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STATE OF VIDEO

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

MAY 14, 2013

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ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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STATE OF VIDEO

TUESDAY, MAY 14, 2013

U.S. SENATE,
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:32 a.m. in room SR–253, Russell Senate Office Building, Hon. Mark Pryor, presiding.

OPENING STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS

Senator PRYOR. I would like to call our hearing to order, and I want to say good morning and want to thank everyone for being here this morning.

And we have two panels today. I want to thank all of our panelists for being here.

And this morning, this Communications Subcommittee's hearing is going to be on the "State of Video." Again, I want to thank everyone for their participation and their input today.

This is the second in a series of hearings on the state of communications in the United States. It is my hope that it will help subcommittee members and the public have a better understanding of the current policy issues that people in the communications sector face.

Today we are focused on issues of importance to consumers on video services. As we all know, the video industry has changed dramatically in the last decade, particularly in light of two things: Internet video and wireless video.

The increased adoption of broadband has changed the manner in which Americans watch video programming, bringing both opportunities and challenges to consumers and companies in the video marketplace. Wireless video continues to put pressure on the use and availability of spectrum.

Our witnesses today will tell us how consumers are navigating and taking advantage of this ever-changing environment. We will also hear from panelists about their concerns and views on a number of policy issues, including some that have been in place since the Cable Act was enacted over 20 years ago and others even longer than that.

Many of these issues were discussed last summer before a full committee hearing, and I think it is helpful that, with our new and returning members, we hear from witnesses on their views on this

matter. Most importantly, we want to hear about our current policies and the dynamic market that is affecting the consumer. Is the consumer receiving the services, channels, and shows that he or she wants, and are these products affordable?

Before we go to our panel discussions, I would like to ask Senator Wicker to say a few words.

STATEMENT OF HON. ROGER F. WICKER,
U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Thank you very much, Chairman Pryor, and thank you for holding this hearing on the state of video. This is the second in our Subcommittee's "state of" communications hearings. This is a good time to examine the truly vibrant, growing, and multifaceted video marketplace.

Today's video marketplace is radically different from the one that existed two decades ago, when the only options for consumers were over-the-air broadcasting and cable television. The advent of the World Wide Web has given consumers a seemingly endless host of avenues to receive video content. There are cable and satellite services, there are Verizon's FIOS and AT&T's U-verse services, as well as so-called over-the-top options, such as Netflix, YouTube, iTunes, and Hulu, which grow in popularity each day.

The unregulated video media marketplace has truly thrived. As a member of this subcommittee, I am eager to learn how policymakers can ensure that the video delivery ecosystem continues on this path of exponential growth, fostering policies that encourage innovation rather than hindering it.

We need to focus not only on the current marketplace but, more importantly, on the future of video. We need to identify not only where the market has been but where it is going.

To that end, I would like to thank our witnesses for testifying today. These industry and consumer representatives are able to bring diverse experience and expertise on the current state of video, and I look forward to hearing from them.

I am particularly interested in hearing their perspectives on the state of video in rural America. Out of 22 members on this Communications Subcommittee, at least 17 represent what would be considered rural states. So viewpoints on the unique challenge of these areas would be appreciated.

I would also like to recognize the tangible presence each of the three industries represented today have in rural America, particularly in my home state of Mississippi.

First, broadcasting. From forecasting storm coverage and issuing tornado and hurricane alerts to helping first responders, broadcasters have been an invaluable resource to Mississippians during times of natural disasters. One example occurred in February, when tornadoes devastated Petal, Mississippi. In March, a major hailstorm caused major damage in Jackson, Mississippi. In each case, local radio and television stations were the lifeline when cable and cell towers were down. I would like to publicly thank them for their service to my constituents.

And, actually, I misspoke, Mr. Chairman. It was not just Petal, Mississippi. It was vast portions of Hattiesburg as well as Lamar County, Mississippi, with that devastating tornado.

As with Arkansas and West Virginia, Mississippi has a number of rural, remote areas that make it difficult to reach via traditional infrastructure. There, satellite providers, such as DISH and DIRECTV, have stepped up, providing access to competitive, quality video and broadband resources. The satellite industry serves approximately 450,000 households and businesses in my state. Many of its dishes are prominently visible at football tailgate parties during the autumn in Mississippi.

And, finally, cable has demonstrated a strong commitment to broadband adoption, investing $200 billion since 1996 to build broadband infrastructure across the country. Cable has created partnerships with the Federal Government and private sector to increase broadband delivery to low-income households that need it most. This includes a company called Comcast, which started with one small cable system in Tupelo, Mississippi, in 1963. They wandered off to Pennsylvania. They are celebrating their 50th anniversary this year. And we want you back in Tupelo.

[Laughter.]

Senator WICKER. Again, thank you, Mr. Chairman, for holding this timely hearing. I think the attendance we already have testifies to the importance of it. And I look forward to hearing from all of our witnesses and having a healthy debate on video marketplace issues.

Finally, I would like to welcome my friend, colleague, and a former Chairman of this committee, the warm and cuddly senior Senator——

[Laughter.]

Senator WICKER.—from Arizona, John McCain, who is here to give a statement on legislation he recently introduced regarding the pay-TV market.

So welcome back, Senator McCain.

And thank you, Mr. Chairman.

Senator PRYOR. Thank you.

Before we hear from our industry panel, we would like to extend a very special welcome to Senator McCain. As a former Chairman of the full Commerce Committee and longstanding member of this committee, he has long expressed his interest in these issues.

And we are happy to hear your thoughts on the current state of the video marketplace. Senator McCain?

STATEMENT OF HON. JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA

Senator MCCAIN. Thank you very much, Chairman Pryor and Ranking Member Colonel Wicker. I thank you for your warm words of welcome. And it is great to be back in a Committee that I enjoyed as much or more than any that I was ever privileged to be part of, with a myriad of incredible and fascinating issues that are part of an ever-changing world that we live in.

As you know, I introduced the Television Consumer Freedom Act, and the bill would give consumers the option to purchase—and I emphasize "option"—to purchase television channels on a per-channel basis, which is also known as "à la carte," rather than tiers of programming that are currently offered by satellite and cable companies.

Basically, I support à la carte and I believe most Americans do for the basic reason that consumers shouldn't have to pay for television channels they don't watch and have no interest in watching. The Television Consumer Freedom Act uses existing statute and regulations as incentives to encourage the retail and wholesale distribution of television channels on an à la carte basis.

Opponents will say that Government should stay out of the television industry, but obviously that overlooks the Government's existing presence throughout the market in the form of legal benefits like the compulsory copyright license, indicated exclusivity, and network nonduplication, which is rife with government involvement.

It is time to restore the proper operation of the market by empowering American consumers. It has already garnered the support of the Consumers Union and Free Press.

They recognize that à la carte channel options are the right thing to do and popular with consumers, in large part because, as we all know, of dramatically rising cable prices, which are dramatically exceeding the cost of living.

According to the most recent FCC pricing survey, since 1995 the average monthly cable bill for expanded basic service—that is the most popular tier—has gone up from about $25 a month to $54 a month today. That is a 6.1 percent annual increase, a more than 100 percent total price hike over the past 16 years.

Considering the following story offered by a cable executive on the significance of à la carte. He says, quote, "My next door neighbor is 74, a widow. She says to me, 'Why do I have to get all that sports programming?' She has no idea that in the course of the year, just for ESPN and ESPN2, she is sending a check to Disney for about $70 even though she doesn't watch it. She would be apoplectic if she knew."

Particularly in today's challenging economy, $70 is an amount of money for a lot of Americans. I am a sports fanatic, and I love ESPN. I stay awake many nights watching games back in Arizona with a horrible three hour time change. And while I would never go without ESPN, the fact is that the majority of TV consumers have no interest in sports programming and shouldn't be forced to purchase it.

Many of these Americans are beginning to realize that included in their cable bill is a charge of about $10 a month just to carry sports programming like ESPN, which costs nearly $5 a month, far more expensive than any other cable, and even less popular channels like regional sports networks, which can be almost as expensive.

Also, we address bundling, which is when individual channels are tied together by a television programmer and sold to a pay-TV company in packages. Once again, do consumers actually want bundles? The answer is obviously no.

According to Nielsen statistics, in 1995 the average cable household was sold 41 channels and tuned in to 11. In 2008, the last year that these statistics were compiled, the average cable household was sold 130 channels but tuned in to only 18. These excess channels are obviously driving up cable bills.

Companies like Viacom don't sell channels like MTV and VH1 individually but rather bundle them together, which then leaves pay-TV companies with little choice but to do the same thing to consumers.

This bill says if you bundle your programming on the wholesale level, then you must unbundle, that is, distribute your programming à la carte, too. So the choice remains with the programmer, and the outcome for the consumer is à la carte and a lower cable bill.

In addition to à la carte, it also ensures that the public spectrum resources are used in the most efficient and publicly beneficial ways possible.

Finally, we want to end blackouts for teams that play in publicly financed stadiums. Those stadiums are publicly financed by the taxpayer. And today the practice of the NFL is that if they don't sell out the stadium, then all the people in that area don't get to see the game. I think that is outrageous.

Now, if that stadium is not taxpayer-financed, then that owner can do anything they want to with it. But if the taxpayers pay for it, then, by God, I think that the taxpayers ought to be able to see the game, whether they sell out the stadium or not.

Obviously, I am a sports fan, as you can easily tell.

[Laughter.]

Senator MCCAIN. So I believe the consumers are at a tipping point when it comes to their monthly pay-TV bill. In my view, the à la carte option is a nonregulatory and consumer-friendly way to provide consumers with the freedom to lower their bills and pay only for what they watch.

I hope that this committee will examine this issue. I truly believe that a lot of Americans are fed up with the size of their cable bill. And they ought to be able to do the same thing we are able to do when we walk into a restaurant and not have to buy everything on the menu in a bundle. We can pick out what we want and choose it.

And I thank my colleagues for allowing me to appear, and I look forward, if you choose, to any questions, comments, or insults that you might have for me.

[Laughter.]

Senator MCCAIN. Thank you very much.

Senator PRYOR. Thank you, Senator McCain. And you are certainly welcome to join us and ask questions of the next panel if you would like. Thank you for being here today.

Senator MCCAIN. I am sure they look forward to that.

[Laughter.]

Senator PRYOR. Well, we do. I don't know if they do, but we do. Thank you.

Senator MCCAIN. Thank you.

Senator PRYOR. You are welcome.

And if I could ask the next panel to come up, please, and take your seat at the table. We appreciate that.

As they get situated here, I will just go ahead and introduce them in order to save some time.

First, we have Senator Gordon Smith, President and CEO of the National Association of Broadcasters. Next, we are going to have

former FCC Chairman Michael Powell, President and CEO of the National Cable and Telecommunications Association. Next, we will have R. Stanton Dodge, Executive Vice President and General Counsel of DISH Network. And then we will have John Bergmayer, Senior Staff Attorney for Public Knowledge.

Now, with all of these, we would ask them to give an opening statement. We have their written statements in the record. We would ask that each would, if possible, keep their opening statements to 5 minutes.

First, Senator Smith.

STATEMENT OF HON. GORDON H. SMITH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. SMITH. Good morning, Chairman Pryor, Ranking Member Wicker, members of the Committee. It is always a privilege to be in this room, whether on your side of the dais or mine. It is nice to be back.

As you know, I have the great honor of advocating on behalf of America's local radio and television stations. Stations play a vital role in informing, protecting, and entertaining every local community across this great nation. And that is never more apparent than when a disaster strikes, as Senator Wicker noted, reminding us of broadcasters' important role as first informers.

We have seen this time and again. In Arkansas, in Mississippi, you saw the largest tornado outbreak that took hundreds of lives across the South. Whether an earthquake in Washington, D.C., a hurricane in New York, or a terrorist attack in Boston, I have no doubt that each of you can tell a similar tragic story from your own state.

But I am also confident that each story involves a response by your local broadcast stations. These stations kept residents safe. And when there was no cable, no satellite, no broadband, no cell, no phone service, broadcasters were there to provide a lifeline to their communities. When it was time to rebuild, local stations were there for their neighbors in need, holding fundraisers and food drives to help them get through the hardest of times.

So I ask you, is this not a public good? Isn't this a role that should be supported? Because if broadcasters are not there to serve in this role as first informers, who will?

Even with all the spectrum in the universe, the wireless industry's one-to-one delivery system could never match our unique architecture and our ability to broadcast to masses for large events. It is crucial that broadcasting and broadband work hand-in-hand to offload congested wireless systems and deliver the content consumers want and the emergency information they need.

In this regard, it is also critical that Congress implemented the necessary safeguards in the legislation granting voluntary incentive auction authority. While these auctions will present an enormous challenge to the FCC, to your constituents, and to local broadcasters, we stand ready to roll up our sleeves and conclude this auction in a successful and timely fashion.

Broadcasters not only inform, we entertain. As content producers, we create the most watched shows on TV. In fact, 96 of the

top 100 shows were on broadcast television last year. This content is valuable to viewers, to stations that supply it, and to the companies that retransmit it.

Broadcasters' ability to serve our local communities, to produce the best shows on television, and to deliver that content free to over-the-air viewers is sustained by two revenue streams: one, paid advertising; and the other, fees paid to us by those who rent our signals and sell our content to paying subscribers.

Without this economic foundation, we could not do what we do. This revenue enables stations to meet their primary goal: serving the public interest. And policy decisions that threaten this economic foundation could cripple an industry that provides an indispensable, even irreplaceable, lifeline service to Americans.

I am always surprised when some of our competitors try to describe broadcasters as "yesterday," as part of a bygone era. I have to ask these critics, what is it about free and live and local that you don't like?

Our communities not only like broadcasting, they depend on it. And despite a changing media landscape, broadcast television is as relevant today as ever. When TV stations transitioned from analog to digital transmissions in 2009, it revolutionized free and local TV, providing viewers more choices than ever before.

Most stations offer extra channels called multicast channels that deliver diverse and hyper-local content. It is coverage of local sports and community events, your local weather and traffic matched to your ZIP code, and programs reflecting vast languages and cultures and amplifying the voices of women and minorities in our communities.

Broadcasters continue to innovate and deliver the content viewers want when and where they want it, including interactive TV customized to your needs that we are sending to tablets, cars, and smartphones. The future of TV is mobile and on the go and more vibrant than ever. In the past month alone, we have seen new services rolling out to viewers. Networks are investing in and launching mobile services to provide viewers with live local and national TV on all their devices and even on demand.

We also saw just last month at the NAB show—and I encourage you all to see this when you can—ultra-high-definition broadcasting, which to my eyes was literally 3-D without glasses. The picture is simply astonishing.

Consumers have limitless options for content and countless ways to access programming, and yet they continue to turn to broadcasting more than any other medium. That is an enduring value we provide.

I would ask you that as you consider public policy that impacts the future of this great industry, remember the unique and critical services local stations deliver and consider the consequences of decisions that could impact broadcasters' ability to serve our communities and to serve your constituents.

I thank you very much.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF HON. GORDON H. SMITH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL ASSOCIATION OF BROADCASTERS

Good morning, Chairman Pryor, Ranking Member Wicker and members of the Subcommittee. Thank you for inviting me back to my former committee to testify before you today. Though I cherished my time in the U.S. Senate, it is an honor for me to now advocate on behalf of our country's local radio and television stations as the President and CEO of the National Association of Broadcasters.

In my view, the state of broadcast video services is very bright. In fact, recent data show that the number of viewers accessing television over-the-air has dramatically increased in recent years. Today 54 million American's rely solely on over-the-air television. Nearly 18 percent of households are watching television with an antenna.

These new over-the-air viewers include young people, low-income families and minorities. A GfK Media report from last year 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 consumers to embrace broadcast television.

Some of this resurgence can also be attributed to technological advances in broadcast TV. The television industry is approaching the fourth anniversary of the transition to all-digital distribution. By almost any measure, the transition and broadcasters' embrace of digital technology have been an enormous success. 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." These extra channels contain new and diverse program content, much of which is local in nature or specific to niche audiences. These stations provide all of this within the same 6 MHz of spectrum that previously held just one analog channel. In fact, today there are 660 multicast stations now offering niche, richly diverse and hyper-local programming to viewers. These new, free, digital over-the-air services actually double, and, in some cases, more than triples, the number of channels available.

Indeed, broadcasters' ability to multicast has led to the rise of new national networks, including many that specialize in delivering diverse content to ethnic and niche audiences, such as Bounce TV, Estrella, Live Well and MeTV. I anticipate continued growth as new networks expand their audiences with increasingly diverse and compelling programming. Multicasting also offers the added benefit of lowering barriers to broadcast ownership, offering new opportunities for women and minorities.

With these exciting developments in mind, the continued growth and evolution of our platform relies on access to the valuable commodity of spectrum. We thank this Committee for the necessary safeguards included for television broadcasters in the legislation granting voluntary incentive auction authority. While this auction will present a challenge, not only to the FCC but also to local broadcasters, we stand ready to roll up our sleeves and help in any way possible to conclude the auction in a successful and timely fashion to the benefit of consumers and the public's safety. To that end, NAB urges the Senate Commerce Committee to be vigilant in its oversight of the broadcast incentive auctions. Incentive auctions themselves are unprecedented, and the television spectrum auction will have a direct impact on millions of viewers, very likely exceeding that of the digital TV transition.

Beyond the auctions, we are focused on the future of broadcasting and how it can, and should, continue to 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 will have an extraordinary impact on how viewers consume broadcast television.

Broadcasters are innovating and working to find new and different ways to serve our audiences. From offering live over-the-air content to smartphones, tablets and the next generation of devices, our goal is offering the highest quality programming and local content everywhere the viewer is watching.

The television broadcast industry is aware of some calls from pay-TV companies to dismantle the legal framework for video programming distribution. These companies want Congress to change the laws and regulations that have successfully governed the video marketplace. These laws have a single purpose. They are designed to ensure 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. The system is not broken, which leads me to question the calls to fix what is successfully working in practice every day. I would argue that changing these laws is not in the public's best interest and will do nothing more than pick winners and losers in what is today a very competitive marketplace.

Ironically, calls for "reform" are in the midst of what I'd consider the "Golden Age" of television. Consumers have been the beneficiary of what is the most competitive video landscape we have ever seen. There are platforms and programming options available that did not exist just a few years ago. Viewers are able to access content when and where they want. Congress has helped to successfully unleash competition, and in turn, it has created the most robust, vibrant video landscape in history.

For broadcasters, as video distributors and as content creators, that means we must continue to offer free high-quality, 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. And we are doing just that. As I said above, as a video distribution platform, reliance on over-the-air antenna reception continues to grow. As content creators, an average of 96 of the top 100 television shows *every week* are consistently on broadcast television.

Lastly and most importantly, broadcasters are committed to providing a valuable public service to every community—big and small—across our great nation. This localism is at the heart of what broadcasters provide each day to their listeners and viewers. Localism is keeping communities informed of the news that matters most to them, such as severe weather and emergency alerts, school closings, high school sports, local elections and public affairs. Localism is supporting local charities, civic organizations and community events. Local broadcasters help create a sense of community.

Locally-based broadcast stations are also the means through which local businesses educate and inform the public about their goods and services, and in turn, create jobs and support local economies. They address the needs of their communities, based on a familiarity with and commitment to the cities and towns where they do

business. Television broadcasters do all of this every day. We reinvest in our communities and are there when our viewers need us most. It is a public good that cannot be replaced. I would ask that you, as policymakers, ensure that changes to laws and regulations do not harm this unique and crucial local television broadcasting system.

Thank you for inviting me here today, and I look forward to answering your questions.

Senator PRYOR. Thank you.

Chairman Powell?

STATEMENT OF HON. MICHAEL K. POWELL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Mr. POWELL. Good morning, Mr. Chairman and members of the Subcommittee. My name is Michael Powell, and I am the President and CEO of the National Cable and Telecommunications Association. Thank you for inviting me to testify on the state of video.

The video world is undergoing exceptional transformation. The power of technology and the insatiable consumer appetite for video content are remodeling the video marketplace. It is both exciting and challenging for companies working to deliver value to the American consumer.

Gazing into the future is always hazardous, but a few critical trends paint a picture of what is possible in the emerging video landscape.

Video is flooding into every crevice of American life. From the moment video content could be digitized, the rise of streams of video anywhere and everywhere was inevitable. Video will be as ubiquitous as the Web itself. In fact, today, as of this morning,

nearly 68 percent of all Internet traffic today is video. And as one CEO recently described it, "The Internet has not invaded the TV as much as the TV has invaded the Internet."

And as Internet traffic is able to crawl across the Web and Internet protocols, it can surface on nearly any screen with an Internet connection. This is why we have seen such a great renaissance in video on devices like iPads and smartphones.

