Angel adds programming channels to its system only through negotiated written agreements with programming owners. Under those programming distribution contracts, Sky Angel pays the programmers fees per subscriber which, in all likelihood, are considerably higher than the fees that large MVPDs pay, because a tiny start-up like Sky Angel has no market power or other ability to bargain for discounted fees. A number of programmers simply will not deal with Sky Angel, essentially denying Sky Angel access to important programming sources, even though Sky Angel ends up paying premium fees.

The ongoing dispute between Sky Angel and Discovery Communications is a perfect example of the problem that Sky Angel faces in attempting to acquire, and pay for, must-have family programming. This dispute also shows that Congress needs to ensure that the regulatory processes it has put into place are being appropriately and fairly administered.

In 2007, Sky Angel and Discovery entered into an Affiliation Agreement for the distribution of five channels of Discovery programming, including "The Discovery Channel" and "Animal Planet." Some Discovery channels are "must-have" programming for Sky Angel's service, and two of Discovery's channels quickly became among the top-five most-watched channels offered by Sky Angel. At all times, Sky Angel paid Discovery the monthly subscriber fees that Discovery wanted under the Affiliation Agreement.

The Affiliation Agreement, the term of which extends through December 31, 2014, expressly permits Sky Angel's use of IPTV technology, and provides a detailed definition of an IP System that is identical to Sky Angel's service. In September 2009, Discovery proposed that the parties expand their relationship, asking Sky Angel to carry, and pay for, additional Discovery-owned networks. However, in December 2009, Discovery unexpectedly informed Sky Angel that it planned to terminate the Affiliation Agreement four years early, and thus withhold its programming from Sky Angel's subscribers and potential subscribers. Although

Sky Angel repeatedly sought additional information from Discovery, and offered to cooperate fully to address Discovery's alleged "concerns," Discovery refused to provide any justification, reasonable or otherwise, for its termination. Instead, Discovery simply repeated that it was "uncomfortable" with Sky Angel's "distribution methodology," which had not changed since Discovery carefully examined the system and the parties executed the Affiliation Agreement. The definitions in the Affiliation Agreement provided in detail for the carriage of the programming over IPTV.

Discovery was achieving its business goals under its Affiliation Agreement with Sky Angel – new distribution of its programming channels with payment of lucrative subscriber fees in return. Certainly, Discovery's sales personnel were pleased with the Sky Angel agreement because they sought to expand the arrangement, for additional fees, of course. However, for reasons that could not have been economic, Discovery terminated the agreement.

The FCC Program Access Process Is an Ongoing Failure

Because of Discovery's threats and refusal to explain or relent, on March 24, 2010, Sky Angel filed a Program Access Complaint and Emergency Petition for Temporary Standstill with the FCC in an attempt to prevent Discovery's unjustified and unlawful withholding. The Complaint relied on the 1992 Cable Act and the FCC's implementing rules. On April 21, 2010, before Sky Angel timely responded to Discovery's claimed defenses, including that Sky Angel fails to "qualify" as an MVPD under the statute, the FCC's Media Bureau declined to issue a standstill, based only on the incomplete record before it. Discovery severed its programming connection with Sky Angel the next day. The FCC has taken no other substantive action in the more than two years since April 2010, and so Sky Angel and its subscribers remain deprived of the Discovery programming or a decision on the merits by the FCC. Sky Angel has suffered harm, in the form of lost revenue, subscribers, and marketing opportunities, because of Discovery's action and the FCC's refusal to protect it.

Although the Bureau declined to grant a standstill at that time, it expressly did not rule on any of the merits of Sky Angel's program access complaint, including whether Sky Angel qualifies as an MVPD entitled to the program access protections Congress intended to apply to new, innovative competitors in the video distribution marketplace. Rather, the Bureau simply found that, because of "the limited record before" it and "the lack of Commission precedent" regarding a service such as Sky Angel, it was "unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted." The pleading cycle did not conclude until after the Bureau declined to grant a standstill, so Sky Angel had no opportunity to address Discovery's unexpected, and strained, legal and factual contentions made in opposition to Sky Angel's complaint and standstill petition.

The record of evidence before the FCC is that:

- Sky Angel qualifies as an MVPD entitled to relief under the program access rules. Sky Angel clearly falls within the broad statutory and regulatory definitions of an MVPD, and its innovative service, while not known to Congress twenty years ago, is exactly the type of new entrant Congress intended to promote in order to increase competition in the video distribution marketplace.
- Discovery continues to engage in unfair acts and unlawful discrimination by withholding its programming from Sky Angel while permitting far larger video programming distributors, including its affiliates, to offer their subscribers multiple linear channels of Discovery programming via broadband Internet connections.
- As has been demonstrated to the FCC, and is known to anyone who cares to look, DISH currently offers its 14 million subscribers unlimited Internet access to all of the live channels they subscribe to, including numerous Discovery channels, via Internet access from any U.S. location, at no extra cost. Discovery permits that Internet-based distribution of its channels by DISH. The "True TV Everywhere" offering by DISH proves that Discovery does not suffer harm from Internet distribution of its channels of a vastly greater scope than Sky Angel provides to its 20,000, or so, subscribers.

- Sky Angel has suffered, and will continue to suffer, irreparable harm due to Discovery's withholding of its programming. Sky Angel subscribers no longer can access Discovery programming, and consumers considering subscribing to Sky Angel have had less incentive to do so for more than two years. Further, Sky Angel's "first to market" advantage in offering this innovative and affordable service continues to deteriorate, and several large programming providers continue to hesitate to enter into distribution agreements with Sky Angel expressly because of Discovery's unlawful withholding.

- Discovery would suffer no harm because it would simply be providing programming to a distributor which uses the same distribution technology as other distributors of its programming, and Discovery would receive additional revenue on a per-subscriber basis at rates it required and contractually agreed to. Other large MVPDs also offer versions of "TV Everywhere" which include Discovery channels provided via some form of Internet distribution.

The D.C. Circuit Had to Scrutinize the FCC Process

Under its program access procedures, the FCC has committed to resolving program access complaints within five months of submission. However, because of almost two years of inactivity by the FCC, Sky Angel felt compelled to ask the United States Court of Appeals for the D.C. Circuit to order the FCC to act in the case by filing a Petition for Writ of Mandamus. To Sky Angel's great satisfaction, in a matter of only a few days after filing its Petition, the Court ordered the FCC to respond to Sky Angel's Petition within 30 days.

Before the 30 days had expired, the FCC assigned the Sky Angel Complaint a file number, which the agency had failed to do for the previous two years. It also accepted a form of protective order between the parties, which also had been languishing at the FCC for most of two years. Then, the FCC "launched" a proceeding, asking for public comment regarding the meaning of the MVPD definition and asking many other questions, the vast majority of which were unnecessary to act upon Sky Angel's program access Complaint. The pleading cycle closed for those comments, and reply comments, on June 13, 2012.

To date, the FCC still has not acted substantively on Sky Angel's Complaint. Nor has it acted on Sky Angel's motion seeking information from Discovery (pending without action for more than two years), Sky Angel's renewed request for a standstill (pending without action for more than 13 months), or Sky Angel's request to sanction Discovery for lack of candor and to investigate if Discovery had misrepresented its claims of "harm" (also pending for more than 13 months).

Congress Should Ensure That There is a Level Playing Field for Video Competition

So far, the regulatory process that Congress enacted in the 1992 Act has been an utter failure for Sky Angel, its subscribers, and the public interest which would benefit from the improved choice and pricing of its service. The fundamental purpose of Sky Angel's complaint is to evoke the program access rights under the 1992 Act so that Discovery would deal fairly with Sky Angel in its programming decisions, and not disadvantage Sky Angel, while providing exactly the same programming to large MVPDs. Sky Angel believes that the program access framework would be beneficial to it and the public interest if it were fairly and promptly enforced. Sadly, the small competitive entrant is being given short shrift by the FCC, and therefore, advancing the interests of multi-billion dollar incumbent MVPDs.

In fact, the recent record before the FCC demonstrates that a majority of interested parties, representing various segments of the video distribution marketplace, agree that Congress intended a broad definition of MVPD so that competitors, such as Sky Angel, would receive fair treatment in access to programming. In contrast, opponents are primarily incumbent MVPDs, who argue for a narrow definition of MVPD, taking exactly the opposite position they promoted in 1992 when the Act was passed and implemented.

Sky Angel, itself, is not a competitive threat to incumbent MVPDs because of its small size and family-friendly commitment. However, it represents a technology and system that could be very effective in competing against the established providers because of its far lower cost of entry into the market and ability to offer service nationwide, wherever broadband Internet connectivity is available.

In addition to the dispute with Discovery, Sky Angel has faced refusal to deal from other programmers. For example, and quite shocking, C-SPAN refuses to permit Sky Angel to distribute its channels. Although C-SPAN entered into an agreement with Sky Angel and began to provide its programming, C-SPAN cut its service off three days later, saying that it had "made a mistake," without any other explanation. Interestingly, C-SPAN is offered on the Internet as a "free" public service to all. Perhaps telling is that C-SPAN is controlled by the cable television industry, which claims that it does not need to be regulated in this area because it can be trusted to do the right thing. No doubt, the fox was quoted as saying much the same on the way to the chicken coop. In addition, a number of larger programmers, which are not distributors, have refused to deal with Sky Angel, saying (or implying) that they want to avoid conflicts within the industry.

Sky Angel believes that if Congress and the FCC made it clear that the law requires that it, and other new entrants, be treated fairly, then these failures to deal would be removed, or at least mitigated. Therefore, Sky Angel urges Congress to make sure that the existing provisions of the 1992 Cable Act are fairly and promptly enforced.

Sky Angel relies upon a set-top box as an essential component of its distribution system. Sky Angel supports fairness in set-top box technology and distribution. It would be delighted if set-top boxes generally supported the distribution of its service, so long as the integrity of its system, especially including encryption, is preserved.

Sky Angel is not an ISP. It does not provide Internet service. It relies upon the Internet connections of its subscribers for "last mile" access to the set-top boxes in their homes. Sky

Angel has no arrangements with ISPs, and its service is subject to any data caps imposed upon subscribers by ISPs.

In conclusion, Sky Angel believes that it represents an important part of the future of video on the Internet. It offers a service that is cost-effective and consumer-friendly, permitting American families to have an alternative to the established, incumbent MVPDs, in a form that is functionally identical. It would improve use of, and access to, the Internet by consumers. The Sky Angel service is not web-based, or even connected to a home computer, and its characteristics fall clearly and squarely under the MVPD definition passed by Congress in the 1992 Cable Act. As such, on the one hand it should be protected under the program access rights that Congress included in the 1992 Act, and on the other hand, Sky Angel is entirely different from all web-based, video-on-demand and/or non-subscription video services, such as Netflix, Hulu, and YouTube. None of those services fall under the MVPD definition.

Sky Angel urges Congress to ensure that there is a level playing field so that it, and other new entrants, may have the opportunity to compete fairly for video subscribers and thus enhance the public interest, and consumer choice, by providing new opportunities and uses for the Internet, now and in the future.

Thank you again for the opportunity to testify and I would be pleased to answer any questions that you may have or provide additional information.

Mr. WALDEN. Mr. Johnson, thank you for your testimony. We look forward to following up with some questions.

We will now turn to Gigi Sohn, the President and CEO of Public Knowledge. Gigi, we are delighted to have you here today. We look forward to your comments as well.

STATEMENT OF GIGI B. SOHN

Ms. SOHN. Chairman Walden, Ranking Member Eshoo, members of the subcommittee, thank you for inviting me to talk about the future of video.

There is widespread agreement that we are currently living in the golden age of television, but despite all the great programming and groundbreaking devices, Americans are still locked into a TV business model that limits competition and choice, keeps prices high for video, and limits technology and online video from achieving their full potential. This business model was made possible largely by an outdated regulatory structure created by incumbents to gain competitive advantage. It is time for policymakers to revamp this regulatory structure so that new video competition can thrive, giving consumers greater options and the ability to watch video whenever they want and on the device of their choosing. This will result in lower prices, better services and more flexibility and control for consumers.

The Internet is changing the video marketplace just as it changed the market for music, books and other forms of media. Consumers are attempting to drive this change by demanding that more content be provided to them through the Internet. One grassroots campaign by consumers called "Take My Money HBO" advocates for HBO content, which is only available if you subscribe to cable or satellite TV service, to be available for purchase on the Internet. More than 60,000 visited the petition Web site within 12 hours of its launch, leading many of them to express over Twitter their willingness to pay money directly to HBO only if it were available on the Internet.

Despite this level of excitement for Internet video distribution, it is not a foregone conclusion that the Internet will disrupt the video marketplace. Dominant players in the market today control both the content their online competitors need for their service and the pipes they must use to reach consumers. As a result, much high-value programming is not available to online video providers. They also have to contend with artificially and arbitrarily low data caps and other discriminatory practices that keep them from reaching their full potential.

So while it is inevitable that IP technologies and the Internet will play an ever-larger part of video delivery, it is not inevitable that the market will reach its full competitive potential. That is why policymakers should extend policies that ensure that new competitors like Sky Angel can access high-value content at reasonable prices. If they do this while at the same time protecting Internet openness, they can ensure that the video marketplace normalizes and becomes truly competitive.

There are other regulations that permeate the video marketplace that should be repealed today. The network non-duplication, syndicated exclusivity and sports blackout rules do little more than preserve old business models. If these protectionist rules ever made any sense in the pre-Internet era, they certainly don't today.

Representative Scalise and Senator DeMint are on the right track with their bill that would clear away much of the regulatory underbrush that holds back the evolution of the video marketplace although the bill does go too far by eliminating media ownership restrictions. Other rules like retransmission consent, the compulsory copyright license and must-carry are also outdated but they are part of an interwoven fabric of regulatory and business expectations. They should be reformed but cautiously and eventually eliminated. And copyright law is also regulation that is often misused to hold back innovation. Witness the lawsuits against Aereo and DISH's AutoHop service.

By taking these simple steps, policymakers will be able to facilitate the development of competitive online video and subsequently disengage from regulations that were designed to counter the effects of bottleneck control. If they fail to do this, it is likely that incumbents will continue to shape the development of the video market and extend their current dominance indefinitely.

While the Internet provides grounds for hope that the future of video will be much better for consumers, a lot of work remains for this hope to become reality.

Thank you. I look forward to your questions.

[The prepared statement of Ms. Sohn follows:]

Public Knowledge

Testimony of Gigi B. Sohn,
President, Public Knowledge

Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing On:
"The Future of Video"

Washington, DC
June 27, 2012

Chairman Walden, Ranking Member Eshoo, members of the Subcommittee, thank you for inviting me to talk about the future of video. My name is Gigi Sohn, and I am President of Public Knowledge, a non-profit public interest organization that seeks to ensure that the public benefits from a communications system that is open, competitive and affordable.

INTRODUCTION

There is widespread agreement that we are currently living in the golden age of television. Programs like *Mad Men*, *Breaking Bad*, *Game of Thrones*, *Modern Family*, *The Daily Show* and *The Colbert Report* have become part of our cultural landscape, and even in this era of 500 channels, still inspire discussions around the water cooler. There are numerous new ways to watch TV – be it on a flat screen LED television, on a tablet or on a smartphone. And the Internet and DVRs have the ability to allow a viewer to watch what they want to watch when they want to watch it.

Despite all of the great programming and groundbreaking devices, Americans are locked into a television business model that limits competition and choice; keeps prices for video high and limits technology and online video from achieving their full potential. This business model is made possible largely by an outdated regulatory structure created by incumbents to gain competitive advantage. It is time for Congress and the FCC to revamp this regulatory structure so that new video competition can thrive – giving consumers greater options and the ability to watch video whenever they want and on the device of their choosing.

Congress and the FCC can achieve this goal in three ways. First, they can clear away some of the outdated rules that slow down the evolution of the video marketplace. Second, they can extend the successful policies that allow competitors to access high-value content to certain online providers. Third, they can protect Internet openness and prevent discriminatory billing practices that hold back online video. By doing this they will increase competition, which will mean lower prices, better services, and more flexibility and control for consumers.

BACKGROUND

For nearly a century the federal government has shaped the development of electronic media. In the 1920s the Federal Radio Commission brought order to the chaotic and experimental landscape that characterized early broadcasting. In doing so it set the conditions that allowed radio and then television broadcasting to develop into what it was in its heyday, and what it is today. In the 1960s and 1970s the FCC took steps to protect broadcasting from the disorganized and innovative early cable industry.[1] By doing this it made sure that cable became an adjunct to rather than a replacement for established broadcasting.[2]

[1] *See United States v. Southwestern Cable Co.*, 392 US 157 (1968). This case, in addition to being an important case setting out the bounds of FCC authority, contains a summary of the FCC's early efforts at cable regulation. *See also* OFFICE OF TELECOMMUNICATIONS POLICY, CABLE: REPORT TO THE PRESIDENT (1974), which contains an early history of the cable industry and attempts at cable regulation, as well as policy recommendations.

[2] The 1974 OSTP Report said that "cable is not merely an extension or improvement of broadcast television. It has the potential to become an important and entirely new communications medium, open while and available to all." OSTP Report at 13. But cable did succeed in providing viewers with more content it fell short of this early promise, and the regulatory system that developed ensured that cable extending the reach of broadcasting instead of developing into a competitor to it.

After Congress passed the Cable Act of 1984, the tables turned and cable became the monopoly. Cable operators controlled who did and didn't get on the new medium, using their power to require cable programmers, such as the fledgling CNN and Discovery, to provide "pay for play" equity interests to cable operators, or sign exclusive agreements prohibiting programmers like MTV from appearing on potential competitors such as Direct Broadcast Satellite (DBS). At the same time, cable operators received access to needed inputs such as poll attachment rights and broadcast programming. The lack of competition led to high prices and poor service, but the cable incumbents' control over "must have" programming made it impossible for any competing services to emerge.

It was not until the 1992 Cable Act[3] that Congress embarked on an express policy of increasing competition in the television market. It realized that potential competitors needed access to the same content as large cable systems with market power. New laws such as program access rules that gave competitors access to programming owned by the cable operators, and program carriage rules that prevented cable operators from demanding an equity share as a condition of carriage ("pay for play"), helped make it possible for new "multi-channel video programming" providers (MVPDs) to compete with cable operators, as did changes to the law to make it easier for competitors to get access to broadcast programming.[4] These policies of increasing competition were somewhat successful

[3] Cable Television Consumer Protection and Competition Act of 1992, PL 102-385, 106 Stat. 1460 (1992).

[4] E.g., The Satellite Home Viewer Improvement Act of 1999, Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

but their promise was not entirely fulfilled.[5] They enabled some new competitors to operate but these new competitors did not change the fundamental shape of the market. They did not slow the increasing power of cable generally and a few large cable companies in particular.[6] And they did little or nothing to keep the market from consolidating in ways detrimental to consumers and independent content producers alike.

The Internet is changing the video marketplace just as it changed the market for music, news, books, and other forms of media. But it's not a foregone conclusion that the Internet will *disrupt* the video marketplace. Dominant players in the market today have control both over the content their nascent online competitors need for their service, and over the pipes they must use to reach consumers. As a result much high-value programming is not available online, and online video providers have to contend with artificially low bandwidth caps and other discriminatory practices that keep them from reaching their full potential.

Thus while it's inevitable that IP technologies and the Internet will play an ever-larger part of video delivery, it remains an open question whether consumers or

[5] *See* Annual Assessment of the Status of Competition in the Market for Video Programming, Thirteenth Annual Report, MB Docket No. 06-189 (rel. Jan 16, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf. *See also* Comments of Public Knowledge in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269 (June 8, 2011), *available at* http://www.publicknowledge.org/files/docs/PK_Comments_MVPD-Competition-Report.pdf.

[6] For example, Adelphia's cable assets were sold to Time Warner Cable and Comcast. *See* Adelphia Sold to Time Warner, Comcast, BUFFALO BUSINESS FIRST, April 21, 2005, http://www.bizjournals.com/buffalo/stories/2005/04/18/daily37.html?page=all. Comcast's cable assets and NBC Universal have been combined in a joint venture that is controlled by, and 51% owned by Comcast. *See* General Electric, New NBCU, http://www.ge.com/newnbcu.

incumbents with market power will enjoy the lion's share of the benefits. Consumers will still suffer from a lack of choice and independent content producers will still struggle to reach viewers if existing incumbents in the content and the MVPD industry continue to thwart disruptive change and manage the transition for their own benefit. Congress should once again take the necessary steps to ensure that incumbents cannot throttle (literally as well as figuratively) the legions of potential competitors trying to reach willing consumers.

At the same time, Congress should prune away the needless overgrowth of older rules, like syndicated exclusivity, the sports blackout rule and the network non-duplication rule, that exist only to protect the business model of local broadcasting. Senator DeMint and Representative Scalise are on the right track with their bill that would clear away much of the regulatory underbrush that holds back the evolution of the video marketplace,[7] although the bill goes too far by eliminating ownership restrictions still needed to maintain diversity in traditional media. Some other rules, like retransmission consent and the compulsory copyright license, are outdated, but part of an interwoven fabric of regulatory and business expectations. They should be reformed, but cautiously.

At the same time, measures that are designed to mitigate the market power of certain large video providers should not be repealed until true competition develops. In some respects they should be extended. For example, online video providers that wish to voluntarily operate as "multichannel video programming distributors"

[7] Next Generation Television Marketplace Act, H.R. 3675 and S. 2008.

(MVPDs) under Title VI of the Communications Act[8] should be able to do so, as this would enable them to access certain valuable content and protect them against anticompetitive actions by incumbents.[9] This would ensure that consumers had more choices for high-value content than they do today and would eliminate the incentives that keep certain content from being licensed widely.

Finally, the fact that the largest residential broadband ISPs, such as Comcast, are also MVPDs invested in the existing video distribution models raises concerns. These ISP/MVPDs can impose a variety of policies that prevent genuinely disruptive competition. For example, the ability to control how much data subscribers may access through data caps, the ability to privilege some content over others through prioritization or exemption from data caps, and the ability to control what devices can connect to the network, give cable operators (and other broadband providers like FIOS) the ability to pick winners and losers just as cable operators did from 1984 to 1992.

DETAILED ANALYSIS AND RECOMMENDATIONS

The video marketplace is unique, not only because of its complicated business and regulatory structures, but because video incumbents are better placed to counter the threat the Internet poses to their business models. They do this in varied and creative ways.

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[8] 47 USC §602 (13)

[9] *See* Comments of Public Knowledge in Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Proceeding, MB Docket No. 12-83 (filed May 14, 2012) (Sky Angel Comments), *available at* http://www.publicknowledge.org/interpretation-mvpd.

Threats to Internet Openness

For a long time it looked as though ISPs would continue doing what Comcast did when it started degrading BitTorrent traffic—picking and choosing which Internet protocols and services got preferential or discriminatory treatment. But recently ISPs have found that it is more effective to discriminate via billing practices. Some ISPs have set their bandwidth caps so low as to make it financially unattractive to switch over entirely to online video, as this would put viewers over their caps and perhaps subject them to overage charges.[10] At the same time, at least one ISP exempts its own video services that are delivered over the same infrastructure from the caps.[11] These practices disadvantage services like Netflix and Amazon Instant Video and relegate most online video to the role of a supplement to, rather than replacement for, traditional MVPD services.

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[10] ANDREW ODLYZKO, BILL ST. ARNAUD, ERIK STALLMAN, & MICHAEL WEINBERG, KNOW YOUR LIMITS: CONSIDERING THE ROLE OF DATA CAPS AND USAGE BASED BILLING IN INTERNET ACCESS SERVICE 48 (Public Knowledge 2012) ("Comcast's own estimate for the amount of data required to replace its pay-television offering with an over the top competitor is 288 GB per month. In light of this, it may come as no surprise that Comcast's data cap is set at 250 GB per month."). Comcast has since raised its cap, but it is worth observing that the 288 GB per month figure is based on an unknown mix of standard and high-definition content; presumably, a higher percentage of high-definition video would lead to a higher figure. *See* Mark Israel and Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, Submitted by Comcast Corporation, MB Docket No. 10-56 (May 4 2010) at 33, *available at* http://apps.fcc.gov/ecfs/document/view?id=7020448237.

[11] Michael Weinberg, *Comcast Exempts Itself From Its Data Cap, Violates (at least the) Spirit of Net Neutrality*, PUBLIC KNOWLEDGE (March 26, 2012), http://www.publicknowledge.org/blog/comcast-exempts-itself-its-data-cap-violates-.

To counter this, Congress needs to stand behind the FCC's attempts to protect Internet openness.[12] At the same time these protections need to be strengthened, their loopholes need to be closed, and they need to take into account the fact that that discrimination can happen through billing, as well as through Internet "fast lanes" and other forms of technological discrimination.

Restrictions on the Availability of Content

The current regulatory system makes it so that incumbent MVPDs but not online providers can carry broadcast content,[13] and it makes it easy for incumbents to share content with each other while keeping it out of the hands of potential new competitors.[14] And while it's unlawful for incumbent providers to behave anti-competitively towards each other, they are free to keep their content away from online services, and to use exclusionary contracts and "most favored nation" clauses to limit the online distribution of independent programming.[15]

As a result, while a lot of very good video programming is available online, the most popular programming is not.[16] Popular broadcast and cable channels are not available online. Many popular shows are not available online at all or are only made available after a "windowing" period. Some programs are put online reasonably

[12] Preserving the Open Internet, *Report & Order*, GN Docket No. 09-191, FCC 10-201, *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.
[13] 47 U.S.C. § 325; 47 C.F.R. § 76.64.
[14] 47 U.S.C. § 548. *See* Revision of the Commission's Program Access Rules, *Notice of Proposed Rulemaking*, MB Docket No. 12-68, FCC 12-30 (rel. Mar. 20, 2012) for an overview of the program access rules.
[15] Jon Brodkin, *DOJ probing Big Cable Over Online Video Competition*, ARS TECHNICA, June 13, 2012 (noting that "[t]he DOJ is also investigating contracts programmers sign to be distributed on cable systems, which include 'most-favored nation clauses' that may favor cable companies over online video distributors.")
[16] *See* Carlos Kirjner, Internet TV (or Why It Is So Hard to Go Over the Top), Bernstein Research (June 15, 2012).

promptly, but are only viewable in inconvenient ways. Some of the best online content is only available to viewers who also have cable subscriptions, through TV Everywhere and similar efforts. Live sports, and especially live local sports, are generally not available online at all. Thus, while online services make it easy to watch great documentaries, classic movies, and old sitcoms, the kinds of culturally-current programming that people talk about at the office and online are usually not available without a cable or satellite subscription.

This problem would be largely abated if online providers like Sky Angel were permitted to operate as MVPDs, like they want to.[17] The rules that ensure that all MVPDs can access certain content would then protect them as well as incumbents. At the same time, the FCC should find that the current rules that prohibit incumbents from behaving anti-competitively toward each other also prohibit them from taking anti-competitive acts against even those online video providers that choose not to operate as MVPDs.[18] But even short of that, if more content were

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[17] *See* Sky Angel Comments.

[18] As Public Knowledge has argued,

> The [FCC] should use its authority over the video programming distribution market to protect online video distribution generally, by prohibiting MVPDs from behaving anticompetitively in ways that harm any video distributor, whether or not it is an MVPD. Section 628 of the Communications Act provides authority for this. This Section bans any actions "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing ... programming to subscribers or consumers." The close connection between the markets for MVPD and non-MVPD video distribution mean that anticompetitive actions taken against an non-MVPD would likely have a deleterious effect on the ability of a competitive MVPD to offer programming—for example, by increasing its costs, or inhibiting the ability of an MVPD to offer programming on demand or online.

available from online services that might choose to operate as MVPDs, the incentive to keep content offline would evaporate to the benefit of the entire video marketplace.

The current pay TV MVPD model is very lucrative for some because it forces viewers to pay for programming they don't want. Even some popular programmers like Time Warner, who have no direct stake in the cable business, find it more profitable to give exclusives to MVPDs than to make their programming available to willing buyers online.[19] This is because people pay for large bundles of cable channels, some of which are very expensive, even if they only want to watch a few.[20] Every cable subscriber has to pay for broadcast channels, even though they are available over the air for free. This leads to high prices that just keep getting higher. The result of all of this is a loss for consumers.

One quick way to fix this would be to scrap the rules that require that cable systems carry broadcast stations as part of their basic tier—customers should be able to choose what they pay for. And while video providers should be free to bundle content and should not be required to offer everything a la carte, it seems logical that increased competition from online providers would force today's providers to begin offering their customers more flexibility.

Sky Angel Comments at 24-25.

[19] Brian Stelter, *HBO Says No, for Now, to Fans Who Want a Web-Only Option*, NY TIMES MEDIA DECODER, June 6, 2012, http://mediadecoder.blogs.nytimes.com/2012/06/06/hbo-says-no-for-now-to-fans-who-want-a-web-only-option.

[20] Peter Kafka, *Hate Paying for Cable? Here's Why*, ALLTHINGSD, March 10, 2010, http://allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why.

Marketplace Consolidation

The merger between Comcast and NBC Universal brought a large amount of programming under the control of a cable system that has an incentive to limit its distribution online.[21] While it is true that both the Department of Justice and the FCC conditioned their transaction on Comcast's commitment to make certain programming available to online distributors,[22] as Public Knowledge has argued, behavioral remedies are, in general, insufficient to overcome all the anti-competitive effects of mergers, joint ventures, and other structural changes that create incentives to limit distribution and innovation.[23] Unfortunately, yet another such change has been proposed, whereby Verizon and several large cable companies plan to create various joint entities to develop new video technologies and to market each other's products rather than compete.[24] In addition to limiting competition in existing markets, these arrangements could mean that much video in the future will be locked up in proprietary platforms, and could mean that anticompetitive "authentication" schemes like TV Everywhere become even more widespread. If

[21] Competitive Impact Statement of the Department of Justice at 4, United States v. Comcast Corp., 1:11-cv-00106, (D.D.C. Jan. 18, 2011), available at http://www.justice.gov/atr/cases/f266100/266158.pdf
[22] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion & Order, 26 FCC Rcd. 4238 (2011); Final Judgment in United States v. Comcast, United States District Court for the District of Columbia, Case No. 1:II-cv-00l06 (Sept. 1, 2011).
[23] Petition to Deny of Public Knowledge and Future of Music Coalition in WT Docket No. 11-65 (filed May 31, 2011), at 62-70, available at http://www.publicknowledge.org/files/docs/pk_fmc-att_tmo-petition_to_deny.pdf.
[24] *See* Petition to Deny of Public Knowledge et al. in WT Docket No. 12-4 (filed Feb. 21, 2012), *available at* http://www.publicknowledge.org/files/pk_verizon_spectrumco_petition.pdf.

policymakers truly wish to safeguard the future of video, they should prevent these sorts of anticompetitive agreements from taking place.

