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THE CABLE ACT AT 20

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

JULY 24, 2012

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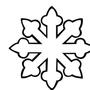

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ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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THE CABLE ACT AT 20

TUESDAY, JULY 24, 2012

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 2:35 p.m. in Room SR–253, Russell Senate Office Building, Hon. John D. Rockefeller IV, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, U.S. SENATOR FROM WEST VIRGINIA

The CHAIRMAN. The hearing will come to order.

I thank our witnesses for being here, for coming whatever distances you have come, and even if they are short, we are still glad you are here.

Two decades ago we passed the Cable Act to promote competition and to provide consumers with expanded choices at lower rates. Today many consumers have a choice of video providers, cable, satellite, and phone companies. Hundreds of channels have been created catering to almost every interest imaginable. Most people do not watch most of them. The Internet now allows us to watch video on not just our televisions but also our computers, our tablets, and our phones.

I know that many in the industry will argue that the Cable Act achieved its goals. I will not go along with that argument. I highly doubt that many consumers would agree. They feel that they have to pay too much and they have very little choice in picking the content that they desire to receive or can receive.

As this committee continues its discussion about the future of the video, we must take a hard look at the Cable Act's impact on modern television and the marketplace. I understand that some want to make this hearing about retransmission consent, and I agree that millions of Americans who are currently victims of a number of high-profile, ongoing programming disputes deserve answers as to why their screens have gone dark. That has happened in West Virginia. Overheated rhetoric alleging greed and bad faith is of little comfort to somebody paying for services that they are not getting.

That is what the health insurance industry did to us, and we stopped it. They cannot do that anymore. They are very unhappy about it and they have actually had to return $4 billion of rebates because we passed a law which the Supreme Court upheld. So $4 billion. I am getting phone calls from people who have gotten checks in the mail because their health insurance company obvi-

ously was going to continue to try and only look at the bottom line, forget the consumer until the law passed. Now the law has passed and now they know they are going to get caught because they are being watched. And $4 billion in a year back to consumers, that is pretty good.

It was certainly of no comfort to the tens of thousands of West Virginians who needed access to news, weather, and emergency information as they were recovering from a natural disaster earlier this month, actually about the largest one, I guess, in the history of the state. When consumers lose channels in these corporate disputes, they should get a refund, I believe. I think you do not believe that. I do and I think it is only fair.

But retransmission consent is just part of a puzzle. Although consumers often have the choice of video providers, rates continue to go up faster than the rate of inflation, year in and year out and year forever. They are tired of it. I am tired of it. And rather than being able to pick smaller packages or choose the channels they want, consumers are still forced to purchase larger and larger packages of channels no matter how few they actually watch.

This says to me that the market is not working. Real competition should be bringing rates down. It is my general impression that those I look at at the witness table, minus one or two, that your profit margins are very, very high, maybe 30 to 40 percent per year, and the question that I would pose to you is that for you this hearing is about how can we make this work for corporate America in the world of television, et cetera. My point of this hearing and my point in chairing this committee is how can we do a better job of protecting consumers. How can we do a better job of protecting consumers to make sure they get what they want, that they do not have to pay more than they should for it, that the companies involved are thinking about consumers? First, companies always say that, but rarely do that.

Real competition, as I said, should be driving rates down, and it should be driving development. It should be bringing consumers more choices, and it should be spurring new, innovative products.

Today I want to take a close look at several core questions about the Cable Act. Why has competition not succeeded in bringing rates down and more programming choices and more selection within those choices? Should the protections in the Cable Act for various entities be maintained? How do we make sure that consumers are protected and see real benefits as video moves to the Internet, where people are increasingly watching?

To our witnesses, again I say thank you for being here. I look forward to your thoughts on these questions, and thank you for joining us.

And now Senator DeMint, to be followed by Senator Kerry.

STATEMENT OF HON. JIM DEMINT, U.S. SENATOR FROM SOUTH CAROLINA

Senator DEMINT. Thank you, Mr. Chairman, for holding this important hearing and for your continued interest in the video market.

The communications sector, particularly video distribution, is one of the most dynamic, innovative, and competitive in our consumer

economy, as shown by the FCC's long overdue video competition report released last Friday.

It is important for us, Mr. Chairman, to remind ourselves of what is the role of government as it comes to this industry and others. It is not our role to manage or to control any business or industry in this country. In fact, our role is more of providing a good legal and regulatory structure for competition to flourish. When that competition is not there, the government does have to play a role, a surrogate role, to protect the consumers, but hopefully we know, as we look out across the free enterprise system in this country today, that the best protection for consumers is competition and choice.

The law at issue today, the 1992 Cable Act, did not contemplate the dynamic market we now have, but rather simply answered problems in a snapshot of the market as it was 20 years ago. I think today's competitive offerings from satellite to telephone companies, rapidly expanding online video services, and more than 500 non-broadcast networks that are now clearly available were not available in 1992.

Last year I introduced the Next Generation Television Marketplace Act to begin withdrawing government meddling from the video industry. There are two primary government interventions in the video market which my bill repeals: compulsory copyright licenses and retransmission consent. As the Committee educates itself and moves toward action on these issues, I want to make clear that the repeal of both of these government interventions must occur in tandem if we are to make lasting progress. Broadcasting is a wonderful technology and industry. I believe there is tremendous consumer interest and benefit in locally oriented programming, and I believe there is tremendous value which locally produced broadcast programming brings to the market.

I do not believe, however, that local broadcasters need government intervention to be viable. It is actually the very competition we have today among many competing video distribution services that favors broadcasters. To the extent broadcast programming is compelling and marketable to viewers, pay-TV providers have an interest in acquiring the rights to carry that programming on their subscription services.

It is this competitive dynamic among pay-TV providers which did not exist in 1992 that today makes government protection of the broadcasting industry unnecessary. That dynamic would not change because of my legislation. In fact, it seems that a right grounded in constitutional copyright is preferable to a manufactured right, retransmission consent, which will constantly be threatened by industry lobbyists, FCC bureaucrats, and meddling politicians. I believe my bill removes government intervention, thereby allowing unencumbered private parties to negotiate contracts based on private property rights.

It is time to recognize that retransmission consent negotiations are not actually free market negotiations. They are more accurately an inefficient proxy for free market carriage negotiations based on copyright licensing like those for more than the 500 non-broadcast networks which get carried in the market today. Unfortunately, a copyright-based negotiation for broadcast programming was pre-

vented by Congress with the passage of the compulsory licensing for cable and satellite providers beginning in 1976. They also are affected by punitive measures which limit the rights of consumers and pay-TV providers, including the mandate on cable companies to place broadcast channels on their basic service tiers and the mandate on consumers to purchase those basic tiers. That answers one of the chairman's questions, why do consumers have to buy things they do not want. Part of it is we require them to.

Make no mistake. Retransmission consent was and is a construct of lobbyists and politicians. It is not the model that would have developed in a free market, and it is not a model rooted in constitutional property rights. It was a right created out of whole cloth to combat a cable monopoly and make up for an earlier government imposition, the compulsory copyright license. Today the cable monopoly is gone with two nationwide satellite services, widely available competitive video services from traditional telephone providers, and online video distributors available to any home with broadband. In short, the 1992 Act is obsolete.

Also, the existence and widespread copyright-based carriage of more than 500 non-broadcast networks is proof that video compulsory licensing is likewise no longer needed.