Now, diversity has long been a paramount public policy objective in this country. In the world we are stepping into, we will see content of every conceivable stripe—every genre, short clips and long series, programming from every ethnic and racial community, and every political viewpoint with a voice, individuals who make videos in their basements, while large studios produce some of the most compelling stories in visually arresting formats.

But the video story will not just be about more of everything. It will also become a more dimensional experience. TV was the original social network, driving water cooler conversations about a favorite show. But social network platforms will expand TV conversation and make it much more contemporaneous. We see growing second screen TV watching as consumers post and tweet along with their viewing.

Now, my kids have grown up digital and have come to expect highly personalized products and the ability to interact with them. As the video model evolves, expect to see channel lineups that are personalized and recommendation engines that modify content choices to your preferences.

Choice is good. But we sometimes hear from consumers the frustration of finding something to watch. Curating consumer retail offerings in a simple and useful way will still have value to many families navigating their options.

As Reed Hastings of Netflix recently noted, "Instead of trying to have everything, we should strive to have the best in each category."

The cable industry has long been an innovative force in the TV landscape and is working hard to bring much of this vision into reality. The industry has unveiled applications to move content out of the TV set and into portable devices.

Our companies have worked to shrink the aggravation of the set-top box by offering cable service over devices consumers already own or may prefer, like an Xbox or a Roku. New platforms are emerging that will put program guides and other consumer tools and services in the cloud, thereby vastly improving the pace and quality of innovation.

It is critical to note that, as broadband providers, we continue to invest massively in the networks that make so much of this vision possible. We have invested over $200 billion since 1996 and invest $13 million per year continuously. As a result of this investment, we are increasingly pushing Internet speeds over 50 percent a year, just a 1,000 percent increase in the last decade.

Beyond the confines of the home, we are opening up the airwaves to video and Internet access by deploying major wifi networks across our markets. This transition will be chaotic and convulsive at times. As the market remodels itself, it will put a strain on the existing video models that we will all have to work through.

The cable industry is highly focused on meeting several key challenges: First, we need to innovate faster to meet the changing habits of consumers. Second, we need to continue working on greater flexibility for consumers in channel offerings while continuing to deliver the content they love. And, third, we need to manage the costs of our service to ensure that we are attentive to the affordable constraints of consumers.

Senator, the 1992 Act that currently governs the video marketplace for incumbent providers is frayed, increasingly incomplete, and out of sync with the realities of the marketplace. But knowing that something is broken doesn't tell you what should replace it. We are not presently calling for a comprehensive rewrite of the video laws because we believe that in this fast-moving period it is difficult to try and ink an effective, full-scale comprehensive regime.

But this is not to say everything is fine with the existing law, however. Rather, we believe it more prudent to evaluate changes more surgically and deliberately as they arrive.

The state of video is a critical topic worthy of discussion. I thank you for holding this hearing and for your attention. I look forward to your questions.

[The prepared statement of Mr. Powell follows:]

PREPARED STATEMENT OF MICHAEL K. POWELL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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 state 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, one in three 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 speeds have increased at a 50 percent annual rate[1] since being introduced in 1996 and are projected to continue on that arc for the foreseeable future. Cable operators have also extended the reach of their broadband service through extensive Wi-Fi networks, offering more than 150,000 hotspots at present and that figure has been growing rapidly. To put that footprint in perspective, AT&T's Wi-Fi network, which can be found in Starbucks®, McDonald's®, Barnes & Noble, FedEx

[1] *ARRIS Group Inc. 2012 Investor & Analyst Conference,* Aug. 8, 2012, slide 29, available at *http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDc2MTUwfENoaWxkSUQ9NTA4NTk3fFR5cGU9MQ==&t=1.*

offices and other locations, includes 32,000 hotspots.[2] All of that in turn has enabled consumers to receive high-quality video over the Internet and on mobile devices.

Today's Golden Age of Video

From the consumer's standpoint, the state of video has never been stronger. Consumers today enjoy (1) more content, (2) higher quality programs, (3) more variety and diversity in video content, (4) more sources for video content, offering different types of content in a variety of packages and at a variety of price points, (5) a greatly enhanced capacity to select, manipulate and record video content; and (6) the ability to access video on an increasingly wider range of devices.

There are hundreds of video programming networks, presented in brilliant HD quality. This is an enormous expansion from just 20 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 10 of the 11 TV Golden Globes and 57 percent of Primetime Emmys. Acclaimed series such as "Game of Thrones," "Breaking Bad," 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 gamut—from compelling scripted dramas, situation comedies, educational content, and kids programming, to 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 thing for duck hunting, or want programming in your native language or reflective of your community, you will find it on cable.

If you are itching to watch video, the number of sources you can turn to has grown exponentially as different providers compete for your business. You may subscribe to cable television and get 150 or more 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 DIRECTV and Dish. In many markets, you can also choose service from AT&T U-verse, Verizon FiOS, or CenturyLink's nascent Prism TV. And Google Fiber is expanding to more cities.

Cable also is working to bring better video experiences to consumers wherever and whenever they want, offering, for example, applications that allow subscribers to watch their cable service 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. And many cable networks allow viewers to access their programming outside their multichannel video programming distributor ("MVPD") subscription. Sprint, for example, offers its mobile subscribers access to a wide variety of popular full-length video programs from networks like MTV, Nickelodeon, Comedy Central, Style, Discovery Channel and many more.

If that were not exciting enough, Internet-delivered video has ushered in an even greater explosion of choice. By one estimate, real-time video streaming represents 65.2 percent of downstream Internet traffic in North America during prime time evening hours.[3] The U.S. online video market attracts an average of 75 million viewers every day and streams nearly 40 billion videos per month.[4] 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."[5] The largest subscription video provider in the country today is Netflix—not Comcast, Time Warner Cable, DIRECTV or any other MVPD.

If market failure is characterized by a lack of new entry, there is clearly no failure in the video marketplace. Companies that stream content are proliferating: Netflix, Hulu, Amazon, iTunes, CinemaNow, Network websites, HBOGo, Apple TV, and user-generated or special interest sites like YouTube, Vimeo, and TED.com are a few. In fact, YouTube recently announced a subscription video service.[6] Some of these services offer multichannel programming like an MVPD; others specialize in

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[2] *See* AT&T Wi-Fi Hotspots, AT&T, *http://www.att.com/shop/wireless/wifi.html#fbid=xu0RiNIAQ3F.*

[3] *Global Internet Phenomena Spotlight 2H 2012 North America, Fixed Access,* SANDVINE INCORPORATED, Nov. 6, 2012.

[4] *US Digital Future in Focus,* COMSCORE (Feb. 2012).

[5] 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.*

[6] *New Ways to Support Great Content on YouTube,* YOUTUBE (May 9, 2013), *http://youtube-global.blogspot.com/.*

entertainment programming, movies, or on-demand content. With their smaller array of programming and emphasis on older content, they generally offer consumers a lower priced option than cable and other MVPDs. And many more offerings are anticipated from the likes of Intel and Sony.

And web video is not limited to a PC screen any more. Analysis of data from Nielsen suggests that 65 percent of Netflix streaming is viewed on television sets.[7] 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 44 percent of U.S. households have a television set connected to the Internet, through an Internet-ready TV, game console, standalone Blu-ray player or smart set-top box connected to their home network.[8] Smartphones and iPads have proliferated as compelling devices for consuming video content and enjoying second-screen experiences. Of note, when measured together, the share of all hours spent watching streaming video on tablets and mobile phones increased 100 percent in 2012.[9]

For some consumers, online video offerings are good enough to cut or shave the cord. According to one report, "3.74 million (3.7 percent) U.S. TV subscribers cut their TV subscriptions 2008–12 to rely solely on" online video and over-the-air for their video entertainment.[10] Yet for most consumers, online video has developed as a supplement to their broadly diverse MVPD service. It enables them to add even more of a particular type of video content—whether it be movies or music—to the live events and new programming available from the MVPD. There are still 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.

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. While there are some challenges—any network that is shared by many users must cope with congestion and ensure all users get quality service—we continue to see great potential in our networks. We are investing billions annually to ensure that this potential can be realized by keeping pace with the dynamic marketplace and consumers' changing needs and interests.

Cable's business incentives in today's marketplace are 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. Cable has a strong broadband business and benefits from greater Internet consumption generated by streaming video services. So while cable operators are developing new services and features that enable their subscribers to access video online and on-the-go, they are also ensuring that other providers of content, services or devices in the online video ecosystem can flourish.

The Future of Video

Gazing into the distance through the eyes of consumers, the future of video shines extraordinarily bright. It will be a great time to be a TV lover. John Malone once talked of a future of 500 channels, but tomorrow's reality will be exponentially greater. The Internet has opened a floodgate to new content creation, produced by individuals and top network studios alike. Combined with the continually expanding traditional television sources, consumers will be swimming in content choices. The expansion of distribution platforms is also fueling a continuing renaissance of creative work. Anyone with a story idea has the venue and the tools to produce compelling video narratives.

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[7] NCTA analysis of data from *The Cross-Platform Report,* Quarter 2, 2012–US, NIELSEN (Nov 2012).

[8] Over Half of Adults Watch Video on Non-TV Devices Weekly, LEICHTMAN RESEARCH GROUP, INC. (May 2, 2013), available at *http://www.leichtmanresearch.com/press/050213release.html.*

[9] *Global Video Index, 2012 Year in Review,* OOYLA, available at *http://go.ooyala.com/rs/OOYALA/images/Ooyala-Global-Video-Index-Q4–2012.pdf.*

[10] *The Battle for the AmericanCouch Potato: Online &Traditional TV and Movie Distribution,* The Convergence Consulting Group Ltd. (Apr. 2013), available at *http://convergenceonline.com/downloads/USNewContent2013.pdf.*

Importantly, the video renaissance is expanding the diversity of content. Diverse communities are finding greater voice. Every genre imaginable is being explored. Top studios are producing award winning long form series. News is being revolutionized. Video is rapidly becoming the central force in all of electronic media and will only grow.

Where will we watch video? Everywhere humans dwell. The ubiquity of broadband networks and devices that connect to the Internet mean content will envelope consumers. The living rooms and family dens will still matter, but video experiences will not be tethered to our walls. Portable screens will only further burrow into our lives. 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.

This ever-present second screen will unleash a plethora of interactive applications that give television a new dimension that never existed before. Live stats during the game, user-controlled camera angles, and social conversation embedded in programming are just a few ways the experience will grow. Additionally, the "TV" will increasingly become personal. Channel guides will be personal to the user. Program line-ups and recording preferences may change for different viewers. This personally tailored-experience is well in motion.

In this world of bottomless content and near endless choice, curating content well will be more valuable, not less. Meaningfully combining programming into useful groupings will be important for simplifying the viewing experience. Technology will play a bigger role, too, empowering recommendation engines and crowd sourcing to bring relevant content to the consumer. A good content editor remains essential. As Reed Hastings recently explained, Netflix is "actively curating our service rather than carrying as many titles as we can" so they can "have the best [content] in each category rather than the most."[11]

In this exciting new world, we believe private platforms—like cable and DBS—will peacefully coexist with the public Internet platform. Among other reasons, the private platforms are more highly optimized for quality and reliability and deliver video content more efficiently than the public Internet. Additionally, the continuous challenges of piracy, malware and cyber-threats on the public web will keep the value of private platforms high. Most importantly, the cable model is critically important for monetizing and delivering the highest premium content to consumers—including sports, live news, and premium series. Indeed, without cable subscribers paying to watch shows like "Mad Men," those shows would never even be available to run later through online services.

This is an exciting future, and cable is working to be an important part of it. Cable companies have been rapidly exporting the viewing experience to iPads and other portable devices to let consumers watch our services on any device they choose. Programming guides are being redesigned by many companies to provide richer and more personal experiences. Smartphone apps are being deployed to replace remote controls. And cable companies continue to empower consumer choice with on demand viewing and advanced DVRs that allow you to watch what you want when you want.

We also are working to de-clutter the home 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. A vast array of cloud-based services and applications will make available a new generation of interactive offerings, and dissolve the lines between video, data, graphics, voice, and text. 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 more rapidly and upgraded more easily. Cable companies have also been working constructively with services like Roku and Xbox to integrate cable video services into those platforms—allowing consumers to consolidate boxes and integrate their cable services with online services.

Importantly, all of the innovation that is taking place to bring both today's and tomorrow's advanced services is occurring and continues to occur with only limited regulatory intervention. Cable, satellite, phone, and online video providers are competing in the arena that benefits consumers—the marketplace—and not before this Committee or the FCC. The cable industry is prepared to meet the future in that arena.

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[11] Reed Hasting, *Long Term View,* NETFLIX (Apr. 25, 2013), available at *http://ir.netflix.com/long-term-view.cfm.*

What is the Role for Policymakers?

The future looks bright, but a natural question for this Committee is what type of regulatory framework will best promote consumer choice. Do you need to take action to preserve and strengthen the incentives of programmers and distributors to invest aggressively to bring new services, features and capabilities to consumers? I think the answer is generally no, at least not right now. While some surgical changes to the law may be appropriate, a broad "rewrite" is not necessary and could even be counterproductive by introducing uncertainty and displacing or skewing the marketplace rivalries that are providing today's consumers with the unparalleled choice I described earlier.

There is no doubt that the transformation underway will not be problem-free. It will be chaotic at times as consumer expectations and demands outpace changes in the underlying marketplace. As market participants seek to realign their business strategies with the new reality, many questions of law and policy may arise. In this dynamic market, it is difficult to know what type of statutory or regulatory changes will promote rather than hinder competition and investment. For that reason, it is better to exercise caution rather than rush to rewrite laws that will, in any event, be obsolete almost as soon as they are enacted.

As the new video market develops, there may be limited, targeted changes to the Act that are appropriate to address specific issues that arise—and the FCC should have the tools it needs to adjust its rules as the market changes—but the basic framework of the Act can remain in place throughout this transition period, without causing any delay or hindrance to the exciting changes that are occurring in the video marketplace. The time may come when adjustments to the current law can no longer suffice, but that time is not now.

Thank you again for the opportunity to appear today. Cable is proud of the products and services it offers customers today and is excited about the dynamic future before us. We look forward to being a key player in this vibrant marketplace.

Senator PRYOR. Thank you.

Mr. Dodge?

STATEMENT OF R. STANTON DODGE, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, DISH NETWORK L.L.C.

Mr. DODGE. Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee, I appreciate the opportunity to testify today, although I am a bit under the weather. And I apologize in advance if I cough on occasion.

My name is Stanton Dodge, and I am the Executive Vice President and General Counsel of DISH Network. DISH is the nation's third largest pay-TV provider, with more than 14 million subscribers and over 25,000 employees. We are the only provider of local TV service in all 210 markets.

DISH's award-winning innovations include the Hopper DVR and TV Everywhere features that consumers can use to have greater choice and control over their viewing experience. Our dishNET service offers affordable, high-speed broadband via satellite throughout the country. And DISH's recent offer to merge with Sprint would allow us, among other things, to extend cable-quality fixed wireless broadband service to more than 40 million underserved and unserved rural households.

For this Congress, we believe that outdated laws need to be updated to reflect changes in the market and changes in how consumers view their content. Public policy should support the preservation and expansion of consumer video choices.

Unfortunately, as distributors like DISH offer advances in technology, some programmers are again crying wolf, saying that this time the threat is real and they won't be able to survive the onslaught of innovation. The challenges to our Hopper DVR are a perfect example. The networks are accusing millions of subscribers of

being copyright infringers merely because they want to skip commercials more easily or watch TV on their iPads.

We believe in consumer choice, and to preserve and expand that, I want to make three points.

First, we believe Congress should protect consumers against the growing problem of blackouts caused by retrans disputes. The proof is in the numbers. In 2010 there were 12 blackouts, and by 2012 the number soared to almost 100, impacting millions of viewers. The consumers are the victims of these one-sided negotiations. Their programming gets pulled by the broadcasters, and their monthly bills go up and up.

As part of a STELA reauthorization, we propose that when a local station is pulled from a consumer due to a retrans dispute that video distributors should be able to provide another market's network signal. This reform will at least allow consumers to keep their network programming while negotiations continue.

Second, Americans living in remote, underserved areas have especially benefited from STELA and its predecessors. Among other things, STELA allows Americans residing in predominantly rural areas to receive distant network signals for any missing local big-four stations in their market. The distant signal license sunsets at the end of 2014, and, without reauthorization, approximately 1.5 million American households will be left without access to a full complement of network channels.

Third, in the 3 years since STELA was enacted, the video industry has not been sitting still. Consumers can and increasingly want to watch news, sports, and entertainment on the go, using increasingly high-resolution screens available on their smartphones and tablets.

Over the years, DISH has done much to respond to changing consumer preferences. Now, DISH stands ready to make a significant investment to satiate consumers' growing appetite for increased mobility and flexibility in consuming video. DISH's recent $25.5 billion offer for Sprint would create game-changing services and capabilities by offering for the first time a nationwide fixed and mobile service for voice, video, and data in and outside of the home.

In summary, we believe government should work to ensure its laws mirror today's competitive realities, consumer expectations, and advances in technology.

Thank you, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Dodge follows:]

PREPARED STATEMENT OF R. STANTON DODGE, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, DISH NETWORK L.L.C.

Chairman Rockefeller, Chairman Pryor, Ranking Member Thune, Ranking Member Wicker, and members of the Subcommittee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the Executive Vice President and General Counsel of DISH Network.

Background on DISH

DISH is the Nation's third largest pay-TV provider with more than 14 million subscribers and over 25,000 employees across the country. It is the only provider of local broadcast television service in all 210 TV markets. Considered an industry leader in technology, DISH's award-winning innovations include the Hopper Whole-Home HD DVR and TV Everywhere devices and functionality that consumers can

use to watch their TV on smartphones, tablets, and computers. Additionally, our dishNET satellite broadband service offers affordable high-speed broadband Internet access, which can be bundled with DISH's satellite TV service. DishNET enables data speeds of 10–15 Mbps, which is fast enough to support high-definition video, voice-over-IP telephony, and other applications previously unavailable to Americans living in unserved and underserved areas. The dishNET satellite broadband service is operated by our corporate affiliate, Hughes Network Systems, which altogether serves approximately 700,000 U.S. customers who tend to be located in rural areas outside the reach of traditional terrestrial broadband networks. DISH's recent offer to merge with Sprint would allow us to extend cable-quality fixed wireless broadband service to more than 40 million underserved and unserved rural households.

Summary

For Congress, the convergence of video, mobile, and broadband services has two major implications. First, outdated laws and regulations need to be updated to reflect changes in the market and changes in how consumers view their content. Second, and more broadly, public policy should preserve and expand consumer video choices, which are repeatedly under attack. As distributors like DISH offer advances in technology that allow consumers to have greater choice and control over their content, content providers again and again cry wolf, saying that *this* time the threat is real and they will not be able to survive the onslaught of innovation.

We believe Congress should safeguard viewer choice in the increasingly frequent and highly unfortunate phenomenon of retransmission consent disputes and "blackouts." When a local broadcast station is pulled from a consumer due to a retransmission dispute, video distributors should be able to temporarily provide another market's network signal and prevent the total disenfranchisement of the consumer. The reauthorization of the Satellite Television Extension and Localism Act of 2010 ("STELA") gives Congress the opportunity to enact this important reform.

In the three years since STELA was enacted, the video industry has not been sitting still. Consumers can, and increasingly want to, watch news, sports and entertainment on the go, using increasingly high-resolution screens available on their smartphones and tablets. Over the years, DISH has done much to respond to changing consumer preferences. Now, DISH stands ready to make a significant investment to satiate consumers' growing appetite for increased mobility and flexibility in consuming video. DISH's recent $25.5 billion dollar offer for Sprint would create game-changing services and capabilities by offering, for the first time, a nationwide fixed and mobile service for voice, video, and data, in the home and out of the home.

STELA Has Been a Success

DISH is a company dedicated to giving its customers what they want, and STELA has been a big part of DISH's ability to deliver upon those customer needs. The satellite licenses established and reauthorized by STELA and its predecessors were instrumental in opening the video industry to competition by placing satellite distribution on a more level playing field with cable. The 1999 reauthorization, for example, created the first satellite "local-into-local" license allowing satellite distributors to retransmit local broadcast stations to their subscribers. In 2004, Congress took the opportunity to update the law for the digital transition. STELA built on these successes by giving DISH an opportunity to earn back its distant signal license—an opportunity that DISH seized to expand its local-into-local service into all 210 of the country's local TV markets.

STELA and its predecessors have been especially important for Americans living in remote, underserved areas. Among other things, STELA allows more than 1.5 million Americans residing in predominantly rural areas to receive distant network signals for any missing local Big 4 stations in their market. The distant signal license sunsets at the end of 2014, and without reauthorization, these 1.5 million American households will be left without access to a full complement of network channels.