Outdated Rules That Protect Incumbent Business Models

Protectionist Measures

Finally, there are some rules on the books today that seem designed to prop up legacy business models and have long outlived any functions they may once have served. Many of them can and should be repealed today. Examples of these include sports blackout rules, network nonduplication, and syndicated exclusivity provisions,[25] and the previously-mentioned rule that requires that all MVPD viewers pay for free over-the-air television.[26] Some of these rules were passed to protect aspects of the video distribution system from disruption before Internet video was a possibility, and when it seemed that if local broadcasters lost revenue nothing could replace them. Exclusivity rules not only keep cable systems from carrying signals from "distant" markets but they prevent networks from distributing content on a non-exclusive basis. The world these rules were written for is gone now and they have outlived their purpose. Some local broadcasters never provided unique local programming, and the various public goals that they provide can be achieved more effectively through other means. Traditional models of video distribution are still valuable, and local broadcasters who serve their communities will continue to thrive after any regulatory reform. But the broadcasting industry no longer needs

[25] 47 C.F.R. §§ 76.92(f), 76.106(a), 76.111, 76.120, and 76.127-130.
[26] 47 C.F.R. § 76.901(a) ("The basic service tier shall, at a minimum, include all signals of domestic television broadcast stations provided to any subscriber"); 47 C.F.R. § 76.920 ("Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming.").

extraordinary protection against changes in technology, business models, and viewer behavior.

Outdated, but Complex Rules

Some other rules are outdated, but so interconnected with other rules and marketplace expectations that they need to be approached carefully. Among these are the compulsory copyright license,[27] retransmission consent,[28] and must-carry.[29] The compulsory license cannot be reformed unless video providers are given assurance that they never have to stop carrying programming just because they don't know whom to contact for a license, and to make sure that they can cope with any potential holdout problems. And it would make no sense to embark on a comprehensive reform of the laws governing video carriage in a way that replicated the problems that afflict the retransmission consent process today, while introducing new ones. Short of dealing with the compulsory license and retransmission consent together, several reforms could improve the current retransmission consent process. Many of the rules that have already been mentioned give an unfair advantage to broadcasters and drive up the rates they can charge. And some broadcasters have engaged in brinksmanship tactics that harm viewers, where they pull their signals from MVPDs right before high-profile events.[30] These problems can at least be alleviated with meaningful "good faith" standards that discourage unfair negotiation tactics, and interim carriage

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[27] 17 U.S.C. § 111.
[28] 47 U.S.C. § 325; 47 C.F.R. § 76.64.
[29] 47 U.S.C. § 534; 47 C.F.R. § 76.55.
[30] Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718, ¶15 (2011).

requirements that minimize disruption to viewers.[31] Finally, while the must-carry system is used by many low-value broadcasters in ways that Congress never intended, public and non-commercial stations continue to serve a valuable role and policymakers should find ways to protect the good that they do.

Policies That Are Still Needed

Still other rules serve a function and should be maintained, at least until competition develops. These include the program access, program carriage rules, as well as set-top box competition rules. The program access rules and related protections prevent any one MVPD from having exclusive rights to content. Although the video market is not as competitive as it can be in the Internet age, the fact remains that the American video distribution market is more competitive than that of many other countries. The program access rules are to thank for that, and they should be extended to all services that wish to operate as MVPDs, even ones that are exclusively online. Similarly, the program carriage system, which protects independent programmers from the negative effects of bottleneck control by some MVPDs, still serves a role in ensuring that viewers can enjoy content from diverse sources. Lastly, the directive expressed by Congress under Section 629 to have true set-top box competition has remained largely unfulfilled. Until Internet-delivered video becomes a true substitution, preserving the FCC's authority to promote set-top box competition will remain necessary.

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[31] *See* Comments of Public Knowledge and New America Foundation in MB Docket No. 10-71 (filed May 27, 2011), *available at* http://www.publicknowledge.org/files/docs/11-05-27PK-NAF_retrans_comments.pdf.

Copyright and Spectrum Policy

There are two other kinds of regulations that can hold back the development of online video. Policymakers don't always see them as "regulations" in the same sense as things like syndicated exclusivity. But copyright and spectrum laws are regulations nonetheless, and they have profound effects on the shape of the market.

Copyright law shouldn't be misused to hold back the evolution of the video marketplace. Dish is being sued for making a DVR that's too sophisticated for the taste of some networks. But it's not illegal to skip commercials or for users to take full advantage of their home recording rights.[32] And Aereo's remote antenna is legal just as Cablevision's remote DVR is.[33] Copyrights are limited monopolies granted by the government, and they come with a series of limitations and exceptions designed to protect users as well as creators. They should not be a weapon used to limit experimentation with business models and services.

Nor should misplaced fears of piracy keep content offline. Some content industry executives have a view of technology and the Internet that can only be described as superstitious, and they think that if they give people access to content they'll lose control of it. But recent history shows that most people only turn to piracy when content is not available online though other means. From the perspective of limiting copyright infringement, limiting online distribution is simply counterproductive.

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[32] *See* John Bergmayer, *Networks Pull the Trigger on Dish, but They're Only Hurting Themselves*, PUBLIC KNOWLEDGE (May 25, 2012), http://www.publicknowledge.org/blog/networks-pull-trigger-against-dish-theyre-onl.

[33] *See* Brief of Amici Curiae Electronic Frontier Foundation and Public Knowledge in *WNET v. Aereo*, United States District Court for the Southern District of New York, Case No. 1:12-cv-01543-AJN, *available at* http://www.publicknowledge.org/files/aereo_amici_brief.pdf.

This is why it is particularly distressing that recent trade agreements contain language that could be interpreted as limiting the possibilities of online video distribution.[34]

To whom the government assigns spectrum and for what purpose it allocates it also has an impact on the video marketplace. As long as broadcasters use the public airwaves they will have public responsibilities. For example, they must operate transparently,[35] they must serve the needs of their communities,[36] and they cannot behave unreasonably in retransmission negotiations.[37] While it is true that fewer people rely on over-the-air television today than they did in its peak, due to the increasing costs of cable, a new generation of viewers is getting familiar with rabbit ears.[38] Thus, to say that broadcasting is no longer relevant is just as wrong as to say that it should remain at the center of the video marketplace. In a more competitive

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[34] Many free trade agreements appear to state that online retransmission may not occur without the permission both of the owner of the copyright in the programming, and of the broadcaster. This is at odds with the current system of a compulsory license plus retransmission consent, which requires MVPDs to obtain the permission only of the signal owner, not of the content owners. Some current reform proposals involve requiring an MVPD to obtain the permission of the copyright holders instead of the permission of the broadcaster, but not of both. *See* John Bergmayer, *The US-Colombia Free Trade Agreement: Policy Laundering in Action*, PUBLIC KNOWLEDGE (April 20, 2012), http://www.publicknowledge.org/blog/us-colombia-laundering. *But see* Comments of ABC, CBS, and NBC Television Affiliates in MB Docket No. 12-83 (filed June 13, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021922660 (arguing that it would be consistent with the agreements if online systems were categorized as MVPDs and subsequently followed standard retransmission consent procedures).

[35] *See* 47 C.F.R. § 73.3526 (public file requirement).

[36] 47 C.F.R. § 73.3526(e)(11)(i).

[37] 47 U.S.C. §§ 325(b)(3)(C)(ii), (iii).

[38] Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by the Web*, WALL STREET JOURNAL (Feb. 21, 2012), http://online.wsj.com/article/SB10001424052970204059804577229451364593094.html ("It's cool to have rabbit ears again.").

video marketplace there will no doubt be room for many different kinds of services. The solution is not to enshrine or attack broadcasting but to incentivize them to create great content, and to adopt policies that allow spectrum to be put to other uses. Not only would this be beneficial to communications policy generally but the impact on the video marketplace would be profound, as distribution channels adapt to fit a more decentralized and dynamic marketplace.

CONCLUSION

As they have in the past policymakers are starting to consider the implications of increasing change in the market for video distribution. History provides examples both of protectionist regulations that should be avoided today, and of pro-competitive measures that serve as more positive precedents. But today is different in one way: Finally, the technology exists that could eliminate the physical, bottleneck control of video distribution that has existed in various forms for decades. If policymakers take some simple steps to facilitate the development of competitive online video they can begin to disengage from regulations that were designed to counter the effects of this bottleneck control. However, if they fail to do this, it is likely that incumbents will be able to continue to shape the development of the video market and extend their current dominance indefinitely. While the Internet provides grounds for hoping that the future of video will be better for consumers, policymakers have a lot of work to do to help make that happen.

Mr. WALDEN. Ms. Sohn, thank you for being here. We appreciate your testimony on this very important set of issues.

Now we will welcome David Hyman, the General Counsel for Netflix. Mr. Hyman, thank you for being here. We look forward to your testimony.

STATEMENT OF DAVID HYMAN

Mr. HYMAN. Good morning. Netflix helped pioneer streaming movies and TV shows over the Internet. In 2008, we began to deliver instant streaming video to televisions through the use of a handful of Internet-connected devices. Today, over 23 million consumers in the United States use the Netflix streaming service on more than 900 different types of devices including game consoles, mobile phones and tablets. In fact, Netflix delivers close to a billion hours of streaming movies and TV shows to its members every month.

The Internet delivery of video provides consumers with unprecedented freedom and control over what video programming they can watch as well as when and where they can watch it. This is the future of video. Increased demand for Internet video is driving consumer adoption of broadband. It is spurring a wave of innovation in the consumer electronics industry with virtually all new devices being Internet connected. Innovation leaders like Netflix are developing new methods for delivering the petabytes of video data traversing the Internet. Just a few weeks ago, we announced the rollout of our open connect network, a single-purpose content-delivery network focused on the efficient distribution of large media files. Our goal here is to help make a faster and less expensive Internet for all, and to this end, we are connecting to ISPs free of charge and making our hardware design and open-source software components publicly available.

User interfaces, or UIs, through which consumers discover and engage with video, are likely evolving. The typical linear channel selection grid that uses the up-down left-right remote to access content will likely be replaced with intuitive and visually stimulating UIs that use motion, touch and voice as means of control. Over the next few years, UIs will evolve in amazing ways. A decade from now, choosing a linear feed from a broadcast grid of 200 channels will feel as odd as using a television dial to change channels does today.

The Internet is helping to reconceptualize how content is made and consumed. Last year, for example, Netflix announced it would be offering several original television series to its members. This is really the first time that such high-quality productions will be debuted through the Internet. Our first show will be House of Cards, a political thriller set right here in Washington, DC. The series stars Kevin Spacey and Robin Wright and is directed by David Fincher. We will be experimenting with how our programs are released, likely offering multiple episodes or perhaps even whole seasons at one time. In doing so, Netflix is giving arts like Mr. Fincher greater latitude to create compelling stories while giving our members the freedom to watch world-class content in a way that suits their individual preferences.

Video services like Netflix are leveraging the power of the Internet to help consumers discover content they will love. Using recommendation and merchandising technology, Netflix is helping to expand the reach and popularity of video content. For example, the availability on Netflix of all four prior seasons of the series Mad Men helped drive a 20 percent increase in those watching this season's opening episode. By combining technology with consumer choice, we were able to find an untapped audience of more than a million viewers for a show in its fifth season. This is just one example of how traditional and emerging video distribution platforms can complement one another.

All this change, however, has led to speculation about the demise of traditional video distribution platforms and networks. It is our belief that these platforms and networks will also adapt to today's shifting video landscape. We see the beginnings of this with various authenticated Internet video offerings commonly referred to as "TV Everywhere." These offers provide cable subscribers on-demand access to a variety of content through Internet-connected devices like the iPod, the iPad and the Xbox. In this way, cable subscribers are afforded many of the benefits of Internet video within the bundled offering of their cable service.

To get a good feel for this implementation, I would recommend that you take a look at Comcast Streampix, HBO GO or Showtime's TV Everywhere offering. These implementations will likely grow in popularity, and consumers will increasingly view traditional cable networks on devices connected to the Internet.

At Netflix, especially as we focus on streaming and begin to offer original content, we are often asked if we are not becoming more like a traditional network such as HBO. The fact, however, is that these networks are becoming more like Netflix. As traditional platforms and networks move to distribute their programming in an on-demand fashion over the Internet, they are beginning to compete more directly with pure play or over-the-top Internet video providers like Netflix. As this trend continues, issues such as discriminatory data caps and IP interconnection must be examined with a much more discerning eye. When you couple limited broadband competition with a strong desire to protect legacy video businesses, you have both the means and the motivation to engage in anticompetitive behavior. Add to this mix a regulatory and legislative framework largely crafted before the modern Internet era and you have the makings for confusion and gamesmanship.

Competition certainly leads to innovation and growing consumer choice. In large part because of innovation from Internet players like Netflix, traditional platforms and networks are changing their longstanding ways of doing business. In adapting to this changing landscape, these platforms and networks should not be permitted to unfairly leverage their data delivery networks or content distribution relationships to stifle unaffiliated video providers.

I encourage this committee to examine closely the evolving competitive environment for Internet-delivered video. Netflix stands ready to work with you and others in the industry to explore various regulatory modifications or other changes that will help assure a competitive and innovative video marketplace for years to come.

Thank you for the opportunity to appear before you today, and I look forward to your questions.

[The prepared statement of Mr. Hyman follows:]

TESTIMONY
OF
DAVID HYMAN
GENERAL COUNSEL OF
NETFLIX, INC.

BEFORE A HEARING OF
THE ENERGY AND COMMERCE COMMITTEE
SUBCOMMTITEE ON COMMUNICATIONS AND TECHNOLOGY
UNITED STATES HOUSE OF REPRESENATATIVES

ON

THE FUTURE OF VIDEO

Wednesday, June 27, 2012

Good morning Chairman Walden, Ranking Member Eshoo, and distinguished members of the Subcommittee. My name is David Hyman and I have served as the General Counsel of Netflix since 2002.

Netflix helped pioneer streaming movies and TV shows over the Internet. In 2008, we began to deliver instant streaming video to televisions through the use of a handful of Internet-connected devices. Today, over 23 million consumers in the United States use the Netflix streaming service on more than 900 different types of Internet-connected devices, including game consoles, mobile phones, and tablets. In fact, Netflix delivers close to a billion hours of streaming movies and TV shows to its consumers every month.

The Internet delivery of video provides consumers with unprecedented freedom and control over what video programming they can watch as well as when and where they can watch it. This is the future of video.

Increased demand for Internet video is driving consumer adoption of broadband. It is spurring a wave of innovation in the consumer electronics industry with virtually all new devices being Internet-connected or "smart." Innovation leaders, like Netflix, are developing new methods for delivering the petabytes of video data traversing the Internet. Just a few weeks ago, we announced the rollout of our Open Connect Network, a single-purpose content delivery network focused on the efficient distribution of large media files. Our goal here is to help make a faster and less expensive Internet for all and to this end we are connecting to ISPs free of charge and making our hardware design and open source software components publicly available.

User interfaces, or UIs, through which consumers discover and engage with video are likewise evolving. The typical linear-channel selection grid that uses an up-down/left-right remote to access content will likely be replaced by intuitive and visually stimulating UIs that use motion, touch, and voice as means of control. Over the next few years, UIs will evolve in astounding ways. A decade from now, choosing a linear feed from a broadcast grid of 200 channels will feel as odd as would using a television dial to change channels today.

The Internet is helping to re-conceptualize how content is made and consumed. Last year, for example, Netflix announced it would be offering several original television series to its members. This is really the first time that such high-quality productions will debut through the Internet. One of our first shows will be *House of Cards*, a political thriller set right here in Washington DC. The series stars Kevin Spacey and Robin Wright and is executive produced and directed by David Fincher. We will be experimenting with how our programs are released, likely offering multiple episodes or perhaps even whole seasons at one time. In so doing, Netflix is giving artists like Mr. Fincher greater latitude to create compelling stories while giving our members the freedom to watch world class content in a way that suits their individual preferences.

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All this change, however, has led to speculation about the demise of traditional video distribution platforms and networks. But it is our belief that these platforms and networks will also adapt to today's shifting video landscape. We see the beginnings of this with various authenticated Internet video offerings. Commonly referred to as "TV Everywhere," these offerings provide cable subscribers on-demand access to a variety of content through Internet-connected devices like the iPad and Xbox. In this way, cable subscribers are afforded many of the benefits of Internet video within the bundled offering of their cable service. To get a good feel for this implementation, I would recommend you take a look at Comcast's Streampix, HBO GO, or Showtime's TV Everywhere offering. These implementations will likely grow in popularity and consumers will increasingly view traditional cable networks on devices connected to the Internet. At Netflix, especially as we focus on streaming and begin to offer original content, we are often asked if we are not becoming more like a traditional network such as HBO. The fact, however, is that these networks are becoming more like Netflix.

As traditional platforms and networks move to distribute their programming in an on-demand fashion over the Internet, they are beginning to compete more directly with pure-play or "over-the-top" Internet video providers like Netflix. As this trend continues, issues such as discriminatory data usage caps and IP interconnection must be examined with a much more discerning eye.

When you couple limited broadband competition with a strong desire to protect a legacy video distribution business, you have both the means and motivation to engage in anticompetitive behavior. Add to this mix a regulatory and legislative framework largely crafted before the modern Internet era and you have the makings for confusion and gamesmanship.

Competition leads to innovation and growing consumer choice. In large part because of innovation from Internet players like Netflix, traditional platforms and networks are changing their long-standing ways of doing business. In adapting to this changing landscape, these platforms and networks should not be permitted to unfairly leverage their data delivery networks or content distribution relationships to stifle unaffiliated video providers.

I encourage this Committee to examine closely the evolving competitive environment for Internet-delivered video. Netflix stands ready to work with you and others in the industry to explore various regulatory modifications or other changes that will help assure a competitive and innovative video marketplace for years to come.

Thank you for the opportunity to appear before you today, and I look forward to your questions.

Mr. WALDEN. Mr. Hyman, thank you for your testimony and your participation.

We will now go to Mr. Jim Funk. He is the Senior Vice President of Product Management for Roku. Mr. Funk, thank you for being here. We look forward to your testimony.

STATEMENT OF JIM FUNK

Mr. FUNK. Good morning, Chairman Walden, Ranking Member Eshoo and members of the subcommittee. Thank you for inviting me here to testify today about the future of video. My name is Jim Funk and I am the Senior Vice President of Product Management at Roku.

Roku was founded 10 years in Silicon Valley. We are a rapidly growing company with less than 200 employees, still small by comparison with other companies represented at this hearing. The company's founder, Anthony Wood, is a serial entrepreneur who, among many accomplishments, started ReplayTV and is considered the inventor of the DVR. While the DVR is now among the most popular entertainment devices, Roku is betting on the Internet as the future of television.

Four years ago, Roku introduced a small Internet connected set-top box that allowed consumers to stream movies from Netflix over the Internet and watch them in high quality on their TVs without needing a computer. The combination of a $99 Roku player and Netflix streaming was a revolutionary offering. Now, 4 years later, there are hundreds of models of TVs, Blu-Ray players, game consoles and set-top boxes offering this streaming video capability. These products can be found today at Best Buy, Walmart, Target and Amazon.com marketed by well-known brands such as Apple, Microsoft, Sony and Samsung.

Since the launch of the Roku player, we have sold more than 3 million boxes in the United States and now offer a range of very affordable products from $49 to $99. Roku has grown beyond a set-top box and has become an open streaming platform that allows content providers to create applications, which we call channels. Roku now features more than 500 channels that are available to the millions of households which have purchased our streaming players. Most Roku users have a cable or satellite subscription service in addition to their Roku player, and Roku provides both new entertainment choices, as well as ways to get more value out of a cable or satellite television service.

In addition to Netflix, Roku users can now enjoy tens of thousands of TV episodes and movies on demand from services such as Hulu Plus, Amazon Instant Video, Crackle, HBO and EPIX. We offer sports packages from Major League Baseball, the NBA, the NHL and Major League Soccer, and there is news from NBC, Fox News, the Wall Street Journal and CNBC.

Beyond video, Roku users can enjoy streaming music services like Pandora, Internet radio from around the world, photo sharing, and popular games like Angry Birds.

Roku is becoming an alternative way to reach consumers for existing video distributors too. We recently announced a partnership with DISH Network to stream their international programming to consumers who may not be able to install a satellite dish. Customers of Time Warner Cable, Verizon, Dish and other MVPDs can now enjoy on-demand movies and shows from HBO and EPIX on Roku.

Local broadcasters have even begun to experiment with reaching their audiences on Roku. Today you can watch local news on demand from broadcast stations located in Madison, Wisconsin, Las Vegas, and Indianapolis.

Roku is also a means for content producers who do not have traditional cable or satellite distribution to reach the living room TV via the Internet. For example, we have over 75 faith-based channels, representing everything from individual congregations to Catholic and Mormon Church broadcasts. We even have a channel created by the House Oversight and Government Reform committee where video of hearings like this are available on demand.

We believe that devices like Roku are part of the future of television because of what we already see. The average Roku user streams over 10 hours of video per week, which is almost one-third the number of hours that the average American watches traditional TV. Consumers like the new technology of Internet streaming because it combines all the new content choices with convenience and value. With the widespread adoption of DVRs, consumers now expect on-demand viewing, and the Internet provides virtually unlimited capacity for delivery of on-demand content. In addition, the combination of inexpensive Internet-connected devices and the expanding selection of Internet video services offer an excellent entertainment value for cost-conscious consumers.

I did not come here today to advocate for specific legislation. Our point of view is that devices such as Roku represent an area of exciting innovation in entertainment and information delivery that are finding a home in the living rooms of millions of consumers. These devices are being embraced by all segments of the entertainment industry as a means to expand the business opportunities for legitimate content distribution. They are also driving the adoption of high-speed broadband connections, to the benefit of ISPs.

Our interest here, and we believe this is also the consumer's interest, is that there continue to be an open marketplace for competition in this space. That includes not only open competition between device manufacturers, but also open competition between video services, both traditional and new, as well as competition between Internet service providers. The widespread availability of affordable high-speed Internet open to all video sources is essential to continued growth and innovation in this market.

Thank you for your time today. I look forward to your questions.

[The prepared statement of Mr. Funk follows:]

Statement of
Jim Funk
Senior Vice President, Product Management
Roku, Inc.
before the
Subcommittee on Communications and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
on
"The Future of Video"
June 27, 2012

Good Morning Chairman Walden, Ranking Member Eshoo and members of the Subcommittee. Thank you for inviting me to testify today about the "Future of Video." My name is Jim Funk and I am the senior vice president of product management at Roku.

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Thank you for your time today. I look forward to your questions.

Mr. WALDEN. Mr. Funk, thank you for your testimony. It is most helpful.

We will now go to Mr. Michael Powell, President and CEO of the National Cable and Telecommunications Association. Mr. Powell, we are delighted to have you here. Please go ahead with your testimony.

STATEMENT OF MICHAEL K. POWELL

Mr. POWELL. Thank you, Mr. Chairman and Ranking Member Eshoo. It is always a great honor and privilege to appear before this committee. I have done it many times and I am proud to be here again.

I am also proud to be here as a representative of America's great success story, the cable operators and cable programmers of the United States, to talk about the future of video for one reason only. This is an industry through its own investment, technological innovation has contributed to the glimmering present that we are currently enjoying and has every intention of contributing to a more glorious future in the area of video.

It is important as a quick reminder to remember that cable industry when it was first pioneered was all about making TV better. We brought television to rural America and urban areas that couldn't be reached by traditional broadcast programming. We ultimately developed original programming that led to the iconic brand that most Americans associate with television today: CNN, ESPN, C–SPAN, Discovery, the History Channel. These were all creations of the artists and creators of the cable industry working in cooperation with the production community.

We were the first to bring about anytime, anyplace shifting through video on demand and through DVR, and in 1996 when Congress called on the communications space to introduce telephone competition, it was the cable industry that most significantly made an impact representing almost 25 percent of all telephone service today. And then there is broadband. Truly the cable industry stepped up and led to the mass deployment of cable broadband in the United States, now reaching 93 percent of all homes in America.

So we are experiencing, in my judgment, a truly golden age of television. By almost any metric used, particularly those used by the government and FCC, we are experiencing the best we ever have. First and foremost, there is simply more content. We have gone from a 1950s world of three channels to one in which there were 100 channels back in 1992 to over 900 programming channel sources today, and that continues to expand and explode at a rapid rate. And is it any good? I would submit that TV is producing the finest content that it has in its entire history. The critically acclaimed programs of The Sopranos or Mad Men or Homeland or comedies like Modern Family are truly capturing the imagination of the American public, and I think the industry and content producers and distributors have a great deal to be proud of in terms of the quality.

When I was at the FCC, I remember one of our central goals, and I heard it mentioned earlier in the opening statement, is the diversity of content. We don't want all the same stuff, and we are experiencing a period in which we hit on a model that allows true diversity of niche programming to smaller audiences by definition but ones that are passionate about the things they believe in. Put simply, if you fish, love music, crave sports, gorge on politics, want your native language or reflect your community on television or if you oddly have a fetish for Jersey Shore, it is all out there and available to you. We should be proud of what we have achieved in diversity.

We also have more competitive sources for content than ever before. I would fully admit that 20 years ago in 1992 when the Cable Act was passed, the cable industry was a monopoly. It had 98 percent of multichannel video distribution in this country. Today, it enjoys 57 percent. And since the mid to late 1990s, its share has remained flat or declined in the face of competitive threat. Today Americans can choose between cable companies, the satellite companies that rank second and third in subscribership, telecos, you can go buy DVDs at Best Buy, or why not walk down to your corner store and pay $1.20 for a DVD at a Redbox distribution machine. It is an exciting opportunity for the American citizen.

But then we haven't seen enough. Then the Internet finally began to produce the realization of its promise. We now are looking at extraordinary amounts of Internet content and video by a whole host of companies, some represented today. There has been an 80 percent increase in video streaming since 2008, and by some estimates, 62 percent of traffic at prime time on the Internet is video content, and as we have heard, they are producing original content and more and more on every conceivable device that can be dreamed up in Apple's magic factory or anyone else. That is an exciting place.

But this golden age is set against a regulatory environment that is tarnished. I am a big believer that law is premised on certain factual predicates about markets, economics and technology. Simply put, today's regulatory regime is built on a foundation that crumbled long ago. I will submit my full testimony for then-and-now analysis, but you can quickly see cable once owned 98 percent of the market, owns 57 percent today. Cable once owned 54 percent of the cable channels that you see today. Today they only own 14 percent. Back in 1992, a majority of Americans would watch television over the air. Today that is down to 14 percent. This is not to suggest that one industry is better than the other, but the predicates on which the law are built long ago crumbled into the sand and it is high time that they be reevaluated.

Finally, I would like to conclude by simply taking head on the conjecture and speculation and active suggestion that somehow the cable industry is actively involved in an effort to destroy or eliminate over-the-top emerging competition. It is just flatly wrong and belied by the facts.

First and foremost, we have seen a breathtaking explosion of video streaming content, as I said, an 80 percent growth. Netflix, who sits next to me, is the largest provider of subscription video in the country, not cable and not satellite. That growth has occurred in the current marketplace. Our policies, caps and pricing have in no way thwarted a consumer's ability to watch video streamed content by any measure, and we are expanding to meet demand consistently, having increased broadband speeds 900 percent in the last decade, and recently announced plans for startling speeds by the end of the decade.

And finally, I would say, Mr. Chairman, remember, we sell broadband, and as the testimonies of the CEO of Roku and the General Counsel at Netflix made clear, their services help stimulate demand for services we sell. I assure you, many members of our board are very proud and appreciative of some of those services and what they have done for our business.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Powell follows:]

TESTIMONY OF MICHAEL K. POWELL
PRESIDENT AND CEO
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

on

THE FUTURE OF VIDEO

before the

Subcommittee on Communications and Technology
Committee on Energy and Commerce

UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

June 27, 2012

Good morning Mr. Chairman and Members of the Subcommittee. My name is Michael Powell and I am the President and Chief Executive Officer of the National Cable & Telecommunications Association. Thank you for inviting me today to testify on the future of video. We welcome this important hearing.

Cable Always Has Been an Innovative Force in Video

From its beginning, cable has driven innovation and transformation in the video business. Cable was founded to make broadcasting better – bringing it to suburban and rural areas outside the reach of over-the-air reception. We made programming better – breaking the lock of the three channel universe by investing billions in original content that appeals to specialized audiences as well as the mass market, and building award-winning iconic brands like CNN, ESPN, HBO, CNBC, C-SPAN, History and Discovery. We were first to unshackle consumers from "appointment TV" with video on demand and the wide deployment of DVRs.

When we turned to areas other than video, the results were similar. In 1996 Congress wanted telephone competition and cable delivered it. Today, 1 in 3 households that have wireline phone service receive it from a cable operator.

And then there is broadband. Where high-speed data service was once the purview only of businesses, cable operators brought broadband Internet service to residential subscribers. This was not serendipity. The industry borrowed heavily and took enormous risk by ripping out its one-way analog network and replacing it with a higher capacity, two-way digital platform that made broadband possible. Cable broadband now reaches over 93 percent of homes—rich, poor, urban and rural. We have increased broadband speeds over 900 percent in a decade, (with even faster speeds coming this year) and we have extended the reach of our broadband service through extensive Wi-Fi networks. All of that in turn has enabled consumers to receive high-quality video over the Internet and on mobile devices.

The Golden Age of Video is Today

Television of the past was the rusty Iron Age compared to today. By any measure, the video experience has never been better than now. There is (1) more content, (2) higher quality programs, (3) more variety and diversity, (4) more sources for content – and video is available on a wider range of devices. There are hundreds of video programming networks, presented in brilliant HD quality and some in 3D. This is an enormous expansion from just twenty years ago. Artists and creators are producing some of the most compelling programs ever and cable is their preferred palette. In the most recent award seasons, cable programming won 73 percent of TV Golden Globes and 50 percent of Primetime Emmys. Acclaimed series such as "Game of Thrones," "Mad Men," and "Homeland" are some of the most accomplished dramas ever.

Public policy has always been concerned about diversity of viewpoints and niche programs for smaller yet passionate audiences. The cable model brought that ambition to fruition. The cable dial runs the gambit – from compelling scripted dramas, educational content, kids programming, sports, cooking shows, and news and public affairs. Simply put, if you fish, cook, workout, love music, crave sports, gorge on politics, admire dance, have a fetish for Jersey youth, or want programming in your native language or reflective of your community you will find it on cable. With all respect to former FCC Chairman Newt Minow, television today is no vast wasteland.

If you are itching to watch video, the number of sources you can turn to have grown exponentially as different providers compete for your business. You may subscribe to cable television and get up to 150 HD channels, the latest premium content and live events, video on demand and the ability to record and watch at your convenience on a DVR. You can get a very similar experience from Direct TV and Dish. Or, in many markets, you can also choose service from a telephone company. AT&T U-verse and Verizon FiOS have been popular new sources of video. Besides these subscription TV services, you can buy DVDs at Best Buy or better yet walk to the corner store and rent them for $1.20 from one of 30,000 plus Redbox kiosks.

If that were not exciting enough, Internet-delivered video has ushered in an even greater explosion of choice. Use of the Internet to watch video has increased 79.5 percent between the 3rd quarter of 2008 and the 3rd quarter of 2011.[1/] By one estimate, real-time video streaming represents 62.5 percent of downstream Internet traffic in North America during prime time evening hours.[2/] By the end of 2011, more than 100 million Americans watched online video content on an average day. That's a 43 percent increase from just a year ago.[3/] Revenue from video content delivered over the Internet to televisions "is expected to grow from $2 billion in 2009 to over $17 billion in 2014."[4/] The largest subscription video provider in the country today is Netflix – not Comcast, Time Warner Cable, DirecTV or any other multichannel video programming distributor (MVPD).