Cable and satellite companies have, unfortunately, long sought remedies which invite further government involvement in the marketplace, but these suggested fixes would only add to the existing framework of mandates and restrictions when what we need is a simpler rulebook for all market participants. We should work together in this committee to encourage more innovation, new competition, job creation, and consumer freedom and remove rules written to serve the last century's business and regulatory models.

The next generation television marketplace does just that.

Mr. Chairman, our nation's laws regarding the video marketplace include mandates on individual consumers and businesses, they violate the property rights of content creators, and they treat similar services differently. I believe we should be creating a deregulatory parity in the video market so investment and innovation, not lawyers and lobbyists, is rewarded in a free economy to the ultimate benefit of consumers.

I want to again express my sincere interest in working together with you, Mr. Chairman, to seek ways to improve our laws and regulations to better serve competition, innovation, the national economy, and most importantly, American consumers.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator DeMint.

The Subcommittee Chairman, Senator Kerry?

STATEMENT OF HON. JOHN F. KERRY, U.S. SENATOR FROM MASSACHUSETTS

Senator KERRY. Thanks very much, Mr. Chairman. I appreciate it, and I appreciated listening just now to Senator DeMint's, future Ranking Member's, comments as we sort of examine this.

The Cable Act at 20. It is interesting to analyze it and look at it. I think most people would agree that it kind of brought us what we wanted, which was pretty broad-based competition. And I think that is one of the things we are going to need to analyze, Mr.

Chairman, to what degree did we really create a playing field with a lot of competition in it.

It is good to have Senator Smith back. Mr. Smith is back in Washington, and I appreciate your being here. I would be very interested in your comments after this hearing of what it is like to be on the other side of the table and what your reactions are.

But as I listened to Senator DeMint, boy, there is a real divide here which is going to be interesting to see how we manage it because Senator DeMint would repeal the retransmission consent and must-carry systems, along with a number of other things, repeal the statutory copyright license, repeal the broadcast television basic tier rules, the buy-through prohibition, and the existing media ownership rules. That is a mouthful.

And in the end, what we are going to need to look at, Mr. Chairman, is what is the impact of that, because as I read it, it would essentially make broadcast channels just like any other cable channel, meaning that the cable companies could purchase the content from a single source or multiple sources rather than from the local broadcaster. I think everybody would agree that is going to have a profound impact on the distribution in the marketplace. It would have a profound impact, I think, ultimately on the concentration of ownership, which has been one of the fundamentals that guided us as we did the 1992 Act. It would do nothing to resolve this question of negotiating stalemates, and it would result probably in very few broadcasters being around, I would suspect. So we are going to have to look at that very closely.

And I would just ask the Senator to keep his mind open to think about those impacts because to make the cable law in 1992, Mr. Chairman, it is good to remember that we had to overcome a Presidential veto. We did. We did it on a bipartisan basis fundamentally making the judgment that we were protecting consumers, promoting competition, and preserving the viability of local broadcasting. And as we look to update the law, I think it is going to be important for the Committee to keep those goals in mind, and we obviously have to put to test the propriety of them or the viability of them, but I would suspect they are pretty viable today.

So among other things, the 1992 Act created the current retransmission consent regime, and with Time Warner Cable and Hearst recently ending the latest retransmission consent dispute, which saw service disrupted for millions of households, that subject probably is going to take up some of this hearing.

Chairman Rockefeller in his opening comments raised this question also of the rising rates and of the hopes for competition to be able to deal with that. I might mention that in the most recent dispute, the station that was pulled from Time Warner Cable in the Boston area during that period, WCVB, was recently named as the Edward R. Murrow Award winner for the Nation's most outstanding news operation. It is a broadcast operation. And we take pride in that. We want to see it succeed and obviously receive fair compensation for the retransmission of its signal. But we do not want to see the pulling of signals repeatedly used as the common tool for arriving at a resolution between distributors and broadcasters. It simply is not fair to consumers who get trapped.

And this is not a new problem. I chaired a hearing on this in 2010 after disputes threatened viewer access to the Oscars and the World Series that year. I asked the FCC to explore its authority to help protect consumers, but the FCC Chairman concluded that he lacked the legal authority to intervene during an impasse in negotiations, and as a result, disputes and standoffs now continue with millions of consumers being affected.

Some people argue that these disruptions are okay because cable subscribers can simply switch to satellite service, but switching in fact does not protect consumers from the disputes. In March 2011, Dish customers in 17 markets lost their CBS, Fox, NBC, and CW signals for 6 days, and earlier this year, DirecTV and Sunbeam Television reached an impasse in the weeks leading up to the Super Bowl which, as you can imagine, caused certainly huge consternation in New England because the New England Patriots were playing. Fortunately, the signal was restored prior to the game. Unfortunately, the Patriots lost the game.

[Laughter.]

Senator KERRY. In extreme cases, it may be that pulling the signal is a broadcaster's only choice, but I think good faith negotiations—there ought to be a way to set up a process for a negotiation to be exhausted and consumers still ought to be able to have access during some kind of temporary negotiating impasse to live events like college bowl games or the World Series or debates for public officials or the Oscars and so forth.

Now, I want to personally preserve local broadcasting. I do not think that means the government has to somehow intervene or sustain it, but a fair, competitive structure can be set up to recognize their values and the values of their programming. And I would not personally support a radical proposal to eliminate a retransmission consent right or must-carry requirements altogether, but I do want to shield consumers from unfair treatment or from being used as pawns in negotiations.

And, Mr. Chairman, the disputes obviously also occur between distributors and non-broadcast channel owners, including the recent dispute between Viacom and DirecTV and AMC and Dish. But those disputes do not elicit the same level of concern because those station owners do not have public interest obligations. They do, however, raise questions about how to appropriately value bundled channels where stations in the bundle are dramatically more valuable than others, and that is tricky obviously.

So I would hope the industry would really step up here and construct an alternative to the disruption of service during negotiations, and I would urge the FCC to complete its pending Notice of Proposed Rulemaking on retransmission consent. And I hope we here on the Committee will explore the role of the Internet as an alternative vehicle for accessing video content.

So I think we need to think about the degree to which consumers can customize their consumption of media and control over spending. I think that our obligation is to maximize that access and maximize that control, and that will come through really fair and open competition where you cannot have the kinds of imbalances that have occurred.

So, Mr. Chairman, these are important issues. They have social, they have civic, they have economic, and they have in the end, vast educational and political implications for all of the working families and citizens and consumers of our country. And I look forward to working with you on them because they are really critical to how information will flow and sort of what kind of discourse and access to information we will have in our country. Thank you.

The CHAIRMAN. Thank you, Senator Kerry.

The Ranking Member, Senator Hutchison?

STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Senator HUTCHISON. Well, thank you, Mr. Chairman. I apologize for being late.

I am not going to read my full statement, but just to say, I guess we can tell from the last two statements that have been made there will be a lot of disagreement about the way forward.

We can agree that 20 years ago when the first bill was passed, that things have exploded since then, and on the one hand, you can say, well, the competition is so diverse now that not having another big regulatory overreach is maybe a good thing, which in general I think we certainly have a lot of competition. On the other hand, the issues that have arisen from all of the proliferation of options has also caused some of the investment that has been made to be obsolete. So how do we deal with that?

I am very anxious to hear what our witnesses say because it is a very diverse group of experiences that are before us. So I will not put my statement in the record, but I will be interested in what enlightenment you can give us that would give us only what is necessary to be done. I do not want to regulate any more than is absolutely necessary, but how do we keep a level playing field?