The Video Industry Is Changing Dramatically

Consumers expect to be in control of what they watch as well as where, when, and how they watch it. Rapid innovations in the device and distribution marketplaces have now made that degree of choice and control possible. Every day, more and more consumers watch video on smartphones, tablet computers, and other portable wireless devices. Online video streaming services grow in popularity, and startups like Aereo are challenging the status quo by giving consumers greater freedom to watch their local broadcast stations whenever and wherever they want. Consumers can use DISH's innovative Hopper DVR with Sling place-shifting technology, which won "Best of CES" at this year's Consumer Electronics Show, to exercise un-

precedented control over their own TV viewing choices. This is good for consumers and good for competition.

Although evolution stands to benefit all players in the video marketplace, incumbents are often resistant—if not hostile—to that change. Rather than embracing consumers' evolving expectations and tastes, entrenched incumbents are fighting to preserve the status quo. The broadcasters' lawsuits against DISH's Hopper DVR are a perfect example. The networks are accusing millions of subscribers of being copyright infringers just because they want to skip commercials more easily or watch TV on iPads in their bedroom. Fortunately, the Supreme Court's landmark decision in the *Sony-Betamax* case protects the right of consumers to record their favorite shows and watch them later, skipping through commercials if they want. Congress has also repeatedly chosen to protect consumers' fair use and private performance rights. Two examples are the Audio Home Recording Act and the Family Movie Act. Congress should continue to protect consumer control over viewing choices.

Congress passed the Cable Act in 1992. Remember how you watched TV then? How disappointing it was to miss your favorite show and have to wait for it to rerun or get the highlights around the water cooler the next day? You likely only had one choice for a cable company from which to get service, as most markets were served by a single operator. You likely had never heard of the Internet, as it was in its infancy. If you had a mobile device, it was probably the size of a brick. All these years of progress later, with increased competitive forces now at play in the video marketplace, it is difficult to look at the laws on the books and tell that much has changed. Nowhere does the Cable Act mention the Internet, wireless, or online video.

Congress Should Fix the Broken Retransmission Consent System to Protect Consumers

A key area where the law has not been updated to reflect a growing imbalance in market power is retransmission consent. This is the system whereby video distributors must negotiate with the broadcasters for the ability to transmit the broadcasters' signals. The laws remain largely unchanged, and yet, in most markets, there are now a growing number of distributors (one or more cable companies, two satellite providers, one or more telcos, an over the top provider, etc.) that network stations can play against one another. By contrast, the local broadcast stations still enjoy a government-created monopoly where all of the video distributors have only one door to knock on in order to transmit each of the four networks in almost all local markets. Consequently, the broadcasters have the luxury of threatening to withhold their programming altogether in order to extract higher and higher retransmission consent fees. We are seeing increased fee demands of several hundred percent.

The result: more impasses and more blackouts interrupting consumers' services. The proof is in the numbers. In 2010, there were 12 instances where a broadcast signal was blacked out in a local TV market. In 2011, there were 51. In 2012, the number soared to almost 100. These numbers do not even include all of the near-misses, which are almost equally disruptive. Adding insult to injury, the timing of many blackouts coincides with marquee events like the World Series or the Oscars. Ultimately, the losers in these one-sided contests are the consumers who get their programming pulled from them by the broadcasters and see their bills on the rise. Some broadcasters have floated the idea of becoming a cable channel, thus stopping the broadcast of their channels over the air. If the broadcasters choose to do that, they should give back all of their government-granted broadcast spectrum.

The STELA Reauthorization Is an Opportunity to Protect Consumers and Further Support Video Competition

In the retransmission consent context, Congress can restore balance to the negotiating table by allowing cable and satellite carriers to substitute a network signal from a non-local market during an impasse in retransmission consent negotiations with a local market affiliate of that same network. For example, if a broadcaster blacks out the local Denver FOX station, the video distributor will be able to temporarily bring in an out-of-market station, such as the Cheyenne FOX station. The replacement station will not be a perfect substitute for the blacked-out local station, since consumers won't have their local content, but at least some measure of protection will be extended to affected consumers. Additionally, this fix will introduce some fairness into the negotiating process and make it more likely that the broadcaster won't pull its signal in the first place. Broadcasters will be introduced to some of the same competitive pressures that satellite carriers and cable operators face every day, and consumers will benefit as a result.

The State of Video Will Continue to Evolve to Include More Wireless Services—Consumers Will Demand It

As I've mentioned, the video industry is a place where the marvels of yesterday have become commonplace today. The needs and desires of consumers are evolving as technological innovations continue to be deployed in the marketplace. We should give American consumers what they want. They want to watch programming on their television sets, on their phones and on their tablets—no matter where they are. They also want to surf the web or make a phone call—again, no matter where they are. Consumers want choice and control. They want mobile video. They want mobile voice. They want mobile data. When we look at the marketplace for video, we need to be able to provide all of those communications options to every one of our customers, and we need to do it anywhere and anytime, on any device.

At DISH today, I submit that we have done a fine job of efficiently providing fixed video to the home. But customers increasingly want more than just home video. As consumers seek to utilize wireless devices and connectivity to view their content, the future of video relies more and more on wireless providers. The explosion in wireless data usage rates is due almost entirely to video consumption.

Our company is moving in that direction. By rolling out technological innovations like the Hopper with Sling, our customers can use a smartphone or tablet from any location in a controlled and private manner to enjoy the video content for which they have already paid. Our new PrimeTime Anytime and AutoHop technologies take the DVR to a new level. Consumers can, at their option, enable these features to more easily view their preferred programming when they want, while skipping what they don't want to see.

These are some of the ways in which 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 are taking a risk again. Recognizing the evolution in video, DISH is on its way to becoming a wireless service provider. We acquired satellite spectrum and, after almost two years, secured FCC approval to use that spectrum for terrestrial mobile broadband services. We now want to compete against the established players by offering video, voice, and data inside and outside the home, from a single platform.

To that end, we have made an offer valued at $25.5 billion dollars to acquire Sprint. Our offer is better for American consumers, Sprint shareholders, and the national security of this country than the competing offer for Sprint made by SoftBank, a foreign company. A combined DISH/Sprint would establish more competition in the wireless marketplace. It will lead to less expensive options for consumers to watch their video content using wireless broadband—either fixed or mobile. Particularly for rural areas, a combined DISH/Sprint will be able to offer a never-before-seen integrated fixed broadband/video service that will place rural Americans on the same footing as New Yorkers and Los Angelinos.

DISH is driven to provide consumers with all that they want, including 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 throughout the United States. Just as businesses must foster change in a rapidly evolving video marketplace to keep pace with what consumers want, government should work to ensure its regulations mirror today's competitive realities, consumer expectations, and advances in technology.

Thank you. I look forward to answering any questions you may have.

Senator PRYOR. Thank you.

Mr. Bergmayer?

STATEMENT OF JOHN BERGMAYER, SENIOR STAFF ATTORNEY, PUBLIC KNOWLEDGE

Mr. BERGMAYER. Good morning, Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee. Thank you for the opportunity to participate in today's hearing.

Today, I am going to talk about two things. First, I have a few remarks on the state of the video marketplace today. Then I will present a few ideas that will make the video marketplace more competitive and affordable.

New technology and new services have given people more ways to watch TV. In fact, they are changing what it means to watch TV. People watch TV on smartphones, tablets, and computers. People watch more on-demand video from online services. They use DVRs to control what they watch and how they watch it.

But there is still a lot of must-see programming, and it is available only through traditional pay-TV services. To keep up with "Game of Thrones" or "NCIS" or live sports, viewers have to subscribe to the traditional expensive bundle of channels. One study has found that the cost of a cable subscription is approaching $90 per month. That is just for video, not broadband.

Content prices keep rising, and they are passed along to consumers. The retransmission fees that broadcasters demand of cable and satellite providers keep going up. NBC estimates that it will collect 400 percent more in retransmission fees in 2013 than in 2012. Retransmission disputes lead to viewer blackouts, as well.

Sports fees are going up. The average cable subscriber pays almost $80 a year just for the NFL.

Large content companies do everything they can to make sure that their cable channels are carried, and this can drive out independent programmers. But they are only able to do this because cable companies have been able to pass along the cost to viewers. These problems are interrelated.

Congress and the FCC have been involved with the video marketplace for decades. Sometimes they protected incumbents; sometimes they promoted competition. The 1992 Cable Act created policies that allowed satellite providers like DISH and telecom companies like Verizon to start offering video services. These policies protected smaller cable operators, too.

However, in a market where you have to string wires through a town or launch satellites into space, competition will be limited. But broadband technology changes that. It is no longer necessary to operate a dedicated network to deliver many kinds of video content. Public policy should reflect this technological shift.

The Internet is changing the video marketplace, just as it changed the market for other media. But there is a difference: dominant players in video have control over the content their nascent online competitors need for their service and the pipes they need to reach consumers.

It is inevitable that new technology will play a large part of video delivery, but it is not inevitable that the market will reach its full competitive potential. Consumers will still suffer from a lack of choice, and independent content producers will still struggle to reach viewers.

But there is a solution at hand: Congress should make sure that its pro-competition video policies are technology neutral. If it does this while protecting Internet openness, it can ensure that viewers have more choices.

Now, online video is a success story, but it can be much more than it is now. It is not driving down cable prices. For most users, it is a supplement to cable, not a replacement. But video services that offer a full range of content should be as competitive and open as e-mail services.

Congress and the FCC can help online video develop into a full competitor in three easy 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 protect providers from anticompetitive conduct to certain online providers. Third, they can protect Internet openness and prevent discriminatory billing practices that could hold back online video. This will increase competition, meaning lower prices, better services, and more flexibility and control for consumers.

To be sure, many of the regulations that permeate the video marketplace can be repealed today. Some of them exist only to protect the business models of local broadcasting or even to enhance the revenues of major sports leagues. These rules include the sports blackout rule and prohibitions on distant signal importation.

Some other rules, like 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 effective competition develops. Examples of these kinds of rules include the program access and program carriage rules.

In some respects, they should be extended. For example, online video providers that wish to voluntarily operate as multichannel video programming distributors should be able to do so. This would ensure that consumers have 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 Senate can help ensure that the Internet remains competitive and open to creators of all sizes by working to prevent the anticompetitive use of data caps and other open Internet violations.

Senators, my brief testimony today can only touch on a few subjects. My written testimony contains more detailed analysis and recommendations. Thank you for inviting me to speak, and I look forward to your questions.

[The prepared statement of Mr. Bergmayer follows:]

PREPARED STATEMENT OF JOHN BERGMAYER, SENIOR STAFF ATTORNEY, PUBLIC KNOWLEDGE

Good morning Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee. Thank you for the opportunity to participate in today's hearing. My name is John Bergmayer, and I work for Public Knowledge, a non-profit public interest organization that seeks to ensure that the public benefits from a media ecosystem that is open, competitive and affordable. Today, I am going to recommend that the Senate consider re-aligning some of the rules that govern the video marketplace so that they better serve the public interest, allowing all creators to be fairly compensated while bringing down bills and increasing the choices available to viewers.

Introduction

There is widespread agreement that we are living in a golden age of television. Technology has increased people's choices so they can watch just the shows and movies they are interested in. Digital technology allows cable and satellite services to fit more channels in the same bandwidth. DVRs give people control over how they watch broadcast and cable programming, and online streaming services provide access to a large back catalog of movies and TV shows. Computers, smartphones, tablets, and connected devices are changing what it means to "watch TV."

These new choices have allowed people to watch more specialized programming that fits their individual tastes. But while some pessimists have predicted that new technology would create a "filter bubble" that isolates people from each other and deprives them of common cultural reference points, this has not happened with video. Programs like House of Cards, Mad Men, Game of Thrones, Dancing with the Stars, NCIS, and (of course) live sports are still part of our cultural landscape. Even in this era of 500 channels, these kinds of programs still inspire discussions around the water cooler and on Twitter.

But despite all of the great programming and groundbreaking devices, many Americans are locked into a television business model that limits competition and choice: the expensive bundle of channels. Most of the most popular programming is not available except through traditional subscription TV services, and these grow more expensive year after year. Two years ago, the monthly fee for cable TV (*not* including broadband) hit $86 per month, and is projected to rise to $200 per month by 2020—that is, unless Congress does something about it.[1] By contrast an online video-on-demand service like Netflix or Amazon Instant Video costs less than $10 per month.

While cable and satellite companies have improved some of their offerings to match the convenience of what is available online, they have a long way to go, and do not come close to matching the value those services offer. This is because most Americans do not have a meaningful choice when it comes to selecting their video provider, so market forces have not been able to keep prices low. Often, if consumers want an affordable broadband and a video subscription that gives them access to must-see content, they can only turn to their local cable company. This is a legacy of a time when subscription video service required a specialized network, and simple economics did not allow for much competition. But this is no longer the case; the technology exists to allow people to have as many choices of video provider as they have of e-mail providers, or of restaurants. While there may be a continuing place for specialized technology or networks to deliver live programming, in a largely on-demand world there should be many more video providers than we currently see.

The ongoing dominance of the MVPD model is made possible largely by an outdated regulatory structure created by broadcast, MVPD, and content incumbents to gain competitive advantages and to cement their place in the video ecosystem. Moreover, most people get their broadband through Internet service providers that also are video distributors, and who have the motivation and the means to discriminate against online video services. It is time for Congress and the FCC to revamp the rules of the video industry to promote the public interest. A video marketplace that served the public interest would give viewers more choice of providers and the ability to watch any programming whenever they want on the device of their choosing. At the same time it would ensure that creators and distributors could continue to get paid a fair price. A video marketplace that served the public interest would align the interests of viewers, creators, and distributors, not set one against the other.

The Senate and other policymakers can achieve this ambitious goal in three ways. First, they can clear away or update some of the outdated rules that slow down the evolution of the video marketplace. For example, protectionist policies like the sports blackout rules should be repealed, and the dysfunctional retransmission consent system should be updated. Second, they can extend the successful policies that protect smaller video competitors. For example, if a large cable system would be prohibited by law from acting anti-competitively toward a satellite provider, there is no reason why it should be able to take the same actions against an online video provider. Third, they can protect Internet openness and prevent discriminatory billing practices that hold back online video. In addition to supporting the FCC's Open Internet rules, Senators and other policymakers should examine whether discriminatory data caps hold back online video competition. 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

[1] NDP Group, *Pay-TV bills continue to increase by 6 percent, year-over-year, as consumer-spending power remains flat,* Apr. 10, 2012, *https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410.*

cable industry.[2] By doing this it made sure that cable became an adjunct to rather than a replacement for established broadcasting.[3]

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 pole attachment rights and broadcast programming. The lack of effective 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[4] that Congress embarked on an express policy of promoting competition in the television market. It realized that potential competitors needed access to the same content as large cable systems with market power. New requirements 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 distributors" (MVPDs) to compete with cable operators, as did changes to the law to make it easier for competitors to get access to broadcast programming. (The remainder of this testimony will use the term "MVPD" to refer to cable, satellite, and telco video services such as U-Verse and FiOS generically.)

These policies of promoting competition were somewhat successful 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. To an extent, this result was brought about by the technology of the time. However, broadband now gives policymakers the chance to promote true competition in video.

The Internet is beginning to change the video marketplace just as it changed the market for music, news, books, and other forms of media. Consumers have new options and incumbents are responding. But it is not a foregone conclusion that the Internet will fundamentally alter the video marketplace. Because they are missing so much of the most popular programming, and because fast broadband is not yet sufficiently deployed, online video providers are more complements to, than replacements for, an MVPD subscription. While Netflix and Amazon have proved fatal to most video rental shops, they do not directly compete with MVPDs, which have shown themselves to be considerably more robust.

This is because cable and media incumbents have control both over the content their nascent online competitors need for their service (either through direct owner-

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[2] *See United States* v. *Southwestern Cable Co.,* 392 U.S. 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. In 1976, the House Subcommittee on Communications issued a staff report titled "Cable Television: Promise Versus Regulatory Performance" that stated that the FCC "has chosen to interpret its mandate from Congress as requiring primary concern for individual broadcasters rather than the needs of the audience being served." 94th Cong., 2d sess., 1976, Subcomm. Print. *See also* Office of Telecommunications Policy, Cable: Report to the President (1974) (OSTP Report), which contains an early history of the cable industry and attempts at cable regulation, as well as policy recommendations.

[3] The 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 while 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 extended the reach of broadcasting instead of developing into a competitor to it.

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 (1992).

[5] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fourteenth Report,* MB Docket No. 07–269 (rel. Jul. 20, 2012), *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-912-981A1.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 (Apr. 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 percent owned by Comcast. *See* General Electric, New NBCU, *http://www.ge.com/newnbcu.*

ship, or through contracts that limit online distribution), 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 is inevitable that IP technologies and the Internet will play an ever-larger role in video delivery, it remains an open question whether consumers or incumbent MVPDs will benefit most from this technological transition. 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 MVPD industries continue to thwart disruptive change and control 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.

MVPDs and content companies are operating in their own self-interest under a framework that Congress and the FCC designed. Congress can address some of the challenges the future development of the video marketplace faces by pruning 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 broadcasters and other incumbents. 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 effective competition develops. In some respects they should be extended. For example, online video providers that wish to voluntarily operate as MVPDs should be able to do so, as this would enable them to access certain valuable content and protect them against anti-competitive actions by incumbents.[7] 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 Internet service providers (ISPs) are also MVPDs invested in the existing video distribution models raises concerns. These ISP/MVPD combinations 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 some cable incumbents are better placed to counter the challenge the Internet poses to their business models in varied ways. The structure and practices of large media companies, copyright policy, and even spectrum policy can directly affect the video marketplace.

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.[8] At the same time, at least one ISP

[7] *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.*

[8] 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.

exempts its own video services that are delivered over the same infrastructure from its caps.[9] To top it off, some ISPs cannot even accurately measure their subscribers' usage.[10] 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.

To counter this, Congress needs to stand behind the FCC's attempts to protect Internet openness,[11] and it needs to find out more about why wireless and wireline providers set data caps at the levels they do.[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 discrimination can happen through billing, as well as through Internet "fast lanes" that prioritize one service's traffic over another's, and other forms of technological discrimination.

Restrictions on the Availability of Content and Rising Content Costs

The current regulatory system is based around the relationship of broadcasters and MVPDs,[13] and this system 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] Most 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 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 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 often not available without a cable or satellite subscription.

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.*

[9] 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-.*

[10] Stacey Higginbotham, *More Bad News About Broadband Caps: Many Meters Are Inaccurate,* GIGAOM (Feb. 7, 2013), *http://gigaom.com/2013/02/07/more-bad-news-about-broadband-caps-many-meters-are-inaccurate.*

[11] Preserving the Open Internet, *Report & Order,* GN Docket No. 09–191, FCC 10–201, (rel. Dec. 23, 2010), available at *http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.*

[12] For example, Representative Anna G. Eshoo, Ranking Member of the Communications and Technology Subcommittee of the House Energy and Commerce Committee, has recently asked the GAO to investigate data caps. Letter from Representative Anna G. Eshoo to The Honorable Gene L. Dodaro, Comptroller General of the U.S. Government Accountability Office (May 9, 2013).

[13] 47 U.S.C. § 325; 47 C.F.R. § 76.64.

[14] 47 U.S.C. § 548 provides that,

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

These baseline statutory requirements still apply even though the Commission has recently modified its program access rules. *See* Revision of the Commission's Program Access Rules, *Report & Order,* MB Docket 12–86 (rel. Oct. 5, 2012), *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–12–123A1.pdf.*

[15] Jon Brodkin, *DOJ Probing Big Cable Over Online Video Competition,* ARS TECHNICA, (June 13, 2012), *http://arstechnica.com/tech-policy/2012/06/doj-probing-big-cable-over-online-video-competition* (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).

This problem would be largely abated if online providers like Sky Angel and Ivi [17] were permitted to operate as MVPDs, like they want to.[18] The rules that protect MVPDs from anti-competitive conduct 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 online video providers, including those that choose not to operate as MVPDs.[19] But even short of that, if more content were 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 creators and distributors because it forces viewers to pay for large bundles of cable channels even if they only want to watch a few.[20] In fact, every cable subscriber has to pay for broadcast channels, even though they are available over the air for free. This is why some studies have shown that current monthly cable bills are approaching $90 per month,[21] and the FCC has shown that cable rates continue to rise at a faster rate than inflation.[22] If these practices were to be lessened, not only would bills shrink, but also more content might become available to new online providers.