Companies that stream content are proliferating: Netflix, Vudu, Hulu, Amazon, iTunes, CinemaNow, Network websites, HBOGo, and user-generated or special interest sites like YouTube, Vimeo, and TED.com are a few. Many more offerings are anticipated from the likes of Google, Apple, Intel and Sony.

1/ *The Cross-Platform Report – Quarter 3, 2011 US*, Nielsen.

2/ *Global Internet Phenomena Spotlight 1H 2012 North America, Fixed Access,* Sandvine Incorporated, May 16, 2012.

3/ *US Digital Future in Focus*, COMSCORE, Feb. 2012.

4/ U.S. Dep't of Justice, Competitive Impact Statement, *United States v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266158.htm.

And web video is not limited to a PC screen any more. Computers can connect to big screen televisions; content can be beamed to sets using functions like Apple Airplay; box companies like Roku, Tivo and Boxee can deliver web video to the TV set; and manufacturers like Samsung are making the Flat Panel TV web enabled, with apps incorporated for accessing video content. One study estimates that at least 38 percent of U.S. households have a television set connected to the Internet, through either an Internet-ready TV, game console, standalone Blu-ray player or smart set-top box connected to their home network."[5/] Smartphones and iPads have proliferated as compelling devices for consuming video content and enjoying second screen experiences.

Cable, too, is working to bring better video experiences to consumers wherever and whenever they want, offering, for example, applications that allow subscribers to view VOD and subscription linear channels on their iPads. Cable's "TV Everywhere" initiative makes it possible for our customers to watch video content they have already paid for on their laptops, tablets, smartphones and other portable devices – no matter where they are.

Even while offering this extraordinary array of new services, features and capabilities, cable has remained a solid value for American consumers. The fact that so many Americans stuck with cable during the recession is a testament to the value Americans get for their entertainment dollar. The price per viewing hour of entertainment for cable television is lower than for Netflix, a trip to the movie theatre, a sporting event, or even a DVD rental. Generally, the price for broadband service from most cable providers remained unchanged for 10-12 years

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[5/] *38 percent OF U.S. HOUSEHOLDS NOW HAVE A TV CONNECTED TO THE INTERNET*, Leichtman Research Group, Inc. (April 9, 2012), available at http://www.leichtmanresearch.com/press/040912release.html.

following the introduction of services, even as broadband speeds increased nearly ten-fold over the same period of time.

Creators have never had so many ways to reach viewers. Broadband networks and the proliferation of devices capable of displaying video have dismantled the old barriers that separated content creators from their potential audience. A growing array of video content is being conceived and developed primarily for Web distribution. For example, Netflix has begun developing its own exclusive television series offerings to compete with video networks and services. Google is hosting original programs of all niches by independent producers. Of particular note, this popular new platform for accessing video content has emerged and thrived without any government-guaranteed access to programming or restrictions on licensing imposed upon content providers.

While not a complete substitute for a cable subscription, online video offerings are good enough for some consumers – currently a small minority – to cut or shave the cord. According to one report, in the three years between 2008 and 2011, "more than 2.65 million subscribers . . . dropped their pay-TV service entirely in favor of streaming video options."[6/] Yet during that same three-year period of time, 2.1 million net, new multichannel video customers were added in the U.S. While cord-cutting and cord-shaving are a business reality facing cable operators, it is also the case that there are millions of new customers subscribing to our service for the first time – or returning to us – because of the HD, on-demand, multi-screen and other advanced video offerings we make available.

6/ Mike Snider and Roger Yu, *Flood of Video Streaming Options Could Confound TV Watchers*, USA Today (April 10, 2012), *available at* http://www.usatoday.com/tech/news/story/2012-04-09/streaming-video-options/54136024/1. *See also*, Daniel Frankel, *Nielsen: 1.5M U.S. households cut the cord in 2011*, PAID CONTENT, May 4, 2012, *at* http://paidcontent.org/2012/05/04/nielsen-1-5-m-u-s-households-cut-the-cord-in-2011/.

As always, the cable industry is responding to changes in technology and in the marketplace in order to stay ahead of the curve and provide leading-edge services to its subscribers. The opportunities presented by broadband are great, as are the challenges. There are capacity constraints arising from the growing demands on the network imposed by services and offerings that require more throughput. High-quality video depends upon continuous bit streams, but the Internet is largely a packet-switched network that sends traffic in bursts. Any network that is shared by many users—as all residential broadband networks are—must cope with congestion and ensure all users get quality service. And as we continue to invest billions annually in fixed cost networks, we must continue to explore fairer and more efficient ways to price service, including potential models that require heavier users to pay more for the additional network resources they use, rather than have lighter users subsidize the power users.

The Internet is vastly more flexible than traditional voice or video networks because it transmits information in packets and reassembles them at the subscriber device – but the "network of networks" that comprise the Internet does not yet offer the throughput and reliability to deliver video programming with the consistency of plant that is specifically built to deliver cable and satellite television services. By some estimates if you tried to put all cable content on the Internet, the Internet would be 100 times too small to handle it. While that circumstance will change, it will require investment and innovation to make that happen.

Cable's business incentives in today's marketplace are, contrary to suggestions from some quarters, fully aligned with the interests of consumers. The path to continued growth for cable is to enhance and expand its customers' use and enjoyment of the broadband platform we offer.

If consumers want to access video content via their laptop, their Xbox, their iPad, or their mobile device, it's our job to make that possible for them. If they want to obtain video content from Netflix, Amazon, Hulu, YouTube, Apple or any other online provider, it's our business to make that possible as well and we are. As our new tag line says, "Cable: It's more than TV. It's how we connect." Cable has a profitable broadband business and benefits from greater Internet consumption generated by streaming video services. To make the point, cable companies frequently promote web services like Netflix, Skype and Facebook in their ads.[7/] So while it is natural that cable operators are themselves developing new services and features that enable their subscribers to access video online and on-the-go, such offerings do not in any way displace or hinder any other provider of content, service or devices in the online video market.

Claims and concerns that cable operators will use their control over broadband networks to stifle online video are simply not borne out by the facts. The exploding growth of online video usage undercuts any argument that cable is standing in the way of this business. To the contrary, cable's broadband networks are the engines that have enabled online video service to emerge and flourish. Indeed, there is simply no way to reconcile such claims with the wealth of content, services and devices that are available for accessing and enjoying online video.

The Future

As vibrant as today's video marketplace is, the landscape of tomorrow that is taking shape is even more exciting. Content will be produced and distributed not just for television, but for any device with a screen capable of displaying video. Consumers will enjoy more variety and choice in how to access and interface with the video and on-demand offerings available to

7/ *See* http://www.youtube.com/watch?v=zEhULSD3MAI.

them from both their television and the Web, using, for example, their iPad or other portable device for navigation, instead of a remote control.

We can envision a world free of set-top boxes. The marketplace of the future is apt to move from being hardware-centric to software-centric, which will accelerate the pace of innovation and adaptation to new features and capabilities. Today, set-top box-based services cannot be deployed until the boxes are tested and glitch-free; by contrast, software-based services can be released in Beta and then improved. Beta versions of new products are common among the Googles and Apples of the world – and consumers benefit from the more rapid innovation under this model.

A vast array of cloud-based services and applications will make available a new generation of interactive and multimedia offerings, and dissolve the lines between video, data, graphics, voice, and text. Comcast is offering consumers a more personalized and interactive viewing experience with the launch of its X1 cloud-based DVR user interface. With the X1, all the processing is done in the network, which gives Comcast the flexibility to quickly test and create new apps for customers without worrying about whether the customer's set-top box is outdated or not. It will also provide more personalized features, for example, allowing customers to see which shows their Facebook friends are watching. The X1 can also be used with mobile phone apps that turn handsets into remote controls.

Cable's investment in interoperable Wi-Fi networks will provide consumers with unprecedented levels of portability and flexibility for consuming video and other broadband service offerings. Cable Wi-Fi also enhances the efficiency of mobile broadband networks by enabling providers to offload traffic where Wi-Fi is available. Smartphones can use Wi-Fi to surf the web and even make calls, providing consumers with the opportunity to save money on their wireless service bills.

Importantly, all of the innovation that is taking place to bring both today's – and tomorrow's – advanced services is occurring *without* technology mandates not because of them – and sometimes even in the face of existing regulatory impediments.

Strengthening Incentives to Invest and Innovate by Updating the Regulatory Framework

The future looks bright, but it will require a business and regulatory framework that preserves and strengthens incentives to invest and innovate. The last 20 years have shown that cable operators and programmers are willing to invest aggressively to bring new services, features and capabilities to consumers. But legacy rules rooted in outdated assumptions concerning the state of competition in this marketplace will only frustrate our ability to obtain the capital for those investments. Investments are deterred by policies that seek to turn our networks into commodities. I doubt anyone here would want to revive the almost non-existent pace of innovation that residential telephone consumers experienced in the 50 years between 1940 and 1990, but that is the risk attendant to proposals that would turn network capacity into a commodity. The way forward to the future is not to revive regulatory anachronisms, but to cast off that baggage.

That means doing away with rules predicated upon marketplace conditions that no longer exist. Twenty years ago, cable was effectively the sole provider of multichannel video programming service in the country, serving 98 percent of all multichannel households. Today, incumbent cable's share of the multichannel marketplace stands at 56 percent and 4 of the 8 largest MVPDs in the country are non-cable.

Twenty years ago, there were no DBS companies providing multichannel video programming. Today, DirecTV and Dish Network are, respectively, the second and third largest MVPDs in the nation. Their multichannel video services are available to virtually every household in the country and together they serve 34 million households.

Twenty years ago, there were no telephone companies providing video service to cable subscribers. Today, AT&T and Verizon, the first and second largest communications companies in the world, make available multichannel video programming to more than 45 million households combined. Verizon and AT&T are respectively the sixth and eighth largest MVPDs in the country, and telephone companies are offering competing video service in rural as well as urban markets around the country.

Twenty years ago, the average cable system featured 36-54 channels and there were no more than 100 programming channels available for distribution to subscribers. Today, most consumers receive service from providers offering hundreds of channels, and there are now approximately 900 non-broadcast channels available for distribution to multichannel households.

Twenty years ago, vertical integration between cable systems and cable programming channels was widespread. Cable operators owned most national cable channels carried on a cable system. Today, vertical integration is the exception rather than the norm, falling from 53 percent of networks available for distribution in 1992 to only 14 percent today.

Twenty years ago, most American households relied primarily on over-the-air broadcast stations for their video entertainment. In fact, 41 percent of households exclusively relied upon broadcast television, a number that has fallen today to 14 percent. On average, broadcast stations accounted for 68 percent of television viewership in 1992. So, on a typical day, just over 2 out of 3 TV viewers were tuned into broadcast stations. Twenty years later, that number has flipped with more than 2 out of 3 television viewers tuning into non-broadcast channels during a given day.

While the premises for cable regulation have been shattered by competition and technological change, old rules based on aging snapshots of the video marketplace remain in effect. There are rate regulation rules designed to serve as a proxy for market-based pricing, even though most American households have a choice of at least three MVPDs and millions may opt to forego multichannel subscriptions altogether in favor of Internet-delivered video.

There are program access rules designed to nurture facilities-based competition to cable. But cable's main MVPD competitors – DirecTV, DISH Network, AT&T and Verizon – are all some of the largest communications services providers in the nation. These companies hardly need the government's help to remain viable competitors to cable. And, in contrast to 20 years ago, the vast majority of programming networks are not owned or controlled by cable operators, mitigating concerns that bottleneck control of programming could somehow stifle the emergence of competitors to cable.

There are also content carriage obligations, such as leased access, whose usefulness has been obviated by the Internet; and program carriage rules designed to protect programmers unaffiliated with cable, even though the vast majority of programming carried on cable systems and available to consumers already is unaffiliated with cable and it has never been easier for new video content to reach consumers. It is also time to re-examine those rules that affect the cable carriage of broadcast signals, such as must carry, retransmission consent, and non-duplication rights, that were adopted in a world in which technology and competitive market forces were vastly different than they are today.

In light of the fundamental changes that have occurred in the marketplace over the last 20 years, Congress should reassess the continued need for these restrictions. A new dialogue is essential because the continued application of outdated rules creates uncertainty and marketplace distortions, encourages unproductive attempts at regulatory arbitrage, and dampens incentives to invest.

* * *

Thank you again for the opportunity to appear today. I look forward to your questions – and to the continued opportunity to consider these critical policy issues.

Cable Then & Now

	1992	2012
Cable % of all MVPD homes	98%	57%
% of national cable nets that are part owned by cable op	53%	14%
Total cable channels	101	900+
Top 10 MVPDs that are NOT cable companies	None	Direct TV (#2) DISH (#3) Verizon FiOS (#6) AT&T U-Verse (#8)
Services offered	Analog Video 35-40 channels	Digital Video 100's of channels
	No Broadband	Broadband up to 100+ Mbps
	No Voice	Digital Voice 25 million customers
Average daily TV viewing	7hr, 5min	8hr, 30min
% of all TV Households that are Pay TV HHs	61%	86%
% of TVHHs exclusively Over-The-Air	39%	14%
% of day viewership share held by broadcast TV	68%	32%

cable

National Cable & Telecommunications Association

Mr. WALDEN. Mr. Powell, thank you, and we will look forward to asking a few questions of you and the other panelists.

We will now go to the President and CEO of Hearst Television Inc., Mr. David Barrett. Mr. Barrett, thank you for being here. We look forward to your testimony.

STATEMENT OF DAVID BARRETT

Mr. BARRETT. Good morning, Chairman Walden, Ranking Member Eshoo and members of the subcommittee. My name is David Barrett. I am the President and CEO of Hearst Television. Our company owns 29 TV stations across the country, a number of which are in your home markets. I have traveled here today from New York City on behalf of the National Association of Broadcasters.

You can tell from the makeup of this panel that the future of video is very bright, very diverse and more inclusive than ever before. Each of us here today plays an important role in the video ecosystem but what differentiates television broadcasters from every other entity at this table is our unique commitment to serve our local communities and to operate in the public interest. Localism is our mandate, and we breathe it every day, and we supplement our logical programming with the most popular national entertainment, news, sports programs to provide viewers with a variety and quality of content that is unmatched by any other media.

Certainly, we cannot discuss the future of video without talking about spectrum, the oxygen of our delivery for over-the-air signals. With concerns over spectrum use intensifying, it is broadcast television that uniquely offers the most efficient use of spectrum to transmit video. The genius of television broadcasting is its one-to-many architecture. For high-demand programming like the Super Bowl and the upcoming Olympics, there is no limit to how many viewers can tune into these games and events. With wireless one-to-one architecture, there is simply not enough spectrum on the planet to allow every viewer to watch the events simultaneously on smartphones or tablet devices. There should be no doubt that we need to focus on the most efficient ways to deliver video to our consumers today and into the future in order to optimize the video experience.

To meet the demands for mobility, our industry is today launching broadcast mobile television. New mobile DTV devices and adapters will enable reception of full-motion digital broadcast without the need for additional spectrum, and because broadcast mobile TV relies on our existing over-the-air transmission, we can offer high-quality video without running up expensive consumer costs or exhausting data caps Internet providers impose on their customers.

Other innovations on the horizon such as 3D, 4K and ultra-high definition are down the road and around the corner. These innovations will highlight how creatively broadcasters are using their digital spectrum now and will be doing so in the future. As incentive auctions and broadcast repacking is initiated, it is imperative that the FCC policy determinations not jeopardize the opportunity to bring these new and exciting services to life. Our industry recognizes that consumers expect to view our programming on a variety of devices large and small. In order to make that a reality and preserve our business viability, content producers will need assurance that programming will only be transmitted with prior consent and agreed-upon compensation.

In the current television context, retransmission consent allows broadcasters and cable and settlement companies to negotiate in the free market for the value of the broadcast signal. These negotiations are successful because both sides of the deal have skin in the game. We have a mutuality of interest. Broadcasters benefit from the exposure that cable and satellite provides, and likewise these video operators benefit from reselling our incredibly popular content.

It has been suggested by some in the cable industry that cable bills are rising because of the costs of broadcast programming. There is a chart on the screen that would indicate that the data does not support that assertion. As you can see, cable price increases have consistently outpaced inflation for 11 of the last 12 years. In actuality, it is the cable networks that have been collecting the vast majority of carriage fees.

This next chart from Kagen shows the differential and the disparity in fees paid to basic cable networks compared to the total fees paid to broadcasters both on a trailing basis and as projected into the future. In 2012, it is estimated that cable will pay broadcasters approximately $2 billion in retrans fees while paying basic-cable networks almost $29 billion. This does not give effect to the value of the inventory exchange that goes on from cable networks to the cable MSOs but that amount of money in no way equalizes a $27 million disparity.

This is even more confounding when you consider broadcast ratings are many times higher than cable in so many cases. In fact, approximately 95 of the top 100 shows in the recently concluded television season aired on broadcast television both in the demographic of 18–49 and in the demographic of 25–54 as measured by Nielson. In truth, retrans payments are not the driver of increasing cable bills, and the money is not following the audience in terms of what is actually viewed on television in this country.

So how do we ensure that our broadcast content is successful beyond these traditional platforms to the new video technologies evolving at a breakneck speed? I will observe that I think Congress got it right in 1992 when it noted that broadcasters must be allowed to control the use of their signals by anyone engaged in retransmission by whatever means. New companies like Sky Angel are now part of the video marketplace but it appears to be unclear as to how the law will apply to them and other new entrants. The FCC is currently considering the question of what is a multichannel video program distributor. These seemingly simple questions have far-reaching implications. Who has program access? Who pays retransmission consent fees? We believe it only makes good sense for the existing retrans consent and exclusivity rules to be applied to all new entrants.

As an industry that creates content or acquires the right to content, it is imperative that we have the right to negotiate over how our content is distributed. Congress should reject any erosion of the bedrock principles of retransmission consent and market exclusivity because they are essential to our uniquely local system of broadcasting. Broadcast television is an indispensably important part of today and tomorrow's video ecosystem. As evidenced by our recent multibillion-dollar investment throughout the digital transition, American broadcasters are prepared to play a major role in the advancement of video services as we look down the road.

I look forward to answering your questions when the remarks have been concluded.

[The prepared statement of Mr. Barrett follows:]

NATIONAL ASSOCIATION OF BROADCASTERS

Hearing on "The Future of Video"

United States House of Representatives
Committee on Energy and Commerce
Subcommittee on
Communications and Technology

June 27, 2012

Statement of David Barrett
President and CEO
Hearst Television, Inc.

On behalf of the
National Association of Broadcasters

Good morning, Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, and thank you for inviting me to testify today. My name is David Barrett, and I am President and CEO of Hearst Television, Incorporated, which operates 29 television stations across the U.S. I am testifying today on behalf of the free, local, over-the-air television members of the National Association of Broadcasters.

I. Introduction

In my view, the future of broadcast video services is bright. Recent data show that the number of viewers accessing television over the air (OTA) has increased dramatically in recent years. Results of a survey released last week by GfK Media/Knowledge Networks show that about 21 million households, representing 54 million viewers, now access digital broadcast television exclusively through an antenna.[1] That is a sharp increase – nearly 20 percent – over just a few years ago. And nearly a quarter (24 percent) of homes headed by younger adults, those with a head of household aged 18-34, rely on over-the-air reception for their broadcast television viewing. *Id.*

Who are these viewers? In addition to young people, many are low-income families or minorities. *Id.* The GfK Media report shows that the effects of the economic downturn, increasing subscriber fees for cable and satellite TV, and the plethora of new broadcast options in the digital age have led many consumers to embrace broadcast TV again. This is exciting news for broadcasters and should inform Congress as it oversees

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[1] *See* John Eggerton, "Study: Most Cord-Cutters May Be OTA 'Opt-Ins,'" *Broadcasting & Cable*, June 18, 2012; *See also* blog post of David Tice, GfK Media Researcher, explaining that what is commonly thought of as "cord-cutting" because of online video options may be better thought of as "cost-cutting," as consumers cancel expensive pay TV subscriptions and use free OTA television instead, available at http://www.gfkinsights4u.com/insights4u.cfm?articleID=511.

the Federal Communication Commission's (FCC) management of spectrum allocated to free, over-the-air television.

Some of this resurgence can also be attributed to technological advances in broadcast TV. The television industry recently passed the three-year anniversary of the transition to all-digital distribution. By almost any measure, the transition and broadcasters' embrace of digital technology have been a tremendous success and a boon for viewers. Nearly every major television broadcaster now provides its content to viewers in crystal-clear high definition over the air for free. Most stations also offer anywhere from one to up to three additional "multicast channels" – extra channels containing new and diverse program content, and all of which operate in the same 6 MHz of spectrum that previously held just one analog channel. This new, free, digital over-the-air service doubles, and, in some cases, more than triples, the number of channels available. Indeed, broadcasters' ability to multicast has led to the rise of multiple new national networks, including many networks, such as Bounce TV, Estrella, Live Well, and MeTV, that serve more specialized, diverse, and ethnic audiences. This trend will continue as new networks grow their audiences with increasingly diverse and compelling programming.

With these developments in mind, this testimony first addresses spectrum and broadcasting's role in the communications ecosystem. It then focuses on important issues regarding the "rules of the road" for video services.

With regard to spectrum, NAB urges Congress to remain vigilant in its oversight of the process of broadcast incentive auctions. Incentive auctions themselves are unprecedented, and the television spectrum auction specifically will have a direct impact on millions of viewers, potentially exceeding that of the digital TV transition. It is critical that this Committee ensure the FCC implements incentive auctions consistent with statutory requirements and Congressional intent.

Beyond these auctions, we should also be focused on the future of broadcasting and how it can, and should, play a vital role in our nation's communications system moving forward. Beyond continuing to serve viewing audiences and local communities as we always have, the broadcast industry's evolving technology will be a critical complement to wireless broadband. Just as wireless companies are upgrading their technology, from 3G to LTE and beyond, broadcasters will also be upgrading, and the results could have an extraordinary impact on spectral efficiency.

My testimony today also responds to continuing calls by pay television services to revise the legal framework of video programming distribution. These companies would have Congress change the laws and regulations that have successfully governed the video marketplace for decades. They would turn back the clock to days when broadcasters were essentially forced to subsidize their pay TV competitors. As explained below, such efforts are contrary to the public interest and should be rejected.

II. Congress Should Ensure That Incentive Auctions Are Implemented As Intended

A. Transparency Is Critical to Incentive Auction Success

Earlier this year, as part of the Middle Class Tax Relief and Job Creation Act of 2012 (Public Law 112-96) ("Incentive Auction Act"), Congress gave the FCC the authority, for the first time, to conduct incentive auctions, including auctions of broadcast spectrum. While we dispute some of the underlying orthodoxy behind the push for incentive auctions – namely, that repurposing large amounts of broadcast spectrum is necessary to solve a looming spectrum "crisis" – we nonetheless supported the legislation after this Committee and Congress included several appropriate viewer safeguards in the legislation. These provisions ensure that the auctions are completely voluntary and that the Commission must make every effort, after the television auction and the repacking of stations into a smaller band, to replicate the service areas of the many stations that will remain on the air serving their local communities. With digital broadcasting, even a seemingly slight reduction in television stations' service areas could result in a loss of service for millions of viewers. And this could have a particularly big impact on rural viewers. I encourage this Committee to ensure that the FCC follows the intent of Congress in this important respect.

The success of incentive auctions ultimately will be defined by their results for the American people. The Commission must maintain a robust broadcasting system that continues to provide free and local television service to millions of viewers, while moving to provide a strong and fast wireless broadband system. To achieve this result, the Commission must fully engage all the affected industries. For broadcasters, that includes not just those stations that may choose to participate in the auction, but also those stations that do not – yet will nonetheless be moved, or "repacked," to a new channel.

Broadcasters are understandably apprehensive about this process. Their concerns include how many stations will be moved and whether there will be enough remaining channels to accommodate those stations that wish to continue to serve the public. To ease that apprehension, the Commission should be as transparent as possible about how it plans to conduct incentive auctions and how it plans to repack stations. NAB is concerned that some well-intended language in the Incentive Auction Act ensuring confidentiality for broadcasters that submit offers to sell in the reverse auction could be interpreted in a way that would undermine this goal.[2] Careful implementation of this provision is important.

While in some respects confidentiality is a good idea, that confidentiality should not extend to the operational mechanisms of the incentive auction and the repacking process. Broadcasters should know, for example, what modeling and service area assumptions the Commission makes as it lays out a repacking plan, how the Commission will coordinate with Canada and Mexico (which potentially affects hundreds of stations near the borders), and what impact the repacking process will have on existing station coverage areas. Transparency benefits broadcasters, potential bidders in the auction, and the FCC. Broadcasters are more likely to submit an offer to sell in the reverse auction or to consider the channel-sharing option if they understand fully how the process will work *before the incentive auction begins.* Limiting the release of information about the mechanics of the incentive auction process will increase the likelihood that the incentive auction will not be successful.

B. The One-to-Many Broadcasting Model Is a Necessary Complement to the One-to-One Broadband Model, Now and in the Future

One of the most important, but least understood, reasons for maintaining a robust broadcasting system is the critical role that broadcasters play in the wider communications ecosystem. Broadcasting's one-to-many video and data service, plainly, is the most spectrally efficient wireless delivery system for high demand content.

[2] Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96, § 6403(a)(3).

As consumers rely on handheld devices – including mobile phones and tablets – to access content like video, the one-to-many broadcasting model will become increasingly *more important*, not less important. For example, mobile digital TV, which is currently being rolled out by broadcast stations around the country, can alleviate pressure on wireless networks when viewers using mobile devices access popular television programming, such as sporting events, because consumers will not have to access that content through the cellular network. More importantly, as evidenced by the lifesaving role the technology played in the Japanese earthquake last year, mobile digital TV is the best way to reach on-the-go viewers with critical information. Future broadcast distribution standards being developed now will be able to deliver not just high-demand video, but also high-demand data of all types, in the most spectrally efficient manner, greatly reducing the burden on over-taxed cellular networks.

In considering what our nation's communications system should look like in 10 or 20 years, it is critical that we avoid any policy relying too heavily on a one-to-one architecture to the detriment of the diverse broadcast model. The point-to-point architecture of wireless broadband networks essentially means that each user has his or her own path in the cellular network. This type of design allows two people standing next to each other using the same type of device and operating on the same wireless network to access totally different types of information. The first person can be watching a video and the second person can be looking up directions to the closest restaurant. But, if those two people and hundreds or thousands of other people near them are trying to access the same information at the same time – which occurs during emergencies – the wireless network will quickly be overwhelmed.

In contrast, television and radio broadcasting creates one or just a few data streams and transmits that data over a specific geographic area using a high-powered transmitter. This data can be received by anyone who has a receiver located within the transmission range of that broadcaster. Adding more users to the broadcast distribution network has no impact on its ability to deliver information. For high demand information, this is the ideal distribution method. As broadcast technology continues to evolve, we expect that the broadcasting model will work cooperatively and seamlessly with cellular networks to deliver information to wireless devices, delivering, as broadcasters do today, the content that consumers seek the most. In addition, broadcast licenses are held by many diverse licensees. The broadcast model permits a diversity of ownership and control that does not exist in wireless services.

This basic broadcast-broadband wireless model will clearly benefit consumers, who will face higher wireless bills and caps on data usage in the next few years. Already, most major wireless companies are eliminating their unlimited data plans. And as the transition to 4G wireless technology has shown, consumers quickly exceed their data limits, and pay exorbitant overage fees, when accessing video through cellular networks.[3] Coupling a high-powered one-to-many broadcast transmission with those cellular networks would eliminate this concern for consumers accessing popular video content.

[3] *See* Anton Troianovski, "Video Speed Traps Lurks in New iPad, Users Find the Superfast 4G Link Carries a Big Cost: Churning Through Data Limits in Mere Hours," *The Wall Street Journal*, March 22, 2012 (available at http://online.wsj.com/article/SB10001424052702303812904577293882009811556.html?mod=WSJ_Tech_LEADTop).

C. There Is Still a Need for a Comprehensive Spectrum Inventory

I would also like to thank Chairman Walden and this Committee for initiating a new spectrum task force, focused on finding ways to analyze and optimize use of the vast quantities of spectrum under federal government control. To that end, it is critical for the task force to have a complete picture of how all spectrum, both federally controlled and commercial, is being used, including a clear understanding of who currently holds spectrum, how they are using it, and the intensity and effectiveness of their use. Such an inventory of spectrum deployment should not delay the incentive auction process, but an inventory is prudent and necessary for Congress, the National Telecommunications and Information Administration (NTIA), and the FCC to make informed decisions on U.S. spectrum policy.

The wireless industry claims there is a looming spectrum crisis, yet the industry appears to be warehousing vast quantities of unused spectrum.[4] If the wireless industry were truly running out of bandwidth, it already would have developed more of the spectrum that it currently controls. There have been a number of industry analysts who have cast doubt on the claims of a spectrum crisis. Martin Cooper, the father of the cell phone, was recently quoted in a *New York Times* article claiming that available

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[4] *See, e.g.,* Deborah D. McAdams, *McAdams On: Tangentially, Spectrum Policy Reform*, TVTechnology (June 8, 2012) available at http://www.tvtechnology.com/mcadams-on/0117/mcadams-on-tangentially-spectrum-policy-reform/213823 (discussing cable, satellite and telephone companies' "hedging" of prime spectrum, and quoting FCC Commissioner Robert McDowell as stating that the federal government occupies about 60 percent of the best spectrum and has no incentive to move off that space or to provide accurate information about the costs associated with moving); *See also* Randall Stephenson, *Spectrum and the Wireless Revolution*, Wall St. J., (June 10, 2012) available at http://online.wsj.com/article/SB10001424052702303665904577450222319683932.html (stating that much spectrum is held by "speculators" interested in making a profitable investment rather than building mobile networks, and arguing that such speculation should be discouraged and that regulations should be put in place to ensure that spectrum be used within a "reasonable" timeframe).

technologies, which could greatly increase spectrum efficiency, are not being implemented by the wireless industry.[5]

In short, NAB supports Congress' decision to grant the FCC authority to conduct voluntary incentive auctions of broadcast spectrum as long as the Commission fully implements the Incentive Auction Act's viewer safeguards and protects the millions of Americans who rely on free, over-the-air local broadcast stations.

III. The Current Legal Framework Governing Broadcaster-Pay TV Relationships Serves the Public Interest

Turning to the challenges facing broadcast video services, television broadcasters offer a high quality, free, over-the-air, locally-oriented service that competes head-to-head with nationally-oriented pay TV platforms, hundreds of non-broadcast subscription networks, and other numerous programming sources. Congress already has in place laws that successfully govern the relationship between pay TV providers and broadcasters. These laws have a single purpose. They are designed to assure fair competition in a highly competitive media market and maximize the diversity, quality, and affordability of television service to the American people. This legal framework works because it serves the needs of television viewers and reflects the actual business relationships between broadcasters and pay TV providers.