Thank you, Mr. Chairman.

The CHAIRMAN. Did the gentlelady, as they say in the House, say that she did not want to put her statement in the record because she did not.

Senator HUTCHISON. I did not. I will not.

Senator COONS. Well, what if I want to?

Senator HUTCHISON. Well, my statement is pretty sophomoric compared to all of the issues that we are facing.

[Laughter.]

Senator HUTCHISON. So I am going to just listen.

The CHAIRMAN. I back off.

Our first witness will be former Senator, Gordon Smith, President and Chief Executive Officer, National Association of Broadcasters.

And we do not have a lot of time. We have a lot of charts and perhaps a lot of testimony, and we have a lot of people who will have a lot of questions. So be concise please.

STATEMENT OF HON. GORDON H. SMITH, PRESIDENT AND CEO, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. SMITH. I will be as quick as I can, Chairman Rockefeller.

Thank you. I thank Ranking Member Hutchison and the members of this committee. It was my privilege to serve with you on

this prestigious committee. Remembering that privilege, it is my pleasure now to return and represent a great trade association, the National Association of Broadcasters. I also thank all of the broadcasters from around the country who have come to participate in this hearing.

Part of what has made my new job at NAB so fulfilling is the focus that broadcasters have on public service. With a father that worked for Eisenhower and a mother with the last name of "Udall," public service remains an important value to me.

In large cities and small, in blue states and red, local television stations are an indispensable source for quality entertainment, high profile sporting events, emergency weather warnings and disaster coverage that can literally make the difference between life and death. We serve tens of millions of Americans every day, are responsible for close to 700,000 U.S. jobs, and are the primary advertising conduit for businesses, small and large, in communities of all sizes across this great country. Local broadcast television is a wholly unique video service because it is free. It is locally focused and it is always on, even when pay-TV, wireless and broadband networks may fail.

That is precisely what is at stake today as we review the 1992 Cable Act which enables a local television model that is the envy of the world. Respectfully, I ask that you focus on the possible devastating impacts that proposed changes in the law could have on broadcast localism and on the 56 million Americans that rely on free local television stations every day.

The 1992 Cable Act ushered in an era of unprecedented choice of television content and provided local TV stations the opportunity to finally realize their full value of our television signals through a free market system called "retransmission consent." Some on this panel will argue that the retransmission consent system is 20 years old and is somehow broken. I would submit that even after 2 decades, the retransmission consent system is working just as the Committee wisely intended.

There are over 5,800 cable companies in the United States. Only three-tenths of 1 percent of those cable companies have ever been party to a service disruption. The fact is over 99 percent of deals are amicably completed with no disruption to the consumer. If you take a closer look at the disruptions, you will find three companies, Time Warner Cable, DirecTV, and Dish, that are principally the party for the vast majority of disruptions. These three pay-TV companies have been involved in three out of every four disruptions in 2012.

Now, let me be clear. We do not begrudge our pay-TV friends the right to make a profit, but when it comes to programming costs, fair is fair. Even after almost 20 years, television broadcasters still do not receive compensation commensurate with their ratings. The fact is demonstrated by this chart from SNL Kagan. The chart shows the total fees paid to cable companies. The dark blue represents the total retransmission fees to broadcasters. The light blue are the fees paid to basic cable networks. As you can see, in 2012, cable networks received just over $29 billion in fees, but local broadcasters received just over $2 billion. The wide disparity between fees for cable and broadcast channels does not reflect our

value in the marketplace. Broadcasters are not the source of rising cable fees. The cost of cable channels and cable profit margins are, of course, the source.

And, of course, I know each of you is concerned with how contractual impasses between broadcasters and pay-TV companies affect your constituents. I remember that. What you should know is that some proposed changes could actually result in more consumer disruptions. Removing compulsory copyright license, for instance, would exponentially increase the number of rights holders that need to grant permission before a station's programming is carried by a cable or satellite company, thereby certainly increasing the likelihood of increased consumer disruptions. Instead, we encourage more creative solutions to this issue.

First, we urge the FCC to insist that pay-TV providers give viewers ample notice of a possible disruption in service.

Second, the FCC should allow customers to easily switch among competing pay-TV providers without incurring financial penalties and also receive refunds when stations are unavailable.

And third, we as broadcasters could do a better job by educating consumers about the availability of free, over-the-television with plugging in the antenna that comes with TV.

In conclusion, Congress in its wisdom fostered what is unique across the globe, a local broadcasting system that provides local content and community-focused programming. It is how communities share common experiences. It is how you as Senators communicate with your constituents. It is a lifeline in moments of great peril. I urge you to carefully consider any changes to this truly remarkable broadcasting system.

And I thank you all for having me here.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF HON. GORDON H. SMITH, PRESIDENT AND CEO, NATIONAL ASSOCIATION OF BROADCASTERS

Thank you Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee. I appreciate the opportunity to be with you today. I share so many fond memories of service on this committee and in serving with so many of you, that it is very meaningful to be a participant in today's hearing.

I am here on behalf of the 1,300 free, local, over-the-air television stations who are members of the National Association of Broadcasters. Those members are the local television stations that you and your constituents have come to know and depend on: the Quincy station in Bluefield, West Virginia—WVVA; the Post-Newsweek station in Houston, Texas—KPRC; the Saga station in Joplin, Missouri—KOAM; the Allbritton station in Little Rock, Arkansas—KATV; and the Hubbard station in Minneapolis, Minnesota—KSTP, to name a few.

Local television stations are iconic brands that Americans identify with and rely on as a link to their local communities. I believe that everyone has a unique connection to local television—whether it is in the place where they grew up or where they live now. Local television is the go-to choice for news, emergency service, and entertainment and is what people depend on to stay connected daily. Importantly, broadcasters' over-the-air signals enable these stations to remain available during times of crisis when other forms of communication may fail.

Recent events have helped highlight the role local television stations play in providing life-saving coverage in times of emergency. Local broadcasters alert and inform viewers with critical information, as they did during the June derecho that swept through West Virginia and the Washington, D.C. region. Bluefield, West Virginia's WVVA provided wall to wall coverage on the storm giving updates on power restoration, providing locations of shelter areas and cooling stations, and noting road closures in southern West Virginia and southwest Virginia. Local stations, like

WVVA, are a trusted source in such challenging times, and make a difference in people's lives.

Several times a year, your offices receive NAB's newsletter, "License to Serve: A Chronicle of Broadcasters' Community Initiatives." This newsletter illustrates the many public service activities broadcasters organize on any given day across the country. A recent spring edition highlighted local broadcaster efforts in Kentucky and Indiana when tornadoes ripped through those two states. Last year, monthly editions covered the local broadcast response to the devastating weather in Missouri and Alabama. These newsletters can be found on NAB's website, *NAB.org,* under Public Service Initiatives, and may be a great resource to your offices. Simply, these stories show local broadcasters at their best.

A vibrant system of local television serving local communities is the underpinning of our system of telecommunications. Congress envisioned a system where local stations are given the opportunity to compete within defined television markets while serving a larger public interest. Local television stations take that responsibility very seriously by providing local news, programming, and services to their communities. As a result, local stations have immense value to all citizens.