But it is important to understand exactly what causes these problems. Input costs—the fees MVPDs pay to content companies—certainly contribute. Rising fees paid by MVPDs to content companies are one of the main drivers of rising cable bills.[23] MVPDs are often forced to pay for, and pass along to their consumers, less-popular channels in exchange for access to the popular ones. Sports fees are a huge portion of viewers' bills. Derek Thompson has calculated that "if you pay $90 a month for cable, you are paying about $76 a year (about 7 percent of the total cost of cable TV) just for the NFL."[24] A typical MVPD subscriber might pay about $60 per year just for ESPN, whether or not she watches it.[25]

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[17] *See* Ryan Lawler, *Court Rules Ivi.tv Not a Cable System, Issues Injunction,* GIGAOM (Feb. 22, 2011), *http://gigaom.com/2011/02/22/ivitv-injunction.*

[18] *See* Public Knowledge Sky Angel Comments.

[19] 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 anti-competitively 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 anti-competitive 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.

Sky Angel Comments at 24–25 (quoting 47 U.S.C. § 548).

[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.*

[21] NDP Group, *Pay-TV Bills Continue to Increase by 6 Percent, Year-Over-Year, As Consumer-Spending Power Remains Flat,* Apr. 10, 2012, *https://www.npd.com/wps/portal/npd/us/news/press-releases/pr__120410.*

[22] The FCC measures the expanded basic tier, which is "the combined price of basic service and the most subscribed cable programming service tier excluding taxes, fees and equipment charges." Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Docket No. 92–266, *Report on Cable Industry Prices* ¶ 2 (rel. Aug. 13, 2012), *http://hraunfoss.fcc.gov/edocs__public/attachmatch/DA-12-1322A1.pdf.* This is not the same as the average or median cable bill, measures which reflect what subscribers actually pay. The Commission found that this specialized measure of rates "increased by 5.4 percent over the 12 months ending January 1, 2011, to $57.46, compared to an increase of 1.6 percent in the Consumer Price Index (CPI). The price of expanded basic service increased at a compound average annual growth rate of 6.1 percent during the period 1995–2011. The CPI increased at a compound average annual growth rate of 2.4 percent over the same period." *Id.*

[23] In fact, Cablevision has recently sued Viacom for bundling channels, "a practice that's led to rising cable bills and ballooning channel lineups." Alex Sherman & Edmund Lee, *Cablevision-Viacom Suit Aims to Shake Up $170B Industry,* BLOOMBERG (Feb. 27, 2013), *http://www.bloomberg.com/news/2013–02–27/cablevision-viacom-suit-aims-to-shake-up-170b-industry.html.*

[24] Derek Thompson, *Mad About the Cost of TV? Blame Sports,* THE ATLANTIC (Apr. 2, 2013), *http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575.*

[25] *See* Daniel Frankel, *By the Numbers: The Spiraling Cost of Sports Programming,* PAIDCONTENT (Apr. 8, 2012), *http://paidcontent.org/2012/04/06/by-the-numbers-the-spiraling-cost-of-sports-programming.*

Retransmission fees for broadcast networks keep rising—NBC expects to collect $200 million in such fees this year, an increase of about 400 percent from 2012.[26] What's more, retransmission agreements often require that MVPDs carry certain cable networks, limiting the ability of MVPDs to offer more flexible price plans. Content companies are able to do this because of media consolidation. The most popular programming is controlled by a handful of companies like Viacom and Disney. When they make offers, they are hard to refuse. Even the broadcast industry is consolidating as companies like Sinclair scoop up local broadcaster after local broadcaster, contributing to the ongoing problem of different local broadcasters coordinating their retransmission consent negotiations and driving up rates.[27]

But content companies have grown accustomed to these practices for a good reason: in a concentrated market for video distribution, it is easier to pass along increased input costs.[28] MVPDs have never liked having to pay more for content, but it has historically been the cost of doing business. They have traditionally resisted calls to move to an à la carte model. But bills have reached a point where a notable number of viewers (especially younger and more tech-savvy ones) are "cutting the cord" (or never getting a cord to begin with) and doing without MVPD subscriptions. Cable executives like Time Warner Cable CEO Glenn Britt have started talking about offering consumers more flexible packages and greater control over the bundles they subscribe to.[29] This would be a positive development for consumers. It is an open question, however, whether a market that remains concentrated both on the content and distribution side can evolve to a lower cost model on its own.

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 ("basic tier buy-through")—customers should be able to choose what they pay for. Policymakers should also look very closely at the practice some media companies have of bundling their programming together and requiring that cable operators buy it all and put even less-popular channels on lower programming tiers. Bundles can make economic sense for buyers and sellers but they can be abused when there are imbalances in bargaining power or a lack of competitive alternatives. If MVPDs themselves had more flexibility in the programming they purchase, they might become more willing to offer that flexibility to viewers. At the same time, MVPDs should be encouraged to offer more flexible programming packages. Consumers do not object to "bundles" *per se*—popular online services like Spotify and Amazon Instant Video work on a bundled approach that is quickly surpassing the pay-per-download iTunes model. What they object to is expensive bundles that feel like a rip-off. They simply want to get good value for their monthly bill. For some consumers who only watch a few programs,

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[26] Steve Donohue, *Comcast CFO: NBC Will Collect $200 Million in Retrans Fees in 2013,* FIERCECABLE (Feb. 26, 2013), *http://www.fiercecable.com/story/comcast-cfo-nbc-will-collect-200-million-retransmission-consent-fees-2013/2013-02-26.*

[27] Among other things, so-called "Joint Services Agreements" allow different broadcasters to collude on retransmission negotiations. As Public Knowledge argued earlier this year,

> Media pluralism does not only ensure that citizens have access to a diversity of viewpoints and sources of information; it creates a baseline level of competition between media companies that helps keep markets competitive and prices low for consumers. Because of the joint negotiations between ostensible competitors, television stations are better able to create a "united front" in demanding higher fees, which are ultimately passed along to consumers. If competing companies worked together on other aspects of their business—for example, in colluding to raise advertising rates—most observers would identify a plain violation of antitrust laws. But under current policies stations feel free to collaborate on this other important aspect of their business operations. This harms consumers and contributes to ever-rising subscription TV bills.

Letter from John Bergmayer to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, in *Promoting Diversification of Ownership in the Broadcasting,* MB Docket No. 07–294; *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09–182; and *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10–71 (filed Jan. 22, 2013).

[28] It is important to note that not all MVPDs have equal bargaining power with respect to content suppliers. A very large cable company with its own content interests like Comcast is in a different position than DISH, Cablevision, or a rural cable system. These smaller MVPDs may not be able to pass along increased prices to their customers, or internalize them through acquisitions. Also, larger MVPDs may be able to negotiate around certain non-price restrictions, such as limitations on the functionality of cable-supplied set-top boxes and other equipment, or the ability to make programming available on tablets or smartphones within the home. By contrast, smaller cable systems may not be able to overcome these kinds of restrictions.

[29] Cecilia Kang, *Time Warner Cable CEO Wants to Slim Cable Bundles, Eyes Aereo's Technology,* WASH. POST (May 2, 2013), *http://www.washingtonpost.com/business/technology/want-to-cut-the-cable-cord-time-warner-cable-may-help-you/2013/05/02/f6b43b84-b27b-11e2-baf7-5bc2a9dc6f44__story.html.*

this might mean channel-by-channel à la carte subscription, perhaps coupled with over-the-air TV and online services. For others, it might just mean better bundles—for example, a cheaper sports-free programming package, or a kid-friendly package.

One solution to the problem of rising input costs that would *not* be good for consumers is further consolidation, allowing distributers to internalize content costs and profits. 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. 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 and to deal with independent programmers fairly,[30] such time-limited behavioral remedies are insufficient to overcome all the anti-competitive effects of mergers, joint ventures, and other structural changes that create incentives to limit distribution and innovation.[31] Furthermore, without an agency that is willing to hold companies to the letter and spirit of their merger conditions, they can simply be ignored, requiring that affected parties undertake expensive legal proceedings to enforce them. Just this has happened with the Comcast merger, where Bloomberg has maintained since 2011 that Comcast has not met its "neighborhooding" requirements, and Internet video provider Project Concord had alleged that Comcast was not meeting its online video requirements.[32]

Similarly, horizontal collaboration between different video distributors (such as the "TV Everywhere" authentication system) may seem to provide new options to some viewers in the short term, but only at the long-term cost of preventing the marketplace from evolving to a more competitive state. Likewise, arrangements between large content companies like ESPN where some content gets preferential treatment, such as an exemption from data caps, would not benefit either consumers or creators.[33] Large and small creators might find that they have to negotiate with many different ISPs just to reach viewers, and viewers might only have access to the programming of companies that have paid up. Smaller competitors might not be able to reach viewers at all. This would be counterproductive, anti-competitive, and a violation of Open Internet principles.

Outdated Rules That Protect Incumbent Business Models

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 non-duplication, and syndicated exclusivity provisions,[34] and the previously mentioned basic tier buy-through rule that requires that all cable subscribers pay for free over-the-air television.[35] 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. Viewers will still have access

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[30] 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).

[31] 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.*

[32] *See* Letter from Senator Al Franken to FCC Chairman Genachowski, FCC Commissioners, and Assistant Attorney General Varney, Aug. 4, 2011, *http://www.franken.senate.gov/files/letter/110804_Letter_to_DOJ_and_FCC_Comcast_conditions_and_Bloomberg.pdf.* While there has been some activity on this matter at the FCC the dispute is ongoing. *See* John Eggerton, *Parties Continue to Tussle over News Neighborhooding Condition in NBCU Deal,* MULTICHANNEL NEWS (Oct. 1, 2012), *http://www.multichannel.com/distribution/bloomberg-comcast-trade-fcc-filings/139564.*

[33] Anton Troianovski, *ESPN Eyes Subsidizing Wireless-Data Plans,* WALL ST. J. (May 9, 2013), *http://online.wsj.com/article/SB10001424127887324059704578473400083982568.html.*

[34] 47 C.F.R. §§ 76.92(f), 76.106(a), 76.111, 76.120, and 76.127–130.

[35] 47 U.S.C. § 543(7); 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.").

to local news, weather, and locally relevant programming because they demand it. Reforms should reward local broadcasters and other media outlets for creating their own content rather than for distributing national programming. Simply put, the broadcasting industry no longer needs extraordinary protection against changes in technology, business models, and viewer behavior.

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,[36] retransmission consent,[37] and must-carry.[38] The compulsory license cannot be reformed unless video providers are given assurance that they never have to stop carrying programming just because they do not know who to call for a license, and to make sure that they can cope with any potential holdout problems. 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. Some broadcasters have engaged in brinksmanship tactics that harm viewers, where they pull their signals from MVPDs right before high-profile events.[39] These problems can at least be alleviated with meaningful "good faith" standards that discourage unfair negotiation tactics, and interim carriage requirements that minimize disruption to viewers.[40] 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.

Still other rules serve a function and should be maintained, at least until effective competition develops. These include the program access, program carriage rules, as well as rules that promote choice in set-top boxes and other video devices. The program access rules prevent MVPDs from taking certain anti-competitive actions toward each other. 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.[41] The program access rules have contributed to 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. Finally, the FCC has not done enough to fulfill Congress's directive to promote set-top box competition—in fact, the FCC's Media Bureau has recently imperiled[42] the Commission's CableCARD program which, though far from perfect, at least gives some cable subscribers more options when it comes to video devices. Until Internet-delivered video becomes a true substitution, preserving the FCC's authority to promote set-top box choice will remain necessary.[43]

Copyright and Spectrum Policy

There are two other kinds of regulations that can hold back the development of online video. Policymakers who are steeped in media issues do not 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.

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[36] 17 U.S.C. §§ 111, 119, 122.

[37] 47 U.S.C. § 325; 47 C.F.R. § 76.64.

[38] 47 U.S.C. § 534; 47 C.F.R. § 76.55.

[39] Some of these incidents were cataloged in Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking,* 26 FCC Rcd. 2718, ¶ 15 (2011).

[40] *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.*

[41] For example, "Free-to-air television in Mexico is a stale duopoly in which 70 percent of viewers tune in to channels broadcast by Televisa, the biggest media company in the Spanish-speaking world. Televisa dominates pay-TV as well, with about 45 percent of Mexico's cable market and 60 percent of the satellite market." *Let Mexico's Moguls Battle,* THE ECONOMIST (Feb. 4th, 2012), *http://www.economist.com/node/21546028.*

[42] Charter Communications had asked for a waiver of some of the Commission's rules, but the Bureau went far beyond what Charter asked for and decided, based on a misapplication of the recent *EchoStar Satellite L.L.C.* v. *FCC* decision, 704 F.3d 992 (D.C. Cir. 2013), to effectively eliminate most CableCARD requirements.

[43] For example, by implementing AllVid or a similar technology-neutral solution. *See* AllVid, *http://www.publicknowledge.org/issues/allvid.*

Copyright law should not be misused to hold back the evolution of the video marketplace. Broadcasters are suing DISH for making a DVR that is too sophisticated and easy to use. But it is not illegal to skip commercials or for users to take full advantage of their home recording rights.[44] And as the Second Circuit Court of Appeals recently found, Aereo's remote antenna is legal just as Cablevision's remote DVR is.[45] 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 will lose control of it. But recent history shows that many people only turn to piracy when content is not available online though other means. Indeed, Netflix has recently provided data that show that as its online service is adopted, unlawful filesharing decreases.[46] From the perspective of reducing copyright infringement, limiting online distribution is simply counterproductive. Creators will benefit most from an open marketplace that allows different services and voices to reach viewer's homes.[47]

A service like Aereo's raises issues of spectrum policy as well as copyright. Broadcasters are given free use of the public's airwaves in exchange for certain public obligations, such as the obligation to provide free programming to the public. While it is true that Aereo does not pay retransmission fees like MVPDs do, it is also true that Aereo, unlike MVPDs, *only* provides people with access to the free local signals they are already entitled to view. As Congress found in 1976,

> The Committee determined . . . that there was no evidence that the retransmission of "local" broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming that is broadcast in 'distant' markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.[48]

The majority of viewers do not watch over-the-air broadcasters directly, but only as those stations are carried by MVPDs. This leads some to question whether the allocation of spectrum to broadcasting makes sense at all.[49] Certainly, the broad-

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[44] See *Fox Broadcasting v. Dish,* 2012 U.S. Dist. LEXIS 169112 (C.D. Cal. 2012).

[45] *WNET et al.*, v. *Aereo,* No. 12–2786–cv (2d Cir. Apr. 1, 2013), available at *http://www.publicknowledge.org/files/aereo__decision__2d__circuit.pdf*

[46] *See Netflix's Ted Sarandos Talks Arrested Development, 4K and Reviving Old Shows,* STUFF, May 1, 2013, *http://www.stuff.tv/news/apps-and-games/news-nugget/netflixs-ted-sarandos-talks-arrested-development-4k-and-reviving-old* (quoting the Netflix Chief Content Officer as saying "when we launch in a territory the BitTorrent traffic drops as the Netflix traffic grows."). It is true, as BitTorrent, Inc. states, that BitTorrent has many lawful uses and that BitTorrent, Inc. is not associated with copyright infringement. *See* BitTorrent Blog, *Reports Of Our Death Have Been Greatly Exaggerated* (May 6, 2013), *http://blog.bittorrent.com/2013/05/06/reports-of-our-death-have-been-greatly-exaggerated.* However, Sarandos appears to have been referring to all files that are exchanged using the BitTorrent protocol (which BitTorrent, Inc. does not control), not just the minority of those associated with BitTorrent, Inc. While BitTorrent is a general-purpose tool with lawful and unlawful uses, it is also true that many viewers use BitTorrent to unlawfully access content that is not otherwise available online.

[47] For this reason, trade and other agreements negotiated on behalf of the United States should not include provisions that could expand the scope of copyrights or copyright enforcement (as many trade agreements do, even though copyright law is already handled internationally by a series of treaties), create new kinds of intellectual property rights (as the proposed WIPO Broadcast Treaty would), or attempt to limit the online distribution of broadcast content. *See* John Bergmayer, *The US-Colombia Free Trade Agreement: Policy Laundering in Action,* PUBLIC KNOWLEDGE (Apr. 20, 2012), *http://www.publicknowledge.org/blog/us-colombia-laundering* (arguing that language in some free trade agreements could be read as limiting online video distribution). *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 such agreements if online systems were categorized as MVPDs and subsequently followed standard retransmission consent procedures).

[48] Copyright Law Revision, House Report No. 94–1476 (1976).

[49] For example, Economist Thomas Hazlett has observed that "[t]oday, the social opportunity cost of using the TV Band for television broadcasting—294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 4G technologies—is conservatively estimated to exceed $1 trillion (in present value)." Comment of Thomas Hazlett, in A National Broadband Plan for Our Future, GN Dckt. No. 09–51, Federal Communications Commission (filed Dec. 18. 2009), available at *http://mason.gmu.edu/~thazlett/pubs/NBP__PublicNotice26__DTVBand.pdf.*

casters who have said they may no longer want to continue broadcasting should feel free to return their spectrum to the public so that it can be put to other uses.[50] However, broadcast content is still important to many viewers and, driven to cut the cord because of rising MVPD subscription costs, a new generation of viewers is becoming more familiar with rabbit ears and over-the-air viewing.[51] Aereo and services like it should be part of this. If Aereo ultimately wins the court challenges against it and the Senate decides to revisit the law, it should consider creating a path where online video services can choose to operate as online MVPDs, which would increase the opportunity for content creators to get paid for their work and to reach new viewers. However, making an antenna rental service illegal would not benefit the public, would provide no benefit to creators, and would be contrary to the public purpose of broadcasting.

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 enable new entrants to reach viewers. 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 now, later 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.

Senator PRYOR. Thank you.

I will go ahead and start the questions with Senator Smith.

Senator Smith, I know that broadcasters have obligations, which I like and I think are based on good public policy, and we have seen decades of good results as a result of that. But these same obligations do not exist on the Internet.

So could you tell the Subcommittee here what might happen if, you know, for some reason those obligations went away?

Mr. SMITH. Mr. Chairman, broadcasting is in competition with everyone else providing video. Obviously, we believe we earn our licenses every day, with all the public service that we do, the decency rules that we observe, the children's programming we provide, the local news, weather, sports, information, emergency information. These are the values that broadcasting represents, and they are valuable still.

I think I infer from your question that if you take broadcaster spectrum away, will those same regulations of public service apply to the Internet? And I would simply say, my experience is that that would be a real steep climb in the U.S. Senate.

But the question is, if you compromise broadcasting, who serves those interests? And the answer is, no one steps up to those kinds of obligations. If you imposed indecency regulations on the Internet, you would collapse the business model of many of the people involved in that.

But notwithstanding an episodic, fleeting expletive or a wardrobe malfunction, I am very proud of the fact that broadcasters work hard to make sure that we are not purveyors of indecency and that

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[50] *See* John Bergmayer, *As Broadcasters "Threaten" to Shut Down, They're Not Getting the Reaction They Were Looking For,* PUBLIC KNOWLEDGE (Apr. 10, 2013), *http://publicknowledge.org/not-the-reaction.*

[51] 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.").

families have a place to go where they can have some confidence that their families can view what is on the television.

But we compete with the lowest common denominators of production, and that is the other pressure on the other side of us. But the best I can tell you, our spectrum comes with public service obligations that only we deliver.

Senator PRYOR. And can you tell the Subcommittee what your industry is doing to increase consumers' access to your programming for online and mobile platforms?

Mr. SMITH. Well, just recently, ABC announced that they are putting through a streamed process their programming.

I am pushing very hard on my members to deploy in more stations mobile facility, so that the 130 stations that now provide—or 130 cities that now have mobile, that that can expand all over the country. That is the very best way you can get video through the broadcast architecture.

It is one-to-everyone in a locality. It is local, and it is free. And it is live; it is big-event. And those are the qualities that I think make, as I said in my testimony, when it comes to video, we are indispensable, even irreplaceable. There is not enough spectrum in the universe to do all video one-to-one. So you have to preserve broadcasting if you want those big events, particularly those emergency events, available to the American people.

Senator PRYOR. Mr. Powell, let me ask you, I wanted to give you a chance to respond to Senator McCain's opening statement and the bill that he has filed.

You know, on one level, it may seem very commonsense that all consumers would have a choice and be able to go à la carte and pick out their programming. And, you know, that is kind of intuitive, that, yes, that makes sense. But I would like to hear your response from the industry's perspective on what problems that presents.

Mr. POWELL. Sure. Thanks for the question.

First of all, Senator McCain has a longstanding and deep interest in this. And I had the privilege when I was Chairman of the FCC to work with him on this issue and many more quite extensively.

As you point out, Mr. Chairman, the objective seems entirely reasonable and noble and quite intuitively right, that somehow if you bought less, you would pay less. That seems logical.