Two bills currently before Congress, H.R.3675 and S.2008, both known as "The Next Generation Television Marketplace Act of 2011," will harm local stations and television viewers in at least three ways. *First*, they would turn back the clock to a time

[5] Brian X. Chen, *Q.&A.: Martin Cooper, Father of the Cell Phone, on Spectrum Sharing*, New York Times Blog (May 31, 2012), available at http://bits.blogs.nytimes.com/2012/05/31/qa-marty-cooper-spectrum-sharing/.

when cable and satellite providers confiscated and resold broadcast signals to their subscribers without obtaining broadcasters' consent — a time when broadcasters were forced to subsidize their pay TV competitors. Aside from being fundamentally unfair, a return to this system would seriously threaten broadcasters' ability to invest in high quality informational and entertainment programming to serve viewers and to compete effectively for audiences and advertisers. *Second*, the bills would eliminate the ability of the FCC to enforce privately negotiated contracts between program distributors and stations for the distribution of network and syndicated programming on an exclusive basis. *Finally*, these bills would further compound the harm to consumers by eliminating statutory provisions that promote fair competition between pay TV providers and the free, over-the-air broadcast service. And they would impair the ability of *any* regulatory body to protect consumers from escalating pay TV bills.

A. Congress Should Not Change Its Well-Functioning System of Retransmission Consent by Tilting the Marketplace in Pay TV Providers' Favor

One point that is sometimes lost in discussions of retransmission consent is why Congress granted broadcasters retransmission rights in the first instance. In short, Congress adopted retransmission consent in 1992 to ensure that broadcasters had the opportunity to negotiate at arm's length in the marketplace for compensation in exchange for the right of cable and other multichannel video programming distributors to resell their broadcast signals. This law promotes fair competition in the video marketplace, is pro-consumer, and enhances the vibrancy of the nation's free, over-the-air broadcast service, as Congress intended. It also benefits television viewers – your constituents – in markets across the country by assuring free access to vital news, emergency and weather information, public service programming, and a variety of entertainment and sports programming. This service is of special significance and importance to your constituents who cannot afford an expensive pay TV subscription service. These policy goals remain just as important today as when they were enacted.

Prior to the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"), cable operators were not required to seek the permission of a station before retransmitting and reselling its signal, nor were they required to negotiate with the station for that privilege. At a time when cable systems had few channels and were limited to an antenna function of improving the reception of certain local broadcast signals, this lack of recognition for the rights broadcasters possess in their signals had limited practical significance. However, the video marketplace changed dramatically in the 1970s and 1980s. Cable systems began to include not only local signals, but also distant, duplicating broadcast signals and the programming of vertically-integrated cable networks and premium services. Cable systems began to compete head-to-head with broadcasters for viewers and for national and local advertising revenues, but they were still allowed to resell local broadcast signals to their paying subscribers without the permission or consent of the station.

By the early 1990s, Congress concluded that this failure to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace" that "threaten[ed] the future of over-the-air broadcasting." S. Rep. No. 92, 102d Cong., 1st Sess. at 35 (1991) (*Senate Report*). Using the revenues they obtained from reselling broadcast signals, cable systems had supported the creation of cable programming (including program networks vertically integrated with cable system operators) and were able to sell advertising on these cable channels in direct competition with broadcasters.

Given this dramatic change in the nature of cable systems, program services and advertising practices, Congress determined that the then-existing law was not only unfair to local broadcast stations, it was anticompetitive.

Specifically, Congress concluded that public policy should not support "a system under which broadcasters in effect subsidize the establishment of their chief competitors." *Id.* Noting the continued popularity of broadcast programming, Congress also found that a very substantial portion of the fees that consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. *Id.* To remedy this "distortion," Congress in the 1992 Act gave broadcasters control over the use of their signals and permitted broadcasters to seek compensation from cable operators and other multichannel video programming distributors (MVPDs) for carriage of their signals. *See* 47 U.S.C. § 325(b). Congress specifically noted that cable operators pay for the cable programming they offer to customers and that programming services originating on broadcast channels and resold by MVPDs should be treated no differently. *Senate Report* at 35.

In establishing retransmission consent, Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals." *Id.* at 36. Congress emphasized that it did not intend "to dictate the outcome of the ensuing marketplace negotiations" between broadcasters and MVPDs. *Id.* Retransmission consent does not guarantee that a broadcaster will receive fair compensation from an MVPD for retransmission of its signal; it only provides a broadcaster with an opportunity to negotiate for compensation of various types.

The reasons for establishing this retransmission marketplace remain as valid and important today as they were in 1992. Congress enacted retransmission consent because it recognized the value of broadcasters' signals, which continue to be highly valued by viewers and advertisers today.[6] It is still the case today that pay TV providers would like to confiscate the signals of local broadcasters – their competitors for viewers and advertisers – and resell those signals to paying subscribers. But it would be as unfair and anticompetitive today to allow pay TV operators to do this without the consent of local stations as when the retransmission consent statute was enacted. Moreover, from the inception of the Radio Act of 1927, one broadcast station has been unable to take the signal of another broadcast station without the originating station's consent. Similarly, a broadcast station cannot intercept a cable system's transmission or a satellite carrier's signal and then rebroadcast it without consent. It would be the height of unfairness to single out broadcast stations for such disparate and anticompetitive treatment by allowing MVPDs – their competitors – to confiscate their signals without authorization.

It is still true today that cable and satellite operators pay for all of the other, non-broadcast programming they offer to attract subscribers (and, in fact, pay *more* for that programming on a per viewer basis). And there is still no reason that broadcasters should be uniquely disfavored and not be allowed to negotiate for others' use of their signals. In sum, Congress's original goals of correcting distortions in the video marketplace, promoting competition, and "ensur[ing] that our system of free

[6] During the 2010-2011 television season, broadcast programming dominated the primetime program rankings, accounting for 95 of the top 100 programs. Source: The Nielsen Company, 9/20/10-5/25/11; Programming under 25 min. excluded; Ranked by AA% (ratings); in the event of a tie, impressions (000's) are used as a tiebreaker.

broadcasting remains vibrant," continue to be served today by the retransmission consent system. *Senate Report* at 36.

While pay TV providers contend that changes in the marketplace since 1992 have somehow undermined the rationale for retransmission consent, they focus exclusively on the advent of limited competition in the MVPD market and disregard other changes that benefit MVPDs in retransmission negotiations. For example, a much larger percentage of television viewers subscribe to pay TV services today than in 1992. Because broadcasters rely very heavily on advertising revenue, and, therefore, seek to reach the largest viewing audience possible, broadcasters today have a stronger incentive than ever to conclude retransmission negotiations successfully and avoid carriage disputes, which result in the immediate loss of both retransmission consent compensation and advertising revenues for local stations. Moreover, the MVPD market also has grown increasingly consolidated over time, with just ten MVPDs serving 90% of pay TV subscribers nationally, and with a majority of cable subscribers served by systems that are part of regional cable system "clusters." As a result, local broadcasters (including small to medium-sized stations and groups) often must deal with powerful, consolidated, and highly-concentrated and vertically-integrated MVPDs in retransmission consent negotiations. These consolidated MVPDs increasingly compete with broadcasters for viewers and for national and local advertising revenues, thereby additionally fragmenting local stations' audiences and advertising revenues. Congress should refrain from intervening in the retransmission consent process at the behest of these pay TV providers.

Beyond tilting the retransmission consent marketplace more in the favor of pay TV providers, changes to the retransmission consent system are entirely unnecessary and would be contrary to the interests of consumers.

Pay TV providers sometimes assert that they are paying retransmission consent fees that represent dramatic increases from one year to the next. Such percentage descriptions of increases may seem significant until you consider that the increase may be from little or no compensation to a small amount of compensation (e.g., an increase from one cent per subscriber per month to two cents per subscriber per month is a 100% increase, but is a very small amount). Retransmission consent compensation to broadcasters represents but a tiny fraction of what MVPDs spend on other programming and what they earn in revenues. For example, in 2010, retransmission consent fees were only about six-tenths of one percent of cable industry revenues.[7] Data recently published by SNL Kagan show that, in 2011, retransmission consent fees represented a total of 1.46 billion dollars, compared to 26.66 billion dollars paid for basic cable networks.[8] Most of these networks have considerably lower ratings than broadcast television stations.[9]

In addition, the vast majority of retransmission consent agreements are successfully negotiated without disruption of any kind to customers of pay TV providers.

[7] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 22 (May 27, 2011), attached to NAB Comments in MB Docket No. 10-71 (filed May 27, 2011).

[8] *See* Dave Seyler, *Broadcast Is Not Busting the MVPD Bank*, TV BUSINESS REPORT (June 8, 2012), available at: http://rbr.com/broadcast-is-not-busting-the-mpvd-bank/.

[9] As one party observed in comments filed with the FCC, "[c]able operators pay more than 10 times the per-subscriber fee for cable networks that are less than half as popular as the network-affiliated broadcast channels." Comments of the CBS Television Network Affiliates Association, MB Docket No. 10-71 at 14 (filed May 27, 2011).

NAB has repeatedly commissioned studies of negotiating impasses and their impact on television viewers. These studies have shown that consumers are over 20 times more likely to be deprived of television viewing by an electricity outage than by a bargaining impasse between broadcasters and MVPDs. From 2006 - 2011, aggregate service interruptions from retransmission consent negotiating impasses represented approximately *one one-hundredth of one percent* of annual U.S. television viewing hours.[10] Moreover, no broadcaster – not a single one – has ever been found by the FCC to have breached its obligation to negotiate retransmission consent in good faith. The same, however, cannot be said of pay TV companies.[11] Especially in light of pay TV providers' continual increases in the rates they charge consumers – increases consistently above the rate of inflation – policymakers should disregard these providers' factually unsupportable attempts to characterize their attacks on retransmission consent as protecting the interests of consumers.

Economic studies have shown that curtailing local stations' ability to obtain retransmission consent revenues would significantly reduce investment returns in the broadcast industry and reduce the amount of local news, public service, and public safety programming produced by stations.[12] In light of the economic challenges facing all providers of local journalism, Congress should refrain from undermining the

[10] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 30 (May 27, 2011), attached to NAB Comments in MB Docket No. 10-71 (filed May 27, 2011).

[11] *See,e.g., Letter from Steven Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable T.V.*, 22 FCC Rd 4933 (2007) (cable operator failed to meet good faith standard); *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of FCC processes and lack of candor).

[12] J. Eisenach and K. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 3-4, attached to NAB Reply Comments in MB Docket No. 10-71 (filed June 27, 2011).

retransmission consent system that increasingly supports local broadcast journalism important to viewers who subscribe to pay TV services, as well as to the growing numbers who receive all television over the air.

B. The Program Exclusivity Rules Work in Tandem with Retransmission Consent to Protect Localism, Diversity, and Private Contract Rights

Through arms'-length free market negotiations with program providers (including networks and syndicators), local broadcast stations purchase and pay for the exclusive rights to carry certain programming within a limited geographic area. The FCC's network non-duplication and syndicated exclusivity rules *do not* impose program exclusivity – they simply allow the FCC to enforce privately negotiated program exclusivity agreements between program suppliers and broadcast stations. In fact, the FCC's rules actually limit and restrict the geographic area of exclusivity to assure fair competition between stations and between cable systems. Both H.R.3675 and S.2008 would require the FCC to eliminate its program exclusivity rules.[13] While cable and satellite interests have sought to paint these rules as regulatory "protections," it is useful to take a closer look at what these rules really entail, why they exist, why they are important, and how they, like retransmission consent, promote competition in the creation and distribution of television programming.

A fact often missed in debate over the network non-duplication and syndicated exclusivity rules is that the rules themselves *do not* provide program exclusivity. In fact, the rules actually *limit and restrict* program exclusivity by limiting the geographic area in which television stations may enter into program exclusivity agreements with network

[13] The program exclusivity rules include the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated program exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125.

and syndicated program suppliers.[14] The actual program exclusivity terms for network non-duplication and syndicated program exclusivity are a matter of *private contractual agreement* between the program supplier and the local television station. Neither the FCC nor its rules provide or enforce program exclusivity provisions or arrangements not agreed to by the program supplier and the local station. The reality is that, subject only to antitrust law, in the *absence* of the FCC's network non-duplication and syndicated exclusivity rules, program suppliers and local television stations could enter into exclusivity arrangements covering geographic areas of hundreds of miles.

In attacking the FCC's rules, what cable and satellite operators actually want is the adoption of mandatory "broadcast signal access" rules in abrogation of market-based, freely-negotiated program contracts – all for the single purpose of securing an unfair, government-granted competitive advantage over local television stations. For example, MVPDs complain that they are limited by program exclusivity contracts in obtaining duplicative broadcast programming from other sources outside the local market. In fact, that is the whole point of exclusivity contracts – exclusivity is valued in the marketplace and ultimately induces the provision of greater programming choice and quality for consumers, as further explained below. MVPDs also complain that the program exclusivity rules somehow confer an unfair advantage on broadcast stations, conveniently ignoring the advantage that MVPDs would otherwise have in exercising their *own* freedom to enter into exclusive programming contracts (a notable example being DIRECTV's NFL Sunday Ticket).

[14] The FCC's rules only (i) provide a forum for adjudication of program exclusivity disputes; (ii) limit and restrict the geographic scope of a program exclusivity arrangement between a program supplier and a local television station; and (iii) impose certain formal notice requirements on local television stations as a condition to enforcement.

Exclusivity – as Congress and the FCC have consistently recognized – constitutes an essential component of America's unique system of free, over-the-air television stations licensed to serve local communities.[15] Local affiliates always have negotiated with networks and syndicated programming sources for exclusive programming within their markets. Advertisers on local broadcast stations expect and, indeed, pay for that exclusivity; these advertising revenues support stations' local programming, including news, and their ability to serve their communities. Exclusivity, which is limited by FCC rules to narrowly defined geographic zones near stations' home communities, enhances competition by strengthening local stations' ability to compete against the hundreds of non-broadcast and non-local programming networks offered by cable and satellite. As noted above, the FCC's rules do not mandate exclusivity, but merely enable broadcasters to protect the contractual arrangements they have entered into for the very purpose of securing programming content that meets the needs and interests of their communities.

Program exclusivity, and the system of local service it permits, thus is not a weakness of our broadcast system, as MVPDs often claim. It is a unique and highly valued strength. As with retransmission consent, there is no warrant for additional government intrusion into this realm of purely private contractual negotiations. As the FCC concluded when it examined its exclusivity rules in detail, interference into the contractual relations between broadcasters, networks and syndicated programming

[15] *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), at ¶ 114; S. Rep. No. 102-92 (1991), at 38.

suppliers would "contradict our own requirements of broadcast licensees and would hinder our policy goals."[16]

C. Eliminating Mandatory Carriage Would Further Harm Viewers

As part of the 1992 Act, Congress found that cable operators had the incentive and ability to favor their own programming over the programming of competitors, including local television broadcast stations.[17] The must carry provisions of the 1992 Act were based on a finding that action was necessary to avoid "a reduction in the number of media voices available to consumers."[18] Congress identified a specific interest in "ensuring [the] continuation" of "the local origination of [broadcast] programming,"[19] and found must carry necessary to serve certain broader aims of the Communications Act.[20] To promote localism and diversity in available programming, and to prevent cable operators from using gateway control over their distribution platform to exclude certain broadcast signals, Congress adopted the mandatory carriage provisions of the 1992 Act and later adopted somewhat different must carry requirements for satellite carriers. Since that time, the FCC has acknowledged the

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[16] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005), at ¶ 50 (*FCC Report*).

[17] *See* 47 U.S.C. § 521 note (1992 Act § 2(a)(15)) (finding cable operators have an "economic incentive" to "refuse to carry new signals" from broadcasters, and that absent a must-carry requirement, "additional local broadcast signals will be deleted, repositioned, or not carried").

[18] *Id.* at 1992 Act §2(a)(4).

[19] *Id.* at 1992 Act §2(a)(10).

[20] *Id.* at 1992 Act §2(a)(9) (must carry is necessary to meet goal of "providing a fair, efficient, and equitable distribution of broadcast services") .

continuing importance of these rules and the growing incentive and ability of cable operators to use their powerful platforms to disfavor unaffiliated content.[21]

These requirements remain important to the nation's highly competitive system of free, over-the-air broadcasting today. Must carry stations tend to be stations that offer niche programming, such as foreign language, religious, or ethnic programming. These stations often target audiences whose needs are not being met by other programming sources. Because these stations serve narrower audiences, the ability to elect mandatory carriage is important to their continued survival. Carriage of these unique stations' signals is important to the diversity of both free over-the-air broadcasting and to the diversity of programming available via MVPD service.[22] I urge you to retain the current must carry requirements, rather than eliminating them as proposed in H.R.3675 and S.2008.

IV. Policies That Support Program Development, Innovation, and Localism Must Apply in the Same Manner to All Those Retransmitting Broadcast Signals

Some have raised questions about the role of Internet video providers in this regulatory landscape. Television broadcasters generally support the deployment of new and innovative Internet services, including broadband video services. Such services have the potential to enhance competition in the MVPD marketplace. Increased

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[21] *See Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007), at ¶¶ 49-52 (finding that because of increasing cable subscribership, rising audience shares for cable networks, cable's increasing share of the advertising market, and other factors, the cable industry was even stronger vis-à-vis broadcasters than in 1992 and that "cable operators have even greater incentives today to withhold carriage of broadcast stations.").

[22] *See* George S. Ford & John D. Jackson, *Preserving Free Television? Some Empirical Evidence on the Efficacy of Must-Carry*. JOURNAL OF MEDIA ECONOMICS, *13*(1), 1–14 (2000) (must carry helps preserve free over-the-air television, especially stations not affiliated with the four largest networks).

competition is a long-standing public policy goal, one that can be a positive development for consumers, broadcasters, and other program providers.

Greater platform choice, developed in a manner that respects the rights of content and signal providers, will provide benefits for consumers. For example, it is easy to see that consumers would benefit from the development and deployment of new, competitive distribution platforms capable of customizing programming or bundling different varieties of services, including voice, Internet access, and video services. Such customization may result in cost savings or increased access to programming of particular interest to the viewer.

Video programming providers, including broadcasters, may also benefit from the deployment of new video distribution platforms. The emergence of such additional platforms could provide programmers with additional outlets for reaching viewers and enhance video competition in the marketplace.[23]

Local television broadcasters, specifically, may also benefit from the emergence of new competitive MVPD services. New video distribution platforms represent other outlets for broadcast programming, including local news and information. These platforms could provide new opportunities for local broadcast stations to reach more local viewers and augment and enhance their program services to their communities. The advertising and retransmission consent revenues from these retransmissions would, in turn, be used to enhance news, entertainment, and public service

[23] In economic terms, the emergence of new outlets and distribution platforms will allow broadcasters, by disseminating programming to a wider audience, to take advantage of economies of scale and reduce their average cost per viewer. J. Eisenach and K. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 6, attached to NAB Reply Comments in MB Docket No. 10-71 (filed June 27, 2011).

programming – furthering the objective of localism. The emergence of another video distribution platform for carrying broadcast programming could also encourage greater innovation in digital television programming, including multicast and high definition ("HD") programming.

To achieve these public policy objectives, it is important that new services not be permitted to expropriate broadcast signals at will. Broadcasters must continue to have the right to control the distribution of their signals over the Internet and to obtain compensation from broadband video service providers seeking to retransmit such signals. If new technologies are allowed to evade retransmission consent and erode local viewership by overriding program exclusivity rights of local stations and offering the same programs on stations imported from distant markets, the viability of local TV stations – and their ability to serve their local communities with high quality programming – will be lost. For emerging video platforms that offer services comparable to those of MVPDs, the preservation of a fair, balanced, and symmetrical regulatory scheme would promote competition rather than impair it. No distribution platfrom – new or old – can under existing law (nor should it be permitted under any change in law) retransmit a station's broadcast signal without its consent. As Congress stated when it adopted the 1992 Cable Act, "broadcasters [must be allowed] to control the use of their signals *by anyone engaged in retransmission by whatever means*."[24]

V. Conclusion

It is an exciting time for consumers of video services. Viewers have more options for accessing content today than ever before. And the road ahead promises even better

[24] S. Rep. No. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991) (emphasis added).

options as online video and other services bring innovation and competition to the marketplace. America's broadcasters are prepared to play a major role in the advancement of video services. Our historic transition to digital has vastly increased the amount and diversity of free, over-the-air television programming content available to nearly every home throughout the country and helped free up more than 100 MHz of spectrum that can be used for advanced wireless broadband services.

Yet, there are many challenges ahead. The FCC's planned incentive auction of broadcast spectrum could, if done correctly, ensure that local TV broadcasting remains the bedrock of our communication system. If done incorrectly, however, it could prove a disservice for millions of viewers that rely on over-the-air television as their primary information lifeline to the world. We respectfully encourage the Committee to keep a watchful eye on this process and act, if necessary, to ensure the FCC conducts the incentive auctions as Congress intended.

We also encourage Congress to ignore the threadbare, self-serving arguments from a handful of pay TV companies for changes in the law for the sole purpose of securing a government-granted advantage in a highly competitive marketplace.

As the broadcast industry continues to develop new and exciting ways to deliver more diverse and high quality programming to the American people, my colleagues in the industry and I look forward to working cooperatively with the Members of this Committee.

Thank you for this opportunity to share our views with you.

Mr. WALDEN. Thank you, Mr. Barrett. We appreciate your testimony.

Our next witness is the Chairman of DISH Network, Mr. Charlie Ergen. Mr. Ergen, thank you for being here before the subcommittee. We look forward to your testimony.

STATEMENT OF CHARLIE ERGEN

Mr. ERGEN. Chairman Walden, Ranking Member Eshoo and members of the subcommittee, thank you for the opportunity to testify about the future of video. My name is Charlie Ergen and I am Cofounder and Chairman of DISH Network, the third-largest pay-TV provider in the United States. We serve approximately 14 million subscribers and employ over 27,000 people.

I believe that understanding the future of video goes hand in hand with two simple rules: first, always try to understand what the customer wants, and second, change is inevitable; embrace it.

What do customers want? They want to be able to watch programming on their TV sets, on their phones and on their tablets, no matter where they are. They also want to be able to surf the web or make a phone call, again, no matter where they are. DISH plans to offer consumers the chance to get all of these services from one company.

At DISH today, we do a good job of efficiently providing fixed video to the home. But customers increasingly want more than just home video. They want mobile video. They want mobile voice and they want mobile data. So when we look at the future of video, we need to be able to provide all of those communications services to every one of our customers, anywhere and anytime.

Our company is moving in that direction. With innovations like Sling, our customers can use a wireless smartphone or tablet from any location to enjoy the video content that they have already paid for. We recently purchased Blockbuster and are integrating their video content holdings to enhance our on-demand offerings. We are a leading distributor of DVR technology and continue to innovate so our customers can watch the programming they have paid for whenever, wherever and however they want.

Our new Prime Time Any Time and AutoHop technology takes the DVR to a new level, giving consumers the choice to more easily view their preferred programming when they want, while skipping what they do not want to see. This means that allowing your kids to watch TV doesn't have to mean they have no choice but to see commercials for junk food and alcohol. Through AutoHop, DISH did nothing more than improve upon existing, legally accepted, and widely available technologies that give consumers the ability to record their television shows for playback at home a more convenient time, when they are able to fast-forward through or skip over commercials. These are some of the ways we have responded to our customers' changing needs but we have to go further.

In the past, we haven't shrunk from betting the company, so to speak, in order to stay competitive. We went from selling big dishes to launching our own small dish, DBS business. To give customers what they want, including mobile video, voice and data, we will have to take a significant risk once again.

Last year, we invested billions of dollars to acquire two bankrupt satellite companies with the aim of transforming those assets into a next-generation mobile broadband service. We want to provide consumers with the choice in services and providers that they seek. If we are successful, we will fuel billions of dollars in investment and create tens of thousands of new jobs in the United States.

And this brings me to my second point: foster change; don't ignore it or be afraid of it.

We are prepared to leverage our experience and financial strength to drive communications and entertainment forward and make them more mobile and dynamic than ever before. We can't get started, however, until the FCC releases updated rules governing how our satellite licenses can be used for terrestrial mobile broadband. Given the overwhelming support of the comments received to date, we hope that the FCC will act, and finalize the new rules by the end of the summer. We want to build the most advanced wireless network in the United States to compete against the well-established incumbents, but we need to begin as soon as possible to have a chance.

And just as wireless rules must be modernized to keep up with consumers and technology, the rules governing how broadcasters and pay-TV providers reach retransmission agreements are outdated and in need of change. Twenty years ago, when Congress first adopted the retransmission consent process in the 1992 Cable Act, there was typically only one cable operator in any given market negotiating with one broadcaster. Today, there are multiple pay-TV providers in each market, including satellite, telco, small local cable and large regional cable providers. Then, of course, there are also the new over-the-top video providers like Netflix, Aereo, and others. The broadcaster still maintains a government-sanctioned monopoly on the network programming in his market, while pay-TV providers face stiff competition from one another. The result is almost always bad for consumers and the free market.

Broadcasters play the pay-TV providers against one another. They cut off the most popular sports and entertainment programming if their demands for drastically higher rate increases are not met. Consumers lose because they cannot see the programming they paid for, they end up paying higher rates, or both. And the problem is only getting worse with more blackouts and more broadcaster abuses. From where we sit, the broadcasters cling to the status quo instead of meeting consumer demand and embracing new technologies and business models.

The retransmission consent regime is a prime example of an outdated government policy in need of an overhaul by Congress and/or the FCC. It is incredible to see how much has changed since 1992. Likely, there are a few of us who used the Internet back then, or had a cell phone. The idea of streaming movies or TV shows to a smartphone was science fiction.

Just as businesses must foster change in a rapidly evolving video marketplace to keep pace with what the consumer wants, government should work to ensure its regulations mirror today's competitive realities, consumer expectations, and advances in technology.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Ergen follows:]

TESTIMONY OF CHARLIE ERGEN, CHAIRMAN AND CO-FOUNDER OF DISH NETWORK AND ECHOSTAR
Before the U.S. House Subcommittee on Communications and Technology
June 27, 2012 -- "Future of Video" Hearing

Chairman Walden, Ranking Member Eshoo, Members of the Subcommittee:

Thank you for the opportunity to testify about the future of video.

My name is Charlie Ergen and I am a Co-Founder and the Chairman of DISH Network, the third-largest pay-TV provider in the U.S. I also co-founded and am Chairman of EchoStar, a worldwide leader in satellite services and the design and manufacture of set-top-boxes. We serve approximately 14 million DISH subscribers and employ over 27,000 people throughout the U.S.

I believe that understanding the future of video goes hand in hand with two simple rules:

First, always try to understand what the customer wants.

Second, change is inevitable … embrace it.

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At DISH today, we do a good job of efficiently providing fixed video to the home. But customers increasingly want more than just home video. They want mobile video. They want mobile voice. They want mobile data. So, when we look at the future of video, we need to be able to provide all of those communications services to every one of our customers, anywhere and anytime.

Our company is moving in that direction. With innovations like Sling, our customers can use a wireless smartphone or tablet from any location to enjoy the video content that they've already paid for. We recently purchased Blockbuster and are integrating their video content holdings to enhance our on-demand offerings. We are a leading distributor of DVR technology and continue to innovate so that our customers can watch the programming they've paid for whenever, wherever and however they want.

Our new "Prime Time Any Time" and "AutoHop" technology takes the DVR to a new level, giving consumers the choice to more easily view their preferred programming when they want, while skipping what they don't want to see. This means that allowing your kids to watch TV doesn't have to mean they have no choice but to see commercials for junk food and alcohol. Through AutoHop, DISH has done nothing more than improve upon existing, legally-accepted, and widely available technologies that give consumers the ability to record their television shows for playback at a more convenient time, when they are able to fast-forward through or skip over commercials.

These are some of the ways we have responded to our customers' changing needs. But we have further to go.

In the past, we haven't shrunk from "betting the company," so to speak, in order to stay competitive. We went from selling big dishes to launching our own small-dish, DBS business. To give customers what they want, including mobile video, voice, and data, we will have to take a significant risk once again.

Last year, we invested billions of dollars to acquire two bankrupt satellite companies, with the aim of transforming those assets into a next-generation mobile broadband service. We want to provide consumers with the choice in services and providers that they seek. If we're successful, we'll fuel billions of dollars in investment and create tens of thousands of new jobs throughout the United States.

And this brings me to my second rule: foster change; don't ignore it or be afraid of it.

We're prepared to leverage our experience and financial strength to drive communications and entertainment forward and make them more mobile and dynamic than ever before. We can't get started, however, until the FCC releases updated rules governing how our satellite licenses can be used for terrestrial mobile broadband. Given the overwhelming support of the comments received to date, we hope that the FCC will act, and finalize the new rules by the end of the summer. We want to build the most advanced wireless network in the U.S. to compete against the well-established incumbents, but we need to begin as soon as possible to have a chance.

Just as wireless rules must be modernized to keep up with consumers and technology, the rules governing how broadcasters and pay-TV providers reach retransmission agreements are outdated and in need of change.

Twenty years ago, when Congress first adopted the retransmission consent process in the 1992 Cable Act, there was typically only one cable operator in any given market, negotiating with only one broadcaster. Today, there are multiple pay-TV providers in each market, including satellite, telco, small local cable, and large regional cable providers. Then, of course, there are also the new over-the-top video providers like Netflix, Aereo, and others. The broadcaster still maintains a government sanctioned monopoly on network programming in his market, while pay-TV providers face stiff competition from one another. The result is almost always bad for consumers and the free market.

Broadcasters play the pay-TV providers against one another. They cut off the most popular sports and entertainment programming if their demands for drastically higher rate increases are not met. Consumers lose because they cannot see the programming they paid for, they end up paying higher rates, or both. And, the problem is only getting worse -- with more blackouts and more broadcaster abuses. From where we sit, the broadcasters cling to the status quo instead of meeting consumer demand and embracing new technologies and business models.

The retransmission consent regime is a prime example of an outdated government policy in need of an overhaul by Congress and the FCC. It is incredible to see how much has changed since 1992. Likely, there are few here who used the Internet back then, or had a cell phone. The idea of streaming movies or TV shows to a "smartphone" was science fiction.

Just as businesses must foster change in a rapidly evolving video marketplace to keep pace with what the consumer wants, government should work to ensure its regulations mirror today's competitive realities, consumer expectations, and advances in technology.

Thank you, and I look forward to answering your questions.

Mr. WALDEN. Mr. Ergen, thank you for your testimony.

And now our final witness, Michael O'Leary, who is the Senior Executive Vice President for Global Policy and External Affairs of the Motion Picture Association of America. Mr. O'Leary, thank you for being here today. We look forward to your comments.

STATEMENT OF MICHAEL P. O'LEARY

Mr. O'LEARY. Thank you, Chairman Walden, Ranking Member Eshoo and members of the committee. I want to thank you all for the opportunity to testify on behalf of the Motion Picture Association and its member companies today. I also want to acknowledge and thank my colleagues on the panel. I am honored to be with such distinguished group here this morning.

Whether you are at a theater, at home, on the road or choose to download and view when you want, content creators, consumer electronics companies and content distributors are working together to provide new, innovative options for audiences to easily access high-quality content. We welcome this opportunity to testify and work with this subcommittee as you consider appropriate policies for the future of video. This is an important discussion, and we are pleased to be a part of it.