The viability of local broadcast stations, and their continued local service, is tied to their ability to negotiate for fair value and carriage of their signals through a process known as "retransmission consent." In today's competitive video market, retransmission consent compensation enables broadcasters to deliver free and locally-focused programming and services. Broadcasters continue to reinvest their revenues in local news and coverage. In 2011, broadcasters hired more than 1,100 additional anchors, reporters, producers and news staff. Total employment in local television newsrooms grew by 4.3 percent to 27,653 employees. This is the second highest total on record. The average television station also set a new record in 2011 for the amount of local news aired—the average amount of news rose to five and a half hours per weekday last year. Retransmission consent is particularly significant for supporting local news operations in smaller markets with more limited advertising revenues.

The fundamental fairness is apparent in allowing stations to negotiate for compensation from pay-TV providers that use a local station's signal to attract subscribers. The value of the local signal encompasses a broadcaster's assembly of the total programming package, as well as its promotion and distribution. Of course, this value is enhanced by the quality of broadcast programming, both local and national. With viewership and ratings, broadcast television is unparalleled—95 of the top 100 rated shows during the 2010–2011 television season were on broadcast TV. With respect to price, broadcasters receive only a fraction of the total carriage fees paid by cable companies. Carriers continue to pay considerably more for non-broadcast channels than for broadcast signals, even though the non-broadcast channels attract smaller audiences and yield lower ratings.

When put in terms of the average consumer cable bill, the cost of carriage for broadcast-owned signals comprises 2 percent of the cost to the consumer, while non-broadcast channels comprises 41 percent of that cost. Broadcast television accounts for 35 percent of all television viewership, yet broadcasters in total receive only 6.7 percent of carriage fees. That number is projected for slow growth in coming years, but this market dynamic is affected by the suggestion of legislative or regulatory change.

I often hear references to the 20-year-old carriage law as if that, by itself, justifies change. These references ignore how new and recent retransmission consent cash compensation is for television broadcasters. In the 1992 Cable Act, local television stations were given the option for carriage via a must-carry election or through the opportunity to negotiate. However, it has only been very recently that many local broadcasters have come to receive cash compensation for their signals through these negotiations. When some focus only on 1992, we should also remember that for many years carriers refused to pay cash to local broadcasters. The simple fact that the nature of the compensation for retransmission consent has changed does not demonstrate a problem. Rather, it shows the means of achieving the fairness that Congress contemplated has evolved along with the market.

When some suggest that these laws are ripe for a rewrite, they misstate history and facts. Direct broadcast satellite (DBS) services were not a truly viable competitor to cable until Congress authorized local-into-local service in the Satellite Home Viewer Improvement Act of 1999. For households unable to receive local-into-local DBS service for one reason or another, a viable competitor to cable did not come until 2003 when regulatory changes brought fiber to the home. When these new market entrants began clamoring for local broadcast signals, marketplace competition finally vaulted retransmission consent into a revenue stream that began to compensate broadcasters for their true value.

Some proposals have emerged seeking to address aspects of television carriage and video programming. Last Congress, there were suggestions to expand the role of government in private business-to-business carriage negotiations. This Congress, legislation seeks to de-regulate the video marketplace. In evaluating each proposal, NAB suggests that the benchmark should be the impact on local broadcasters and their ability to continue offering the level of community service that viewers expect and deserve.

In looking at S. 2008, there are some provisions that broadcast groups may look favorably upon and others that raise concerns and may require more thoughtful consideration. Language that would eliminate carriage provisions like retransmission consent and must-carry is a chief concern. These suggestions only fuel those carriers that would rather seek to change the law than engage in meaningful negotiation. They also come at a time when local television stations are more fully realizing the value of their signals.

The legislation also proposes significant changes to cable and satellite compulsory licenses. While NAB could look favorably on the elimination of some of these licenses (such as the distant signal licenses), Congress should know that wholesale changes may well result in serious disruptions and diminish the availability of programming viewers have come to expect on their local stations.

I understand that the intent of this proposal is for broadcasters to maintain control of the copyright interests through direct licensing and to allow for carriage negotiation. As I noted earlier, though, the local broadcasters' value in its signal is not the same as the copyright interests in the programming elements. Many stations may be unable to undertake the expensive and cumbersome responsibility of direct licensing, and such a change might affect the ability of local stations to serve their local markets.

Another impact is on those stations that simply elect carriage through must-carry rules rather than seeking compensation. Telecommunications policy has always acknowledged a public value to these stations and for viewers in a community to have access to local offerings. There is a community value in viewers being able to see WFMZ in Allentown, Pennsylvania and its localized and extensive news coverage of the northern tier of the Philadelphia market. There is also a community value to viewers being able to see religious, minority, and other niche programming. The legislation removes this carriage option which will leave many of these stations off systems and may weaken the diversity of offerings in markets and to viewers.

We will continue to review and engage on this and other legislative proposals before the Committee. Our underlying goal is always to enable the continued viability of your local television stations to serve their communities.

Also, as this committee continues its forward looking approach to communications policy, video programming providers—including broadcasters—may benefit from the deployment of new online video distribution platforms and competitive subscription television services. These platforms could provide new opportunities for local broadcast stations to reach more local viewers and augment program services to their communities.

To achieve these public policy objectives, broadcasters must continue to have the right to control the distribution of their signals and to negotiate with broadband video service providers seeking to retransmit such signals. If new technologies are allowed to evade retransmission consent and exploit broadcasters' signals without local stations' consent, the viability of those stations—and their ability to serve their local communities with high quality programming—will be lost.

In conclusion, local broadcasters serve the public interest and have a unique position in the telecommunications marketplace, both today and well into the future. As Congress shapes policy to address the hyper-competitive television marketplace, it is essential that key underpinnings, such as broadcast television carriage, remain cornerstone public policy goals.

The CHAIRMAN. Thank you very much, Senator Smith, and I appreciate your interest in refunds. It has worked well with the health insurance industry, as I indicated.

Our next witness is Ms. Melinda Witmer, Executive Vice President and Chief Video and Content Officer, Time Warner Cable, not a small operation.

STATEMENT OF MELINDA WITMER, EXECUTIVE VICE PRESIDENT AND CHIEF VIDEO AND CONTENT OFFICER, TIME WARNER CABLE

Ms. WITMER. Good afternoon, Mr. Chairman, Ranking Member Hutchison, and members of the Committee. My name is Melinda Witmer of Time Warner Cable. Thank you for inviting me here to appear today.

Nearly 20 years ago, Congress passed legislation intended to promote innovation in the video marketplace by fostering the development of competitive alternatives to cable. The 1992 Act also sought to preserve local broadcasting by giving station owners a subsidy through a new regulatory right called "retransmission consent." Broadcasters also benefit from a host of other special privileges. These include mandatory carriage on cable's basic tier of service, preferential channel placement protection, and territorial exclusivity provisions that limit cable operators' ability to carry out-of-market television signals. These rules were adopted at a time when cable operators generally were the only pay-TV option to consumers. That world no longer exists.

Today cable operators face competition from three or more pay-TV providers in virtually every community. In fact, cable's share of video households has declined from 95 percent in 1992 to approximately 58 percent today. Cable operators also face growing competition from Internet video offerings and a much more robust digital broadcast distribution system.

Given the marketplace changes over the last 2 decades, many provisions of the 1992 Act are no longer needed and, worse yet, have become counterproductive. One provision in particular, retransmission consent, has led to significant and ongoing consumer harm. This is the focus of my testimony today.