But many independent, third party studies that have looked at this very carefully have concluded that is not likely to be the case, including the GAO in 2003, the FCC again in 2004, and the Congressional Research Service again in 2006, as well as a bunch of academic reports, have concluded that it is a very serious question mark whether consumers would actually have lower bills or cheaper services as a consequence of à la carte.

The reasons are relatively clear when you think about it for a moment. If you take a channel that is accustomed to a large audience size and allocating its services across a big base and the advertising revenue and subscription revenue that go with it and have it sold directly to the consumer à la carte, a couple of things happen.

One, their audience size has shrunk dramatically. And so to make up for the revenue loss associated with advertising and their

revenue base, they are very likely to have to raise the individual price of that programming quite substantially than the $4 or $5 that Senator McCain was referencing when it is provided in a bundle.

It doesn't take long for consumers, putting those pieces together, to quickly get to a package that costs something very similar to what they were paying before, if not more. It is not a good deal for consumers if you pay $10 for 10 channels and you were paying $10 for 100. And I think that there has been some quite serious academic work to show that that is a possibility, a very likely possibility.

And so, while the concern is respectable and noble and one that we should continue to work on, I think we have our profound doubts that à la carte would actually deliver a lower-cost product to the American consumer.

Senator PRYOR. Senator Wicker?

Senator WICKER. Mr. Powell, let me start with you. I believe you testified that the current statute is frayed, needs some work, but you don't think this is a good time for an overhaul of the Act; we need to do something surgical because the state of the industry is fast-moving, we are in a period of transition.

When will it ever be less fast-moving than it is now? And when will we ever not be in a transition era?

Mr. POWELL. It is a very good question, because we may never. That is a fair enough question.

But I am a big believer that you can migrate existing regulatory regimes as well as just throw them out and try to replace them with a grand scheme. And I think by tackling the problems as they surface, you have demonstrable evidence, very specific fact patterns, understandable technology that you can directly address, that I think is very, very challenging to try to do in a big, comprehensive rewrite.

So, again, I would emphasize, we are not saying we are enamored with every aspect of the 1992 Act and that no change over time is necessary. But I think it is a more prudent and deliberate approach to try to address specifics as they arise, in which fact patterns and demonstrable evidence are available for us to address.

It is dated, as you note, in the sense that it was based on a lot of factual premises that are simply no longer true. I would be the first to admit that in 1992 the cable industry was unquestionably a monopoly provider. We had 98 percent of the multichannel video market. Today, that percentage is under 60 percent. At the time the 1992 Act was written, the industry was vertically integrated with program providers, closer to 57 to 60 percent. Today, that number is down to 14 percent.

But many of the rules that underlie the 1992 Act are meant to address those concentrated considerations, and I think those rules over time will have to be modified to reflect reality.

Senator WICKER. OK. What specifics have recently arisen that would be the target of your so-called surgical changes?

Mr. POWELL. Well, I would say, among our members, there is a difference of opinion on that. And we, as an association, are not particularly prepared to present a list of specifics for you.

Senator WICKER. So you are not advocating an overhaul of the Act, nor are you coming before us even suggesting the sort of surgical limit to changes that your testimony seems to advocate.

Mr. POWELL. I would only suggest that any surgical proposals we might make or those of our members might make will be done, if at all, subsequently to this hearing.

Senator WICKER. All right. Well, tell me this. For the overall industry, for the consumer, what do you fear might go wrong with an overhaul, a general overhaul, of the act?

Mr. POWELL. I think we could easily retard or disincent the enormous revolution we see taking place. Number one, a comprehensive rewrite is a long, complicated, and uncertain exercise. That uncertainty that hangs over the industry while it is rewritten tends to retard taking risk, making business model changes, because you are awaiting the understanding of what the rules will be.

I have been through, as a regulator, many major transformational rewrites. I would say that the 1996 telephone provisions took almost a decade to settle down, with multiple trips to the Supreme Court for resolution of clarity. And I think the country underinvested and underinvested in taking risks and innovation during that period. I think that is a real risk.

And I don't think some of the problems that some refer to are necessarily clear enough for a government response.

Now, that said, I think we have members, to be perfectly honest, who are very concerned about consumer affordability, and we will also often be talking about ways to manage cost to deal with that.

Senator WICKER. Mr. Bergmayer, would you like to briefly comment on Senator McCain's proposal, the à la carte proposal?

Mr. BERGMAYER. Yes, Senator.

I support Senator McCain's bill as a first step toward broader reform. The Senator, like so many Americans, is clearly outraged by ever-increasing cable bills. And the bill promotes his pro-consumer goals by taking note of the various regulatory advantages that broadcasters and cable already get, and it requires that these companies serve the public interest to qualify for them.

Notably, as I read it—you know, the bill came out recently, but I don't think that the bill outlaws the practice of bundling. It simply requires that viewers have a choice.

I would especially like to single out the bill's response to broadcaster threats to take high-value content off the air. This would clearly be an abrogation of the public trust. And Senator McCain is right to require that broadcasters serve the public if they wish to use the public's airwaves.

And as just a general observation, I would say the à la carte bundle tends to polarize people because they think it is a choice between buying a bundle that has every channel or simply assembling your entire subscription on a channel-by-channel basis.

Now, there is room in the marketplace for bundles of content. Something like Netflix, that is a bundle. You subscribe and you get access to everything at once. And many online services are like that. And, frankly, I prefer the Netflix model of just a single flat rate to get access to everything to, you know, the iTunes model of buying every show or every series episode by episode.

That said, what I think people want is a lot more choice. It is not bundles per se; it is that they don't like feeling like they are getting ripped off. And I think that a lot of people today feel like they are getting ripped off. So I support Senator McCain's bill because it is aimed at giving consumers a lot more choice and flexibility.

Senator WICKER. Thank you.

Senator PRYOR. Thank you.

We have been joined by Senator Thune, the Ranking Member of the full committee.

Senator Thune, you are recognized.

STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Well, thank you, Mr. Chairman. I don't have a lot to add. I thank you and Ranking Member Wicker for having this hearing.

And I want to thank our former colleague, Senator Smith, for coming back and joining us here.

And, Chairman Powell, thank you for being here, and Mr. Dodge and Mr. Bergmayer.

We had, earlier this year, an FCC oversight hearing, and I mentioned at that time that we needed to focus on establishing a 21st century legal and regulatory structure that meets the realities of our 21st century economy.

And as we move forward this year and continue looking at various aspects of our communications marketplace, I want to learn where our current laws need to be modernized. Every law that we pass is based on assumptions, and tends to address issues of a given moment in time. And a great deal has changed, obviously, in the video market in just the past 5 years, not to mention since 1992.

So, as we look at these issues and think about them, I think there are some basic questions that need to be asked:

Do our laws work? Are they still relevant? And do they provide the foundation for innovation and consumer choice?

And so I appreciate all of you and your testimony and your good work.

And thank you, Mr. Chairman, again, for holding this hearing and for the opportunity to just share those comments. I look forward to addressing these issues and moving forward in a way that will reflect a 21st century economy and the amazing changes over the years and technologies that have really given the American people higher quality and more choices. And those are all good things, so we want to continue in that direction.

Thank you.

Senator PRYOR. Thank you.

Senator Fischer?

STATEMENT OF HON. DEB FISCHER,
U.S. SENATOR FROM NEBRASKA

Senator FISCHER. Thank you, Mr. Chairman.

And thank you, Ranking Member Wicker.

In Nebraska, the way that the Nielsen DMA map is currently drawn, many people don't get in-state news, especially those living around the borders of our state. And as I understand it, the map was developed years ago for the purpose of assessing advertising revenue, and then Congress codified it and now determines where those broadcast signals for cable and satellite can be.

If I can watch Nebraska broadcasts on my computer over the Internet, I can tell you, the Internet doesn't represent those boundaries, but I can get them. But I can't get them on TV.

So my question is, to Senator Smith and Mr. Bergmayer, does this law make any sense in the current era? Because my neighbors in north-central Nebraska, we love our neighbors to the north, but we would also like to see Nebraska news.

Mr. SMITH. Senator, I remember vividly sitting in a seat in the Commerce Committee and being very frustrated by the very issue that you raise, and I introduced a bill to fix it. The NAB that I now am employed by fortunately didn't remember when they hired me that I did that.

[Laughter.]

Senator FISCHER. But you thought it was a good idea at the time.

Mr. SMITH. Well, I understand exactly what you are saying and the frustration. Unfortunately, when the state boundaries were drawn, the advice of Thomas Jefferson was not followed, that state boundaries be drawn on the basis of irrigation basins—in other words, groups of economics. And the Nielsen ratings, which we do not control, reflect those economic basins, if you will. And yet, if you go to Oregon, they don't want to listen to the Cougars and the Huskies; they want the Ducks and the Beavers and they want their local news.

So what I did, with NAB's help, was to work with cable and satellite providers to—in one case, one of the satellite providers was willing to add a Portland station. It relieved a little bit of the pressure, but it did not solve the problem.

But what we have done and what we will do with you is, if you have a particular situation, such as the chairman did in Arkansas, we work to try to resolve specific problems.

But I understand the problem. I am entirely sympathetic. I don't have a legal, statutory recommendation for you because the statute can't change where the money is, the advertising goes. People in Pendleton, Oregon, don't necessarily buy Chevys in Portland; they buy them in Pasco, Washington. And this is the problem.

And I wish I had an easier answer, but we will work with you and your office to see if we can't get some of the other providers to help solve that problem.

Senator FISCHER. I appreciate that.

Mr. BERGMAYER. Yes, Senator, I think that the rules that really limit the ability of cable or satellite and VPD providers to carry broadcast signals really should be reformed, because they demonstrate how the current regulatory system sort of freezes relationships and it freezes the status quo and it prevents the industry from flexibly evolving to, you know, match our technology and to match expectations.

And I think, for the most part, the broadcast industry should be able to control most of its relationships with cable providers or sat-

ellite providers, you know, with a lot of exceptions, as is in my testimony, through voluntary contracts and not necessarily—I don't think that those should be backed up by FCC rules that sort of set those contracts in the form of law.

Senator FISCHER. Would you try to reconfigure the way the formula is drawn now?

Mr. BERGMAYER. Sure, that might be a very——

Senator FISCHER. And what would you do? Do you have examples right off the top of your head?

Mr. BERGMAYER. For the technical, you know, reformulating the boundaries, I don't have any examples off the top of my head. That is extremely technical, and, you know, I am sure there are people out there who can better assess that than me.

I would reconsider the basic idea of things like distant signal protections, where if a signal in another market is willing to be carried by a cable system in another market, I don't see why those two businesses can't reach an arrangement to do so, and I don't see what the FCC should have to say about it one way or the other.

So I would attack issues like that probably at a more fundamental level. However, I certainly acknowledge in the short term simply just, you know, revisiting the formula and changing boundaries might make a lot of sense.

Senator FISCHER. Good. Thank you.

Thank you, Mr. Chair.

Senator PRYOR. Thank you.

Senator Johnson?

STATEMENT OF HON. RON JOHNSON,
U.S. SENATOR FROM WISCONSIN

Senator JOHNSON. Thank you, Mr. Chairman.

There is either a breakdown in the competitive model or there is not. And I guess what I would like to do, just—and I don't know who I should ask this of, but whoever has an opinion, chime in.

If we have sufficient competition, describe it. If we don't have sufficient competition, describe that. In other words, what is preventing the competitive model from offering à la carte? I mean, where is the breakdown occurring?

Mr. SMITH. Senator Johnson, if I might offer my perspective from my experience on this committee. I served here when Senator McCain was the Chairman. I remember wrestling with the issue of à la carte.

I will tell you that I have members in broadcasting who are for à la carte and I have members who are against à la carte. And I am with my members.

[Laughter.]

Senator JOHNSON. But, again, why don't we have à la carte?

Mr. SMITH. What I concluded at the time—I did not vote for it, despite Senator McCain's considerable pressure, because I saw it as a new market, and, as Michael just indicated in his testimony, there are tremendous market forces anyway that are creating kinds of adjustments. I foresaw a market developing that would keep pressure on this issue.

And I believe—I can't speak for Michael, but I believe there are some cable offerings now and satellite offerings that are beginning to offer different kinds of packages.

Senator JOHNSON. I mean, is there simply not enough competition? Is there collusion? Or is there a law or regulation that prevents à la carte pricing? That is really what I am asking.

Mr. BERGMAYER. In terms of specific laws, in fact, I believe there are. For example, there are certain provisions such as the basic tier buy-through, where even if a cable operator wanted to offer, say, their subscribers a broadcast-free cable package—because, after all, you can access over-the-air broadcast TV just with an antenna; what do you need to pay your cable provider for? However, they can't do that because there are rules passed by Congress and the FCC that prevent that flexibility.

So I certainly, you know, support repealing those because I don't think they make a lot of sense anymore.

On the broader point, I believe that online video is showing a lot of promise as the potential, the technological potential and the business model potential, for online competition to MVPDs, to cable, satellite, and the teleco video services.

However, I don't think that they are directly competing with each other. You can see that just by looking at the prices. I think online video more competes with the video rental store. And we have seen what happens. You know, we saw what happened to Blockbuster. I think that is much more of what that model approach is, as opposed to cable. And that is what competition looks like. You know, Blockbuster really had to change and is almost out of business. I am not sure exactly what their business status is right now.

But I don't see online video directly competing with cable right now, and I think that is why you don't see the cable providers really lowering their prices and offering as much flexibility. I have seen some improvement, as we would like.

Senator JOHNSON. But it has the potential, and there is really no legal impediment from the Internet to be able to do that?

Mr. BERGMAYER. Well, the Internet market right now, it can't get access to the same kinds of content, partly in response to the overall regulatory system. And most of the really must-see content is still available only on cable. So I think that is really—that and, plus, particular challenges like data caps and other things are preventing online video from becoming the full competitor.

So, right now, it is simply not a full competitor. But, yes, in the unregulated online space, there is nothing stopping them. In fact, some online services, like iTunes I mentioned before, I would characterize those as à la carte.

Senator JOHNSON. Mr. Powell, I get your point that just by going à la carte doesn't necessarily mean the service is going to be reduced. By the way, consumers are actually voluntarily paying these prices. So, you know, there is the marketplace actually working.

But is it fair for some content to subsidize the other content, which is basically what you are doing as you bundle? I mean, why not let each individual program stand on its own and fight for its own audience?

Mr. POWELL. Sure. A couple of things that I think might be informative.

One, I would say the way the market is evolving, consumers have à la carte depending on the window and timing that they want to watch it. There is a distinction between I want to watch it in its live, current, premium window à la carte versus your willingness to wait sometimes the next day, sometimes a few days before it is available on iTunes or Netflix or many other services that offer those programming offerings just as a show bundle.

Second, one of the big challenges in our market is the economics of funding high-value content. So the average television show today is $3 million to $4 million an episode to produce. When it runs in the first window, it often runs on cable in an effort to recoup some of that expense——

Senator JOHNSON. But, again, if it is so good, won't people pay for that? If it is not quite so good, they won't pay for the price.

Mr. POWELL. I think the challenge is, in a country committed to diversity of content, there would be a whole host of content that we would say collectively we value that probably would not survive being sold à la carte. This is one of the challenges of the television economic business.

If you are standing alone, you are depending 100 percent on the subscriber base that you can attract, the advertising you can attract. The challenge is for niche audiences or minority audiences that have a high-intensity love for a particular kind of content or programming, that programming potentially would not be able to survive economically being distributed and sold solo as opposed to a model in which the whole subscription model allows it to be sold in a bundle.

Senator JOHNSON. So, in other words, your association does support subsidizing certain programs over others?

Mr. POWELL. Well, I think an aspect of the cable model is it supports a wide range of diverse choices of channels that would be difficult to survive on their own. I do think that is a beneficial part of the cable model.

Senator JOHNSON. OK. Thank you.

Senator PRYOR. Senator Warner?

STATEMENT OF HON. MARK WARNER,
U.S. SENATOR FROM VIRGINIA

Senator WARNER. Thank you, Mr. Chairman.

It is great to see you all.

I guess, you know, as we think about here broadcast, cable, satellite, you know, each along the way have been in periods of dominance, and now each of you kind of being evidence of the status quo of content distribution, I guess, one, I would love—and I know this is a hot topic, but, you know, as we see the next wave of disruptive technology come along, whether it is the Aereo circumstance and some of the litigation that has been talked about, and the other members have mentioned Netflix and some of the others, you know, how do you all see these—what role, if any, that government should play as these new disruptive technologies come in and really, basically, potentially threaten each of your core business models?

And I would like to hear Mr. Bergmayer's comments on that, as well.

And then maybe a subset of that question being, you know, how do we factor in kind of the new revenue stream around digital rights, which is basically a whole new revenue stream that doesn't fit within our existing legal structure?

Mr. SMITH. Senator Warner, I think the thing that Congress can do is to be faithful to what is as old as our country, and that is our Constitution, which includes copyright. If you have copyrighted material, rights go with that that deserve compensation when others use it. I think that that is a principle that was valuable in the beginning and is important, hugely important, today.

Senator WARNER. That goes to the Aereo question, I guess.

Mr. SMITH. Well, I would just simply say I have members who are in litigation, and I can't speak to the facts of it or the technical details of it. But it seems to me that if someone takes copyrighted material, distributes it, and charges for it, and does not do what other MVPDs do, that that is called piracy.

And I think if you are faithful to the principle of copyright, the constitutional principle—ultimately, the courts will settle this and see if there is an exception. I don't believe there should be, because I think that begins to undo the creative community.

Senator WARNER. I would like to hear from everybody else.

Mr. DODGE. That said, I think copyright law also needs to keep pace with the times.

And so, for example, are there any devices out there today that don't have buffers, for example, and does a buffer make a copy, and should that copy be entitled to a royalty. And I guess it all depends on the facts and circumstances of a particular case, but, you know, our set-top boxes today are really computers. And if we make a transitory buffer copy, should that be an additional royalty to the copyright owner? I would put forth not. If you pay one royalty at the beginning, then the consumer, through fair-use principles, should really be able to do what they would like with the content.

Mr. POWELL. Senator, I would just say that the arrival of the Internet as a genuine and viable distribution platform will shake up the marketplace. I read it in articles, every week. One week, they are the greatest threat to our industry ever seen; the next week, they are a complement; and some of that language coming from the various CEOs who said the one comment last week and are saying a different comment this week. It is really in convulsive change.

The best part about it, I would observe, is that it is creating economic competitive stimulus to force companies to continue to innovate at a much more rapid pace, try to provide much higher-value services to consumers, and to compete with the pressures of content for nearly free that exist in the Internet space. It puts an even better punctuation mark on our need to continue to find ways to provide flexible channel offerings and to provide affordable services.

So I think, on balance, all of these things are exciting and positive, and I think they are going to continue.

I think it is very typical, sort of like a spinning jump rope, to say to Congress comprehensively that we know enough to step into

that and write an entirely new, responsive, effective, comprehensive regime. And I still think it is prudent to try to evaluate issues on a very specific basis as they arrive.

But I think if you just sit here from the perspective of consumers, what is not to like about the future that is emerging? And I think it is very, very exciting, generally, and, you know, I think it is something we should be excited about.

Senator WARNER. Mr. Bergmayer? And then I have just one other quick question, if I could.

Mr. BERGMAYER. Yes, I mean, sure, on the Aereo topic, two courts have now found that Aereo is an antenna rental service that does not require a license, and I think that both of those courts were correct. And I think it would be a very bad idea to change copyright law to make it so that services like Aereo would require a license. You don't need a license to put an antenna on the roof of your house, or rabbit ears, and it is hard to see why all of a sudden now you do need a license because you rent an individual antenna which happens to be located in another building in town.

And if you were to change copyright law to make services like that unlawful, there could be all sorts of unintended consequences for the Internet economy. And I think that is such a growing part of our economy today, I think it would be a bad idea. All kinds of services that can exist today without having to separately negotiate licenses, for example, services that allow you to access your own content that you store online, like Dropbox, would they suddenly need to get public performance licenses because they allow people to access their own individual content? I think that would be disastrous.

So, you know, for that reason, I don't think that the law needs to change to match Aereo.

And in broadly answering your original question, which was, you know, how should regulations cope with the rise of new technology, I think one of the primary ways is ensuring that these innovative online services are able to reach consumers over the broadband pipe and that they are not discriminated against and there are not data caps or other measures that, you know, prevent the next Netflix from offering innovative service to viewers.

Senator WARNER. I guess the only—and I appreciate that.

And I know my time has expired. I just want to ask Senator Smith one last question, though.