Like all successful business, we are driven by the desire to create and meet consumer demand for the products that we produce. We are listening to our audiences. We are attuned to their desires, and every day we are developing innovative new ways to give viewers the experiences that they want. Audiences today want to enjoy movies on multiple platforms from the big screen to televisions of all sizes to computers and tablets and even on their phones. We are partnering with companies of all stripes from around the globe including YouTube, Facebook, Netflix and Roku and soon with others that are no doubt some other new platform which exists only in the mind of some inventive young person out there. All of these exciting innovations and distribution benefit both the consumers who receive the high-quality viewing experiences that they want and the creators, who take the risk and invest in these productions in the first instance.

For many people all around the world, there is no substitute for the theater-going experience. The big screen is the foundation of the American movie industry. Creating wonderful movies that people can watch in movie theaters is an important part of America's rich history but is equally part of the present and the future of video. In addition to utilizing cutting edge and sophisticated visual and special effects in our productions, our companies have embraced 3D, IMAX and brilliant sound that has enhanced and transformed the movie theater experience. The theater will continue to play a significant role in the future of how people around the globe are entertained.

But our member companies are not just making movies available for the big screen. For decades now, people have watched movies on television, but that experience is changing and improving too with each passing today. Today our programs are being delivered to television screens by over-the-air digital broadcasts and through an astonishing range of channel choices enabled by our distribution partners in the cable and satellite business. Audiences are able to watch these programs at the time of the original airing or at the time of their choosing, either through the DVR or through an increasing array of video demand options.

In addition, with the advent of interactive television, Blu-Ray players, Roku boxes, Microsoft's Xbox 360, the Sony PlayStation, Nintendo's Wii and Apple TV, just to name a few, consumers can watch HD movies and TV shows streamed across the Internet in their home through services like Netflix, VUDU, Hulu or other services too many to list.

Audiences now find entertainment on their mobile devices as well. All of the major motion picture studios distribute full-length films and television shows directly to consumer mobile devices through major mobile operators such as AT&T, Sprint and Verizon. The ability to access high-quality content is also, as you have heard this morning, thriving online where competitors for consumers' attention are providing new offerings every week.

In just a few short years, the quality of video delivery has improved tremendously, and with it, literally hundreds of licensed online services have sprung up around the world. Among them is HBO GO, which adds significant value to existing subscribers by providing online access to HBO programming, and that is not simply the programming that is available on TV today, that is basically all of their catalog in the past as well. Netflix, as you heard, is not only delivering a staggering number of movies online but is also moving into the production of online content—original content, rather. YouTube and Facebook are entering into agreements to distribute movies as well.

Online services today cater to every matter of consumer viewing model including rental, download to own, subscriptions and ad-supported viewing. They are provided by every conceivable type of commercial entity including technology companies like Apple's iTunes, broadcast television networks like ABC, CBS, Fox and NBC, cable networks like the Comedy Channel, TBS and USA, pay-television channels like HBO and EPIX, telecommunications, cable and satellite providers like AT&T, DISH and Comcast, retailers and rentailers like Amazon, Best Buy, Blockbuster, Netflix and Walmart, and gaming systems as I mentioned like PlayStation and Xbox, and new ventures devoted entirely to delivering great content seamlessly such as Crackle and Hulu.

Finally, Mr. Chairman, a word about portability. Simply put, today audiences want the convenience to access the content they purchased on a variety of devices without having to buy the same thing twice, and we are delivering to that promise. This began a few years ago as our companies started to include with many DVD and Blu-Ray disc titles a transferable or downloadable digital copy for consumers to use on their computers or their portable devices. Now there are a variety of ways to buy once and play everywhere.

One exciting innovation comes from the Digital Entertainment Content Ecosystem, which is a consortium of more than 60 studios, retail stores and technology firms that has created UltraViolet, which is a cloud-based digital storage locker for consumer content. It works like this. When a consumer purchases UltraViolet media such as a Blu-Ray or DVD or Internet download, the consumer receives the enduring right to access that content on any UltraViolet device registered to their household and to enjoy that content via streaming through the devices at home or on the go. Presently, over 5,000 titles are available through UltraViolet and over 3 million consumers have set up accounts in less than one year. This spring, Walmart began offering consumers the ability to convert their current DVD and Blu-Ray collections to digital UltraViolet copies that can both download and stream. Walmart estimates that the average user of this service brings about seven discs to the store, and each conversion takes approximately a minute. Other complementary digital initiatives are also being developed such as Disney Studio All Access, which will provide consumers with easy access to Disney content across multiple digital and video services and devices.

In closing, Mr. Chairman, we are relentlessly innovating to keep pace with the evolving demands of our audience and to give them more choices on how they view our content. We are committed to that. As this committee considers the appropriate policies for the future of video, we hope that you will continue to recognize that as promising as these new forms of distribution are, they all need content to reach their full potential. A video streaming site, satellite television company, a broadcaster, they are all terrific technologies, but without the content that consumers want, they simply don't reach their full potential. Make no mistake, we will always have an incentive to seek our new ways for our content to be distributed but we must be allowed to be compensated for it and we must be a part of the discussions on how it is distributed. The topic today is an important one, and we are pleased to be a part of this dialog and we look forward to working with you in the weeks and months ago.

Again, Chairman Walden, Ranking Member Eshoo, I want to thank you for your time this morning.

[The prepared statement of Mr. O'Leary follows:]

MOTION PICTURE ASSOCIATION OF AMERICA

STATEMENT OF MICHAEL P. O'LEARY, SENIOR EXECUTIVE VICE PRESIDENT, GLOBAL POLICY AND EXTERNAL AFFAIRS, ON BEHALF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

BEFORE THE HOUSE ENERGY AND COMMERCE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

"THE FUTURE OF VIDEO"

RAYBURN HOUSE OFFICE BUILDING, ROOM 2123 WASHINGTON, D.C.

WEDNESDAY, JUNE 27, 2012 10 A.M.

The Film and Television Industry

Chairman Walden, Ranking Member Eshoo and members of the subcommittee I want to thank the Committee for the opportunity to testify on behalf of the Motion Picture Association of America, Inc.[i] and its member companies. As the primary voice and advocate for the American motion picture, home video and television industries in the U.S. and around the world, we are committed to providing audiences with a wealth of delivery options to experience the high quality entertainment that our companies produce. Whether you are at the theater, at home, on the road, or choose to download and view when you want, content creators, consumer electronics companies, and content distributors are working together to provide these new, innovative options for audiences to easily access licensed content. We welcome this opportunity to testify and work with the subcommittee as you consider appropriate policies. We hope you will recognize that as wondrous as these new forms of distribution are, they still need high quality content to deliver.

Enhanced Offerings to Our Audience

We have listened to consumers, we are attuned to their desires, and are at the forefront of developing innovative ways to meet and anticipate those desires. For some, there is not, and may never be, a better way to truly appreciate the magic of movies than in the theater setting. Creating wonderful movies that people can watch in movie theaters is an important part of America's rich history, but is equally part of the present and the future of video. In addition to utilizing cutting-edge and sophisticated visual and special effects in our productions, our companies have embraced 3-D, IMAX, and brilliant sound that has enhanced and even transformed the movie theater experience.

However, our member companies are not just about making movies for the big screen. We know that our audience enjoys watching our movies and television shows on every type of screen, from the television set in your living room, to your computer, iPad, Kindle, other tablet, or smartphone. We are partnering with companies of every stripe across the globe, including YouTube, Facebook, Netflix, Vudu, Roku – and soon, no doubt with some new platform being conceived by an unknown start-up company. All of these exciting innovations in distribution benefit both the audience who receive a high-quality viewing experience, and the creators who are able to monetize their enormous investment and success, and have the resources to reinvest in those dollars into creating even more high-quality programming.

Viewers Choose Screen Size

For many people, watching great entertainment on their television with their family is a cherished part of the day. And today, our programs are being delivered to television screens by over-the-air digital broadcasts and through an astonishing range of channel choices enabled by our distribution partners in the cable and satellite business. Viewers are able to watch these programs at the time of original airing, or at a time of their choosing, either through DVR, or through the increasing array of video on demand options.

But a viewer's options do not end there. In addition, with the advent of interactive televisions, Blu-ray players, Roku boxes, Microsoft's X-box 360, Sony's Playstation, Nintendo's Wii, and Apple TV, viewers can watch HD movies and TV shows streamed across the Internet into their home through services like Netflix, VUDU, Hulu, HBO GO, or other services too numerous to be listed. And as

Internet-enabled televisions continue to gain in popularity, the variety of options will expand even more.

More and more, people want the option to view programs not only at the theater or on TV, but also on their computers, tablets, and mobile phones. And we are responding to this call. Almost all the great ways you can watch your favorites programs on television are also available on-line or through your mobile phone. Hulu has been a great success, allowing people to use the Internet to catch up on their favorite TV shows or to explore new ones. YouTube and Facebook have entered into arrangements to distribute some of our companies' titles and Netflix is, for the first time, providing its customers with original content with shows like "Arrested Development". HBO GO is just one of the many services that allow cable and satellite subscribers to access the same content that they could on television and sometimes even more.

And in our enthusiasm over the distribution mechanisms, let's not forget Blu-ray disc, and the DVD, which much of our audience still consider the most enjoyable and convenient way to experience entertainment.

Our Audience Wants High Quality Content Online

It's amazing to think that in only a few short years the picture quality of online video has come to match traditional video distribution mechanisms. More than 350 unique licensed online services around the world now provide high-quality, on demand film and television shows online to viewers, including more than 60 such services in the United States. These services cater to every manner of consumer viewing model including rental viewing, download-to-own, subscription viewing, and ad-supported viewing. They are provided by every conceivable type of commercial entity, including technology companies like Apple's i-Tunes; broadcast television networks like ABC, CBS, Fox and NBC; cable networks like Comedy Central, TBS and USA; pay television channels like HBO and Epix; telecommunications/cable/satellite providers like AT&T, Dish and Comcast; retailers and "rentailers" like Amazon, Best Buy, Blockbuster, Netflix, and Walmart (Vudu); gaming systems like PlayStation and Xbox; and new ventures devoted entirely to delivering great content seamlessly like Crackle, Hulu and MUBI.

Our Audience Wants Content Available on Their Mobile Devices

All of the major motion picture studios distribute full-length films and television shows directly to viewers' mobile devices through the major mobile operators. AT&T's MobileTV service contains full length episodes of hit television shows; television channels; and PIX, a film service for mobile phones launched by Sony. Sprint TV includes television channels and on demand television shows and movies from studios including Disney (Watch Disney Channel, Watch Disney XD, and Watch ESPN apps), Paramount, Sony, and Warner Bros. Verizon offers V Cast Mobile TV with channels and on demand full episodes of hit shows. Other wireless networks have similar licensed offerings. Apart from streaming to mobile devices, studios have made content available to load onto those devices through media such as SD flash memory cards, like those used in digital camera card.

Offering Portability and Flexibility to Our Viewers

More of our audiences want the convenience to access the content they purchased on a variety of devices without having to buy the same thing twice. And we're delivering. This began a few years ago, as our companies started to include with many DVD and Blu-ray disc titles a transferable or downloadable digital copy for viewers to use on computers or portable devices. Now there are a variety of ways to "buy once, and play everywhere". The Digital Entertainment Content Ecosystem (DECE) consortium of more than 60 studios, retail stores and technology firms has created "UltraViolet," a digital storage locker for your content. It works like this. When a consumer purchases UltraViolet media – such as a Blu-ray, DVD or Internet download – the viewer also receives the enduring right to access the content on any UltraViolet device registered to their household, and to enjoy the content via streaming through devices at home or on the go.

The first UltraViolet content rolled out late last year, through services like Walmart's Vudu, Flixster, and studio offerings. Presently, over 5,000 titles are available through UltraViolet and over three million consumers have set up accounts. This past spring, Walmart began offering the ability to convert current DVD and Blu-ray collections to digital UltraViolet copies that can both download and stream. Walmart estimates that the average user of this service is bringing about seven discs to the store and each conversion takes about a minute. Other [s] complementary digital initiatives are also being developed, such as Disney Studio All Access, which will provide viewers with easy access to Disney content across multiple digital video services and devices.

A Unique American Manufacturer

The U.S. motion picture and television industry is a creative community of many thousands of creators and makers, one that serves as a global cultural ambassador and one that plays a unique role in the American economy. Our members:

- Provide high-paying jobs to workers in all 50 states;
- Fuel small business growth, injecting capital into local, state, and national revenue pools and consistently generating a positive balance of trade;
- Help provide jobs for 2.2 million American workers who depend on the entertainment industry for their jobs, 12 percent of whom are directly employed in motion picture and television production and distribution – from behind-the-scenes production technicians to make-up artists and set-builders – across all 50 states;
- Provide quality jobs paying an average salary of nearly $79,000, 73 percent higher than the average salary nationwide;
- Support a nationwide network of nearly 95,000 small businesses—83 percent of whom employ fewer than 10 people—involved in the production and distribution of movies and television.
- Generate more than $15 billion in public revenue nationwide; and
- Return a positive balance of trade, making us critical to the U.S. export economy.

Over the last year our studios have filmed in Tennessee, Georgia, Illinois, Texas, New York, California, Michigan, Louisiana, Ohio and Massachusetts. Today there are ongoing productions in most of those states but we are also in Florida, Oregon and recently wrapped a film in Pennsylvania. "The Lone Ranger" is currently on location in Colorado and moves onto Utah next week. On average, a major motion picture shooting on location contributes $225,000 every single day to the local economy, impacting the hundreds of thousands of other businesses that provide services to productions, like the local drycleaner that served the cast and crew on location or the local hardware store that supplied paint and lumber.

* * *

Audiences haven't been shy about their desire for seamless access to their favorite movies and television shows, at the time and on the device or platform that works best for them. We are relentlessly innovating to keep meeting that demand, and the choices available to audiences keep getting better. Our creative community – the studios and many thousands of creators and makers who create and make great movies and television shows – is committed to continuing that innovation. As noted in this testimony, we welcome and embrace the plethora of new forms of distribution, because they provide us new ways of offering our content to our audience in the manner they want to view our product. As this committee considers the appropriate policies for the future of video, we hope that it will recognize that as wondrous as these new forms of distribution are, they still need content to deliver. A video streaming site, a satellite television company, a broadcaster – they are all great technologies, but virtually meaningless to consumers if they don't have content to distribute. As the creators of that content, we are the entities that are taking financial risks in investing in product with no guarantee it will be profitable. As the party that takes the financial risk, we are entitled to control the distribution of our product. Make no mistake – we will always have an incentive to seek out new ways for our content to be distributed, but we must be allowed to be compensated for it and we must be allowed to make decisions about the proper context for its distribution. Mr. Chairman, Ranking Member Eshoo, again I thank you and this Committee on behalf of our member companies for the opportunity to testify today.

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[i] 1 The Motion Picture Association of America and its international counterpart, the Motion Picture Association (MPA) serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA. MPAA members are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

Mr. WALDEN. Mr. O'Leary, thank you for your testimony and thanks to all of our witnesses for enlightening us on your views on these very important issues related to the world of video.

I am going to start my questioning with Mr. Johnson. I appreciate your comments and the situation you face, and I want to just kind of get above your company per se but raise the issues that come up in this new world we are in. I understand why you would want the protections of the Communications Act that afford multichannel video program distributors, but are you prepared for the responsibilities? And so this probably goes to others as well. For example, are you willing to live under the must-carry rules, the rules requiring the competitive availability of set-top boxes, the network non-duplication and syndicated exclusivity rules and the closed-captioning emergency information requirements? So that is all the other cars attached to the Communications Act. Tell me what that means to your world.

Mr. JOHNSON. Chairman Walden, we are currently already offering closed captioning. We currently offer the EAS service. As far as must-carry retransmission consent, we are not going to be carrying any type of local broadcasting. We have done a marketing agreement with a company called Antennas Direct, which sells over-the-air digital antennas, so that our subscribers that want to receive over-the-air programming can do that through them. So we will not be entering into any retransmission consent issues.

Mr. WALDEN. But what if you were required to?

Mr. JOHNSON. Well, we would have to look at that when it happens.

Mr. WALDEN. I am going to ask the same of Mr. Hyman and Mr. Funk, given the world you are operating in now. Do you want everything that is in the Communications Act good and some might argue burdensome?

Mr. FUNK. I think our position is the current situation where there is a competitive environment to innovate is probably the right approach. There are some parts of the requirements that I think will naturally come to the markets such as closed captioning and other things that are a benefit to consumers but a lot of the regulations that have been written were really written for a different environment than exists today.

Mr. WALDEN. Mr. Hyman?

Mr. HYMAN. I agree with Mr. Funk in the sense that I think this highlights some of the antiquated notions of the Cable Act with the definition of MVPD, and I also think that it is something that in connection with determining MVPD should be done on a broader scale than in a single regulatory filing.

Mr. WALDEN. All right. Mr. Johnson, Mr. Hyman, Mr. Powell and Mr. Ergen, isn't it a little strange that a child could be watching the Sprout Channel's Caillou on the same television in the same living room but the way that programming got there may have been subject to different rules depending on whether it was provided by Sky Angel, Netflix, a cable company or DISH? Shouldn't the regulatory or non-regulatory treatment be the same? Mr. Johnson, I will start with you.

Mr. JOHNSON. Well, we are asking for a level playing field that, you know, we have the same access to the programming that our competitors do, and because the definition of MVPD is up in question, we have not been able to have the access to that programming.

Mr. WALDEN. Mr. Ergen?

Mr. ERGEN. Well, in general, I would say yes, the rules should be the same. To your earlier point, to the chairman's earlier point, if you are going to be an MVPD provider, you have all the rules or eliminate the rules for the current incumbents. Having said that, there are cases where things are a little bit different between the technologies and I think you have to look at it on a case-by-case basis. Cable is more of a local service. Satellite, for example, is a national service. It remains to be seen how the IP networks that Mr. Johnson and others are doing, whether it is going to be national or it is going to be local. So, you know, it depends on— there may be some differences because of that.

Mr. WALDEN. Mr. Powell?

Mr. POWELL. Yes, Mr. Chairman. I largely agree with Mr. Ergen. I think what you are having is, this is just a continued evolution of the challenge of convergence in which technologies increasingly bring sameness to the way things are provided and distributed. But that said, I wouldn't make the hallmark of suggesting that things are insimilarly situated just because they can produce the same content, the same show. There are different business models, different terms, different technologies underlying it. The cable industry spends $186 billion over a decade to build an infrastructure that is optimized for premium, high-quality, low-latency content. That is very different than the same content being sold on iTunes for $2.99 in a model largely designed to sell iPods more than it is designed to sell content. So as long as we are cognizant these different business models are often pursuing different central objectives, just because they have the same content doesn't necessarily make them identical. But as we look at a new statute, I do think there should be more sameness than there is today.

Mr. WALDEN. My time is expired, but, really trying to get to the heart of the issue here. Everybody wants a little different deal, the other guy's deal, and so we are trying to sit here and figure out what is the right regulatory regime to really spur innovation and competition in a marketplace that functions, so your input is most valuable.

With that, I will turn to my colleague from California, the woman who is proud to represent innovation and technology, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman. I think you have hit the nail on the head because I think that we all want to see an acceleration of innovation, that it not only be—you know, that we motivate things through, whatever it might be, a change of the law, whatever rules at the FCC, because this is really one of the more exciting areas relative to our national economy that holds so much promise, and there is an insatiable appetite on the part of consumers, and so I think this morning's hearing is really highly instructive but right below the surface there are all these different cases.

I have four questions that I want to ask starting with Mr. Funk, Mr. Hyman and Ms. Sohn. We are very well aware of the consumer demand for innovative data-intensive video applications like Netflix, Amazon video and Hulu, they all continue to grow, while at the same time the wireless carriers are moving away from the unlimited data plans. There was a piece in the New York Times yesterday that talked about broadband moving to meters.

First of all, do you think that this curtails innovation? And if so, how would you address it?

Mr. FUNK. Well, first of all, there have been speed-based tiers in Internet service for some time, so the idea of some different classes of service for Internet consumers is not new. I think the important thing is that as long as there is competition among Internet service providers, providers who give good value to consumers will get the business, and if the tiers become restrictive in a way that they disadvantage some services or restrict choice in a competitive market, companies that provide those services will not succeed. So I think the key here is really competition in order to ensure that we get the right outcome.

Ms. ESHOO. Thank you. Let us go quickly.

Mr. HYMAN. There has been a lot of talk about the competition in the video marketplace.

Ms. ESHOO. You traveled across the country and you have got 30 seconds.

Mr. HYMAN. Thousands of video channels and it is the golden age of video. I think that is true. I think the one thing that we have to be mindful of and that I would suggest this committee to be mindful of is that Internet video, there is only one way to get Internet video and that is over an Internet pipe, and there are very few carriers that provide Internet video. In some places, there is only one carrier that people can access that, and the ability to have competition in that marketplace is something that you guys should be mindful as you go on and think about Internet video.

And with respect to our issues out there, you know, the issue that we have been raised and been very public about, is the application of discriminatory data caps and the way in which the same content that is delivered over the——

Ms. ESHOO. When are they discriminatory, and when are they not?

Mr. HYMAN. When are they, and when are they not?

Ms. ESHOO. Right.

Mr. HYMAN. So the same content from Netflix or the same content from, for instance, Comcast over Streampix, one counts against a data cap and the other one doesn't. So from our standpoint, well, if you are going to implement data caps, there are innovation issues associated with data caps but they should be applied equally or not applied at all.

Ms. SOHN. Let me give you an example. I agree with my colleagues to the left. So a perfect example of discriminatory data caps that we are concerned about is what Comcast is doing with the Xbox 360. So it is exempting its own Xfinity app from the data cap but Netflix and others are subject to the data cap. So while we don't think the data caps are inherently bad, when they are arbitrary, they can be abused, they can be anticompetitive. Remember, ISPs also own video services so there is an incentive and an ability to discriminate against online video competitors.

And if I could just say one more thing. One of the things that really galls us is that we have been asking, Public Knowledge has been asking the FCC now for almost 2 years to look at data caps, not to regulate them, look at them, find out how they are evaluated, how they are raised or lowered so people can have an idea of what these caps are intended to do, and they have just refused.

Ms. ESHOO. Thank you.

Mr. Funk, it is my understanding that 20 percent of your customers have dropped their cable or satellite service. What factors do you think would leave more of your customers to consider Roku as an alternative rather than a traditional, you know, rather than a complement to traditional cable or satellite service?

Mr. FUNK. We do see a percentage of our users who have cut the cord, as it is called, and dropped their cable or satellite package. It is the minority, as you said. I think there is a variety of reasons for this. In some cases, it is cost, and in some cases it might be a living situation or just individual preferences on programming. I think what is interesting is that there are now choices that allow consumers that opportunity so things like Netflix and Hulu Plus give people who want potentially a different selection of video at a lower price the ability to get that. So I think increased choice of offerings is really the key to providing the right service for all consumers. I think we provide one method for doing that. I think you will see a lot more innovation in the coming months and years as to how to do that better. So we are optimistic that cord-cutting will lead to continued video consumption but just in different fashions.

Ms. ESHOO. Thank you. I had four questions. I will submit the other two in writing. I want to thank all the witnesses because together you have made this not only an important but an instructive hearing on the future of video.

Thank you.

Mr. TERRY [presiding]. Thank you.

The chair recognizes Chairman Emeritus Mr. Barton.

Mr. BARTON. Thank you, Mr. Terry.

I first want to take a little victory lap this morning. The college presidents announced yesterday we are going to have a non-BCS football playoff in college football, and I can take a little bit of credit because back when I was chairman of this committee, we had some hearings on that and we got the ball rolling and they announced a 2014 playoff, so I want to commend them but also take credit for this committee highlighting that issue several years ago. I don't think the 2014 playoff is the ultimate but it is a start in the right direction. When they get to eight or 16, I think they will have it.

My first question is to the audience. I want somebody in the audience to tell me the original analog televisions, how many channels were on them. Anybody that is my age ought to know. I see one hand out there. How many? Somebody? No, not how many you got but how many were on the dial. There were 13. There were 2 to 13 but there was no number 1. I never understood why there was no number 1. But you could go up to 13. As Mr. Powell just pointed out in his testimony, there is, like, 900 programs available now. We have gone from—my first TV, we got one channel on a good day, and now we have got thousands literally.

I think it is time to review the telecommunication video market. I think Mr. Walden and Ms. Eshoo and Mr. Upton and Mr. Waxman are to be commended for agreeing to do this hearing. I think there are some principles that we need to remember as we look at this, and this is just my scratches so I don't claim this is the universe. But obviously in order to have a program, you have to have a creator. In this country, we have never regulated the creator of the programming. Then you have to have a producer, and to my knowledge, we have never regulated the producers. Now, there have been efforts at censorship but in terms of creativity and production, we basically let that be a free market operation.

Once you have a program, you have to have somebody to package it and market it. You have to have somebody to transmit it and then obviously you have to have somebody to buy it, somebody to view it, somebody to consume it. When you get into the packaging and the transmission is where we had a role for government. I think it is a truism that form follows function, and our original regulatory format was based on the fact that where there was radio or television, there was a potential for a natural monopoly, and government either tries to prevent monopoly or regulate monopoly, and a lot of the rules that we are talking about here originated when the radio market and the early TV market was getting started. As Mr. Powell pointed out, the advent of the cable industry brought video to more people but it also brought additional regulation.

I was the only member of the committee back in the 1980s that voted against the re-regulation of cable, the only one on either side of the aisle when the first President Bush was President, and I was at the White House when we deregulated cable. When we passed the telecommunications Act in 1996, there were at least four and maybe five or six witnesses at this table that their industry or their company did not exist, did not exist. I couldn't tell you today what Roku is, and I listened to the president of Roku try to explain what it is.

So I think, Mr. Chairman, I know it is too late to do a major bill in this Congress but I hope in the next Congress we take this up and use original principles to review the market, and in general, I think we are better off having less regulation than more and more enterprise and more market competition than less. The role of government is to provide a level playing field to prevent a monopoly if possible, if we can't prevent a monopoly to try to prevent undue market share and be fair to all.

So I think this is an excellent hearing, and I look forward to big things happening on this committee in the next Congress.

The last thing I will say: If we are going to do big things, it has to be done no a bipartisan basis. This is not a partisan issue. It will go nowhere if it becomes R versus D. It has to be done in a bipartisan basis, and the good news is, with the leadership on both sides of this committee, that is a very doable deal.

With that, I yield back, Mr. Chairman.

Mr. TERRY. I would agree.

The gentlelady from California, you are now recognized for your 5 minutes.

Ms. MATSUI. Thank you very much, Mr. Chairman.

First of all, I would like to welcome all the witnesses before us today, and I would just like to acknowledge the great work that a Hearst-owned station, KCRA, is doing for my constituents in Sacramento.

You know, local news and weather as well as other local programming is important to all Americans, not just to my constituents, and I like to get a better understanding from our witnesses about the role of retransmission consent and preserving our shared commitment to localism.

Mr. Ergen, I understand that retransmission consent payments are used by broadcasters to support local news and local weather. How would you respond to concerns that changes in the retransmission consent regime could undermine quality local programming?

Mr. ERGEN. Thank you for the question.

First of all, retransmission consents—and maybe Mr. Barrett can give us a little bit more information on this—in my understanding generally goes some to the network. If it is changed where the network themselves, the major network may take some of that and a large part of retrans consents does not actually flow to the local broadcasters anymore. That is the way it started but now the national network will take a large portion of that. And then second, of course, the broadcast model is a two-prong model, the retransmission consent fees and also advertising fees so they get ad revenue from two sources.

The troubling thing is that despite the fact that retransmission fees have gone up probably 200, 300, 400 percent since I started in this business, the actual localism and local level has actually gone down from a local news perspective in the sense that to cut costs and operate more efficiently, many broadcasters are sharing local news networks and so forth. In many cities today you will see that a network show, a news show will be on multiple networks or there will be sharing of resources, so very similar to what the newspaper industry did as well.

Ms. MATSUI. Sure. Mr. Barrett, would you like to comment on that?

Mr. BARRETT. Well, I disagree. The 21st century media company needs a dual revenue stream, and for years, the television industry operated with an advertising-only model. The cable industry was launched and helped us get our signal into rural areas but then built a significant business on the back of the most popular programming available to Americans in every community in this country, and that was local television. I would say to you that we are using as an industry the retransmission consent fees to invest in our local businesses. It helps support the investment we made in digital technology, which was multiple billions of dollars over the last decade. I think you have seen most local stations, many local stations go from producing 20 hours a week of programming to 40 hours of week of programming exclusively in the local news genre. We have added multi-cast channels on our signals now which are trying to get clearance on settlement and cable, so I would disagree with Mr. Ergen that that money is not being used in a constructive way to advance the business interest of local television.

Ms. MATSUI. Well, Mr. Barrett, how would you respond to concerns some parties have raised about the impact of broadcast stations' coordination and consolidation on retransmission consent negotiations?

Mr. BARRETT. Well, I think speaking for our company, we negotiate only on behalf of the owned stations of the Hearst Company. Other companies have pooled some of their retransmission consent negotiations, have created bundles, but I believe in most cases, in all cases, people have been smart enough to acknowledge that they have to break up a bundle. Mr. Ergen wants to buy a station where we have a duopoly separately from KCRA. If you would like to buy KQCA, I will sell him KQCA separately, I will sell him KCRA separately.

Ms. MATSUI. Mr. Ergen, your thoughts quickly.

Mr. ERGEN. Yes, I think the problem is, is that in retransmission consent, the local broadcaster is in fact a government-sponsored monopoly. In other words, nobody else can bring that signal into that marketplace today, so it is a little bit of an unfair fight, and what has happened is, I will give you one example. In Wyoming where one individual got the rights to negotiate for all three broadcast networks in Cheyenne, Wyoming, so there was either no local networks in Cheyenne or you had to pay whatever rate——

Ms. MATSUI. But would you say——

Mr. ERGEN. And so the signal actually had to come down and so consumers lost because of unfair bargaining between—it is one thing to be an unregulated monopoly, it is another thing then to band together and negotiate on behalf of multiple stations in the same market.

Ms. MATSUI. Would you say, though, this is not the same throughout the country? I mean, it appears that what Mr. Barrett in certain areas like where Sacramento may not be the same way as what you are talking about in Wyoming and other areas.

Mr. ERGEN. I would agree with Mr. Barrett that each broadcaster handles it differently so Mr. Barrett's company handles it in a very professional manner with just their networks. Other people utilize their market power and that mischief can happen, now, of course, legally sanctioned.

Ms. MATSUI. Well, I have run out of my time. I would like to submit some written questions.

Mr. TERRY. Absolutely. Thank you, Ms. Matsui.

Now I recognize myself for 5 minutes, and I will spend most of my time with you, Mr. Powell. But first I want to just give a little anecdotal story. When I walked into my 17-year-old's room and, by the way, we got him a TV for his room for Christmas thinking that when he graduates, it will be a good thing for him to take to college. Hopefully he is going to college. But I walk into his room and he is on his iPhone and I said hey, what is going on; oh, just watching Netflix, on his iPhone, and there is a TV sitting right there, and that is the world we are living in. That is the people that are going to dominate the consumer products and video markets for the years to come. I think of turning on the TV; they don't.

Mr. HYMAN. Is the TV Internet connected?

Mr. TERRY. Good point. Yes, he has the Xbox 360. Yes, so he can do it that way as well but he just chose to do it on his phone.