Congress established retransmission consent to bolster the continued availability of local broadcast television. Unfortunately for consumers, we are seeing the opposite result. Retransmission consent negotiations are now characterized by escalating blackout threats as broadcasters make clear that they are willing to pull their signals to increase their bargaining leverage. And the Big 4 broadcast networks now demand a significant cut of the fees obtained by affiliated stations. This creates even more pressure for rate increases and more contentious negotiations.

As a result of these dynamics, the number of disputes and blackouts has risen dramatically. In the first half of this year alone, there have already been 69 blackouts, a 35 percent increase over all of last year. Owners of broadcast stations have said the sky is the limit when it comes to their compensation demands. Unfortunately, we can expect public disputes and blackouts to increase in the future.

Congress also intended retransmission consent to subsidize and preserve localism, but that objective has been subverted as well. Despite demanding significant increases in retransmission consent fees, local broadcasters are cutting costs and scaling back on local news programming. Many broadcasters are also duplicating news programming across multiple stations in the same market.

Another unintended and negative consequence of retransmission consent is that it allows broadcasters to force distributors to pur-

chase a bundle of affiliated cable networks even if there is little or no demand for some of those channels. This has resulted in bloated packages and higher costs to consumers.

In 1992, Congress was concerned with the fact that more than 53 percent of the national cable networks were owned by cable operators. That number has fallen to approximately 14 percent. In sharp contrast, due largely to retransmission consent, Big 4 broadcasters now own 60 percent of the top 50 cable networks.

Finally, it is clear that the social compact between broadcasters and the public is broken. Broadcasters were given the free use of tens of billions of dollars worth of spectrum and other special privileges in return for a commitment to serve the public interest, but broadcasters should not have it both ways. They cannot claim that without special treatment they can no longer provide consumers with local news and information and at the same time reduce their spending on localism and deny pay-TV customers access to their signals during disputes. Contrary to broadcaster assertions, retransmission consent and the host of protections that go with it is the opposite of a free market.

The time has come to update the Nation's laws to reflect the current competitive and technological landscape to best ensure that the public interest is served. We applaud the leadership of Chairman Rockefeller, Senator Hutchison, Senator Kerry, and Senator DeMint on this issue. Senator DeMint's legislation has begun an important dialogue and we look forward to working with all of the members of the Committee as it undertakes this essential task.

Thank you.

[The prepared statement of Ms. Witmer follows:]

PREPARED STATEMENT OF MELINDA WITMER, EXECUTIVE VICE PRESIDENT AND CHIEF VIDEO AND CONTENT OFFICER, TIME WARNER CABLE

Good afternoon Mr. Chairman, Ranking Member Hutchison, and members of the Committee. My name is Melinda Witmer, and I am Executive Vice President and Chief Video and Content Officer of Time Warner Cable. Time Warner Cable is the Nation's second largest operator of cable television systems and the fourth largest multichannel video programming distributor ("MVPD"), serving more than 12 million subscribers in 29 states. I want to thank you for inviting me to appear before you today to share Time Warner Cable's perspective on the 1992 Cable Act and its role in the television marketplace of the twenty-first century.

As the title of this hearing indicates, the 1992 Cable Act is turning twenty years old this year. This legislation, enacted over a presidential veto, has defined the role of government in the regulation of the video marketplace for two decades.[1] During that time, vast changes have occurred in the competitive and technological landscape. Thus, it is both necessary and appropriate for Congress to take a fresh look at whether the provisions of the 1992 Act have met their goals and whether they continue to serve the public interest.

The principal goal of the 1992 Act was to protect consumers and promote innovation while fostering the development of competitive alternatives to cable services, which at the time constituted the only pay television option for most consumers. Congress's objective was for competition eventually to take the place of regulation. This was made clear in the Act's Statement of Policy, where Congress expressed its preference "to rely on the marketplace" rather than regulation wherever feasible.[2] Consistent with this policy, several of the Act's provisions were expressly designed to be temporary, such as the rate regulation measures and certain provisions governing competitors' access to vertically-integrated programming.

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102–385 (1992).
[2] *Id.* at Section (2)(b)(2).

A separate, but related goal of the 1992 Cable Act was to address the concern that competition from non-broadcast cable networks, particularly those that were owned by cable operators, was diverting viewers and advertisers from local broadcast stations and thus threatening the future of "free" over-the-air local television.[3] Among other things, Congress created a new regulatory right, called retransmission consent, which broadcasters could elect to invoke when it served their interests. Retransmission consent is one of a number of special privileges given to broadcasters by the government as part of a thicket of outdated regulations. These special privileges, which also include must carry rights, territorial exclusivity protection, a guaranteed right to basic tier carriage and, of course, the broadcasters' free use of the public airwaves, were supposed to safeguard the public's access to broadcast programming. Unfortunately, given the dramatic changes over the last twenty years, that is not the case today.

Over the past twenty years, many of the 1992 Act's objectives have been accomplished in the marketplace. In particular, cable operators face effective competition in virtually every community that they serve from three or more MVPDs (including two national direct broadcast satellite services that are now the Nation's second and third largest MVPDs and, in many instances, a well-funded telco-video provider like Verizon FiOS or AT&T U-Verse, who are among the ten largest MVPDs). As a result of this competition, traditional cable operators have seen their share of the multichannel video business decline from 95 percent in 1992 to about 58 percent today.[4] Cable systems also face growing competition from new platforms that were not even imaginable in 1992, such as online video delivery. Moreover, Congress's hope that cable operators would "continue to expand, where economically justified, their capacity and the programs offered"[5] has been fulfilled as the industry, responding to competitive marketplace pressures, invested billions of dollars to provide consumers with an unparalleled array of innovative services, including high definition and 3D television, video-on-demand, digital video recording and other time-shifting capabilities, high speed Internet, and digital telephone.

In light of these marketplace changes, several of the provisions of the 1992 Act clearly are no longer needed and, in fact, may be working counter to Congress's intentions. In my testimony, I will focus on how the retransmission consent framework, originally intended to advance the public interest, is now harming consumers.

The first point I would like to make is that, Congress established retransmission consent to "ensure the universal availability of local broadcast signals" to consumers.[6] Today, however, this regulatory regime is having the opposite effect. Retransmission consent negotiations are characterized by the broadcasters' demands for massive fee increases backed by blackout threats, and the incidence of actual blackouts has spiked as broadcasters increasingly have demonstrated their willingness to withdraw retransmission consent to increase their bargaining leverage. Retransmission consent disputes have increased dramatically in recent years from 12 in 2010 to 51 in 2011. So far this year there have already been 69 blackouts. And these numbers do not capture the fact that every retransmission consent negotiation is resulting in dramatically increasing fees ultimately borne by consumers.

This is not what Congress intended or expected when it gave broadcasters retransmission consent rights. Retransmission consent is a regulatory construct that provides broadcasters an opportunity to obtain value for their "signal" not for the content contained within that signal. This value was intended to subsidize local stations to ensure the continued viability of local broadcasting. Given the market structure in 1992 with essentially one local broadcaster negotiating against one cable operator in each local market, Congress expected that the rough balance of power between the parties would serve as a check on unreasonable behavior.[7]

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[3] S. Rep. No. 102–92 (1991) at 1168 ("Senate Report"). See also 138 Cong. Rec. S14615–16 (Sep. 22, 1992) (Statement of Sen. Lautenberg) ("if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will have an opportunity to seek relief at the FCC.").

[4] *See In the Matter of Revision of the Commission's Program Access Rules,* MV Docket No. 12–68, Comments of the National Cable & Telecommunications Association (filed June 22, 2012) at 9.