You know, I am struggling with this because on one hand I absolutely understand your concern about piracy and the notions about content. But I also have to say, when I heard, I believe, Mr. Carey from Fox say recently that, you know, if this continues, Fox or others may start taking content off broadcast, simply putting it on cable, I have to tell you, that raises a real concern for me. Because your broadcasters, unlike some of the others, actually have public spectrum you got for free, unlike, you know—I think if we were looking backward, those of us who used to be in the wireless industry, finally the government got smart and said, let's go ahead and auction this spectrum; it is a public good.

If you all have had this spectrum, which is an enormous value, for free and you are threatening to withdraw content because of these other challenges, then it really raises, to me, the question of

whether you ought to be able to keep that spectrum for free, which is a public good and maybe could be utilized for better public purposes.

Mr. SMITH. Senator Warner, I don't speak for Mr. Carey. Fox is an esteemed member of the NAB. I think he was speaking of hypotheticals or potentials. I think Fox produces enormously valuable content that gets huge viewership, and they have to figure out how to pay for it.

I understand the concerns you raised, but I would also simply say that we don't feel like we got our licenses for free. Those licenses come with significant public policy choices of the Congress that those airwaves should be used for localism, to produce news, weather, sports, and particularly emergency information that literally is the lifeline in either manmade or natural disasters. So broadcasters earn those licenses every day by obeying and observing, being faithful to the conditions of those licenses.

But I won't speak for Mr. Carey. I understand what you are saying. I think he is simply saying, we are not going to sit still for piracy.

Senator WARNER. And I would only simply say, sir, that I would imagine if we were to take this spectrum and say, let's go ahead and put a requirement out there, since we are losing a lot of that local content as broadcasters move more and more content upstream into national bases, and say, we are going to sell off some more digital component of that spectrum to entities that will provide that very local content, that emergency response, all those very valuable items, that there still would be a lot of excess, additional value that could perhaps be better utilized for the public.

And, candidly, the Government could receive a lot of revenues from that, as well.

But thank you, Mr. Chairman.

Senator PRYOR. Thank you.

Senator Begich?

STATEMENT OF HON. MARK BEGICH,
U.S. SENATOR FROM ALASKA

Senator BEGICH. Thank you very much, Mr. Chairman.

And let me, if I can, I want to follow up, Mr. Powell, in the discussion you had with Senator Johnson, if I could.

And when you talk about the subscription or the packaging, is the thought that there may be some that are new entries of product that—because people don't know they exist but, by putting them into a package, that people like me that surf channels might stumble across it and say, wow, I didn't know this existed, where did this content come from, and suddenly become someone who wants that content? Is that the thought behind it?

Because I want to follow up, because——

Mr. POWELL. Yes, sir.

Senator BEGICH. Is that what you are thinking there?

Mr. POWELL. I think there are two versions of the thought: the one that you have described very well, that there is an element of the television experience that is about discovery. It is about stumbling on something you didn't know you loved or wanted. I can certainly list a long string of shows that I discovered that I don't know

that I would have thought to buy in advance with full knowledge of what I am buying.

Moreover, I am not so sure in the course of the year my interests or patterns wouldn't change, that I got tired of that program or that program went off the air and now there is some other program on another channel that I haven't subscribed to that seems interesting. That is just a complicated movement of the way consumers consume television.

I think the second point, the one I was making earlier too, is, let's say you are interested in launching a brand-new network. And a brand-new network to survive has to audience, it has to have subscription. Right now in the model, you still have to convince cable operators to carry you. You still have to convince them that it is worth paying the price that you are asking for for carriage. But if you get on that system, you are being accessed by everyone in that subscription household.

If it was à la carte and you basically had to go essentially knock on doors and convince people to buy something they had never seen, something they have never experienced, I think there really would be a challenge for new and diverse networks to——

Senator BEGICH. Yes. And I guess I am following—as you were talking, I am thinking about from a network standpoint, it is like a pilot. You know, if someone had a pilot—in this case, a pilot channel—to go out and market, to get the share they need, to get their customer base would be very expensive. But if they have to just convince a company to carry something, it is a little bit easier. Is that a fair statement?

Mr. POWELL. Yes, sir. And if you think about it——

Senator BEGICH. That is what your thought is, right——

Mr. POWELL. Yes.

Senator BEGICH.—and that is how you are doing that?

Mr. POWELL. Another dimension of it, you understand, is that all the marketing, all the sales, all that work is done by the cable operator. If you had to sell à la carte, you would have to absorb the cost and expenses of doing all of that yourself.

Senator BEGICH. Right.

I am going to come back to one more issue on cable, but I am going to go to Mr. Dodge, if I can.

And you may not want to answer this because it is regarding your company's effort to merge with Sprint, and also SoftBank, I think, is also considering or in the process of going through a process. And SoftBank, which is predominantly foreign-owned or a foreign process—can you—I don't understand the process of if you are a domestic company and they are a foreign company and they are buying into a domestic company in this business, how that process works, in the sense of ensuring that we understand, when a foreign company buys some of our network, what happens.

And is there a difference between what you have to go through and what they have to go through? And what are the risks—and this may be unfair because you obviously would prefer the company, you, to buy it, not them. I am guessing that; I may be wrong, but——

Mr. DODGE. That is true.

Senator BEGICH. OK.

[Laughter.]

Senator BEGICH. I am just guessing here. So I am going to try to ask you to be as nonbiased as possible, which I know is going to be difficult, but I just want to understand the process.

So you come and you buy a company like Sprint, or SoftBank, which is foreign-owned, wants to buy Sprint. Don't they have to go through a whole other process? Or help me understand that a little bit.

Mr. DODGE. They do. For a foreign company to acquire FCC licenses in this case, they have to go through a CFIUS process, and the FCC also——

Senator BEGICH. Say that process again.

Mr. DODGE. CFIUS, C-F-I-U-S, which is the Committee for Foreign Investment in U.S. Companies, I believe.

Senator BEGICH. Yes. OK. I am with you now.

Mr. DODGE. Which takes a look at the national security concerns that may be associated with a foreign company owning broadcast or FCC authorizations generally.

And we do think that, you know, there is a difference between us and SoftBank acquiring Sprint, really for two primary reasons, one of which is, you know, we think a wireless nationwide network today is an asset that has, you know, important national strategic significance. And all things being equal, you know, we think it is better to keep it in U.S. hands.

And, specifically, assuming that the Clearwire spectrum is rolled up into Sprint or if Sprint keeps its controlling interest in Clearwire, the 2.5 gigahertz spectrum that they hold is evolving as the global standard for LTE mobile deployment. So we think it is preferable for a U.S. company to own that huge swath of spectrum in the United States.

And, similarly, Sprint has an enormous fiber backhaul network with numerous government contracts that rely on that for national security reasons. So we think, again, all things being equal, it is better for an American company to hold those.

Senator BEGICH. Very good.

Let me ask you one last question on that. Obviously, my state is a very rural state, and I mean extremely rural. The description you just gave, I mean, what gives—and, again, this is probably self-serving to you, so, again, try to be as nonbiased as possible here. But, you know, obviously, my end issue is, how much can we provide to rural communities and what would give the most access to rural communities? At the end of the day, that is what I look for. And so give me your thoughts on that.

Mr. DODGE. Yes, well, I think our proposal is to use that 2.5 gigahertz spectrum to actually increase broadband capability in rural areas for unserved and underserved households, which we estimate is about 40 million people today.

And we are uniquely positioned to do that because we actually have an installation network. We are largely a rural-based satellite TV provider today, and we have installers in every square inch of the country who could actually go and put outdoor antennas on the sides of people's houses, which allows the propagation of the 2.5 gigahertz spectrum to go much further and reach, as I said, you

know, the 40 million unserved and underserved households in rural America for broadband.

Senator BEGICH. Very good.

Mr. Chairman, if I could ask one last question of Mr. Powell.

Mr. Powell, thank you very much, again, for that answer, but I have another question. I have a 10½-year-old, and so I am always wondering what he is watching.

[Laughter.]

Senator BEGICH. But I have a—and I won't say the company name, but I do love this system, and I want to just suggest one piece added to it. And that is, I literally was flying, I was on Gogo Internet on the plane, sending a note to my wife saying, what is the channel my son is watching right now, and she says—I said, great. I literally went on and changed it online, and it changed it. And I said, did he notice it changed? And she said, yes, but he flipped it back. I said, I am going to change it again.

[Laughter.]

Senator BEGICH. And I literally used my iPad, obviously, and I was doing that, and I changed it again. And I was really testing the system. I mean, I was flying back to Alaska, changing his channel to a more educational channel, in my view. But what I wanted to do is, at that moment, also lock him out.

So I am just giving you a little—I think from a parent's standpoint, it is an incredible tool. I mean, literally, anywhere I am, I can see what he is up to, and if I don't like the channel he is on, at that moment, I can lock him out. That is what I would love to go to the next stage.

So I am just giving you that from a parent of a 10½-, 11-year-old. Give me a couple more extra tools, because, you know, as a parent, you always—you know, there are a lot of channel choices. You know, we have the ability on the mechanism there to lock out channels, but sometimes there are channels that have some really good content and you want that show but you may not want the whole channel because later in the evening they may have content you don't want them to see, or limit his content.

So I am just giving you a thought to the industry. I think it is amazing that I was able—my wife was very impressed, so now it is on her, you know. I think she will lock me out of channels or something, I don't know.

[Laughter.]

Senator BEGICH. "No, you can't be watching any more movies," or something. But it is really—I found it very impressive. So I just want to throw that——

Mr. POWELL. Well, thank you. I will definitely take the suggestion back. I can tell you, I try to lock out my 24-year-old, too, mostly because he is running up the cable bill.

Senator BEGICH. That is exactly—you just said why I do it, too.

Mr. POWELL. And, by the way, I would love to work with you, because there actually may be ways to do what you are trying to do in some of our systems. So——

Senator BEGICH. I would be game.

Mr. POWELL.—I could look at yours.

Senator BEGICH. I think it would be great. From a parent standpoint, it is great, because so much is mobile now. If you can make that access point——

Mr. POWELL. Well, we have worked hard to move interfaces and channel-changing capacity into devices like iPads so you can do just what you said, as well as really invigorate the parental controls in our set-top boxes. So anything we can do to make those two things work together better we will happily pursue.

Senator BEGICH. Great. Thank you very much.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you.

I have a few more questions.

Senator Johnson, do you have other questions? Let me go ahead and recognize you, Senator Johnson. My understanding is we are going to have a vote on the floor at noon. So go ahead and ask a few questions, and I will ask a few questions before we——

Senator JOHNSON. OK.

Again, I just want to follow up on the competitive model.

Mr. Powell, you used the term "convulsive change." I got in trouble using the word "great obstruction," but that is really how economies move forward.

Mr. POWELL. It is a good trumpeter word. That is good.

Senator JOHNSON. What I am getting a sense out of a lot of people on the panel here is that we really need to proceed cautiously. I understand Senator Begich's concern with something like a lockout, but I think that is something the private market ought to institute, not a government solution.

So I think that is—you know, obviously, a hearing like this is about legislation. And I guess I am asking, the competitive model works, the competitive marketplace is a marvel; we don't want to screw it up. So are there things that government needs to do to get out of the way? Are there legitimate governmental roadblocks to that competition versus roadblocks that will just be taken care of over the course of time through market competition? Maybe they are not here quite yet because of technology, but over the course of time. Let's not have government step in and screw it up.

So I will start with—I guess just kind of work down the list, or the table.

Mr. SMITH. Senator Johnson, I think, philosophically, I am a big proponent of markets.

I also know that many of the rules that sometimes you hear complaints about where government regulates—a comment was made earlier that there is a lot of rural representation on this panel. A lot of these rules are to try to protect rural residents in Wisconsin. If you get rid of nonduplication, compulsory license, things like this, what are you really getting rid of? You are getting rid of the congressional intent to foster localism. Because if you just go where the money is, you are going to go to New York, Chicago, Los Angeles, a few other big cities, and rural folks get left out.

And so Congress made a decision, with all of these rules—compulsory license, whatever—how do we foster this marvel that we have in this country that is actually unique to this country, where you have local broadcasting in this big, vast country that serves so many public values that are valuable still?

And so, always ask yourself when it comes up, I don't like this, why? Well, the answer is localism.

Senator JOHNSON. OK.

Mr. Powell?

Mr. POWELL. I would concur that I think we are in a tumultuous and competitive market that is generally operating well. But I would say, as I am obligated to, particularly on the behalf of some of our members, a lot of rules, a lot of aspects of the market have government at the table. They shape the terms and conditions under which certain things can be done.

And so, while I am not in a position to say which ones we would eliminate and in what way or even if we ever will, I would preserve the discussion that, where government is a party to how market conditions unfold, there can always be a question about whether that would be a productive place for government involvement.

But, you know, we reserve what that might be——

Senator JOHNSON. OK.

Mr. POWELL.—to a time in which it is——

Senator JOHNSON. And I would love to follow up with you when you have those issues. I would also love to hear what rules and regulations your members disagree on and the reason, but we can do that offline.

Mr. Dodge?

Mr. DODGE. So I would say, you know, we at DISH love competition and a free market figuring out the right answer for, you know, all manner of business questions.

There is one area today where there is not competition, and it is largely government-created, which is the retransmission consent system that I mentioned in my opening remarks.

And that is because, when this all started, there was one local broadcaster, say, an ABC affiliate, and one cable company. It was a pretty fair fight, you know, either called a symbiotic relationship or mutual assured destruction, but they both needed each other.

Today you have one broadcaster who is playing three or four distributors off against each other, and the result being prices are going up by hundreds of percent every time retransmission consent comes up for renewal. Consumers, in many cases, lose their programming. And it is just not a fair fight.

So that is why we suggested in those cases allowing us to import additional signal to level the playing field just a little bit so that the broadcaster has an incentive to actually be fair.

Senator JOHNSON. But you don't have a problem in paying for the retransmission. You just want more competition so that you are not pretty well forced to negotiate with just one supplier.

Mr. DODGE. Correct.

Senator JOHNSON. You would like multiple suppliers, potentially.

OK, Mr. Bergmayer?

Mr. BERGMAYER. Now, when you look at the way that people watch content, it is created by the network, they lure it to the affiliate, the FCC has rules about that. If it goes from the affiliate or the local broadcaster to the MVPD, the FCC has rules about that. That is retrans and the compulsory copyright license.

So, now, I support localism. However, I think there are better ways to foster localism than essentially subsidizing it through this

baroque regulatory apparatus that holds back change and limits choice.

So I support a lot of the same goals that our broadcaster friends support. However, I just think there are better ways to accomplish those goals, particularly with the change in technology that we have all seen.

Senator JOHNSON. OK.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you, Senator Johnson.

Let me follow up, if I may. I will start with you, Mr. Bergmayer. And that is, you mentioned in your testimony or in one of the answers to one of the questions, you mentioned that online video distributors are having problems getting access to some content. Do you want to explain that a little further?

Mr. BERGMAYER. Sure. I mean, a lot of the online video providers we see are very successful, and I don't think they really want to change their business model and become essentially virtual cable systems. You know, that said, you know, we do see that some content that is available through more traditional channels simply is not available online. And I would imagine that it is not for want of trying but it is just not available because the current incumbents, you know, have control over the business models and incentives of the content creators.

But, that said, you know, we have seen a number of providers—I will just point out Sky Angel, who is a company that wanted to offer a family-friendly—they are actually a Christian cable system. And they were an online cable system; however, you know, they lost access to certain content because they were an online system, and for that reason only. So they have a dispute at the FCC.

And I think, you know, that is just a hint of the kinds of, you know, competitive services that we might see and choices and control for viewers that we might see, you know, if these providers were allowed to basically, you know, do the cable model except online.

Senator PRYOR. Is that because of copyright considerations?

Mr. BERGMAYER. There are copyright considerations. There are telecom considerations. You know, there are ways to handle it. I don't think it is an intractable problem, though.

Senator PRYOR. Mr. Dodge, as you know, one of the things that we have to do in this committee and the Senate and the House have to do is to reauthorize STELA before the end of 2014. You suggested in your statement that retransmission consent is one area that Congress should consider when reauthorizing the measure.

And, you know, I think retransmission consent deserves a much longer conversation. I see some heads bobbing back there behind you; I think some would agree. But what other issues do you think ought to be part of the discussion when it comes to STELA reauthorization?

Mr. DODGE. So an area of potential improvement, I would say, is DMA reform or the orphan county issue, which is, you know, to use Colorado as the example, there are folks who live in the southwest corner of Colorado who are in the Albuquerque DMA and

every time the fall rolls around ask the question, why can't I watch my beloved Denver Broncos?

Senator PRYOR. Which is what Senator Fischer was asking about.

Mr. DODGE. Yes. And so, for that, we proposed a pretty simple fix, which is, you know, folks in the "orphan county," meaning from a neighboring state, should be able to get some in-state programming. We are happy to provide them with the programming for the DMA they are in, you know, as, if a will, a buy-through requirement, but give them the in-state programming to allow them to make a choice, ultimately.

You know, because, for example, there might be folks in southwest Colorado who, to Senator Smith's point, they might want to buy their cars in Albuquerque, and if that is the case, then they will probably watch Albuquerque stations to see those advertisements. But if they are watching Denver, you know, when Nielsen calls, they should say, "I am watching Denver," and maybe someday those DMAs will flip.

And then with respect to just STELA reauthorization generally, there are several categories of folks that we think should still be protected: you know, first and foremost, folks in short markets who don't have a network affiliate; folks who drive around in RVs; and DIRECTV also has some legacy customers who are true DISH Network subscribers that actually live in unserved households.

Senator PRYOR. OK.

Mr. Powell, let me ask you, I know that you offered your comments, your response to Senator McCain's proposal. Is there something that might give consumers more transparency and more choice that might be short of à la carte?

Mr. POWELL. Well, I think this has been mentioned, you know, there is a whole range of product configurations one could imagine that would improve the value from the perspective of the consumers. And I think all of our companies actually believe in that and are working very, very hard to try to create much more flexible offerings to give consumers that choice.

I would point to as an example Time Warner Cable's offering, in which it attempted to provide a package called, I believe, Internet—I mean, Essentials package for a much lower price without some of the traditional programming. Experimentation like that I think is going on. I think our operators would like to have even more flexibility to try to make those offerings. And I think that is a positive.

I also think we shouldn't underestimate the role of the cable company as broadband provider and the ability to continue to provide an infrastructure that really opens up the world of video far beyond what we provide over the proprietary system. And in that area, we are working very, very hard to be transparent about consumption patterns, usage of meters, clarification in billing, better information on the Web. I know these are issues you have been focused on.

So those are some of the things we are doing.

Senator PRYOR. And would some of this desire for more flexibility and, you know, pricing structure changes, whatever they may be, would that also include more transparency on what each channel actually costs the consumer?

Mr. POWELL. Well, interestingly enough, I can only speak to it factually; we have operators—there is nothing that prevents them—we do have operators who actually break out on the bill some of the costs associated with specific programming. Even if they are obligated to carry it by contract, I think some of them do let the consumer understand what the various consumer pieces are.

Senator PRYOR. And let me ask also about rural. This is changing gears a little bit, but let me just ask about rural.

You know, I believe, of course, and I think you all mentioned that there are several Senators on the Committee and subcommittee that have large areas of rural constituents in their states. And, you know, I think it is fair to say we believe that they should have the same ability to view the programs, not just—you know, I think they should have the same access to programs generally.

So let me ask Mr. Powell, if I can start with you on this, is it your experience that customers of small cable companies—it doesn't have to be rural, but small cable companies—end up with the same choices and the same viewing options and offerings that folks with the larger cable companies have?

Mr. POWELL. I would say that the small companies, first of all, do a very terrific job of providing good service even in rural communities. I think they are very proud of that. And they work very, very hard to provide a programming lineup that is compelling.

I think it is merely factually true that, being a small programmer, buying programming to match what may be provided on other cable systems sometimes can be a bigger challenge. Given because it is not as large, not as profitable a company, some of the premium programming that is understandably relatively expensive is a bigger challenge for them to purchase. But they work hard at trying to make sure that they can replicate that the best that they can.

Senator PRYOR. Senator Smith?

Mr. SMITH. Mr. Chairman, I need to say a word in defense of retransmission consent.

I understand why my friends on this dais don't want to pay for broadcast content. We literally represent a few pennies per dollar of a subscription-TV bill, but it is the most valuable content they have, the stuff that people watch the most.

Retransmission consent is only a recent, in terms of literally years, when we have gotten paid for that value. But we are not the driver of what is driving up their costs. We are one piece of it, and literally cents per dollar.

Somehow, if you want to support localism, please remember the two revenue streams that provide for it and pay those costs: advertising and retransmission consent. Mr. Dodge's company now has the technology to get rid of broadcast ads. It gets rid of your ads, too, Mr. Chairman.

It does not get rid of cable or their ads.