So Mr. Powell, it is interesting that you mentioned the 57 percent. In 1992, Congress was concerned about the cable monopoly. That does not exist today if you are at 57 percent and the folks that are sitting on this panel. So what does that really mean to the cable industry? How is it evolving to be competitive? And in reference to the 1992 Act—let us try and not be redundant on Ms. Matsui's questions of retransmission—but what other underbrush is there from 1992 that was just so focused on the cable industry? What do we need to do to clear out the brush? What specific things should Congress look at if we want to review the 1992 Act?

Mr. POWELL. Well, the first thing I would say is, the beauty of competitive dynamics is, you have to increase value for consumers, and you can do that through innovation, evolution of your service, and I think that the competition we face first and most formidably from the satellite companies increase both the quality of content that we are providing, the amount of content we are providing. It forced us to look at new businesses for revenue development to continue to be competitive, which is part of the dynamic that I think helped drive investment in broadband and ultimately brought that into the bundle of services we offer as well as telephony. If you look at the wonderful things that the over-the-top folks are doing, you see cable companies knowing they too have to be able to bring that value to your son to be able to allow him to watch what they are selling over iPads and Xboxs as well. So I think that dynamic has driven a lot of innovation.

I would give you a more global answer about what to change, so I think that the 1992 Act had two core fundamental foundational elements. One, that we were a vertically integrated exclusive monopolist and a whole bunch of other rules that were premised on supporting and subsidizing broadcasting for the protection of the social compact that America supposedly wanted to advance in the context of broadcasting. I think vertical integration rules when an industry only has about 14 percent of its operators integrated with content, these would be rules like program access, program carriage and rules that are premised on the idea that you have to guard against incentives associated with both being a distributor and owner of content. I think when we have a dialog, those are the kinds of rules we should have to talk about.

But to be fair and honest, I think you also have to sort of reevaluate elements of the social compact. You know, is it still the policy of the United States that the cable industry should continue to forcefully subsidize the broadcasting model through must-carry, retransmission consent and other elements. I am not prepared to answer them.

Mr. TERRY. Well, one last question and then hopefully we can have time for the broadcaster, Mr. Barrett, to rebut that. We are getting calls in our office about cable rates going up, and I think this goes to the vertical integration model that was thought of as cable then but you are not the content provider today. Could you explain very quickly in 26 seconds how that it is impacting the business model and what we should be telling our constituents?

Mr. POWELL. So price is two things. One, I think any industry in this day and age under economic stress who is not sensitive to affordability of the American consumer is acting at its peril, and

I think our industry is very focused and looking for ways to do that. You are seeing companies experimenting with smaller and lower priced packages. You are seeing basic packages being offered for one. Secondly, I think it is very difficult to compare prices over time because there is so much more that is in the suite of bundled services that consumer are buying—DVR, more channels. I would leave you with one statistic. On an hourly basis, cable is about 21 cents per hour. That is cheaper than even Netflix subscription and most other entertainment products in the market.

Mr. TERRY. Is that viewing hours or 24 hours in a day?

Mr. POWELL. Viewing hours, 8 hours a day.

Mr. TERRY. Thank you.

At this time the chair recognizes the gentlelady from the Virgin Islands, Ms. Donna Christensen.

Ms. CHRISTENSEN. Thank you, Mr. Chairman, and welcome to all of the panelists this morning. Thank you for holding this hearing. I have a couple of questions. I probably won't use up all of my time.

Ms. Sohn, you advocate for eliminating the broadcast must-carry rule but you also note on the other hand the importance of protecting the public and non-commercial stations. So what policies would protect this programming without a must-carry rule?

Ms. SOHN. I think we would be comfortable with preserving must-carry for public stations but, you know, as far as commercial stations are concerned, my feeling, our feeling is that if local broadcasters are indeed providing good local programming, cable casters will want to carry them because their customers will demand it, but I don't think they need the protection of must-carry.

Ms. CHRISTENSEN. And Mr. Barrett, I know one of the concerns is advertising revenues, so how are broadcasters looking to respond to the pressures on advertising revenues from the new technologies and services?

Mr. BARRETT. Well, one of our challenges has been an accurate measurement from Nielsen. It has been a challenge as to we have moved to a time-shifted world of viewing for Nielsen to capture that television viewing, and that has had downward pressure on commercial pricing. Retransmission consent has been a new revenue stream as we have referenced. The multi-cast business has been a new revenue stream for us and we are optimistic that mobile television as it rolls out over the next several years will be a new revenue opportunity for local stations as well, and that will help offset some of the downward pressure on ad rev.

Mr. TERRY. Is your mic on?

Mr. BARRETT. Now it is on. I am a TV broadcaster. I should know that.

Ms. CHRISTENSEN. Mr. Powell, you and all of the other——

Mr. TERRY. Could he answer that again and we will stop the time?

Ms. CHRISTENSEN. Sure.

Mr. BARRETT. Our challenge as broadcasters has been to be sure that Nielsen captures the viewing that has occurred on time-shifted—on the television experience that is time-shifted on DVRs and the like, and very briefly, the new revenue opportunities we have with retransmission consent, multi-cast and, in the future, mobile television, the extent that those ad revenues will help replace and support some of the downward pressure on ad revenues against our core video product.

Ms. CHRISTENSEN. Thank you.

Thank you, Mr. Chairman.

And Mr. Powell, you and all of the other panelists have pointed out the way the competitive environment and technology has changed and is continuing to change, and you recommended re-examining a lot of the rules, the regulatory rules, program access, content carriage obligations as well as must-carry transmission content and non-duplication rights. So some would say that if we were to weaken any of those rules, it would give cable an unfair competitive advantage. Given the wide choices that are available today, how would you respond to that?

Mr. POWELL. That is a great question. I think the way I would characterize it is, I don't think the cable industry's position is we are just looking for a wild, abandoned deregulation. I think we are looking for a more rationalized regulatory model that more properly reflects the reality of the market. We think a lot of the rules that we are currently living under, if you accept the way they are premised, would fall under a standard by today's measurements.

Now, I am perfectly willing to entertain that somebody could conceive of a different basis or a different reason for some sort of regulatory rule but I think that the obligation, the burden should be to prove that from a zero base, meaning giving the reality of today, not the legacy of yesterday, why do you still need this rule or why do you need some new proposed rule? So I really wouldn't say that I think we are a cooperative partner in trying to make sure the policy is right as opposed to just some random, get rid of everything because it is stupid but we do think it should be justified based on what we are seeing in the market, and given all the wonderful things you have heard, we think on balance, that would be a dramatically lighter regulatory regime.

Ms. CHRISTENSEN. Thank you.

Mr. Chairman, I will yield back the balance of my time.

Mr. TERRY. Thank you.

Ms. CHRISTENSEN. Thank you.

Mr. TERRY. At this time we recognize Mr. Stearns for 5 minutes.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. Barrett, you have been getting all the questions. I have a little delicate question, which is more or less confined to my Congressional district. I represent the University of Florida in Gainesville, and it appears there is a dispute between DirecTV and the ABC affiliate, WCJB, over transmission consent fees. You are probably not familiar with that.

Mr. BARRETT. I am not familiar with that. We own the NBC affiliate in nearby Orlando.

Mr. STEARNS. I don't necessarily want to get involved with this business dispute, but some have suggested that because now Gainesville and Alachua County, they have DirecTV, they can't even get ABC now. It is sort of a blackout. And I guess in your opinion, are these blackouts becoming more frequent?

Mr. BARRETT. I think they are very infrequent. Cox happens to own the ABC station in Orlando. We own the NBC affiliate WESH in Orlando, and over the past several years or so, there has been a new NBC affiliate licensed to Gainesville to that marketplace, and you may infer that we stood aside and did not challenge that NBC affiliate that went into that marketplace.

Mr. STEARNS. Mr. Ergen, what is your reply to that? Are these blackouts becoming more frequent? Are they a problem for DirecTV?

Mr. ERGEN. They are becoming more frequent. I can speak for DISH Network.

Mr. STEARNS. Mr. Chairman, we have a clear difference of opinion here between——

Mr. ERGEN. And perhaps we can get the committee to——

Mr. STEARNS. But your position is, they are becoming more frequent?

Mr. ERGEN. Yes. I can speak for DISH Network. We had six blackouts last year. We have had nine already this year.

Mr. STEARNS. So if you have had nine this year, and let us take Gainesville, for example, and they can't get ABC so they call you up and say why can't we get ABC, what do you say?

Mr. ERGEN. You basically say you are working with the broadcasters to negotiate a fair rate for them. You know, what happens is, it is bit of an unfair food fight because the broadcaster—because everyone has a choice to switch to another video provider, A, and B, they only get—their sweeps ratings only happen four times a year so they only get measured four times a year by Nielsen, which affects their advertising rates except by law, is my understanding, cable companies can't take down a network during a sweeps rating. So it is just not a fair fight out there today and it is become more prevalent.

Mr. STEARNS. What do you think a solution should be? Is there a solution? It seems like——

Mr. ERGEN. I think there are some fairly easy solutions. I mean, as an example, if we are going to make it a market determinant, I am all for that, but that means that we should be able to—if you don't have the Gainesville ABC station, then you would have to go to a stand-still arbitration or you have to have the right to import an ABC station from Orlando, for example, so the customer doesn't do without the ABC network while the dispute is going on. Then you get a free-market system working where it is more of a fair fight between the broadcaster and the distributor.

Mr. STEARNS. I don't necessarily want to get involved with this dispute, so I mean——

Mr. BARRETT. You have opened Pandora's box here.

Mr. STEARNS. I know.

Mr. BARRETT. We would strongly resist the——

Mr. STEARNS. Well, I have given you a chance to speak and I have given him, so I don't know, because he will want to speak after.

Mr. Barrett, I understand that broadcasters are poised to deploy mobile DTV services to allow viewers to watch live local news, emergency alerts and other programming on the go. What are the differences between broadband mobile DTV and video over broadband that is currently available on cell phones and can mobile DTV help alleviate some of the pressure on the wireless bands?

Mr. BARRETT. The architecture of the broadcast as a single-point, a multi-point distribution is the superior distribution system. It doesn't run into broadband congestion. If I invited you to a Yankee game in New York City and we wanted to go online, you would have trouble in Yankee Stadium on any given weekend connecting with a broadband supplier that didn't buffer and didn't have real signal limitations. An over-the-air broadcast signal could touch everyone in that stadium simultaneously and there would be no signal degradation at all. It is a vastly superior distribution system of the signal

Mr. STEARNS. OK. My last question, Mr. Ergen, I think we all understand the need for more spectrum. I think the FCC is moving forward on a rule regarding the S band spectrum DISH recently acquired in order to build out a wireless network. What is the status of this item and when will the FCC issue its final order on this proceeding, in your opinion?

Mr. ERGEN. Well, we first went through a waiver process last year and ultimately were denied that waiver by the FCC. Then we went into a rulemaking process, which is now complete in the sense that all the comments are in from all the parties who might be affected either in a positive or negative way by our entering into the wireless business and now it is just in front—the rulemaking now just has to be decided by the full commission, the five commissioners, to make a decision. We are hopeful that they can do that by the end of the summer. Other than time—we realize the FCC has a lot of other things on their plate, as Michael Powell can speak to when he was there. Other than time, they have all the facts in to approve it, so we are hopeful they will do it by the end of the summer, and then that unleashes 40 megahertz of spectrum and of course obviously a huge investment in this industry and jobs at a time when, you know, a lot of companies are hoarding their cash because of an uncertainty out there. We are certainly hoarding our cash because we are waiting on the FCC uncertainty that they can alleviate that problem. So it is a case where business and government can work together to do the right thing for consumers and also unleash productivity and investment in the United States.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. TERRY. Thank you.

The chair now recognizes the gentlelady from Colorado, Ms. DeGette.

Ms. DEGETTE. Thank you very much, Mr. Chairman.

Sitting here listening to this testimony reinforces my view that this retransmission consent issue is a very messy issue and there is not a one-size solution. Most people would like to see agreements reached that are fair to consumers and I think one thing almost everybody could agree with is Congress shouldn't put too heavy of a finger on that scale. We should really try to allow the market to come to a solution.

I believe that we need access to free and diverse and local news and local programming and information in an emergency. I was just looking at some of my local news on these wildfires in Colorado and there is a good example of how consumers in Boulder or in Colorado Springs or Fort Collins need to be able to get access to local news. And so that is a balancing that we have to have, and also several members of the panel talked about mobile TV and how much promise that that has. But the strong argument supporting the value of broadcasting to consumers doesn't necessarily equate to a justification for pulling a signal from cable or from satellite viewers if retransmission consent negotiations fail, and I am thinking about this from the standpoint of my constituents who work all day, who barely have time to sit down in front of the television, who want to turn on the first game of the World Series with hope the Rockies might be in it, although maybe not this year, but they can't get the programming they want because we have had failed retransmission consent talks.

And so my first question is a simple question, and if preferable, I would like to have a yes or no, and that question is, do you think blackouts as a result of the failure of these agreements are fair to consumers no matter how rare or how often they might be? Mr. Powell, I will start with you.

Mr. POWELL. No.

Ms. DEGETTE. Mr. Barrett?

Mr. BARRETT. No.

Ms. DEGETTE. Ms. Sohn?

Ms. SOHN. No.

Ms. DEGETTE. And Mr. Ergen?

Mr. ERGEN. No.

Ms. DEGETTE. OK. Thank you.

Now, Mr. Ergen, I have a question for you about this AutoHop issue. As you testified in your statement, and I think everybody knows, the AutoHop technology lets consumers skip over commercials or other things that they don't want to watch, and as you said, that would mean that when kids are watching TV, they wouldn't have to see junk food and alcohol commercials. I would submit that as the fall approaches, many viewers would skip over the shock-and-awe TV commercials that everybody is going to be treated to in the campaign this fall. And so it—I am sorry?

Ms. SOHN. And the volume too.

Ms. DEGETTE. Yes, and the volume too. So I think the volume is the issue.

But if people had AutoHop, it would let them decide what they wanted to see. Now, I know that this is in the courts right now, but talking not about the legal issues but consumer choice and innovation in the free marketplace, doesn't AutoHop simply improve on technology that is already available from the DVR to what is possible through the DVR?

Mr. ERGEN. Yes. I think it was settled legally 28 years ago in the betamax case but the AutoHop does what everybody in the pay-TV business does with DVRs which is, allows a customer with the push of a button to record a channel or series of channels and it allows customers with the push of a button to skip ahead through a commercial. What AutoHop does it make it more convenient for customers to do it. When I woke up this morning, my alarm went off at 6 o'clock in the morning as it does every morning, and I don't have to reset it every morning for 6 o'clock even if I'm in a different time zone. So AutoHop allows you then when you choose to watch a prime-time show, you can make the choice to AutoHop through the commercial with the push of a button. And so it is—just as we regulated—I've sat through regulation of, we have to have a rating system for our TV shows so that parents can block them out, we now have regulations to turn the volume down for commercials. It is amazing we had to do that. It is amazing that commercials could be that loud. And I think that we certainly don't need regulation that prevents a customer, as I understand the broadcasters' point, it is that consumers do not have the right to skip a commercial and do not have the right to record a show, and I think that, you know, we will fight the good fight for the consumer.

Ms. DEGETTE. You know, I have to say, from the standpoint of the broadcasters, I understand their business plan and their revenue concerns but I think we have to balance the consumer decision of what they want to see versus that business plan. We need to work something out. I think we can all agree on that.

Mr. Barrett is eager to make a point

Mr. BARRETT. I think if this committee is interested in protecting localism, if you are interested in having your local station cover the wildfires in Fort Collins, the AutoHopper and that technology will be damaging to the local business model and you will lose local stations' ability to provide the kind of coverage that is important to you and your district.

Ms. DEGETTE. And that is why I am saying, I think for the local broadcasters, I am sympathetic to the business model, but we need to balance that plus the consumers wanting a choice. It is not DISH that wants to have that choice, it is the consumer. So I think we are going to have to work that out.

Thank you very much, Mr. Chairman.

Mr. SCALISE [presiding]. The gentlelady's time has expired and now the gentlelady from Tennessee, Ms. Blackburn, is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you so much.

I just have a couple of questions that I want to get to today but I do thank all of you for your patience, for your diligence in continuing to work on this issue.

Ms. Sohn, since you are the only female on the panel today—I see seven guys and you—there is a lot I could say, right? We need more women down there.

Let me go to something you said previously. You basically endorsed having usage-based billing at one point by saying the ISPs should charge a flat rate for a certain amount of bandwidth and then charge a per-bit metered rate for usage that goes beyond that limit. So what I wanted to see was if you still agreed with that. And let us say if somebody is a Netflix subscriber and they are using a large portion of capacity as opposed to someone who just checks email and does a little bit of surfing every day, should they be paying the same amount? So where are you on that one?

Ms. SOHN. We don't endorse usage-based billing or data caps. I mean, basically what we say is, data caps are not inherently bad, but they can be abused and they can be used anti-competitively to discourage people from using online video to disadvantage competitors, so we are very, very concerned about that.

One of the problems here is what is the rationale for usage-based billing or data caps? Former Chairman Powell says in his testimony and he said yesterday in response to questions about the

DOJ investigation well, we have to deal with congestion on our networks. Well, data caps is a very blunt instrument to deal with congestion because congestion only happens at one point in time, right? So if I am backing up my data at 3 o'clock in the morning, I am not causing congestion, but that goes against my data cap. So I want to reemphasize that it is really, really important for Congress and the FCC to know how data caps are set, how they are evaluated, how they are moved over time. I mean, Comcast just raised its data cap for the first time in 4 years from 250 gigabytes to 300. Why did it take so long with the explosion of video? So no, we are—you know, we don't think usage-based billing is inherently bad but it can be abused and it is very, very important to know how they are used.

Mrs. BLACKBURN. OK. Mr. Powell, let me come to you. You might want to respond to that. Then I want to ask you also to talk a little bit about MFN and Most Favored Nation status, and looking at that plus the alternate distribution method clauses that are there in cable carriage contracts. You know, in Nashville with a lot of the entertainers, they understand an MFN approach when they are doing shows. And so with a lot of our content producers and people that are pushing content forward, we have got some questions about the MFN and the ADM approach, so if you want to respond to what Ms. Sohn had to say and then answer the second question, that would be great.

Mr. POWELL. Sure. First, I would like to highlight something she did say and by the way has been echoed by the country's leading regulations, both the chairman of the Federal Communication Commission and the chairman of the Federal Trade Commission. There is nothing inherently wrong with usage-based pricing just like there isn't—if you run your air conditioning all day long at the lowest temperature and your neighbor chooses to open the windows and have the breeze blow in, you are going to pay more money than your neighbor is as a consequence of your use. So inherently usage-based pricing is about price fairness, that you are being allocated a portion of the cost consistent with your use, and that is a very well established economic principle and we don't think just because you can condemn it in words makes it so.

The other thing I would say about caps, first of all, let us be clear. Caps are not the industry standard. In fact, as far as I know, after Comcast's recent change, there is not a cable company that employs a cap that penalizes a consumer after they exceed that cap. They are able to move to other pricing bundles or increased capacity. So, you know, this idea that we are all uniformly applying caps as a way of creating artificial scarcity is not factually accurate. And I do think there is an economically defensible reason for usage-based pricing and threshold models and it is not about congestion management, as Gigi suggested. It is about how do you fairly monetize a very high fixed cost network? You have to dig up the ground, put this thing in and you have to charge your end users. And also I might note because of net neutrality, we are not allowed to charge other corporations. We have to charge end users alone. And how to do that fairly is the question that cable companies are experimenting with.

On MFN, Congresswoman, honestly, I am not that much of an expert on the specifics of these contracts. They have been around a long time. I would note that in the DOJ supposed investigation that is underway, DOJ looked at these MFNs in the context of the Comcast/NBC merger and other merger-specific deals and didn't find antitrust violations in those cases in passing on them. So to be honest, they are contract specific. I am not usually privy to the contours of them. I think they can serve a beneficial purpose. I also think they can be harmful, but that is what we rely on honest examination for.

Mrs. BLACKBURN. Thanks. I appreciate that.

My time is expired, Mr. Chairman. I will yield back.

Mr. SCALISE. The gentlelady yields back.

Now the gentleman from Pennsylvania, Mr. Doyle, is recognized for 5 minutes.

Mr. DOYLE. Thank you, Mr. Chairman.

Mr. Barrett, I want to thank you for joining us today. I know my constituents in Pittsburgh appreciate the Hearst station that you have there. I just want you to elaborate more on Mr. Ergen's comments about the hopper service.

My understanding is, there is a fair-use exemption for DVR recordings. Can you explain to me why you believe that the hopper service is so different than regular DVR service?

Mr. BARRETT. I believe it goes beyond the contemplated fair-use parameters. I think it is a copyright issue. It is a matter that is in the court right now, and I will be anxious to see how the court adjudicates that. It remains a threat to the local broadcasting system and, you know, one of the best qualities of the American society is that we have a local broadcasting system that is in place in 210 markets, and in all the determinations that you will make, there is going to be a prioritization and a tradeoff of things, and I am here on behalf of people who are committed to local communities and I think there has go to be a high prioritization for preserving that localism that these stations provide.

Mr. DOYLE. Thank you.

Ms. Sohn?

Ms. SOHN. It is absolutely not a copyright issue, and to me, this is a perfect example about how copyright is misstated and misused, you know, to stop innovation. I mean, the Sony versus Universal case, as Mr. Ergen said, is absolutely clear. The public has the right to record what they want to record off of TV, whether it be a VCR or DVR. That was 1984. That was a long time ago.

Look, people have been skipping commercials for 50 years since the guy who just died invented the remote control. This is about consumer choice. I remember it was about 10 years ago when Jamie Kellner from Fox said it was OK for people to go to the bathroom to skip commercials. So what Mr. Ergen's AutoHop service is doing is just turning three steps with a remote control into one, and consumers should have the right to do that.

Mr. DOYLE. Thank you.

Mr. O'Leary, in your testimony you spoke about your UltraViolet service. My understanding is that it is basically a new way for consumers to be able to watch movies through the Internet rather than having to purchase a DVD that they can only watch on a

DVD player. I find the service very interesting. I have some questions.

On the UltraViolet Web site, you indicate that customers can stream content on almost any Internet-connected device and that they can also download digital copies when they don't have good Internet access. Can UltraViolet customers download a digital copy of a film onto any device or just certain compatible devices?

Mr. O'LEARY. My understanding, Congressman, is that it has to be a device that is registered with UltraViolet service, and that downloading is a component of it. I think in the first phase, the emphasis, as your question highlighted, is in streaming but they will have the ability to download it onto different devices as long as they were registered.

Mr. DOYLE. I just thought it was unclear on the Web site. Based on the advertising, it kind of seemed like to me that I could download the content onto any device of my choosing, and I noticed some similar confusion from some other UltraViolet users who thought they were going to get a digital copy of a movie to watch anywhere. Can you explain what some of the approved devices are that I can download my films to? What would be an approved device, for instance?

Mr. O'LEARY. Well, you could download it, for example, onto your laptop, onto, you know, a tablet, onto different things like that. I would have to get back to you with a specific list of the types of devices, a complete list of the types of devices that——

Mr. DOYLE. Yes, I am just curious what these UltraViolet-compatible devices are. I think it just might be easier for consumers, you know, when you look at that Web site to understand what actually they can use and what they can't use.

Mr. O'LEARY. Absolutely.

Mr. DOYLE. And just to follow up to that, does your service give customers any guarantee that they will always have access to the purchase they made? You know, I have my old DVD. You know, some of them might be scratched up but I can still go into the closet and pull out that DVD any time I want because I know they are always there. Is there a guarantee that people will always have access to a purchase they make?

Mr. O'LEARY. Yes, Congressman, it is my understanding that there is a perpetual agreement between the consumer and the producer in that they will have access to those, yes.

Mr. DOYLE. Thank you.

Mr. Chairman, with that I will yield back.

Mr. SCALISE. Thank you.

The chair will now recognize himself for 5 minutes. When we look at the video marketplace today, it is drastically different than it was in 1992 when Congress passed the Cable Act yet the laws and regulations written then still apply today as if a monopoly power exists and as if innovation has come to a screeching halt. I think it is important for us to go back, you know, because we take for granted that technology—you know, I can look on my video device and watch Swamp People episodes on this video device and yet the laws that we have on the books today were written when we had these devices for telephones. So while I can do things today we all take for granted, just remember, the law was written when this device was your communications device. And so I think when we start this conversation, it is real important to remember that technology has changed dramatically yet the law hasn't changed at all and so we have got a process today where if you have a disagreement with the law, you have to go to the FCC and maybe they rule your way one day, maybe they rule against you one day, but shouldn't we have this open discussion.

Traditional distributors remain subject to archaic regulations while new entrants operate virtually free from the heavy of government but are constantly threatened by the possible extension of these same obsolete rules. Since Congress created the problem decades ago, it has a responsibility to review and fix them today.

The current unfair system forces people to turn to the FCC for relief and encourages new entrants to cherry-pick regulations that benefit their platforms. I also question the wisdom of regulating new startups and innovative services as traditional video providers. They are not recipes for encouraging the utmost innovation, investment and ultimately competition benefiting consumers.

Modernizing this decades-old regulatory framework should instead focus on providing relief to all stakeholders by repealing the intertwined 1976 and 1988 compulsory copyright licenses as well as the 1992 cable Act. Sweeping away these government intrusions altogether will actually level the playing field for content creators and video distributors alike. Negotiations for broadcast content will then look much like it does for cable programming where compensation is paid for the issuance of traditional copyright licenses.

It is time we recognize the dramatic transformation that has occurred in the video marketplace by getting the government out of negotiations that should be strictly left up to the private sector. I think I know somebody in this subcommittee who has actually got legislation to do just that.

I am going to ask some of our panelists some questions about this. First, if we can just go across the board and a yes or no question. Do you believe the current video marketplace allows consumers sufficient choice over what, when, where and how they watch video programming? Yes or no, starting with Mr. Johnson.

Mr. JOHNSON. Well, regarding our service, I would say no because of the lack of programming.

Mr. SCALISE. Thank you. Just yes or no.

Ms. SOHN. No.

Mr. SCALISE. Mr. Hyman?

Mr. HYMAN. Getting there, yes.

Mr. SCALISE. Mr. Funk?

Mr. FUNK. I agree with Mr. Hyman.

Mr. SCALISE. Mr. Powell?

Mr. POWELL. Make that three, yes.

Mr. SCALISE. Mr. Barrett?

Mr. BARRETT. Yes.

Mr. SCALISE. Mr. Ergen?

Mr. ERGEN. No, not yet.

Mr. SCALISE. Mr. O'Leary?

Mr. O'LEARY. Yes.

Mr. SCALISE. OK. So we have got clearly a split amongst the panelists here.

Mr. Barrett, I appreciate the work that WDSU–TV, the NBC affiliate in New Orleans, does. It is one of the Hearst affiliates. Do you currently have the legal rights to sublicense all broadcast programming transmitted over your signals to companies like Netflix and Sky Angel if so desired? Who do you not qualify for compulsory copyright licenses?

Mr. BARRETT. We have a limited right from our networks with respect to how we may transmit their signal to other distributors.

Mr. SCALISE. So limited rights?

Mr. BARRETT. Yes.

Mr. SCALISE. OK. Mr. Ergen, your company is opposed to paying for access to content?

Mr. ERGEN. No, we are not opposed to paying for content.

Mr. SCALISE. Mr. Johnson?

Mr. JOHNSON. When you say content, do you mean local programming or cable channels?

Mr. SCALISE. Any content that you——

Mr. JOHNSON. Well, no. We respect and have been paying for the content

Mr. SCALISE. Mr. Hyman?

Mr. HYMAN. All we do is pay for content.

Mr. SCALISE. Right. So this is something that already occurs.

I want to ask Mr. Barrett, you all own a stake in A&E, the History Channel, Lifetime, other cable channels, correct?

Mr. BARRETT. That is correct.

Mr. SCALISE. Now, those negotiations when you are negotiating with different video distributors, is that a free market? Do you all just sit at a table? Are there any government-enforced compulsory copyright laws or retransmission consent agreements that have to happen?

Mr. BARRETT. We negotiate on behalf of Hearst Television for the retransmission consent rights and are not involved in any linked negotiations with Heart-owned cable assets.

Mr. SCALISE. OK. I want to ask you about some comments you made in your opening statement. On page 9 and 10, you made specific reference to the legislation I filed, H.R. 3675. In it, you say "Cable and satellite providers"—you are referring to their content. You said, "First, they would turn back the clock to a time when cable and satellite providers confiscated and resold broadcast signals to their subscribers without obtaining broadcasters' consent." I would first suggest to you that my legislation does not do that. I would hope you have read the sections that not only repeal compulsory copyright but also retransmission consent, which means we would revert to traditional copyright laws, and under the legislation that I filed that you referred to, a company would have to pay for the content that you would provide before they could distribute it, yet you refer to my bill and you say that providers could confiscate the content under my bill, which is a mischaracterization. I wonder, did you read the bill and have you re-looked at this statement?

Mr. BARRETT. I have read the bill. If you say that this is a mischaracterization, I will revisit that.

Mr. SCALISE. And on a final question, Ms. Sohn, you look at this industry. You have read the bill, too. Does this legislation that I filed allow for people to confiscate content and give it away or would they actually have to pay for it?

Ms. SOHN. No, of course not. I think the thing that keeps getting lost in this conversation is that Mr. Barrett and his colleagues get their transmission, meaning spectrum, for free from the public, OK? They get it for free from the public. In exchange, they are supposed to make that signal available for free to the public. So this notion that they are somehow entitled to money for their signal, number one, that has only been the case for the last 20 years, so from the advent of television broadcasting in the 1950s until 1992, you know, other people were, quote, unquote, confiscating their signals. But again, that signal is supposed to be free. I don't know how you confiscate something——

Mr. SCALISE. But under my bill, if somebody retransmits it, they would have to actually pay and get an agreement with one of Mr. Barrett's companies, pay to get the copyright license.

Ms. SOHN. Right, and that makes more sense. That eliminates the middleman.

Mr. SCALISE. So I would just ask if you could go back and look at the statement.

Mr. BARRETT. I will go back and look, but let me comment. I think the characterization that we get this for free is a mischaracterization. The public trustee model has been in place since the 1920s and the 1930s Communication Act and it acknowledges that the limited spectrum is a limited resource. It belongs to the public and those most capable of serving the public interest should be entrusted with that license, and I think the body of record would show that local broadcasters in this country have served the public interest very well and the notion of free is baloney.

Mr. SCALISE. Right. Well, that is referring to over the air. I was specifically asking about the bill that was filed and the copyright laws that would still be in effect if the bill were to pass, that nobody should retransmit your signal without first getting an agreement and compensation to you. All right. I appreciate it.

Now Mr. Dingell, the gentleman from Michigan, is recognized for 5 minutes.

Mr. DINGELL. I thank you. I commend you for holding this hearing and welcome to our witnesses. I have a lot of questions to ask and too little time, so I hope you will help me by answering yes or no.

This question to all witnesses, and I am going to make a statement and then I am going to ask if there is anyone that disagrees. We can all agree that consumers want innovative, informative and entertaining new content. Absent such content, new delivery methods won't matter much to consumers. Now, is there anyone that disagrees with the statement that content creators should be compensated fairly for the content which itself should be protected. Is there anyone that disagrees with that statement?