[5] *Id.* at Section (2)(b)(3).

[6] 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye).

[7] The legislative history indicates that Congress expected demands for retransmission consent compensation would be modest because "broadcasters also benefit from being carried on cable systems." Senate Report at 1168. *See also* 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye) ("It is of course in their mutual interests of these parties to reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely

Moreover, even with the expectation that the grant of retransmission consent rights to broadcasters did not pose an undue threat of harm to consumers either in the form of increased rates or service disruptions, Congress acknowledged, and took steps to address, these risks. For example, Congress included in the 1992 Act a provision directing the FCC to adopt rules to ensure retransmission consent would not adversely impact the rates that consumers paid for multichannel television service.[8] In addition, Members of Congress, including Senator Inouye, the floor manager of the legislation in the Senate, made clear that the FCC had (and was expected to exercise) its "existing" authority to resolve retransmission consent impasses if and when they resulted in an interruption of service to consumers.[9]

Unfortunately, the FCC has adopted a narrower interpretation of its role in overseeing the retransmission consent process and the agency's inaction, combined with broadcasters' ability to play competing MVPDs against each other, has been a key cause of the brinkmanship tactics (or take-it-or leave it demands) that now characterize the broadcasters' approach to retransmission consent negotiations.

Ironically, the marketplace-driven increase in competition among MVPDs that has occurred since 1992 enables broadcasters to play one MVPD against another while each MVPD still only has one broadcaster from which it can obtain programming, giving broadcasters a lopsided advantage in retransmission consent negotiations. Additionally, territorial exclusivity and the requirement that cable operators place broadcast stations on the basic tier of service further exacerbate the harm to consumers by preventing MVPDs from obtaining broadcast programming from alternative sources and consumers from opting not to purchase the broadcast channels. As a result, broadcasters—who continue to enjoy their government-created and -supported monopolies—now threaten to withhold consent to the carriage of their stations with the confidence that neither MVPDs nor their subscribers have any recourse. Making matters worse, the Big Four broadcast networks have begun demanding a cut of the retransmission consent fees obtained by affiliated local stations, creating even more pressure for rate increases.

As a result of these dynamics, consumers lose, or face the threat of losing, access to season premieres of popular programming, major events like the Super Bowl and the Olympics, and even emergency weather information. Two of the better-known examples of retransmission consent-related service disruptions occurred when FOX denied Cablevision subscribers in New York access to World Series games and Disney/ABC denied those same subscribers access to a portion of the Academy Awards. Earlier this month, over two million of our subscribers lost access to broadcast signals when we would not cave in to Hearst Broadcasting's demands for huge fee increases. While our dispute with Hearst has been settled, the fact remains that our customers are being asked to shoulder ever-increasing rates resulting from each and every retransmission consent negotiation, even those that do not result in a public dispute. It is also worth underscoring that broadcasters are making much of their marquee programming, such as the Olympics and the Super Bowl—not to mention much of their entertainment programming, available for free on the Internet. The perverse result is that MVPD subscribers are literally paying billions of dollars to subsidize content that the broadcasters make available for free both over-the-air and via the Internet. While MVPDs recognize that broadcasting has always had an alternative distribution system, it is not economically rational to pay the premium the broadcasters are demanding and that ultimately consumers are being asked to bear.

Nor is there any indication that the situation is going to resolve itself. In 2009, it was estimated that retransmission consent fees would reach $1.6 billion in 2015.[10] But according to data compiled by SNL Kagan, retransmission consent payments grew from $215 million in 2006 to nearly $1.5 billion last year and are now projected to top $2.0 billion this year—a compounded growth rate of 45 percent over

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rare."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues,* Report and Order, 8 FCC Rcd 2965 (1993) at ¶115 (expressing the FCC's belief that "there are incentives for both parties to come to mutually beneficial arrangements" in retransmission consent negotiations).

[8] 47 U.S.C. §325(b)(3)(A).

[9] 138 Cong. Rec. S643 (Jan. 30, 1992)(Statement of Sen. Inouye) ("I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers.").

[10] Michael Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime,* at 32 (Nov. 12, 2009), filed as an attachment to the Comments of the National Cable & Telecommunications Association in MB Docket No. 07–269 (Dec. 16, 2009).

that period.[11] SNL Kagan estimates that by 2015, retransmission consent payments will reach almost $4.0 billion, more than double what the 2009 study predicted. While the broadcasters like to claim that this rapid escalation in retransmission consent fees is part of a "market adjustment," the fact is that there is no sign that retransmission consent costs will level off in the future. Indeed, SNL Kagan forecasts that in the next five years retransmission consent fees will double again, reaching just under $5.0 billion.[12] This dramatic uptick in retransmission consent fees is not surprising given statements by broadcast executives like CBS's CEO Les Moonves, who boasted that when it comes to retransmission consent fees, "the sky's the limit" and by Sinclair Broadcasting Group's CEO David Smith, who has acknowledged that, in order to meet reverse compensation demands from the networks, local broadcasters will need "to keep upping" their retransmission consent fees "forever."[13]

These demands for dramatically escalating fees inevitably impact consumers in the pocketbook. In fact, according to the Katz/Orszag/Sullivan study, more than a million households "likely [will] forego the benefits of MVPD services because of the higher subscription fees they face as a result of retransmission consent fees."[14] The broadcasters' unreasonable demands also will lead to more blackouts as MVPDs do what they can to hold the line. Yet, given the disconnect between a 20-year old law and today's marketplace, it is unclear what will prevent the rising tide of retransmission consent demands. As Mr. Moonves explained, the retransmission consent right that Congress created gives broadcasters the "ultimate leverage" in retransmission consent negotiations.[15]

Incredibly, having the "ultimate leverage" is not enough for some broadcasters. Local broadcast station owners have managed to skirt the FCC's ownership rules and now conduct retransmission consent negotiations on behalf of multiple stations in the same local market. The advent of multicasting has exacerbated this trend. In 2010, a study commissioned by the American Cable Association found that there were at least 57 instances in which one station exercised common control of multiple Big Four network stations in its local market through some form of contractual arrangement.[16] And a review conducted last year by BIA/Kelsey on behalf of Time Warner Cable indicated that there are more than 40 examples of "virtual duopolies" in which one station uses its multicast capacity to operate as the market affiliate of two Big Four networks and nearly 150 instances in which one station's multicast capacity allows it to serve both as an affiliate of a Big Four network and as an affiliate of either CW or MyNetwork. It is likely that this is not the complete picture of coordination and consolidation by local stations because there currently is no requirement for broadcasters to disclose these arrangements.

As you can imagine, being able to deny a cable operator access to the programming of not just one, but of two or three broadcast signals in the same local market gives a broadcaster an almost insurmountable advantage in retransmission consent negotiations. It also explains why the record in the FCC's retransmission consent reform proceeding indicates that retransmission consent fees for Big Four affiliates are more than 20 percent higher where a single station is negotiating on behalf of more than one affiliate in a market.[17]

Not only are broadcasters demanding that consumers bear these exorbitant cost increases and deal with threatened and actual blackouts, many are reducing their commitment to local programming in order to cut costs. While Congress intended for the 1992 Act to subsidize and preserve local broadcasting, the trend in the broadcast industry in recent years has been away from localism. As Senator Inouye

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[11] *See* Appendix 1.