So somehow, if we are going to do business with them, we need to be paid for the value of what we provide, because it is expensive. And what does it preserve? It preserves localism, because I have to tell you, if they bring in a distant signal from L.A. into Fort

Smith, it is not going to mean a lot to them when a hurricane is bearing down or a tornado.

So these things cost money, and we have only two ways to pay for it: advertising and retrans. And they want to eliminate our advertising model. It doesn't add up.

Senator PRYOR. Do you want to comment on that, Mr. Dodge?

Mr. DODGE. Sure, just on a couple points.

One, you know, Senator Smith is referring to our AutoHop technology, and it doesn't get rid of the ads. The entire broadcast is actually saved to someone's hard drive, and people actually have to enable the functionality to skip ads. So if they want to watch them, they are there. If they fast-forward into them or rewind, the ads are actually still there.

Two, it is my understanding that an increasingly increasing proportion of retransmission consent fees, which are collected ostensibly in the name of localism, are actually being required to be sent back to the networks in Los Angeles and New York. So I would ask you to view that statement, that retrans 100 percent supports localism, with a little bit of skepticism.

Mr. SMITH. It does involve both, by the way. Networks and local affiliates are actually both hugely important to localism.

Senator PRYOR. Mr. Smith, let me ask you, if I may—this is a little bit of a change of gears here, but a little bit here today but also in other contexts I have heard you talk about spectrum and the spectrum crunch that we are in in this country, especially when it comes to the most densely populated areas.

And I am wondering if you would share with the Subcommittee your thoughts on how the broadcast model helps to alleviate some of the spectrum crunch we are seeing around the country.

Mr. SMITH. Let me say as a predicate, if there is any misunderstanding, the NAB supports the voluntary spectrum auction. We believe it should be done right and not right now. It should be done as soon as it can be done right.

But the uniqueness of the broadcasting signal is that it is one-to-everyone, local, free, and live. That is a huge value, the architecture of which is not shared by broadband, which is one-to-one. As I said earlier, there is not enough spectrum in the universe to do all video one-to-one. So when it comes to big events and big emergencies, the broadcast signal becomes a matter of extreme public safety importance.

And that is why I think, as you calculate, you know, all of the various regulations around it, go back to the original intent of Congress as to why they set it up to foster localism. If everything is pay on TV now, if you have to go to DISH or you have to go to whatever to see television, what does that do for the elderly, the shut-ins, the poor, many minority communities, who disproportionately rely on broadcast television for, in these days, 20, 30 broadcast channels that they can access? I think they should be counted too.

And those are the kinds of things which broadcast spectrum uniquely provides to the American people. It was valuable in the beginning; it is valuable still. And it is a value that the Congress should support.

Senator PRYOR. Senator Johnson, do you have anything else?

Senator JOHNSON. Just quickly, as long as we are talking about rebroadcasting, the fees that I have—I am looking at a schedule right here—about $2 billion last year. Is that approximately true? And it has gone from about 1.3 percent in 2006 to about 7 percent of the total fees paid to cable. So, I mean, it has been increasing as a percentage of the cable bill.

What is the total amount—you said two income streams. What is the total value of advertising in the broadcasting——

Mr. SMITH. It would vary with each broadcaster, but I would say——

Senator JOHNSON. But, I mean, annually.

Mr. SMITH. As a general rule, I would say somewhere between 15 and 30 percent of their revenue stream is retransmission consent. The balance, of course, is advertising.

Senator JOHNSON. No, the question I am asking—so, in terms of revenue streams coming into broadcasting, you get about $2 billion per year nationally in terms of rebroadcasting fees. What do you get in terms of advertising? I mean, that is hundreds of billions of dollars, correct?

Mr. SMITH. It is a lot of money. I can get you an exact——

Senator JOHNSON. But, I mean, the retransmission fees, in the scheme of things, is a pretty small amount of the revenue stream, correct?

Mr. SMITH. Correct. But as telecommunications fractures and the advertising model gets smaller, how do you maintain the quality, how do you pay the athletes, how do you provide all of the content that people demand the most, which comes from broadcasting——

Senator JOHNSON. And I know that the business model is changing dramatically.

Mr. SMITH. Right.

Senator JOHNSON. And, again, I just come from the standpoint of I don't think government is particularly good at trying to redirect that business model very effectively.

Another quick question, in terms of the total value of the spectrum you have right now, I mean, yes, I realize that broadcasters are providing the local content and the emergency services, all those types of things, but there is a huge value locked up——

Mr. SMITH. Right.

Senator JOHNSON.—in that spectrum, correct?

Anybody on the panel have some kind of estimate? Isn't this next auction supposed to bring in somewhere around $15 billion? And that is still a roughly small sliver of the spectrum, correct?

Mr. SMITH. Broadcasting has about 230 megahertz of spectrum. Wireless now has, I believe, over 500 megahertz, much of it still inventoried. The government has the other half.

Mr. DODGE. Not all spectrum is created equal.

Mr. SMITH. Not all spectrum is created equal, but the truth of the matter is, with the digital technology, digital compression technologies, spectrum gets more and more efficient all the time.

Senator JOHNSON. But broadband providers are paying for their spectrum? They have already purchased it? It has been auctioned off?

Mr. DODGE. The wireless providers? Yes.

Mr. SMITH. In some cases, not all.

Senator JOHNSON. Do you have any idea how much that has cost, whatever the amount you have had?

Mr. DODGE. We paid $3 billion for 40 megahertz of S band spectrum in the bankruptcy auction several years ago.

Senator JOHNSON. That was actually probably a pretty good deal, right?

Mr. DODGE. It was an auction. It is fair.

Senator JOHNSON. No, I know. I am just saying—I am not—I am just saying, that was—again, I am just trying to get some sort of feel of overall numbers, overall value. Because it is real easy to kind of throw around generalities in terms of, you know, local content, but when you start putting a dollar to it, that is where competition starts kicking in, and that is what we are really talking about here, is dollars going to and from different individuals. That is how competition is created.

I am just trying to get, you know, that basic information to tell me what is happening here.

OK. Well, that is all. Thanks.

Senator PRYOR. Thank you.

And I want to thank the panel. You guys have been outstanding and very informative. We appreciate your time and the fact that you were here today.

What we are going to do is we are going to leave the record open for 2 weeks and allow members to ask questions, submit questions. We would appreciate you all getting your answers back as quickly as possible.

And since there is no other business before the Subcommittee today, we will adjourn. Thank you very much.

[Whereupon, at 12:15 p.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARK PRYOR TO HON. GORDON H. SMITH

Question. During our hearing, there was much discussion about retransmission fees and their effect on consumers' cable bills as well as consumers' access to free broadcast television. Could you please further describe the amount of revenue that the broadcast networks, as well as affiliate stations, receive on a yearly basis from retransmission consent fees? Can you provide an average rate that TV stations charge pay TV providers for retransmission consent? Could you also describe how the amounts generated have changed yearly and the reasons for these changes? Finally, can you discuss what benefits this added revenue has provided to the networks, affiliate stations, and consumers?

Answer. Retransmission consent negotiations are market by market business transactions. Therefore the cost of retransmission consent varies widely from market to market and station to station. On average, retransmission consent accounts for about 2 percent of a consumer's cable bill. SNL Kagan recently estimated that broadcasters' retransmission consent fees amount to just 8.9 percent of what cable/satellite operators pay for the programming of basic cable networks and regional sports networks (which receives much lower ratings than broadcast programming). Despite the low cost per subscriber, retransmission consent offers signification public interest returns. Retransmission consent revenues are used to purchase weather radars, pay the salaries of journalists and create new and refreshing content for viewers.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. GORDON H. SMITH

Question 1. In his testimony, Mr. Bergmayer argued that much of the most popular video programming is not currently available online because the current regulatory system allows broadcasters and other media incumbents to decline to make their programming available to online video providers. What are the barriers that prevent online video providers from making many of the most popular television shows and movies available to their customers?

Answer. Broadcasters have always been committed to offering our popular programming directly to consumers for free. In some instances, this means cord cutters utilize a digital antenna to view live over the air broadcasts. In many other cases, broadcasters have committed to putting popular shows online on network websites or via streaming video services created by broadcasters such as Hulu.

Question 1a. What steps can be taken to facilitate online streaming of more of the programming that is most popular with consumers?

Answer. Increasingly, pay –TV providers demand, as a condition of carriage, that programmers do not display their content on websites other than those available to authenticated cable subscribers. These contractual restrictions are designed to curb "cord cutting" by forcing consumers to subscribe to an MVPD service in order to view their favorite programming online. Congress should investigate the extent to which MVPDs utilize their market power to coerce programmers to restrict access to their content online.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO HON. GORDON H. SMITH

Question 1. Improving mobile broadband and emergency communications is a key priority of this Committee. This priority led to the call for the Federal Communications Commission to design and carry out voluntary incentive auctions, a complex auction process allowing television broadcasters to voluntarily return spectrum. A

key component of these auctions is sufficient coordination with Mexico and Canada to ensure channel slots remain available at the conclusion of repacking. Can you expand on why these negotiations are important for the stations along the Canadian and Mexican borders and how your industry is working with stakeholders and government officials to ensure effective coordination and a successful auction?

Answer. Organizing television bands to ensure broadcast stations do not interfere with one another is an incredibly complex task. Before making new interference calculations and assigning broadcasters new channel allocations, the FCC needs detailed information *and a plan* prior to repacking. In states that border Canada and Mexico, the FCC also needs detailed information on the broadcast television stations in these counties before it can effectively reorganize the television bands. If the FCC does not coordinate with our neighbors to the north and south, broadcast television stations in border states will be left with channel allocations that receive harmful interference from Mexican and Canadian broadcasters and will prevent U.S. viewers from receiving a quality signal. Unfortunately, the Commission has been lacking core details on how it plans to treat border stations in the repacked television band. It is unfortunate that viewers in Lake of the Woods, MN risk losing free television service due to lack of planning and information from ongoing negotiations with our partners north and south of the border.

Question 2. The emergence of online video services and the ability to send video over multiple internet-enabled devices has changed the way viewers expect to access programming. In the hearing last April, we spoke about the future of video and how consumers are starting to want more and more "on-demand" services. They want what they want, when they want it, wherever they want it. What are some of the examples of how are your members/companies evolving and innovating to these new market demands, and do current laws help or hinder these customer-demanded market evolutions?

Answer. Broadcasters have made significant investments in Mobile DTV technologies that allow subscribers to view free over the air television on their choice of mobile device. Unlike other technologies that rely on a wireless Internet connection, Mobile DTV utilizes the same 6 MHz of spectrum broadcasters use to deliver their over the air video to subscribers at home. As a result of Mobile DTV's one-to-many architecture, Mobile DTV offers a level of spectral efficiency that is unmatched by wireless Internet dependent solutions that rely on a one-to-one architecture and exacerbate spectrum scarcity concerns.

Question 3. I understand that 5 local broadcast stations in Minneapolis are currently on-the-air with mobile television. Can you explain the benefits of this service to my constituents and how it speaks to the future of broadcasting?

Answer. Mobile DTV is a pro-consumer, spectrally efficient way to watch television on the go. Unlike other services that rely on wireless Internet connections to stream live television, Mobile DTV uses the same television architecture as traditional broadcast television. As a result, consumers aren't forced to pay for monthly data packages and overages, nor are they subjected to quality degradation and streaming buffers that delay live news weather and sports. Additionally, because Mobile DTV relies on hardened broadcast television transmission facilities, rather than cellular towers susceptible to outages in severe weather, Mobile DTV is a premiere platform for providing emergency alerts and important safety information to viewers who are away from a traditional television.

In a market where wireless providers claim spectrum is at a premium, Mobile DTV offers television viewers an affordable option to watch TV on the go without compromising quality or wasting precious bandwidth.

Response to Written Question Submitted by Hon. Mark Pryor to Hon. Michael K. Powell

Question. During our hearing, there was much discussion about retransmission fees and their effect on consumers' cable bills as well as consumers' access to free broadcast television. Could you please further describe the amounts being paid to broadcasters and affiliate stations annually by your members/company? What percentage do these fees represent of your total programming costs and how do they compare to non-broadcast access fees? How have these percentages changed yearly? How does the amount paid in retransmission consent fees to stations compare to the amount paid to non-broadcaster affiliated cable networks? Finally, can you discuss the benefits broadcast programming provides to your company/companies and consumers, and the challenges posed for your operations and for consumers by the retransmission consent system?

Answer. NCTA does not have access to data regarding the individual payments made by its members. However, FCC Chairman Wheeler recently noted that the costs of retransmission consent agreements have increased from $28 million in 2005 to $2.4 billion in 2012—a nearly 8,600 percent increase in seven years. In 2013 alone, retransmission consent fees rose 38 percent, while overall programming expenses rose only approximately 13 percent.

Broadcast programming remains an important part of the cable service offering. Therefore, it is important to our member companies that negotiations for the carriage of broadcast programming on cable are conducted honestly, in a good faith attempt to reach a mutually beneficial carriage agreement without demanding unreasonable terms and conditions or taking unreasonable negotiating postures.

The proliferation of video competition from DBS and telephone company providers has resulted in increased leverage for broadcasters, because broadcasters can withdraw their programming from one MVPD and still reach consumers through multiple other MVPDs in the market. Certain anticompetitive behavior by broadcasters, such as joint retransmission consent negotiations between broadcasters that are not co-owned, give broadcasters even more power in retransmission consent negotiations, putting consumers at greater risk of losing broadcast programming. We believe that the law should be changed to protect consumers by addressing such behaviors.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BARBARA BOXER TO HON. MICHAEL K. POWELL

Question. In his testimony, Mr. Bergmayer pointed out that many media incumbents control both video content and the infrastructure necessary for delivering it to consumers. As a result, he argued, online video distributors are subject to practices such as bandwidth caps, which some commentators believe may be discriminatory, particularly when they exempt video traffic of the incumbent's affiliates from the cap. Do data caps disadvantage online video distributors such as Netflix and Amazon Instant Video?

Answer. Far from thwarting the development of online competition to its video service, the cable industry's massive and continual investments in upgrading and enhancing its broadband service have only encouraged and facilitated new online video offerings. Netflix now has more than 33 million domestic streaming customers—more than the largest cable or satellite operator. We expect and hope that this trend continues. Netflix and other online video options have been positive for cable. They have driven up consumption and demand for higher broadband tiers.

Bandwidth "caps" (largely a misnomer, since subscribers generally do not lose access when they reach their plan's "cap"), or other usage-based pricing plans in which subscribers who use the network less, pay less, and subscribers who use the network more, pay more, allow consumers to select the broadband plan that works best for them, rather than requiring them to take a one-size-fits-all approach. Usage-based pricing is not an effort to discourage broadband use, but rather a means of ensuring fairness and economic efficiency. Such pricing plans also drive consumer adoption of broadband, as would-be low-volume users are able to enjoy lower prices premised on their below-average usage. When accompanied by appropriate disclosures (regarding plan options and a customer's own usage), usage-based pricing promotes consumer choice and empowerment.

Providing video from an ISP's affiliated MVPD service outside of a provider's data cap does not undermine the basic fairness of usage-based pricing. Cable customers demand and expect value from their providers, including the ability to access the MVPD content they subscribe to on an anytime, anywhere basis. Exempting an operator's authenticated video services from consumption limits is not intended to discriminate against online video, but rather to benefit consumers by adding value to the video programming package they already pay for.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO HON. MICHAEL K. POWELL

Question. The emergence of online video services and the ability to send video over multiple internet-enabled devices has changed the way viewers expect to access programming. In the hearing last April, we spoke about the future of video and how consumers are starting to want more and more "on-demand" services. They want what they want, when they want it, wherever they want it. KWhat are some of the examples of how are your members/companies evolving and innovating to these new

market demands, and do current laws help or hinder these customer-demanded market evolutions?

Answer. Consumers increasingly want access to programming on the device in their pocket and the tablet on their desk. To meet this demand, cable operators have developed apps and services for many popular mobile platforms. Of particular note, cable companies are streaming live video to their subscribers' mobile devices. Using various technologies, subscribers can now access streaming content over the Internet on nearly any connected device. Moreover, cable companies have adapted to customers' preferences for using a wide variety of devices (such as game consoles) and screens (such as smart phones and tablets) inside their homes to watch programming that used to be available only on their television sets and via cable set-top boxes.

Cable companies are also enabling their customers to access cable programming outside the home. Comcast Xfinity customers can now watch more than 50 networks live via the Xfinity TV Go app. Comcast customers can also watch more than 25,000 on-demand video choices anywhere on mobile devices and download thousands of video choices to watch offline. Cablevision has been steadily expanding the channels included in its "Optimum: TV to GO" service. The service now includes everything from ESPN and the Food Network to HGTV. Charter's recently launched Cable TV App. provides over 100 channels of live streaming in-the-home, and a subset outside-the-home.

The investments cable operators have made in new apps and services are beginning to pay off, but current laws sometimes hinder these customer-demanded market evolutions. To continue to promote these developments, the law should:

1. *Provide the greatest possible degree of business flexibility.* Requiring providers to arrange and offer service in a particular way hinders their ability to create and respond to market demand.
2. *Contain fewer prescriptive rules.* The government needs to resist early and premature entry into the markets based on hypothetical harm, and instead focus on addressing problems if and when they arise. Experimentation in new services and new business models should be encouraged.
3. *Be applied on a technology-neutral basis.* Like services should be treated alike, and all providers of those services should play by the same rules. There is a serious threat to innovation and competition when the law confers any regulatory advantage on particular technologies, or deregulates not when market forces warrant, but when a favored technology is used. Companies facing fierce competition will respond to what consumers want, as providers continuously seek to differentiate themselves and their products and services. Their response should not be driven, or even affected, by a need to fit a service into a particular regulatory box.

Response to Written Questions Submitted by Hon. Marco Rubio to Hon. Michael K. Powell

Question 1. Consumers want their video consumption to fit around their lives, giving them greater flexibility and more control and choice over the content they watch. As a result, the market is responding, and wireless services and capabilities are growing substantially: networks are live streaming programming, cable companies are providing mobile applications, and WiFi hot spots are expanding. Given the expected growth in the wireless video marketplace, how important is spectrum to the future of cable companies and video distribution?

Answer. Spectrum, particularly unlicensed spectrum for Wi-Fi use, is extremely important to NCTA's member companies and the future of video distribution. Our member companies have invested in and deployed more than 150,000 Wi-Fi access points, extending their networks to make them more flexible, more interoperable, and more convenient for customers. These Wi-Fi access points allow subscribers to access fast and reliable Internet connections indoors and outdoors when away from their home or office, advancing our joint goal of increasing broadband access. Americans rely on these access points not only for everyday business, education, and entertainment purposes, but also during emergencies, such as Hurricane Sandy, Winter Storm Nemo, and the attack at the Boston marathon. As Comcast noted in its recent testimony before the Subcommittee, ". . . unlicensed spectrum is an essential input to technological innovation, investment, and economic growth. Only with access to enough unlicensed spectrum will industry be able to meet consumer demand for wireless data services."

Question 2. NCTA has stated that cable companies now depend on the 5 GHz band for their Wi-Fi networks, and that the future of Wi-Fi depends on the FCC making more spectrum available in this band and adjusting the rules that apply to this band. Why is the 5 GHz band so important to the future of consumer Wi-Fi?

Answer. In the United States, more data is carried over Wi-Fi than any other Internet source, and Cisco's Visual Networking Index estimates that today's already enormous Wi-Fi traffic will more than double by 2015. Wi-Fi has been so successful, in fact, that existing spectrum designated for unlicensed use is becoming increasingly congested—a trend that will only continue. Indeed, the 2.4 GHz band, the primary band used for Wi-Fi, is already reaching exhaustion in larger, high-penetration markets. In fact, a recent study suggests that Wi-Fi spectrum at 2.4 GHz will be exhausted in many markets by the end of 2014. Device manufacturers and service providers are turning to the 5 GHz band to meet growing demand as the 2.4 GHz band reaches exhaustion. The 5 GHz band is particularly attractive for new Wi-Fi deployments because it provides a large amount of unlicensed spectrum and is compatible with existing Wi-Fi standards, and because 5 GHz capability is already built into many consumer devices used worldwide.

In addition, the next-generation "gigabit" Wi-Fi standard—IEEE 802.11ac—is built exclusively for the 5 GHz band, in large part because the 160 MHz channels necessary to deliver gigabit Wi-Fi are not available in other unlicensed bands. This new standard is already in place and being rolled out in consumer devices. It will allow substantially better speed and performance compared with previous generations of Wi-Fi. Under current FCC rules, however, American consumers do not have access to even a single channel in the 5 GHz band where both indoor and outdoor use is allowed that is wide enough to accommodate gigabit speeds

Question 3. NCTA has stated that cable companies are only able to use a fraction of the 5 GHz band for their Wi-Fi networks. What portions of the band can you use and what portions can you not use? Why do the FCC rules make most of the 5 GHz band unusable for cable Wi-Fi systems?