Very well. Now, speaking of some content, there is some consternation, I understand—this question to Mr. Ergen—about your latest invention's effect on content distribution so I would like to explore this issue perhaps a bit more carefully.

Now, Mr. Ergen, is DISH Network currently being sued for copyright infringement and breach of contract in Federal court over its new hopper service? Yes or no.

Mr. ERGEN. Yes. I would characterize it a little bit differently. We filed a declaratory ruling——

Mr. DINGELL. Thank you.

Mr. ERGEN [continuing]. In the State of New York based on——

Mr. DINGELL. Now, the next——

Mr. ERGEN. Just let me finish, please, because I want to make sure the record is clear. We filed a declaratory ruling because——

Mr. DINGELL. Mr. Chairman, may I have order, please?

The next question, Mr. Ergen, is it true that hopper only automatically records and provides commercial skipping for programs on the local four network affiliations in the market? Yes or no.

Mr. ERGEN. No, it does not automatically record.

Mr. DINGELL. Thank you. Now, Mr. Ergen, is this so because the channels are the most popular channels on your system? Yes or no.

Mr. ERGEN. It has to do with a variety of factors.

Mr. DINGELL. Is that yes or no?

Mr. ERGEN. Well, it is not a yes or no answer on that one because——

Mr. DINGELL. I have got an election coming up like all of my colleagues here on the committee, and like every politician everywhere, and we all use political ads on local stations to reach our constituents, those who vote in the districts. The hopper potentially limits the ability of every member of this subcommittee and every one of our challengers to reach constituents with ads to help them to make up their minds on Election Day. Do you understand and appreciate the concern that the politicians up here on the dais and other politicians everywhere would feel in this matter? Yes or no.

Mr. ERGEN. I understand consumers very well. I am not a politician so I can't say that I understand your concerns on whether someone——

Mr. DINGELL. Very well. Thank you.

Now, given all of this, Mr. Ergen, I hope you understand my skepticism when it comes to DISH's latest offering and its effect on the future of video.

Now, I would like to use the rest of my time to learn a little bit more about how the cable industry is adapting to new Federal communications regulations to provide its subscribers with new types of content and ways to do this. Now, Mr. Powell, is it true that the cable industry supported the commission's Open Internet Order? Yes or no.

Mr. POWELL. Ultimately, yes.

Mr. DINGELL. Thank you. Mr. Powell, again, if you please. Help me remember, was use-based billing considered and allowed by the Open Internet Order? Yes or no.

Mr. POWELL. Yes.

Mr. DINGELL. Mr. Powell, were managed services also considered and allowed as part of the order? Yes or no.

Mr. POWELL. Yes.

Mr. DINGELL. Mr. Powell, I want to thank you for the way you are proceeding here. So are cable companies delivering products and services as well as practicing business models that comply with the Open Internet Order? Yes or no.

Mr. POWELL. Yes.

Mr. DINGELL. Mr. Powell, in other words, cable is complying with the order. Is that right?

Mr. POWELL. Yes, we believe we are.

Mr. DINGELL. Now, Mr. Powell, one last question, and I do want to commend you again. The FCC just sunsetted its Viewability Order. I think it is very important that cable subscribers be able to access local content by smaller broadcasters. Now, this is the question. What steps will NCTA's member companies take to ensure that their subscribers can still access local broadcast signals affected by the Viewability Order's sunset?

Mr. POWELL. Yes, we agree that it is important that they continue to receive those signals. Eighty percent of the consumers have already gone digital and they will not be affected. As to the remaining 20 percent, we have committed to low-cost boxes that would make that an affordable transition, similar to the boxes broadcasters used for the HDTV transition, and we have committed to providing adequate notice and a transition period that will allow that to happen smoothly.

Mr. DINGELL. Thank you, Mr. Powell.

And Mr. Chairman, to you my thanks. To the panel, thank you for your assistance and your candor.

I yield back the balance of my time.

Mr. SCALISE. The gentleman yields back.

The gentleman from Illinois, Mr. Rush, is recognized for 5 minutes.

Mr. RUSH. Thank you, Mr. Chairman, and I want to thank the witnesses also for their appearance before this subcommittee.

I have a question for the panel regarding the legal construction of the MVPD definition that I will submit for the record or may get to ask if we go another round of questions. And if there is time remaining, Mr. Chairman, I would also like to hear some of the panelists' views regarding the consumer privacy matters. Privacy needs to be addressed as so many of your business models depend heavily on advertising and there are other emerging models not represented here today that are rolling out video offerings tied to social media platforms.

But first, I would like to ask for the record questions that pertain to the importance of more diverse ownership of broadcasting, wireless, cable and information services licenses. Mr. Barrett, while I agree with you that we should lament the lack of diverse ownership and control of wireless services, I would like to look more into something that is written into your testimony. It says that, and I quote, "The broadcast model permits diversity of ownership and control that does not exist in wireless services." Did you know, Mr. Barrett, for example, that minorities make up more than one-third of the U.S. population yet only own an estimated 3 percent of full-power commercial television stations and a little more than 7.5 percent of commercial radio stations? And I strongly suspect that minority cable system ownership numbers are not much better or much lower. Do these numbers suggest to you that there is sufficient diversity of ownership and offerings of diverse video content and should we be concerned that those levels could decrease even further following voluntary relocation of broadcasters during the lead-up to incentive auctions?

Mr. BARRETT. I think those numbers suggest that there is a sad limitation of the number of minorities that are involved in ownership. I think my comments and my remarks were meant to suggest that there are 1,700 or so TV stations across the country. There is an opportunity for more diverse ownership than there may be in a world where the national licensees and national providers of this content is the reality that we live with. I think the country is at risk in terms of less diversity and I would note that minority groups are very dependent on broadcast reception. Twenty-eight percent of Asian households, 23 percent of African American households, 26 percent of Latino households are today receiving broadcast reception over the air.

Mr. RUSH. Thank you very much.

Mr. Chairman, without objection, I would like to enter into the record a copy of a letter that was just filed with the FCC a couple days ago by a number of stakeholders asking the FCC to study the state of black radio ownership and programming diversity and to adopt rules that address these disparities. Even though the subject we are taking up today is video and not audio, these stated concerns and the state of minority ownership in the video marketplace is even more acute and troubling.

Mr. SCALISE. Without objection.

[The information follows:]

June 25, 2012

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Chairman Genachowski:

There has been a great deal of discussion about the state of black radio following the format change of a top-rated New York City station that had long served the market's black community.

For nearly three decades, adult urban radio stations WBLS (107.5) and WRKS (98.7, KISS-FM) were fierce competitors, battling for listeners in our nation's largest media market. But that rivalry ended when Disney took over programming for 98.7 FM several weeks ago and immediately changed the station's format to sports talk.

This abrupt format change shocked New York City's African American community and its larger urban radio audience. The most populous city in the country is now left with just one urban adult contemporary station. And two of the nation's most popular African American radio talk show programs, the *Tom Joyner Morning Show* and the *Michael Baisden Show*, will no longer be broadcast in the New York City market due to the departure of KISS-FM.[1]

While KISS-FM listeners lament the sudden loss of a popular station, we believe what happened in New York City speaks to a much larger crisis plaguing black radio and the radio industry.

We call on the FCC to study the state of black radio ownership and programming diversity, and to adopt rules that finally address our nation's media inequality.

Like the rest of the radio industry, black radio has been devastated by media consolidation. The passage of the 1996 Telecommunications Act lifted the ban on the number of stations a company could own nationwide, allowing a few large companies to control the radio landscape. Companies like Clear Channel went from owning 40 stations to as many as 1,200 in just a few years. The number of independent radio station owners declined by 39 percent in the decade following the passage of the Telecommunications Act.[2]

Greater consolidation in the radio industry created large radio conglomerates that are less responsive to the information and entertainment needs of the communities they serve. And perhaps no other community has been as negatively impacted by this growing media inequality as the African American community.

Many black radio stations have historically provided the community with a voice in the fight for greater equality. African American DJs not only provided the community with the latest news and information, but they played records by local black artists that served as the soundtrack for African American empowerment.

But today, with few exceptions, local radio has abandoned serving the needs of these communities — and at a time when many of them face enormous suffering. Unemployment among African Americans has often reached a figure twice as high as the national average. As of 2007, African Americans were six times more likely to be in prison than whites. And as of 2010, the median family income earned by black and Latino families was 57 cents to every dollar earned by a white family.[3]

These social and economic disparities are one major reason that the African American community depends on local black radio stations now more than ever for news and entertainment.

But media consolidation has made it harder for people of color to own radio outlets. African Americans own just 3 percent of all full-power commercial radio stations. And many urban radio stations that purport to serve black audiences air little local programming and are seldom responsive to the needs of their communities. Indeed, the advocacy group Industry Ears has often raised concerns about the amount of syndicated music programming targeting adult African Americans.

Media corporations have a long history of profiting off the suffering of African Americans, starting with the use of offensive stereotypes in radio programs like *Amos 'n Andy* during the early years of commercial radio. This shameful tradition continues. Today many radio stations play music that too often denigrates African Americans. It is rare to hear records from independent black artists or musicians who use their music to uplift and inform.

As Industry Ears has long stated, the public remains largely unaware that major record labels and radio corporations too often control what music is played on local stations. We are concerned that payola could remain a major issue throughout the industry, including in black radio, despite an FCC payola investigation a few years ago.

Media inequality persists as a result of government policy that places control of media and the public airwaves in the hands of corporations that prioritize profit over their responsibility to serve the public interest.

This history of inequality began with the government distributing our country's first commercial radio licenses almost exclusively to white males. This free, government-granted, exclusive use of the public airwaves enabled those early licensees to amass wealth and control practically all of our nation's media outlets, leaving people of color with few broadcast ownership opportunities and virtually no say over how they are depicted in the media.

The FCC must take proactive steps to expand ownership opportunities for people of color and other marginalized communities, and must examine fully the impact on diversity of any media ownership rule changes the FCC proposes.

We also call on the FCC to adopt rules ensuring that local broadcasters are held accountable to the communities they are licensed to serve. Such changes could include shortening the length of a broadcast license, a position that former FCC Commissioner Michael Copps often advocated.

Finally, we call on the FCC to do a thorough study of the state of black radio that examines who owns urban-formatted radio stations. This should occur as part of a much-needed effort to compile trustworthy data on broadcast ownership and the identity of broadcast license holders. And we also call on the FCC to investigate whether payola continues to play a major role in determining what airs on these outlets.

Sincerely,

Paul Porter, co-founder, Industry Ears

Joseph Torres, senior external affairs director, Free Press

Rashad Robinson, executive director, ColorofChange.org

Steven Renderos, national organizer, Center for Media Justice

Brandy Doyle, policy director, Prometheus Radio Project

Maxie C. Jackson III, president, National Federation of Community Broadcasters

Casey Rae, deputy director, Future of Music Coalition

Paul Billings, general manager, WUVS Muskegon LPFM

Dr. Jared Ball, associate professor, Communication Studies, Morgan State University

Dave 'Davey D' Cook, San Francisco State and Pacifica Radio

Todd Steven Burroughs, Ph.D., author , journalist and lecturer, Communication Studies, Morgan State University

cc: Commissioners Robert McDowell, Mignon Clyburn, Jessica Rosenworcel, Ajit Pai

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1 Richard Prince, *Civic-Minded Jocks Out as KISS Folds Into WBLS,* Maynard Institute for Journalism Education, April 30, 2012.

2 George Williams, "Review of the Radio Industry, 2007," Federal Communications Commission, August 2007.

3 Tim Sullivan, Wanjiku Mwangi, Brian Miller, Dedrick Muhammad, Colin Harris, *State of the Dream 2012: The Emerging Majority,* United for A Fair Economy, January 12, 2012.

Mr. RUSH. This is a question I have for both Mr. Barrett and Mr. Powell around the issue of tax certificates.

In the past, Mr. Barrett, the association you are representing here today, the NAB, has strongly endorsed passage of legislation to establish a new communications tax certificate program. Is that still the NAB's position?

Mr. BARRETT. Yes, it is. The NAB would continue to support such a legislative initiative.

Mr. RUSH. And Mr. Powell, the association that you are representing here today, the NCTA, also previously endorsed passage of legislation for a new communications tax certificate program. Is that still the NCTA's position?

Mr. POWELL. Yes, Mr. Rush. In 2003, when Senator McCain introduced tax certificate, as chairman of the FCC, I was an enormous proponent and remain so.

Mr. RUSH. Thank you very much.

Mr. Chairman, without objection, I would like to enter into the record the FCC's Section 257 report recommending that Congress reinstate a tax certificate policy. I will point out that the statement of former FCC Commissioner Michael J. Copps accompanying that order as being the source for the minority ownership percentages that I cited earlier.

And with that, Mr. Chairman, I yield back the balance of my time.

Mr. SCALISE. The gentleman yields, and there is no objection to the gentleman's unanimous-consent motion, so that will be entered.

[The information is available at http://www.fcc.gov/document/section-257-triennial-report-congress-identifying-and-eliminating-market-entry-barriers-ent.]

Mr. SCALISE. Now the gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Ms. Sohn, could you tell me what you believe the effect will be of the proposed deal between Verizon and spectrum companies on the telecommunications marketplace?

Ms. SOHN. So the Verizon/spectrum co. deal will have several negative effects both for competition and consumers. One is, because there are these side agreements—OK, there is a spectrum sale and there is affiliated side agreements. Two of the side agreements, one is a marketing agreement, one is a reselling agreement, basically is an agreement between the cable companies and Verizon to lay down arms and no longer compete in the video or wireless marketplace. So Verizon and AT&T will get the wireless marketplace to themselves and the cable industry will get the wireline industry to themselves.

But even worse than that, there is something called the Joint Operating Entity, or the JOE, and that is essentially an agreement between those five cable companies and Verizon to develop patents and technologies that would help to stream a video from wireless to wireline systems, and that has an enormous capability to be anticompetitive and used against, for example, Mr. Ergen's company. If he wants to use that technology, he would probably be charged, you know, very, very high licensing fees or he might be told I am sorry, you are not part of the club, you are not part of the cartel, you can't have this technology.

Mr. MARKEY. Now, Mr. Ergen, are you afraid of that, that you might not be part of the club? I guess what Ms. Sohn is saying is that there is going to be cozy cooperation here that exists and you just might get walled out. Do you agree that that is a possibility?

Mr. ERGEN. Well, unfortunately, we have not seen the unredacted comments so I can't say specifically what they say, but we would certainly have a concern where two vicious competitors might get together to, A, not compete with each other, and B, exclude other people from competing with them.

Mr. MARKEY. Yes. That has always been the beauty of the 1992 and 1996 Telecom Act is that it created, you know, the conditions for Darwinian paranoia inducing competition, which, you know, ultimately results in innovation and more benefits for consumers. And so you always have to be wary, especially when people start talking about rewriting the 1992 and 1996 Telecommunications Act, that somehow or other there is too much competition or too many players that out there, and maybe some of the smaller players don't need protection.

So let me go to you, Mr. Powell. You just heard the two comments made by Ms. Sohn and Mr. Ergen. How would you comment?

Mr. POWELL. I will be limiting my comments, because as the head of the association, I am not really a party to the transaction and don't have the specifics, but the companies would in terms of their conversation. I would say that all deals like this deserve vigilance and that is why we have an antitrust process, and I think that we should rely on the confidence and the able skills of both the Federal Communications Commission, the Antitrust Division, to rigorously scrutinize the transaction for those purposes and to reach a conclusion in the public interest.

I don't believe that it is intuitively clear that it is a capitulation, there wouldn't be continued competition among these companies, but I think that is why we have an antitrust process and I have a lot of faith in it.

Mr. MARKEY. Let me ask you, Mr. Barrett, and you, Mr. O'Leary. July 1st is the deadline for the completion of kind of the rulemaking and the implementation of the provisions which I built into a 2010 law for video accessibility. Could you give us an update as to where your two industries are in terms of complying with that?

Mr. BARRETT. Speaking on behalf of Hearst Television, we are well in hand. Our implementation will be fully complete, and I am very pleased with how that has proceeded, and I think on behalf of the NAB member stations, the same thing can be said.

Mr. MARKEY. Mr. O'Leary?

Mr. O'LEARY. Congressman Markey, I would say effectively the same thing in response to your question.

Mr. MARKEY. And what was that?

Mr. O'LEARY. That we are working towards compliance and I am also pleased with the way the process has gone.

Mr. MARKEY. I mean, it is so important that the deaf and the blind do have access in the 21st century, that they are able to use all their God-given abilities to fully participate, and so it is very,

very important that we get the full cooperation, and we thank you for your positive comments about the process.

I thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. WALDEN. The gentleman yields back the balance of his time.

I believe that is the last member of subcommittee with time, so I want to thank all of the participants today. As you probably heard from some of our colleagues, they may have other questions that they would submit for the record, that if you can be responsive in your answers, it would really help us in our work. Your presence today certainly does that. These are consequential issues we are discussing at a policy level, and your input is really helpful in our process. So I thank you for participating, and with that, the hearing is adjourned.

[Whereupon, at 12:40 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Public

August 28, 2012

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walden,

Thank you for the opportunity to testify before the Subcommittee on Communications and Technology hearing on "The Future of Video" held on June 27, 2012.

As requested, I have attached my response to your additional questions for the record. I look forward working with you and the members of the Subcommittee to protect consumer choice in this area of rapid innovation.

If I can be of any further assistance please do not hesitate to contact me.

Sincerely,

Gigi B. Sohn
President and CEO
Public Knowledge

Cc: The Honorable Anna Eshoo, Ranking Member,
Subcommittee on Communications and Technology

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Public

Rep. Henry Waxman – Question for the Record
Subcommittee on Communications and Technology
Hearing: The Future of Video
July 27, 2012

Q: Many witnesses at the hearing discussed the increased availability of on-demand access to a variety of video content through Internet-connected devices and services. How do you view authenticated online video services like "TV Everywhere" and the impact these business practices have on consumer choice?

A: As Adam Smith wrote in The Wealth of Nations, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public." Thus it's no surprise TV Everywhere, the result of a collaboration between large cable and content companies, is not good for consumers, competition, or innovation.

Authenticated services do little to promote consumer choice, since--by definition--they require that you have a cable or other MVPD subscription to use them. Thus, they do nothing to promote competition, drive down prices, or change the marketplace dynamics that keep video programming out of the hands of innovators. They further perpetuate a "windowing" model that creates artificial distinctions between distribution platforms, which harms independent programmers (who are strong-armed into windowing their content) and encourages piracy.

Authenticated services such as TV Everywhere perpetuate a geography-based model for content distribution that has no place in the online world. Broadcasters and cable systems have limited geographic scope for physical and practical reasons, and a number of legal and business practices developed around this reality. There are no such physical geographic restrictions for online delivery of content, and it bodes ill for the future development of online video distribution if obsolete geographic distinctions continue to be made online.

Finally, authenticated services such as TV Everywhere raise net neutrality concerns. Broadband ISPs who are also MVPDs have an incentive to discriminate in favor of TV Everywhere traffic--for instance, by exempting such video content from bandwidth caps. If TV Everywhere video content is not subject to bandwidth caps or metering, but competing services (like Vimeo or Netflix) are subject to caps and metering, then customers will gravitate to TV Everywhere content or other authenticated systems even if they are less compelling than the competition.

TV Everywhere could become a much more consumer and competition-friendly video platform with three simple fixes. First, TV Everywhere should not be tied to an MVPD subscription. Consumers who want an online-only option should have that choice. Second, providers should be free to sell TV Everywhere subscriptions on a nationwide basis. Different MVPDs should compete with each other to offer the best TV Everywhere experience, and should not divide up the country between themselves. Third, no online video service, authenticated or otherwise, should receive preferential treatment with regard to data caps or metering.

DAVID HYMAN
GENERAL COUNSEL OF
NETFLIX, INC.

BEFORE A HEARING OF
THE ENERGY AND COMMERCE COMMITTEE
SUBCOMMTITEE ON COMMUNICATIONS AND TECHNOLOGY
UNITED STATES HOUSE OF REPRESENATATIVES

ON

THE FUTURE OF VIDEO

Wednesday, June 27, 2012

RESPONSE TO (FURTHER) QUESTION FOR THE RECORD

The Honorable Doris Matsui:

The transition of linear video programming to a world of anywhere, anytime, any screen video seems to be the future. Soon nearly half of all TVs sold will be smart TVs with an Internet connection and accessing a variety of video applications. Like audio, video consumption between PCs, mobile devices and TVs is also converging.

With so many different business models and technologies coming to the Internet, how can we ensure, between broadband providers and companies like Netflix, that there is meaningful competition, continued innovation and consumer choice?

Netflix
David Hyman, General Counsel, Response:

The transition of linear programming to a world of anywhere, anytime, any screen viewing is indeed happening. What's more, Internet applications that increase consumer demand for broadband are also spurring a wave of innovation in the consumer electronics industry with virtually all new devices –including televisions – connecting to the Internet. These devices and the applications they enable, are in turn, causing increased demand for broadband Internet access services provided by the cable and telco industries.

User interfaces, or UIs, through which consumers discover and enjoy content are also evolving rapidly. For example, the typical linear-channel selection grid that uses an up-down/left-right remote to access content will likely be replaced by intuitive and visually stimulating UIs that use motion, touch, and voice as means of control. The ease with which the Internet can mix media – combining written, audio and visual together-is creating new and exciting ways to tell stories and convey information. With an open Internet, the ways of finding and presenting content will evolve in astounding ways if policymakers adopt the right measures designed to maximize choice.

As more services like Netflix offer consumers great movies and TV programs in an easy-to-use, timely manner and at a low cost, it lessens many of the motivations for using the Internet to access content illegally. In this way, we have become a key partner with content providers in reducing piracy while at the same time adding new revenue sources.

All of this represents a lot of change, and has led to speculation about the demise of traditional media distribution platforms and networks. But it is our belief that many of these platforms and networks will also adapt to today's shifting media landscape. For example, in the video delivery world we see the beginnings of this shift through various authenticated Internet video offerings. Commonly referred to in the U.S. as "TV Everywhere," these offerings provide cable subscribers on-demand access to a variety of content through Internet-connected devices like the iPad and Xbox. In this way, cable subscribers are afforded many of the benefits of Internet video within the bundled offering of their cable service.

Implementations like TV Everywhere will grow in popularity and consumers will increasingly view traditional cable networks on devices connected to the Internet. At Netflix, especially as we focus on streaming and begin to offer original content, we are often asked if we are not becoming more like a traditional pay-TV operators. The fact, however, is that these networks are becoming more like Netflix.

As traditional media platforms and networks move to distribute their programming in an on-demand fashion over the Internet, they are beginning to compete more directly with pure-play or "over-the-top" Internet media providers such as ourselves. As this trend continues, the openness of the Internet may be challenged. In particular, issues such as the discriminatory application of data usage caps and IP interconnection must be examined with a much more discerning eye.

When you couple limited broadband competition with a strong desire to protect a legacy media distribution business, you have both the means and motivation to engage in discriminatory behavior. Add to this mix a regulatory and legislative framework largely crafted before the modern Internet era and you have the makings for confusion and gamesmanship that can be a challenge to maintaining an open Internet.

There, one of the largest cable television and ISP services exempted its own proprietary Internet video offering from Internet data caps that otherwise applied to non-affiliated video traffic over its network. That is to say, the exact same movie traversing this ISP's network is treated in a discriminatory manner based on who provides the content.

When a corporation can exercise this kind of discriminatory control over the network, it challenges the openness of the Internet and threatens to stifle innovation. More importantly, it serves as a wake-up call that the historically open nature of the Internet is not guaranteed. Without certain safeguards or rules of the road to help preserve Internet openness, incentives can easily skew in favor of a highly fractured Internet with tollbooths and hurdles stifling innovation.

Maintaining openness policy and ensuring the Federal Communications Commission, Federal Trade Commission and Department of Justice have all the authority they need to protect innovation on the Internet is a central responsibility of the Congress. We look forward to working with you and your colleagues to realize the potential of an open Internet that maximizes choices for consumers.

Subcommittee on Communications and Technology
House Committee on Energy and Commerce
"The Future of Video" – June 27, 2012
Responses of Michael K. Powell, National Cable & Telecommunications Association
To Additional Questions for the Record

<u>The Honorable Greg Walden</u>

1. **DirecTV, the second largest pay-TV provider, is allowed to have a nationwide exclusive deal for the NFL Sunday Ticket but some cable operators are restricted from having their own exclusive deals. Does this make sense? Can't exclusive arrangements promote competition by enabling a pay-TV provider to differentiate itself and attract subscribers? And doesn't that force other pay-TV providers to differentiate themselves or lower rates in response to retain customers?**

   It makes no sense to prohibit cable operators from entering into exclusive programming contracts while allowing their DBS competitors to use such exclusivity as a means of differentiating their product and attracting customers. The existing restriction, which prohibits program networks in which a cable operator has an ownership interest from entering into an exclusive contract with any cable operator – a remnant of the 1992 Cable Act – was aimed at a perceived threat from marketplace circumstances that no longer exist. In 1992, cable operators faced little competition from other multichannel video programming distributors ("MVPDs"). DBS was about to be launched, and Congress was concerned that cable operators – who, at the time, owned a significant percentage of the most popular cable networks being carried by cable systems – would, by refusing to make a critical mass of programming available to DBS, quash any prospect of competition before it could ever take hold.

   Twenty years later, competition in the MVPD marketplace is flourishing and is here to stay. The two national DBS services – DIRECTV and DISH – are the second and third largest MVPDs in terms of customers nationwide, and competition from DBS and telephone company MVPDs like Verizon and AT&T has eroded cable's share of MVPD customers to less than 58%. Moreover, the percentage of cable program networks in which cable operators have an ownership interest has sharply declined in the last two decades – from approximately 53% to only 14%. In this environment, there is no longer any reasonable prospect that cable operators could use exclusivity to eliminate or cripple competition among video distributors. To the contrary, it is disparate treatment of DBS and cable – allowing one but not the other to use exclusivity to attract customers – that threatens to unfairly distort and hamper such competition. Competition and consumers would benefit from a level playing field based on today's reality, not that of twenty years ago.

2. **Doesn't the current regulatory regime discourage diversity of content? Why would a distributor risk investing in new content if it is entitled under law to the most popular content of the day? And why would someone invest in new content if all the shelf space is taken up because distributors availed themselves of that right or**

because other programmers used regulations to muscle their way onto the platforms?

There's little doubt that the regulatory environment impacts the willingness of entities to create new and diverse content. The two factors that led to the adoption of the program access and program carriage rules twenty years ago no longer exist – today there is no cable television monopoly and vertical integration has dropped from 53% in 1992 to less than 14%. Competition among MVPDs is flourishing as noted above, with strong, established competitors in the marketplace. All of those competitors are attempting to gain a competitive advantage through product differentiation, including the development and acquisition of unique and attractive programming. But unlike its other MVPD competitors, when a cable operator considers investing in new programming it must weigh the fact that it will bear the sole risk of an unsuccessful venture while being forced to share the successful ones with its competitors. The program carriage rules also promote program "sameness" by giving non-affiliated programmers the right to demand carriage if their programming is similarly situated to programming affiliated with the MVPD. In a competitive market, cable operators should not be hamstrung by outdated regulations that ultimately harm their ability to select and package programming that meets the demands and interests of their subscribers.

3. **Ms. Sohn's testimony suggests that viewers today lack choice of provider and choice of content. Do you agree? Don't viewers have more sources of distribution and more sources of programming than ever before, not just from traditional players, but from the Internet? Isn't the problem not a lack of choice, but that the business models are still being ironed out amidst the constructive and creative chaos of it all?**

I disagree that today viewers lack choices in content or among providers. Today's video experience has never been better. Much has changed since the days of three broadcast networks. There is more diverse and higher quality content available from more sources and distributors than ever before. Today there are over 900 channels ranging from those offering scripted dramas, educational content, kids programming, sports, cooking shows to news and public affairs shows. Plus, there is an abundance of non-linear video programming available on the Internet.

The number of sources consumers may turn to has also grown exponentially as different providers compete. A consumer may subscribe to cable, DIRECTV or DISH, or, in many markets, choose service from a telephone company as AT&T U-verse and Verizon FiOS have become popular new sources of video. As noted in response to your first question, the two national DBS services – DIRECTV and DISH – are the second and third largest MVPDs in terms of customers nationwide, and competition from DBS and telephone companies has eroded cable's share of the MVPD customers to less than 58%.

MVPD competition is flourishing, but today the video market is comprised of much more than the MVPD market. The largest subscription video provider in the country is Netflix – not a cable operator, DBS provider, or telephone company. A consumer can buy DVDs at Best Buy or rent them from one of the 30,000 plus Redbox kiosks. Finally, companies that stream content on the Internet are proliferating: Netflix, Vudu, Hulu, Amazon, iTunes, CinemaNow, Network websites, HBOGo, and user-generated or special interest sites like YouTube, Vimeo, and TED.com are a few. Many more offerings are anticipated from the likes of Google, Apple, Intel, and Sony. Web video is not limited to the PC screen. Computers can connect to big screen televisions, and box companies like Roku, Tivo, and Boxee can deliver web video to the TV screen. There are web-enabled TVs, game consoles, smartphones and iPads – all giving consumers more choices on how and where they watch video.

Lack of choice is not the problem, but admittedly, we are in a chaotic period of experimentation as consumers sample different content and experiment with how they view that content, and as content owners and distributors perfect business models based on consumer choices.

4. Ms. Sohn's testimony describes "authentication" as anticompetitive. Would you care to respond?

It is exactly the opposite. Without "authentication" and the TV Everywhere concept, consumers would have access to *less* online content. TV Everywhere is just one of several concepts, based on different technologies and business models, being developed for the online video marketplace. It provides a new service *at no extra charge through authentication* to consumers who subscribe to a multichannel video programming service – whether provided by cable, satellite or telephone companies – giving consumers the ability to watch TV programs on PCs or laptops, and potentially other Internet-connected devices. It could significantly increase the amount of high-value video content available online – something the FCC has said would help drive broadband adoption. Indeed, without authentication, it's quite possible that at least some of this content would not be made available online at all.

The TV Everywhere concept involves a multitude of *competing* program networks, most of which distribute their content on *competing* cable, satellite, telephone and online platforms. Distributors do not have the ability to unilaterally decide how content is distributed. *Content owners*, through individual business arrangements with a growing array of distributors, have the freedom to decide how to distribute their content. These programmers invest tens of billions of dollars a year to produce high quality content; they have the right to experiment with different business models and determine how to recoup that investment in terms of distributing their content on different platforms.

As an individual content owner determines how to offer its product in a manner that brings value to the consumer in an economically sound manner, some choose to distribute video online without requiring a cable subscription. Others believe the most economical approach is to expand the value of online distribution to their existing MVPD subscribers. For programmers choosing the latter approach, cable operators have partnered with the programmers in deploying TV Everywhere type-models. No single content owner or distributor is controlling this process or could do so.

The fact that market participants are experimenting with models in addition to fee or advertiser-supported models is not a sign of anti-competitive conduct. It is a sign of a dynamic and rapidly-changing market in which no one knows the ultimate outcome. Some may prefer one video distribution model over another. But that is for the marketplace – and content owners exercising their rights to distribute their content in the manner they choose – to sort out. A model that would give consumers the option to get more value – by access to online content – as part of the TV subscription they already pay for is something that consumers should have the right to embrace or reject.