[12] *Id.*

[13] *See* CableFAX Daily, June 3, 2011, at 2; Communications Daily, May 5, 2011 at page 5.

[14] *See* note 5 *supra* at 37. Given that the Katz/Orszag/Sullivan study underestimated how high retransmission consent fees would climb, it is likely that the number of households opting out of MVPD services will be even higher than they projected.

[15] CableFAX Daily, June 3, 2011, at 2.

[16] *See In the Matter of 2010 Quadrennial Regulatory Review; 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. 02–182, Comments of the American Cable Association (filed July 12, 2010). Given the difficulty of tracking SSAs in particular, TWC believes that the ACA data may well understate the number of instances in which a station licensee has entered into a control-sharing arrangement with another network affiliated station in the same market.

[17] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10–71, Comments of the American Cable Association (filed May 27, 2011). *See also* William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees* (May 18, 2010) (attached to ACA's comments in MB Docket No. 10–71).

said during the debate on the Act, the intent of retransmission consent was to "permit local stations, not national networks . . . to control the use of their signals."[18] NAB expressed a similar view, writing to members of Congress that retransmission consent was "not a 'network TV' issue" and that "[t]he television networks will not play a role in negotiations between local stations and local cable systems."[19] Indeed, NAB not only proclaimed that the networks would have no right to participate in retransmission consent negotiations, it also declared that the networks would have "*no right to dictate their terms, or to demand any part of the benefits which the local station might obtain from a cable system.*"[20]

Today, however, retransmission consent has become exactly what it was never intended to be: a subsidy for the national broadcast networks and their affiliated cable channels rather than a source of support for local broadcasting. The national networks increasingly dictate to their affiliates whether and on what terms those affiliates may grant retransmission consent. In addition, the national broadcast networks have begun demanding "reverse compensation" from their affiliates, completely supplanting the structure that existed in 1992, when networks paid compensation to local stations for carriage.[21] We turn again to CBS' Mr. Moonves, who has made clear that the national networks believe that they are the ones that should be receiving the bulk of the retransmission consent fees collected by their local affiliates, stating that "[i]f a station is looking at what's really bringing in the money, it's the NFL, it's 'American Idol,' it's 'CSI,' it's the primetime strength. *It's not the local news*. . . ."[22]

Faced with the need to satisfy the networks' demands for compensation, the local affiliates are trying to cut expenses while simultaneously increasing the amounts they require MVPDs to pay to carry their signals. One of the principal ways in which the stations are cutting costs is by entering into agreements that allow multiple stations to share resources. While some sharing of costs may be beneficial for the stations and their viewers, the growing use of "shared services" and other similar arrangements has precipitated a significant decline in original, diverse local news and public affairs programming as broadcasters combine studio facilities and eliminate separate newscasts, lay off employees, and reduce their production of local news and other community-oriented programming.[23]

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[18] 138 Cong. Rec. S562–63 (Jan. 29, 1992). Other members of Congress echoed Senator Inouye's statement. *See, e.g.,* 138 Cong. Rec. H6491 (July 23, 1992) (Statement of Rep. Callahan) ("The right to retransmission consent . . . is a local right. This is not, as some allege, a network bailout for Dan Rather or Jay Leno. *Networks are not a party to these negotiations, except in those few instances where they own local stations themselves.*") (emphasis supplied); 138 Cong. Rec. H6493 (statement of Rep. Chandler) ("*The intent of the [retransmission consent] amendment was to give bargaining power to local broadcasters* when negotiating the terms of cable carriage—*not to serve as a subsidy for major networks.*") (emphasis supplied).

[19] *See, e.g.,* Letter from Edward O. Fritts, President & CEO, NAB, to Jack Valenti, President, MPAA, dated October 7, 1991 ("NAB Oct. 7, 1991 Letter"); *see also* Letter from Edward O. Fritts, President & CEO, NAB, to Rep. Christopher H. Smith, dated August 9, 1991 (stating, in attachment, that characterizations of retransmission consent as a "network plan" are "sheer nonsense" and that "Networks are not involved in any negotiations."). Copies of the documents referred to in footnotes 19–21 can be found as an attachment to the Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc. filed in the FCC's retransmission consent reform proceeding, MB Docket No. 10–71, on May 27, 2011.

[20] *See* NAB Oct. 7, 1991 Letter (emphasis supplied).

[21] For example, in May 2011 it was reported that NBC had entered into an arrangement with its affiliates by which NBC would hold its affiliates' proxies and negotiate retransmission consent deals on their behalf, with NBC pocketing as much as 50 percent of the revenues. *See* Harry A. Jessell, *NBC's Affiliate Retrans Plan is 50–50 Split,* TVNewsCheck, May 18, 2011 (available at *http://www.tvnewscheck.com/article/2011/05/18/51322/nbcs-affiliate-retrans-plan-is-5050-split*).

[22] *See Les Moonves Insists That Retrans Cash Is Network Driven,* Radio & Television Business Report, June 3, 2011, available at *http://www.rbr.com/tv-cable/les-moonves-insists-that-retrans-cash-is-network-driven.html* (emphasis supplied). The admission by the broadcasters that retransmission consent is all about the value of the broadcast content is, of course, directly contrary to the assertion, made by some of those same broadcasters and their supporters, that retransmission consent is not an intellectual property right and "has no bearing on the relative value" of the programming embodied in a broadcaster's signal. *See* Testimony of NAB President David Rehr, Hearing on Copyright Licensing in a Digital Age, House Committee on the Judiciary, February 25, 2009 ("Retransmission consent rights under the Communications Act are distinct from copyright rights in broadcast programming. Retransmission consent agreements relate to the value of creating and disseminating the broadcast signal.").

[23] *See, e.g.,* Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism* at 18–25 (Nov. 2011), available at *http://fordham.academia.edu/PhilipNapoli/Papers/1163518/Retransmission_Consent_and_Broadcaster_Committmet_to_Localism. See also*

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The broadcasters would have policymakers believe that if the retransmission consent rules are changed, they will be unable to provide local programming content that they, and they alone, are capable of producing. But not only are broadcasters already cutting back on their local content, cable and other sources (including the Internet) are rushing to fill the void. For example, Time Warner Cable now has nineteen channels that offer full-time coverage of local news, politics, sports and weather. In fact, Time Warner Cable produces three daily local newscasts that are aired by an ABC affiliate owned by Sinclair in Greensboro, NC.

In sum, while Congress expected retransmission consent to sustain and improve the quality of local broadcasting without causing an unreasonable increase in consumer prices or disruptions to consumers' access to local stations, the opposite has occurred. Prices for retransmission consent are soaring while the quality of local broadcast programming continues to erode. In addition, consumers face a growing level of disruption in their access to local broadcast programming as stations more frequently deny MVPDs' retransmission consent in order to enforce their demands for unreasonable compensation.

Next, I would like to address the bundling practices that are engaged in by programmers, particularly the Big Four broadcast networks, which are another unanticipated consequence of the 1992 Act. When MVPDs sit down with the broadcast networks to negotiate for the carriage of their owned and operated affiliates, they often are met with demands that the MVPD agree to carry and pay for not only the Big Four broadcast stations, but an array of non-Big Four stations and non-broadcast channels as well.[24] These bundling agreements also typically require the distributor to offer all or most of these channels on preferred tier locations. The effect is to force distributors and their subscribers to take and pay for an array of services that often includes channels for which there is limited (if any) subscriber interest.