Answer. The FCC divides the 5 GHz band into several different sub-bands. According to the Commission's current Notice of Proposed Rulemaking, these would be: UNII–1, UNII–2A, U–NII–2B (proposed), U–NII–2C, U–NII–3, and U–NII–4 (proposed). Cable companies overwhelmingly use the U–NII–3 band. This band allows outdoor operations, has a reasonable maximum power limit, and does not mandate that companies employ a difficult listen-before-talk technology called "Dynamic Frequency Selection" (DFS). The other bands do not support widespread operations because FCC rules (1) do not allow unlicensed broadband devices, (2) prohibit outdoor Wi-Fi use, (3) mandate a very low power level, and/or (4) mandate the use of DFS. I have included a chart that explains this visually. The result of these overlapping restrictions is that it is technically and economically feasible for widespread Wi-Fi networks to use just 100 megahertz of the 555 megahertz potentially available for use in the 5 GHz band.

Question 4. NCTA has stated that it agrees with Congressional action in the Spectrum Act to make the "U–NII–4" portion of the 5 GHz band available for Wi-Fi. Intelligent Transportation Services also will use a portion of this band once that technology becomes available in the future. Are you seeking to displace ITS or to share with ITS? Given the well-understood licensed and unlicensed spectrum crisis, we need to make sure every band is used as efficiently and intensively as possible. How would sharing improve the efficiency and intensity of use of this band?

Answer. NCTA is committed to sharing the U–NII–4 band with ITS and has not sought to displace ITS. The goal must be for the FCC to establish a sharing approach that increases the efficiency and the intensity of use of the band while also protecting ITS operations when companies begin to deploy these technologies. This is critical, because today the U–NII–4 band is underutilized. Although fourteen years have passed since the Commission authorized ITS to use U–NII–4, there is not one commercially available ITS network deployed in the 5 GHz band. The ITS industry has only recently begun to coalesce around the IEEE 802.11p standard, and is now testing a limited number of experimental vehicles. The fact that ITS, unlike licensees in almost any other band, has not yet deployed presents Congress and the FCC with a golden opportunity to make sure that we all build in sharing and efficiency from the beginning.

Question 5. The issue of retransmission consent negotiations has garnered the attention of Congress and the Federal Communications Commission. In 2011, the FCC issued a Notice of Proposed Rulemaking seeking comments on whether the must carry-retransmission consent regime should be modified. Last Congress, the Next Generation Television Marketplace Act was introduced in the House and Senate to reform the must carry-retransmission consent regime. Which entity would NCTA

rather act on rules for retransmission consent—the FCC or Congress, or neither? Why?

Answer. Retransmission disputes implicate very complex issues, which involve both statutes and regulations. NCTA filings at the FCC raise concerns about the current trend of broadcasters in the same market utilizing local marketing agreements or shared services agreements to jointly negotiate retransmission agreements. Cable operators in particular have raised concerns about other aspects of the current system. We are happy to work constructively with both Congress and the FCC as they discuss retransmission consent.

Question 6. There has been a dramatic increase of programming blackouts over the last few years under the current retransmission consent regime, from 12 blackouts in 2010 to 91 last year. Why has the number of blackouts increased?

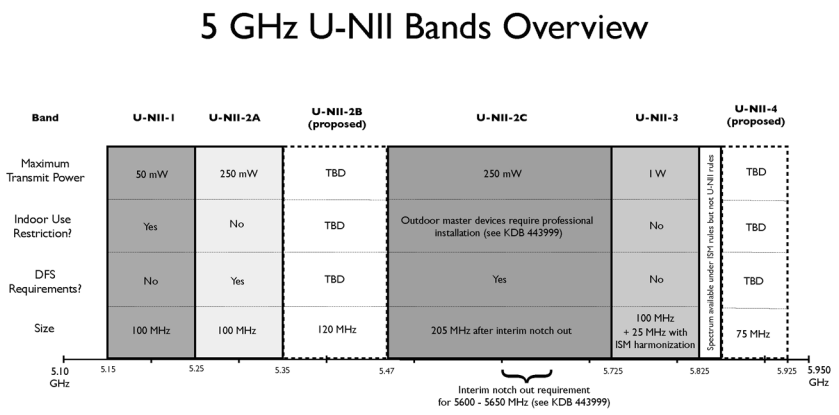
Answer. Inherent in the right to withhold broadcast programming in the absence of a distribution agreement is the risk that sometimes the parties won't be able to reach agreement. As broadcasters have focused in recent years more on retransmission dollars for compensation rather than on other issues, business disputes have arisen over differences between how the parties value the programming, and the terms and conditions of how it is offered.

Question 7. It seems that, in many respects, it is a good time to be a television viewer. Consumers have many choices. The emergence of Netflix, Amazon Plus, Hulu, as well as more digital offerings from over-the-air from broadcasters has provided a lot of competition to cable and satellite providers. Over the years there have been arguments that consumers were "forced" to buy some cable channels that they did not watch, but as best as I can tell, this too has changed in the past several years. For example, at least 8 of the largest cable and satellite providers offer "light" packages that don't include channels like ESPN. It seems that the market is working. With renewed discussions of the need for à la carte pricing, would you agree that the market is providing consumers choice without the need for government intervention?

Answer. Consumers certainly have a choice among distributors, as competition has grown to include satellite providers, telephone companies, and Internet-delivered options. Moreover, cable is committed to offering a variety of pricing and packaging options to meet consumers' needs and desires. As the market evolves, our members will continue to work to find compelling and sufficiently flexible offerings.

As policymakers examine the implications of this evolving marketplace, including whether to make changes to the existing regulatory structure, NCTA looks forward to serving as a resource in that discussion.

ATTACHMENT



RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO
HON. MICHAEL K. POWELL

Question 1. Mr. Powell, cable is a broadband company. Does the cost of content slow down broadband deployment or slow down re-investment of infrastructure?

Answer. Cable companies continue to invest vigorously in their networks in order to meet growing demand and more broadly to provide the advanced high-speed services that consumers want. Since 1996, the cable industry has invested over $200 billion in its facilities. These investments have also included bringing broadband to previously unserved areas.

Question 2. Is there any reason why an "à la carte" package isn't available today? Is there a reason any of the companies represented here can't or won't provide it?

Answer. Numerous studies of retail à la carte have cautioned that consumers would not necessarily enjoy higher value from such a model. While it seems intuitive that choosing one's individual channels would result in cheaper content, the economic reality strongly suggests that may not be the case.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
R. STANTON DODGE

Question. During our hearing, there was much discussion about retransmission fees and their effect on consumers' cable bills as well as consumers' access to free broadcast television. Could you please further describe the amounts being paid to broadcasters and affiliate stations annually by your members/company? What percentage do these fees represent of your total programming costs and how do they compare to non-broadcast access fees? How have these percentages changed yearly? How does the amount paid in retransmission consent fees to stations compare to the amount paid to non-broadcaster affiliated cable networks? Finally, can you discuss the benefits broadcast programming provides to your company/companies and consumers, and the challenges posed for your operations and for consumers by the retransmission consent system?

Answer. Today, multiple MVPDs negotiate against one monopoly broadcaster in a given market, creating an unfair advantage for the broadcaster. As a result, the retransmission fees MVPDs pay to broadcasters have skyrocketed, leaving customers with higher bills and more blackouts. SNL Kagan estimates that MVPDs paid $3.3 billion in retransmission consent fees in 2013, and that this figure will soar to a staggering $7.6 billion by 2019. DISH is not suggesting that broadcasters be denied fair compensation for content, but the multiple hundred percent increases that broadcasters are often demanding is unsustainable.

Reforming the retransmission consent regime to address the broadcasters' government-sanctioned monopoly could halt the trend in rising prices and prevent consumers from suffering blackouts.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BARBARA BOXER TO
R. STANTON DODGE

Question. In your written testimony, you propose that cable and satellite carriers be permitted to retransmit a non-local market signal in situations where a stalled retransmission consent negotiation would otherwise result in a blackout for consumers. What legislative or regulatory actions are necessary to implement such a change to the retransmission consent system?

Answer. In order to provide blackout relief to consumers, Congress could designate those who are caught in a broadcast television blackout as "unserved," which would allow DBS providers to import a corresponding signal from a different "distant" market and pay the distant signal copyright royalty fee set forth under Section 119. On the cable side, the same result could be achievable by adjusting the network non-duplication and syndicated exclusivity rules. MVPDs would only be allowed to import a distant signal when the local station has refused to keep the in-market signal up while contract negotiations continue and viewers have been left in the dark.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO R. STANTON DODGE

Question. The emergence of online video services and the ability to send video over multiple internet-enabled devices has changed the way viewers expect to access programming. In the hearing last April, we spoke about the future of video and how consumers are starting to want more and more "on-demand" services. They want what they want, when they want it, wherever they want it. What are some of the examples of how are your members/companies evolving and innovating to these new market demands, and do current laws help or hinder these customer-demanded market evolutions?

Answer. DISH is investing in the emerging Over-the-Top ("OTT") video space to meet consumers' increasing demand for Internet-delivered content. For example, DISH today offers a stand-alone OTT service for foreign-language consumers, called DISH World. This OTT service provides programming in Hindi, Mandarin, and many other foreign languages.

DISH also plans to launch a new domestic OTT video service that will distribute live programming. Viewers will be able to access the DISH OTT product through any Internet-connected device, and will be able to subscribe to a smaller package of channels at a lower price than what is currently available under traditional pay-TV packages.

DISH is focused on responding to its customers' changing needs and today's communication laws should reflect the current marketplace. Just as DISH is adapting to keep pace with what consumers want, Congress and the FCC should work to ensure that all laws and regulations mirror today's competitive realities, consumer expectations, and advances in technology.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO R. STANTON DODGE

Question 1. In the late 1980s and early 1990s, Broadcasters flagged that their signal was being taken by Cable for free and repackaged with other channels. Congress then provided retransmission consent rules which required Cable and then later Satellite television companies to secure the permission of a broadcast station before retransmitting the programs on its schedule. Cable could only offer the signal from stations in their general vicinity and the broadcast station must be on the basic tier of channels made available. Is this system still working?

Answer. The system is not working. It was designed at a time when Americans basically had two choices for television: over-the-air broadcasting or cable TV. When negotiating retransmission consent, the "mutually assured destruction" existing between each local broadcaster and the local cable operator established a shared incentive for both parties to reach an agreement. If they could not agree upon terms, the broadcaster risked losing significant viewership (and advertising revenue) and the cable operator risked losing significant programming content (and a major hook for securing subscribers).

Today, the local broadcaster still enjoys the same exclusive control over key content, namely the broadcast network programming from ABC, CBS, NBC, or FOX. The pay-TV provider, however, faces stiff competition from multiple sources. Whereas only one pay-TV company, the cable operator, offered service when the 1992 statute originally was enacted, at *least* three companies offer that service today, including the original local cable operator (such as Comcast, Time Warner Cable or a smaller company like Wide Open West or Bend Broadband), DISH, DirecTV, phone companies (such as AT&T and Verizon), and overbuilders (such as RCN). The broadcaster in this scenario faces little risk in taking down its programming from any one of those providers during a retransmission consent dispute because it will still reach audiences via the other pay-TV providers.

The imbalance in bargaining power between the local broadcaster and the pay-TV providers in every community has led to a 600 percent increase in broadcast programming take-downs over the last three years, and a material spike in retransmission consent fees demanded by broadcasters.

In short, the government-created broadcaster monopoly is no longer working for the benefit of consumers. The 113th Congress has the power to fix this imbalance, and it should.

Question 2. Mr. Dodge, what are your thoughts on the current video marketplace? Are consumers getting a good value?

Answer. More consumers are watching video in a non-linear, on-demand fashion on mobile devices such as tablet computers and smart phones, computer screens and

in-home flat screen HD displays. They expect to be able to watch the video they want, where they want, when they want.

Consumers increasingly feel that they pay too much for a collection of linear video channels, most of which they do not watch. Costs are driven by several factors but programming fees are by far the biggest factor. Certain categories of programming increase costs more than others. For example, 48 percent of all DISH's programming acquisition costs are sports related. Less than 12 percent of DISH subscribers regularly watch those channels, however, meaning that the vast majority of our subscribers are subsidizing the viewing habits of a tiny minority.

Reforming the retransmission consent regime would help to reverse the trend of cost increases because it is, invariably, the broadcast network conglomerate that demands significant cost increases across its entire suite of broadcast and non-broadcast channels, using retransmission consent for local broadcast signals as leverage. If the government would take its thumb off the scale and reduce the federally subsidized leverage bestowed upon broadcasters, pay-TV companies would pay less for programming and have greater flexibility in designing programming packages that better fit consumers' tastes and pocket books.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO JOHN BERGMAYER

Question 1. In your written testimony, you describe how cable incumbents control content and infrastructure vital to online video providers and, as a result, sometimes engage in discriminatory practices such as artificially-limited data caps that include exemptions for an incumbent's affiliates. Does the average consumer understand how much data she consumes when performing various types of activities online, such as streaming a feature film on Netflix?

Answer. No, I think that asking consumers to understand technical issues like "data" and how that relates to video and billing plans is asking too much—at least for billing plans where overages or caps are not set at extremely high levels to deter abuse but are designed to affect ordinary viewer behavior. For that matter, even technical experts in the relevant fields might have a hard time estimating how much data a given video stream is using. Among other things, the amount of data a video stream uses will vary based on resolution (standard definition, high-definition 720p, high-definition 1080p, or something else), the "complexity" of the video (how much change there is frame-by-frame), the number of channels in the audio track (stereo or surround sound), and the compression codec used (MPEG2, MPEG4, WebM).

Also, if the data usage customers are supposed to keep track of is cumulative, it might be hard for them to connect going over the cap at the end of the month with watching an HD streaming movie at the beginning of the month. By contrast, other ways of differentiating service, such as speed (more accurately, bandwidth) are immediately obvious to users, since they influence the experience of using the Internet at that exact point in time (slower responsiveness, lower-quality-video, buffering, and so on).

Question 2. Does a data cap discourage the average consumer from watching as much online video as she would in the absence of a cap?

Answer. A data cap not only has that effect, many of the caps we've seen appear designed to have that effect—set, for instance, at just below an amount of data that would be at a minimum necessary if you were to replace cable TV viewing with online video viewing.

However, another way that caps can affect online video is by exempting certain video services from caps but not others. This could distort the online video marketplace in ways that harm consumers by encouraging viewers to use inferior services for reasons that have nothing to do with their quality, ease of use, or choice of content.

Question 3. Are there steps Congress could take to address industry practices that result in fewer online video choices for consumers?

Answer. Congress should extent the protections that enabled satellite TV providers to access content and gain an audience to certain online video providers, and take steps to ensure that dominant ISPs and cable companies are not able to restrain or control the development of online video through discriminatory data caps or other billing practices, discriminatory treatment of online traffic, or otherwise leveraging their dominance in the consumer pay TV and broadband markets in ways that reduce choices to consumers.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO JOHN BERGMAYER

Question. The emergence of online video services and the ability to send video over multiple internet-enabled devices has changed the way viewers expect to access programming. In the hearing last April, we spoke about the future of video and how consumers are starting to want more and more "on demand" services. They want what they want, when they want it, wherever they want it. Do you think the current market players are doing enough to meet consumer demand?

Answer. The facts suggest that they are not. Consumers are clamoring for more choice and flexibility in their video choices, yet most have no option but to purchases an inflated and overpriced bundle of content. Many existing online video services are popular, and it is likely that if they were able to access more content under reasonable terms they would be able to serve even more viewers. Additionally, the persistence of online copyright infringement of video content is in part attributable to unmet demand.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARCO RUBIO TO JOHN BERGMAYER

Question. Your testimony states that the "broadcasting industry no longer needs extraordinary protection against changes in technology, business models, and viewer behavior." Why is that the case?

Answer. Over-the-air broadcasting was once the primary way to reach the American public. Thus, it is understandable that Congress and the FCC have, through time, enacted various rules designed to protect this essential medium. However, with the rise cable and satellite TV, not to mention the Internet, broadcasting is not as essential as it one was. Most people watch broadcast content via MVPDs and not over-the-air. Broadcasting is now just one medium among many—one that, like other communications media, certainly has its relative advantages. But these no longer justify extraordinary treatment, such as protection from competition and government-backed exclusives on certain content.

That said, broadcasters use the public airwaves and it is proper to expect them to continue to have public obligations, just as all other spectrum licensees do. Notably, broadcasters have a continuing obligation to provide free programming to the public that is relevant to their respective communities. Broadcasting still has a place in the communications landscape, but it should compete on its own merits and should not be the lynchpin of video policy. For this reason, Public Knowledge has long advocated reform to the retransmission consent, distant signal, sports blackout, syndicated exclusivity, and similar provisions that grant broadcasters special privileges under the law.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO JOHN BERGMAYER

Question 1. Is there any reason why an "à la carte" package isn't available today? Is there a reason any of the companies represented here can't or won't provide it?

Answer. There are two main reasons, both related to market structure (and public policies that contribute to that market structure). First, there is not sufficient competition in local MVPD markets. Markets with more than just a few competitors—and markets that are open to new entry—tend to have a few "maverick" players that offer more unusual pricing options, or are willing to offer lower-cost value products. For instance, in a more competitive market one could picture an MVPD that chooses not to carry some very popular, but high-cost programming, passing along the savings to its customers (while explaining the tradeoff). In more competitive markets, in other words, it becomes worthwhile for some competitors to differentiate themselves through more varied price and service levels (as well as by going after niche interests). By contrast, in less competitive markets, it makes more sense for each competitor to go for the mainstream market. These markets are more prone to parallel pricing and other behaviors, and are more likely to leave price-sensitive customers behind. The best way policymakers can address this aspect of the problem is to adopt policies that promote new entry. In particular, providing MVPD service no longer requires (as a technological matter) that the provider build out new physical infrastructure. Policies that enabled more online video competition would be likely to bring about new competitors with new kinds of pricing and service options. Just as some MVPDs have responded to competition from online on-demand video services by improving their own on-demand offerings, it is likely that

more online MVPD competition would also encourage existing MVPDs to improve their offerings.

Second, concentration and market power in the content industry leave MVPDs themselves with less flexibility. Perhaps in response to the threat of "cord-cutting," some MVPDs themselves have been calling attention to this obstacle to their providing more flexible service offerings. Due to restrictive deals with content providers, MVPDs are often required to buy content bundles at the wholesale level, and pass them along to viewers. To carry a particular popular cable or broadcast channel, an MVPD may be required to devote space in the channel line-up to programming a content company is trying to develop. MVPDs would be contractually prohibited from offering programming subject to these restrictive contracts on an à la carte basis to viewers, and all the viewers who end up with these channels in their cable packages are counted as "subscribers" to that programming. In addition, the "carry one, carry all" and "basic tier buy-through" rules prevent MVPDs from offering broadcast programming on an à la carte basis. There are many ways that policymakers and other officials can begin addressing these problems: By reforming the retransmission consent system, by addressing media consolidation, and by examining whether wholesale content bundling practices run afoul of antitrust laws.

Question 2. Mr. Bergmayer, I have been interested in ensuring that robust broadband buildout into residential markets take place by the private sector. However, economics are at play here. Most broadband providers cannot compete unless they are also providing voice and video in addition to a data plan. It is very expensive to enter into a market due to the cost of infrastructure and I assume the local municipal approval process is also cumbersome. Can you shed any light as to whether the cost of content may also weigh on a company being able to enter into a market and provide competition for voice video and data?

Answer. I agree that the cost of infrastructure, regulatory clearance, and the cost of acquiring video content can all be obstacles in the way of providing new facilities-based broadband competition. Most broadband providers (new entrants such as Google Fiber, as well as other non-cable broadband providers such as DSL) find that a video product is a necessity offering. Unfortunately, the costs of acquiring content for a video product are often forgotten when people consider issues of broadband competition.

There are two ways policymakers can address these problems. The first is measures designed to bring down the wholesale costs of content, as discussed above in response to the question on à la carte. The second is to promote online video, by clarifying the law to establish that an MVPD need not be facilities-based itself, and instead can offer its service "over-the-top," using a customer's existing broadband connection. If broadband customers were able to access high-value MVPD content online, it would be less important for new broadband entrants to offer that service themselves. By way of analogy, there is little demand for ISP-provided e-mail or webhosting services, since all of these are available through competitive online markets (and can easily be used through multiple ISPs, meaning that customers who move or change providers do not need to change their e-mail addresses, for instance).

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