Nothing about TV Everywhere or other similar cable industry initiatives limits the ability of cable Internet customers to go to the Internet directly for video programming. To the contrary, cable operators will continue to invest in and develop innovative technologies that enhance the capability of the cable broadband network to meet subscribers' varied demands for access to video over the Internet.

There are nearly countless sources of online video that don't require MVPD subscribership. New means of watching video – from subscription services to iTunes' *a la carte* approach – emerge constantly.

5. **Ms. Sohn's testimony suggests that online video providers should be allowed to voluntarily elect to be treated as an MVPD. Why would this be voluntary if cable and satellite operators are not given such an option, even though they too get both benefits and responsibilities from such treatment?**

MVPD is a statutory definition. An entity either falls within the definition or it doesn't. Entities that don't qualify as MVPDs do not have the option to "voluntarily" elect that treatment. But as with all regulatory questions, there should be regulatory parity – a new provider should not be entitled to enjoy the benefits without the responsibilities.

6. **The broadcasters seem to be arguing that they should have absolute freedom to negotiate the terms of retransmission consent deals as a pure market transaction. Under that theory, shouldn't pay-TV providers also be relieved of regulatory obligations like the must-carry rules, the basic tier requirement, and the buy-through requirement and allowed to negotiate pure market-based transactions?**

Broadcasters should be paid the fair market value for their content. However, the current market is not an environment where all terms are freely negotiated. Government mandates dictate many critical conditions for carriage that only one class of programmer enjoys – giving broadcasters advantages not available to other classes of programmers. Any discussion of a pure market transaction must include the future of decades-old rules like must carry, the basic tier placement guarantee, the buy-through, the non-duplication rights, and other rules that favor broadcast content.

7. **Do you think it is contradictory for pay-TV providers to argue for government intervention in retransmission consent negotiations with broadcasters but oppose it**

when networks like the Tennis Channel, the NFL Network, the Big Ten Network, Wealth TV seek to force their way onto their platforms on more favorable terms?

Not at all. Retransmission consent is a government creation and the government is already heavily involved in the relationship between broadcasters and pay-TV providers. By contrast, program carriage is an anomaly in the otherwise market-based negotiations between cable programmers and pay-TV providers.

The Honorable Anna Eshoo

1. **Recently, we've seen MVPDs embrace new technologies like video game consoles, tablets and smartphones as a means of providing their customers with access to live, or on-demand programming. What are the roadblocks for widespread adoption of these new video distribution technologies?**

   As you have pointed out, we are in a time of technological change. Consistent with the introduction of any new technology, there are copyright matters that must be addressed and resolved in order to ensure that content owners are fairly compensated. It is also a time when new business models must be considered taking into account a complex set of first-time issues involving multiple stakeholders. There may also be issues of technological compatibility that must be addressed, so that the content is formatted in a fashion that will display on a given device or platform. Finally, as I noted in my testimony, the "network of networks" that comprise the Internet does not yet offer the throughput and reliability to deliver video programming with the consistency of a plant that is specifically built to deliver cable and satellite television services. While that circumstance will change, it will require investment and innovation. Clearly, however, the growing availability of live and on-demand programming online is clear evidence that these matters can and are being worked out without the need for government involvement.

2. **Last December, the FCC adopted final rules implementing the CALM Act and they will go into effect on December 13, 2012. Which of your members have implemented the ATSC A/85 Recommended Practices, as stated in the FCC's final rules? What steps are they taking to ensure compliance by year's end?**

   NCTA's member companies are in the process of implementing the FCC's CALM Act requirements, and we expect our members to be in compliance with the ATSC A/85 Recommended Practice by – if not before -- the December 13, 2012 deadline. Cable operators are ordering and deploying necessary test equipment and are taking steps to ensure that the advertisements they insert locally comply with the Recommended Practice. Cable programmers are implementing the required processes for ensuring compliance for network advertisements they include in their programming.

   NCTA and its member companies are also taking steps to ensure that implementation proceeds smoothly. NCTA has distributed information to its membership about the rules; has held a seminar and webinar to explain the rules; is participating in technical discussions to develop common testing protocols; and continues to proactively work with the companies to ensure compliance with the rules by the December deadline.

The Honorable Henry Waxman

1. **Some popular programming is only available online for existing cable subscribers, which has led some consumers to ask how they get standalone online access to this content (See e.g., http://takemymoneyhbo.com). How would you respond to consumers that want to be able to access popular programming online through services like HBOGo without subscribing to a cable package?**
Content owners, through individual business arrangements with a growing array of distributors, have the freedom to decide how to distribute their content. These programmers invest tens of billions of dollars a year to produce high quality content; they have the right to experiment with different business models and determine how to recoup that investment in terms of distributing their content on different platforms.

As an individual content owner determines how to offer its product in a manner that brings value to the consumer in an economically sound manner, some choose to distribute video online without requiring a cable subscription. Others believe the most economical approach is to expand the value of online distribution to their existing MVPD subscribers.

For programmers choosing the latter approach, cable operators have partnered with the programmers in deploying TV Everywhere type-models. The TV Everywhere concept involves a multitude of *competing* program networks, most of which distribute their content on *competing* cable, satellite, telephone and online platforms. Distributors do not have the ability to unilaterally decide how content is distributed. No single content owner or distributor is controlling this process or could do so.

Without "authentication" and the TV Everywhere concept, consumers would have access to *less* online content. TV Everywhere is just one of several concepts, based on different technologies and business models, being developed for the online video marketplace. It provides a new service *at no extra charge through authentication* to consumers who subscribe to a multichannel video programming service – whether provided by cable, satellite or telephone companies – giving consumers the ability to watch TV programs on PCs or laptops, and potentially other Internet-connected devices. It could significantly increase the amount of high-value video content available online – something the FCC has said would help drive broadband adoption. Indeed, without authentication, it's quite possible that at least some of this content would not be made available online at all.

Nothing about TV Everywhere or other similar cable industry initiatives limits the ability of cable Internet customers to go to the Internet directly for video programming. To the contrary, cable operators will continue to invest in and develop innovative technologies that enhance the capability of the cable broadband network to meet subscribers' varied demands for access to video over the Internet.

There are nearly countless sources of online video that don't require MVPD subscribership. New means of watching video – from subscription services to iTunes' *a la carte* approach – emerge constantly.

The fact that market participants are experimenting with models in addition to fee or advertiser-supported models is not a sign of anti-competitive conduct. It is a sign of a dynamic and rapidly-changing market in which no one knows the ultimate outcome. Some may prefer one video distribution model over another. But that is for the marketplace – and content owners exercising their rights to distribute their content in the manner they choose – to sort out. A model that would give consumers the option to get more value – by access to online content – as part of the TV subscription they already pay for is something that consumers should have the right to embrace or reject.

2. **Some of your member companies are experimenting with usage-based billing or data caps. Several witnesses at the hearing expressed concern about the effect these practices could have on online video services if used in a discriminatory manner.**

   a. **Please explain the rationale behind usage-based billing practices.**

The cable industry continues to explore more efficient and consumer-friendly business models. On the video side, some operators are experimenting with smaller, more targeted bundles; and on the on the broadband side, operators are exploring usage-based business models. The development of tiered pricing models simply reflects industry's efforts to price service fairly for consumers as demand rises, a concept widely endorsed by the FCC, the FTC Chairman and even consumer groups. Paying more for using more is a fair and common form of pricing in our economy. A consumer who runs his air conditioning around-the-clock receives a higher electric bill than a neighbor who opens her windows instead. What applies to utilities, food, gasoline, and just about every other product or service we consume, can be applied to broadband as well. According to a recent Sandvine study, one percent of broadband users account for about 42% of upstream traffic and 15% of downstream traffic. Under an all-you-can-eat model, this 1% pays no more for their massive bandwidth consumption than the remaining 99%. In comparison, the lightest 60% of users account for only 10% of total traffic.

Bandwidth is not free nor is it unlimited. Like all resources, bandwidth on local access networks is finite. Cable operators and other ISPs continually invest in new capacity to accommodate skyrocketing consumer demand. Since 1992, the cable industry has invested nearly $200 billion in its networks and other infrastructure and increased speeds 900 percent. But as more bandwidth hungry applications eat up capacity, ISPs need to promote more efficient use of the network in a manner that is effective and fair to all subscribers.

   b. **Should users be subject to data caps if they are consuming bandwidth at off-peak times when others aren't making great demands on the network?**

Cable broadband operators are experimenting with broadband pricing models ranging from flat rates to tiers and everything in-between. Data caps without recourse are not a standard industry practice. Tiered pricing is the more common way industry is seeking to match demand and price. When used, data caps, like tiered pricing, are simply another way of ensuring that pricing reflects overall usage. Higher level tiers of service have higher caps. As noted above, matching price with usage is a concept widely endorsed by the FCC, the FTC Chairman and even consumer groups. Obtaining a level of service commensurate with what you pay is a fair and common form of pricing in our economy.

<u>The Honorable Doris Matsui</u>

1. **The transition from linear video programming to a world of anywhere anytime any screen video seems to be the future. Soon nearly half of all TVs sold will be smart TVs with an Internet connection and accessing a variety of video applications. Like audio, video consumption between PCs, mobile devices and TVs is also converging. With so many different business models and technologies coming to the Internet, how can we ensure, between broadband providers and companies, like Netflix, that there is meaningful competition, continued innovation and consumer choice?**

   The cable industry believes that the future is bright, but it requires a business and regulatory framework that preserves and strengthens incentives to invest and innovate and one that builds on existing video competition.

   The last twenty years have shown that cable operators and programmers are willing to invest aggressively to bring new and innovative services, features and capabilities to consumers. But legacy rules rooted in outdated assumptions concerning the state of competition will only frustrate the ability to obtain capital for new investments – investments that are deterred by policies that turn broadband networks into commodities. It is important that policy makers not revive the almost non-existent pace of innovation that residential telephone customers experienced from 1940 to 1990. That means doing away with rules predicated on marketplace conditions that no longer exist.

   The past twenty years has been a time of remarkable change.

   The number of video sources consumers may turn to has grown exponentially as different providers compete. A consumer may subscribe to cable, DIRECTV or DISH, or, in many markets, choose service from a telephone company as AT&T U-verse and Verizon FiOS have become popular new sources of video. The two national DBS services – DIRECTV and DISH – are the second and third largest MVPDs in terms of customers nationwide, and competition from DBS and telephone companies has eroded cable's share of the MVPD customers to less than 58% in comparison to cable's 98% share in 1992.

   MVPD competition is flourishing, but today the video market is comprised of much more than the MVPD market. In fact, the largest subscription video provider in the country is Netflix – not a cable operator, DBS provider, or telephone company. A consumer can buy DVDs at Best Buy or rent them from one of the 30,000 plus Redbox kiosks. Finally, companies that stream content on the Internet are proliferating: Netflix, Vudu, Hulu, Amazon, iTunes, CinemaNow, Network websites, HBOGo, and user-generated or special interest sites like YouTube, Vimeo, and TED.com are a few. Many more offerings are anticipated from the likes of Google, Apple, Intel, and Sony. Web video is not limited to the PC screen. Computers can connect to big screen televisions, and box companies like Roku, Tivo, and Boxee can deliver web video to the TV screen. There are web-enabled TVs, game consoles, smartphones and iPads – all giving consumers more choices on how and where they watch video.

Twenty years ago vertical integration between cable operators and programmers was widespread. In 1992, 53% of cable networks were owned by cable operators in comparison to fewer than 14% today. More than 900 channels are available today compared to 100 in 1992. Broadcast television over-the-air viewing has dropped from 41% to 14% today.

Despite all of these marketplace changes, old rules based on a very different video marketplace persist. To ensure continued innovation, investment and competition, it is time to revisit the 1992 Cable Act.

2. **Much of the testimony we heard during the hearing focused on the incredible new choices consumers have for accessing video content online. But we know that one third of Americans have not adopted broadband and that these numbers are particularly high among lower-income Americans, seniors, and people with disabilities, among others.**

   Mr. Powell, what role does online video have in driving broadband adoption in this country?

   Online video may well promote broadband adoption by making broadband more relevant to some non-adopters. An FCC survey cited in the National Broadband Plan identified three major barriers that keep non-adopters from getting broadband: cost, digital literacy, and relevance. In 2009, when the survey was conducted, some 19% of non-adopters said they didn't believe digital content delivered over broadband is compelling enough to justify getting broadband service. Many didn't view broadband as a means to access content they find important or necessary for activities they want to pursue. Others seemed satisfied with offline alternatives. These non-adopters say, for instance, the Internet is a "waste of time." But as online video increases and increasingly caters to diverse interests, it is likely that some non-adopters will explore broadband.

Written Responses of David Barrett
"The Future of Video" Hearing
Subcommittee on Communications and Technology
June 27, 2012

Chairman Walden:

1. When a party seeks government intervention in a retransmission consent negotiation, aren't they just trying to get a leg up in the negotiation? Don't both parties have something valuable to bring to the table, either content or distribution? And don't both parties have something to lose: viewers? Isn't this why virtually all retransmission consent deals get done?

Retransmission consent negotiations benefit both broadcasters and pay TV providers—and, most importantly, American viewers—by expanding the quality, quantity and diversity of available programming. Broadcasters have strong incentives to reach retransmission consent deals because their success depends upon maximizing viewership and thus advertising revenues. With large numbers of viewers subscribing to pay TV services, it is critical for broadcasters, such as Hearst Television, Inc., to secure distribution of its stations' signals via cable, satellite and telecommunications carriers offering video. Similarly, popular local broadcast stations form the backbone of every pay TV subscription package, and pay TV providers recognize the importance of making local stations available in order to attract and retain subscribers. Thus, market forces create natural incentives for the negotiating parties to find common ground and reach agreement in a timely fashion.

As you correctly point out, the current, market-based retransmission consent system keeps both broadcasters and pay TV providers focused on reaching an agreement. Changes to the current system advocated by some pay TV providers, such as government-imposed mandatory arbitration or mandatory interim carriage in the event of a carriage dispute, would place the government's thumb squarely on the scales in favor of pay TV companies, and give them undue and unfair advantages at the bargaining table. Government intervention of this kind in retransmission negotiations is unwarranted because, as you recognize, virtually all retransmission deals are negotiated without disruption. A 2011 study confirmed that, since January 2006, the very few retransmission consent-related service interruptions have affected, on average, only about one one-hundredth of one percent (0.01%) of annual total television viewing hours. Even in those cases, the signal of the local station continues to be available free, over the air for the affected pay TV subscriber.

It would be difficult to envision a less compelling case for government intervention in these market-based negotiations.

2. If parties could invoke government intervention whenever they don't like the terms of the deal, wouldn't more deals ironically end up in a stalemate rather than fewer?

Yes. Based on my experience with the retransmission consent process, that is exactly what would result. The retransmission consent system is successful because, as noted above, both parties have much to gain from successfully and timely reaching agreement, and much to lose if an agreement is not reached. If either party believed government intervention would be advantageous, it would create a disincentive for that party to reach a deal and an incentive to rely on the government to enhance its negotiating position. Should the various interventionist proposals advocated by pay TV providers be adopted, the FCC (and eventually the courts) would be saddled with literally thousands of adjudicatory cases, resulting in wasteful expenditures of scarce public funds for no legitimate public interest purpose.

Moreover, if the ability of local broadcast stations to negotiate retransmission consent arrangements with MVPDs that resell their signals is impaired (and, in turn, the ability of those stations to secure the retrans revenue necessary to purchase high-quality programming is impaired), then program rights holders will simply withdraw their best programming from broadcast stations and place it on less regulated and less encumbered video distribution platforms where they could more effectively monetize their investment in programming. In that event, viewers—especially those who rely exclusively on the over-the-air service—would be harmed.

The mere suggestion of change to the retransmission consent rules has given pay TV providers incentives to engage in tactics tending to delay or derail negotiations to create a misperception among policymakers that the current retransmission consent process is broken, when it is not.

3. You seem to be suggesting that broadcasters should have absolute freedom to negotiate the terms of retransmission consent deals as a pure market transaction. Under that theory, shouldn't pay TV providers also be relieved of regulatory obligations like the must-carry rules, the basic-tier requirement, and the buy-through requirement and allowed to negotiate pure market-based transactions?

The current system of retransmission consent already largely allows both broadcasters and pay TV providers to negotiate deals as a "pure market transaction." Neither broadcasters nor pay TV providers have "absolute freedom" in negotiating these agreements. Both pay TV providers and broadcasters are required by statute and FCC rules to negotiate retransmission consent in good faith, and any aggrieved party can file a complaint with the FCC alleging that another party violated this good faith requirement. Broadcasters take their good faith obligations seriously. Notably, the FCC has *never* found that a broadcaster failed to negotiate in good faith, although it has found that a cable operator violated the good faith negotiation standard, and that a satellite TV provider was abusing the good faith complaint process.

The fact that pay TV providers are also subject to certain other consumer-oriented obligations is no more relevant to the terms and conditions of a retransmission consent negotiation than are broadcasters' regulatory requirements to comply with children's programming requirements, equal employment opportunity requirements, political broadcasting rules, decency requirements and other public interest obligations. In addressing the specifics of your question, it is important to recognize at the outset that broadcasters are required to elect *either* must carry *or* retransmission consent. Once an election of retransmission consent is made by a station, that broadcaster must successfully negotiate with each pay TV provider to secure carriage for its signal on the pay TV provider's platform. At that point, the pay TV provider has no must carry obligation or any other carriage obligation with regard to that station. There is no option to revert back to an election of must carry if the broadcaster cannot reach a retransmission consent agreement with the pay TV provider. Thus, the fact that other broadcasters may elect must carry has no bearing at all on the negotiations between pay TV providers and stations that elect retransmission consent.

As your question also notes, some – but not all – pay TV providers are required to place certain channels on the basic tier they offer to consumers. This requirement does not materially alter the retransmission consent process between broadcasters and pay TV providers. Retransmission consent negotiations typically involve multiple issues, including, but not limited to: (1) carriage of the station's primary channel and various multicast channels, (2) channel position and service tier of carriage, (3) network and syndicated program exclusivity, (4) carriage of other commonly owned stations, (5) carriage by other commonly owned cable or satellite systems, (6) after-acquired station and cable system provisions, (7) mutual and/or reciprocal advertising and promotion arrangements, (8) carriage of local news and/or weather services, (9) confidentiality, (10) remedies for breach, (11) geographic scope of carriage rights and commitments, (12) quality of signal carriage, (13) downconversion of digital for analog subscribers, (14) channel guide placement, (15) emergency broadcast, video description, closed captioning, and digital copy protection requirements, (16) copyright issues, (17) indemnification of the parties, (18) assignment provisions, and (19) of course, financial consideration, if any.

It is difficult to see how this wide range of retransmission consent negotiation issues between a pay TV company and a local station could be affected by a basic tier rule—especially one that does not apply to many pay TV providers. There is no basic tier rule for satellite providers of video service, and cable operators that have been found to be subject to "effective competition" are not subject to this requirement. The pay TV industry cannot fairly or reasonably argue that a requirement for some cable operators to offer a basic tier to consumers somehow negates the multi-faceted market-based nature of the retransmission consent process.

Finally, the tier buy-through provision of the Cable Television Consumer Protection and Competition Act of 1992 serves to protect consumers. It does not impact the broadcaster-pay TV relationship or retrans negotiations. This rule prevents cable operators from requiring subscribers to purchase tiers of programming other than the basic service tier in order to obtain access to video programming offered on a per-channel or per-program basis. The provision also prohibits a cable operator from discriminating between consumers who subscribe to only the basic tier and other subscribers with regard to the rates charged for programming on a per-channel or per-event basis. As with the basic tier rule, the tier buy-through prohibition does not apply to the many and increasing numbers of cable operators subject to "effective competition" as defined in federal law, and it has never applied to satellite providers. This consumer protection provision simply does not concern broadcast signal carriage or otherwise have the potential to impact market-based retransmission consent negotiations.

Ranking Member Eshoo

1. Last December, the FCC adopted final rules implementing the CALM Act and they will go into effect on December 13, 2012. Have you implemented the ATSC A/85 Recommended Practices, as stated in the FCC's final rules? If not, what steps are you taking to ensure compliance by year's end?

Hearst Television Engineering has held numerous internal conference calls and operational tutorials in preparation for the CALM Act. One such example, at the corporate engineering conference held last March with all engineering managers in attendance, was a two-hour session that specifically addressed understanding the implications of the CALM Act. This presentation was made by our vendor, Ken Tankel of Linear Acoustics, who has an industry leading role in Broadcast Audio Processing.

The ATSC document, "A/85 – Techniques for Establishing and Maintaining Audio Loudness for Digital Television – July 2011," has been sent to all Hearst Television stations. Our engineering team has been asked to review, understand and implement these practices.

Furthermore, Hearst Television has made substantial investment in Audio Processing equipment for its outbound distribution channels at all stations and will be making further investments in 2013 to improve our stations' capabilities to monitor audio loudness as recommended by the ATSC.

Our group has also assembled monthly conference calls to foster continued dialogue on this topic. The goal is to improve and socialize our company-wide "Best Practices." These will continue monthly throughout 2013.

There is however one aspect of concern: proving compliance in response to complaints received. As the deadline for the CALM Act nears, stations have yet to see any FCC rules or, at a minimum, some guidance on points related to compliance.

Hearst Television has taken a responsible course in employing new technology as well as operational practices to implement the full range of ATSC Recommended Practices.

DISH Network L.L.C.
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DISH's Response to the Questions Posed by The Honorable Anna Eshoo

Recently, we've seen MVPDs embrace new technologies like video game consoles, tablets and smartphones as a means of providing their customers with access to live, or on-demand programming. What are the roadblocks to widespread adoption of these new video distribution technologies?

Our focus on expanding our library of streaming content combined with unique innovative products gives DISH one of the most robust offerings in the industry. DISH customers have access to over 20,000 movies and TV shows on their computers (by logging onto dishonline.com) and on the DISH Remote Access app on portable devices. In addition, Sling – based in Silicon Valley -- gives DISH customers the ability to watch their DVR recordings and even live TV on devices with Internet access. Programmers and content owners should applaud such legitimate innovation that empowers the customer with choices over the content they are paying for. If programmers and content owners seek to stifle such innovation through lawsuits and other tactics, it will be a significant roadblock to the widespread adoption of the services you describe in your question.

Last December, the FCC adopted final rules implementing the CALM Act and they will go into effect on December 13, 2012. Have you implemented the ATSC A/85 Recommended Practices, as stated in the FCC's final rules? If not, what steps are you taking to ensure compliance by year's end?

DISH has been working hard to update its systems and hardware to implement the ATSC A/85 Recommended Practice ("A/85 RP"), and believes it will be able to comply with the new rules by the deadline this December. We hope that all programmers will issue public certifications that they comply with the CALM Act, which means DISH will not need to conduct annual 'spot checks' for those channels. In addition, DISH plans to ensure compliance with the A/85 RP for commercials that DISH inserts.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

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August 14, 2012

Mr. Michael P. O'Leary
Senior Executive Vice President, Global Policy and External Affairs
Motion Picture Association of America
1600 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. O'Leary:

Thank you for appearing at the Subcommittee on Communications and Technology hearing entitled "The Future of Video" on June 27, 2012.

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please e-mail your responses, in Word or PDF format, to Charlotte.Savercool@mail.house.gov by the close of business on Tuesday, August 28, 2012.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: The Honorable Anna Eshoo, Ranking Member,
Subcommittee on Communications and Technology

Attachment

The Honorable Greg Walden

1. When a party seeks government intervention in a retransmission consent negotiation, aren't they just trying to get a leg up in the negotiation? Don't both parties have something valuable to bring to the table, either content or distribution? And don't both parties have something to lose: viewers? Isn't this why virtually all retransmission consent deals get done?

Answer: The MPAA does not participate directly in retransmission consent negotiations. We agree, however, that regardless of the specific context for a commercial negotiation over the carriage of content, the government would do best by refraining from intervening, and instead leave the negotiation to the parties. My written testimony underscored a related point: "As the creators of content, we are the entities that are taking financial risk in investing in product with no guarantee it will be profitable." As the party that takes the financial risk, content creators should have the final say in negotiations related to the distribution of their content.

2. If parties could invoke government intervention whenever they don't like the terms of a deal, wouldn't more deals ironically wind up in a stalemate rather than fewer?

Answer: MPAA members have long supported the view that copyright licenses should be subject to free market negotiations. Copyright owners are not all the same, so they should be free to adopt the licensing approach (or combination of approaches) that best suits their unique business interests.

3. Ms. Sohn's testimony suggests that viewers today lack choice of provider and choice of content. Do you agree? Don't viewers have more sources of distribution and more sources of programming than ever before, not just from traditional players, but from the Internet? Isn't the problem not a lack of choice, but that the business models are still being ironed out amidst the constructive and creative chaos of it all?

Answer: Chairman Walden, I believe that Ms. Sohn got it right in her testimony when she said that "there is widespread agreement that we are currently living in the golden age of television. Programs like Mad Men, Breaking Bad, Game of Thrones, Modern Family, The Daily Show and The Colbert Report have become part of our cultural landscape, and even in this era of 500 channels, still inspire discussions around the water cooler. There are numerous ways to watch TV - be it on a flat screen LED television, on a tablet or on a smartphone. And the Internet and DVRs have the ability to allow a viewer to watch what they want to watch when they want to watch it." And, as mentioned in my written statement, new services like Ultraviolet serve as a cloud-based clearinghouse where UltraViolet retailers, streaming services, and UltraViolet-capable devices and apps can confirm your rights to watch movies or TV shows and provide access via download or streaming.

When a customer buys an UltraViolet-enabled movie or TV show, whether as a stand-alone online digital purchase, or a Blu-ray or DVD that comes with UltraViolet, a digital "proof of purchase" representing the consumers' digital rights is added to their UltraViolet Collection.

This enables UltraViolet Services to identify to which content a consumer has rights; to stream to most any Internet-connected device, including PCs, tablets, smartphones, Blu-ray players, and cable set-top boxes; and to download copies for permanent retention to view when they do not have internet access. Additionally, retailers may allow consumers to make a physical media copy along with the digital purchase. An UntraViolet purchase always allows consumers to download the title to their UltraViolet-enabled portable device for offline viewing and, if the consumer choses, to their home server for permanent retention. When a customer adds an UltraViolet title to their collection, the record of this title does not expire and will remain in the collection unless an account member deletes it or terminates the account. Even if the retailer from whom the customer originally purchased the content goes out of business, the customer's UltraViolet rights would endure and they would be able to continue to access their content from other sources.

The MPAA's member companies are committed to providing audiences with an abundance of delivery options to experience the content they produce. At the same time, our companies invest significant resources and take significant risk to produce that content, so the distribution models they pursue must also be economically viable.

It is always easy for some to criticize perceived shortcomings of the current marketplace, but the fact is that the marketplace has evolved - and will continue to evolve - to provide consumers more choice as to the content available to them, as well as the way they are able to view that content.

4. Does it make sense to revisit network non-duplication and syndicated exclusivity without also revisiting the compulsory copyrights?

Answer: Although the MPAA has not taken a position on network non-duplication or syndicated exclusivity, we have long supported the view that it is time to phase out compulsory copyright licenses in a non-disruptive manner. These two FCC rules are premised on the existence of privately negotiated contracts. In the absence of these rules, the compulsory copyright licenses would defeat the exclusivity provisions in such privately negotiated agreements. In that sense, these provisions are directly related to the compulsory licenses. Without taking a specific position on the need for the retention of these rules, I would note again that as the parties that take the financial risk, creators of content should have the final say in granting distribution rights, including whether those rights include exclusivity.

The Honorable Mike Doyle

1. Ultraviolet permits consumers to purchase and view video entirely from the web without having to buy a physical copy, altering the manner by which ownership of motion picture content is exercised. In answering my question during your testimony at the House Communications and Technology Subcommittee hearing on Future of Video on June 27, 2012, you mentioned that Ultraviolet provides a "perpetual agreement" between the consumer and producer of that content to guarantee that users will always be able to access the digital material they purchase. Please provide a detailed description about this

guarantee, including how consumers will continue to be able to access that content should the Ultraviolet service be discontinued or otherwise altered at some time in the future.

As I indicated at the hearing, I believe Ultraviolet has the potential to revolutionize the way consumers access copyrighted content in a very positive way. However, when users pay a certain price for a product with the belief that they will be able to access that product "forever," they should have the comfort of knowing that they do in fact own that product for an unlimited amount of time, no matter what changes may occur to the business from which they purchased it. Therefore, I would like to receive more specific assurance that consumers will have guaranteed access to this content as they do when they purchase physical copies of such material, even when they purchased that content for streaming only. What specific legal rights does Ultraviolet provide to consumers in this regard?

Answer: To be clear, UltraViolet is not itself a content delivery service, but rather a new industry standard digital distribution ecosystem developed by the Digital Entertainment Content Ecosystem (DECE) that guarantees consumers certain benefits when they purchase UltraViolet-branded content. It serves as a cloud-based clearinghouse where UltraViolet retailers, streaming services, and UltraViolet-capable devices and apps can confirm your rights to watch movies or TV shows and provide access via download or streaming.

When a customer buys an UltraViolet-enabled movie or TV show, whether as a stand-alone, online digital purchase, or a Blu-ray or DVD that comes with UltraViolet, a digital "proof of purchase" representing the consumers' digital rights is added to their UltraViolet Collection. This enables UltraViolet Services to identify to which content a consumer has rights; to stream to most any Internet-connected device, including PCs, tablets, smartphones, Blu-ray players, and cable set-top boxes; and to download copies for permanent retention to view when they do not have internet access. Additionally, retailers may allow consumers to make a physical media copy along with the digital purchase. An UntraViolet purchase always allows consumers to download the title to their UltraViolet-enabled portable device for offline viewing and, if the consumer choses, to their home server for permanent retention. When a customer adds an UltraViolet title to their collection, the record of this title does not expire and will remain in the collection unless an account member deletes it or terminates the account. Even if the retailer from whom the customer originally purchased the content goes out of business, the customer's UltraViolet rights would endure and they would be able to continue to access their content from other sources.

2. Please provide a specific list of devices that are currently compatible with the download function of Ultraviolet service; a list that are planned to become compatible with that function in the future; and how such decisions on Ultraviolet device compatibility are made. In other words, why does Ultraviolet permit digital downloads only to certain "approved" devices, and why are those devices chosen in particular?

Answer: Today, Consumers may not need any new or additional equipment to watch UltraViolet movies. UltraViolet Services such as Walmart's VUDU or Flixster allow consumers to stream or download UltraViolet movies on apps that are available on a wide array of devices including PCs, Macs, PS3, Xbox, iOS and Android. DECE does not determine which devices support UltraViolet. It is up to CE manufactures and software developers to make UltraViolet compliant players.

In the near future UltraViolet will launch a new interoperable digital format that can be downloaded by Customers and copied across compatible UlraViolet devices without having to download another copy. Similar to the Blu-ray or DVD formats, any device manufacturer can build an UltraViolet device or app. This will allow devices to be marketed as optimized to work with UltraViolet right out of the box, and for the first time allow interoperability. Customers may be interested in making such a feature one of their "checklist" items when buying new devices.