The broadcasters' ability to engage in these bundling practices is an unfortunate byproduct of the 1992 Act and, in particular, of the Act's retransmission consent provisions. In 1992, Congress was concerned about vertical integration—the fact that more than 53 percent of the national cable networks available at the time were owned by cable operators. Ironically, retransmission consent actually fostered a dramatic increase in vertical integration between cable networks and *broadcasters.*

Today, broadcast networks and their affiliates are the dominant providers of cable networks. In fact, sixty percent of the top 50 basic cable networks are owned by broadcasting companies and their affiliates.[25] This is due in large part to the way retransmission consent developed in its early days, where broadcasters sought retransmission consent compensation in the form of carriage of, and payment for, new cable networks.

Now that the number of linear cable channels is reaching a saturation point, and with the ever-growing competition among distributors, broadcasters have shifted their demands to payment in cash, not just for carriage of the local television station, but also for carriage of bundles of cable channels. Because of the broadcasters' retransmission consent leverage, there is no check on the amount that they can demand for these bundles of broadcast and non-broadcast channels or on the size of those bundles. Thus, bundling is a major impediment both to controlling the price of service and to giving consumers other benefits (including more flexible packaging of services) that they should be enjoying as a result of the robust competition that now characterizes the multichannel video distribution marketplace.

It is ironic that the 1992 Act, which sought to protect free, over-the-air television from supposedly "unfair" competition from non-broadcast cable networks has led to a regime in which the national broadcast networks take retransmission consent revenues obtained either directly from MVPDs (in the case of network-owned affiliates) or indirectly (in the form of reverse compensation payments from their independently owned affiliates) and use them to support the many non-broadcast channels that they now operate and not local broadcasting. Furthermore, these cable channels now feature major programming events—such as Monday Night Football and college bowl games—that used to be available on over-the-air broadcast channels.

Danilo Yanich, Local TV News & Service Agreements: A Critical Look (Oct. 2011), available at *http://www.ccrs.udel.edu/sites/ccrs.udel.edu/files/DYanich%20.Local%20TV%20News%20%26%20Service%20Agreements-A%20Critical%20Look.pdf*.

[24] Similar bundling takes place at the local level when a group station owner refuses to grant retransmission consent unless the MVPD also agrees to pay for carriage of non-network affiliates, including low value multicast stations.

[25] *See* Appendix 2 for a chart showing examples of the Big Four broadcast networks ownership of non-broadcast cable networks. This chart is illustrative in nature and is not intended to reflect the full extent of the Big Four's cable network interests.

It also is worth remembering that, during the debate over the 1992 Act, the Act's proponents dismissed concerns that retransmission consent would drive up consumer prices by suggesting that cable operators would simply shift a portion of their programming budget away from the non-broadcast cable networks and towards local broadcasters. As Representative Markey (the chairman of the House Commerce Committee's Subcommittee on Telecommunications and the sponsor of the Cable Act in the House) stated,

> If [cable operators] have to pay Nashville a little bit less, to pay the sci-fi channel a little bit less, to pay some of these other channels a little less in order to get revenues over to Channel 4, 5, 7, and 9 so that the local children's programming, the local news and public programming that the rest of watch on free television, fine. It is meant to be within the same existing pool of money; no additional monies are going to the cable industry or to the broadcasters; it is the same pool of money."[26]

The assumption that retransmission consent would have no impact on a cable operator's programming costs was questionable in 1992. But even if it was valid, MVPDs today do not have the choice of "paying a little less" for non-broadcast programming to cover their growing retransmission consent expenses. The very broadcasters that are demanding increased retransmission consent fees own the non-broadcast cable channels and are not about to lower the amounts that they are paid for those.

My final point flows directly from my first two points: despite, or possibly because of the 1992 Act, the broadcast model on which Congress relied in adopting retransmission consent is broken. That broadcast model assumed the broadcasters' acceptance of the social compact under which local stations are given free use of the public airwaves and certain related privileges in return for a commitment to serve the public interest—to put the needs of the communities that they are licensed to serve ahead of all other considerations.[27]

Today, however, the Big Four networks are looking to increase the profits of their cable channels and the affiliates are looking to cut costs by entering into sharing agreements and reducing local programming in order to be able to pay reverse compensation to the networks. Furthermore, broadcasters are often arguing to reduce or avoid their public interest obligations often citing some of the same changes in the competitive and technological landscape that we believe justify revising the 1992 Act. Yet, when it comes to preserving the special privileges that have been accorded local television stations—from free spectrum to black out rights—the broadcast industry claims that nothing has changed over the past twenty years that warrants revisiting those privileges. For example, the broadcasters not only oppose suggestions that they be limited in their ability to engage in joint retransmission consent negotiations, they even oppose efforts to make them simply report the details of those sharing arrangements online where they would be more readily accessible to public and regulatory scrutiny.

The broadcast industry is sitting on spectrum worth tens of billions of dollars. It is not surprising that they would use their position as custodians of the public interest when it is to their benefit. But the broadcasters should not have it both ways. They cannot claim that without special treatment they will no longer be able to provide consumers with local news and information, and at the same time, reduce their spending on localism and deny cable and other pay-TV customers access to their signals during disputes. Nor should they be allowed to have the benefit of special protections such as mandatory basic tier carriage and territorial exclusivity protection—privileges that were premised on broadcasters fulfilling their public interest obligations.

In conclusion, two years ago, Time Warner Cable's CEO, Glenn Britt, testified before this Committee and stated that Time Warner Cable agrees with the principle, embedded in the 1992 Act, that free markets are preferable to regulated markets wherever feasible. We stand by that position today. Contrary to broadcaster assertions, retransmission consent is not now and has never been a free market. Rather, it is a government-created regulatory regime established to address vastly different conditions than those that exist today. That regulatory regime was intended to safeguard the public's access to local broadcast programming. But today, the law is having the opposite effect. It is resulting in consumers losing access to local broadcast stations and bearing the costs of increased fees as vertically integrated broadcast networks are permitted to siphon support away from local broadcasters to increase

[26] 138 Cong. Rec. H8652 (Sep. 17, 1992) (Statement of Cong. Markey).

[27] *See* Thomas W. Hazlett, *If a TV Station Broadcasts in the Forest: An Essay on 21st Century Video Distribution* (May 19, 2011), filed in MB Docket No. 10–71 (May 24, 2011).

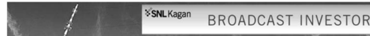
their profits and those of their non-broadcast cable networks. No one could have foreseen how broken this regulatory regime ultimately would become.

We applaud the leadership shown by Chairman Rockefeller, Ranking Member Hutchison, Senator Kerry, Senator DeMint and other Members of the Committee and their recognition that the *status quo* is not sustainable. We are particularly appreciative of Senator DeMint's efforts to begin the dialogue on the role that government should play in the television marketplace by proposing to replace the outdated regulatory regime embodied in the 1992 Cable Act with a genuine free market approach. We also have made clear that, as long as the regulatory regime established by the 1992 Act remains in effect, the FCC should make targeted changes to protect consumers from the broadcasters' abusive retransmission consent practices. We look forward to working with all of the Members of the Committee as it undertakes the essential task of updating the 1992 Act.

Thank you again for the opportunity to testify before the Committee today. I would be happy to answer any questions you might have.

APPENDIX 1

Article



Tuesday, November 22, 2011 2:03 PM ET SNL Kagan

Boosting retrans projections as TV station owners succeed in pushing rates

By Robin Flynn

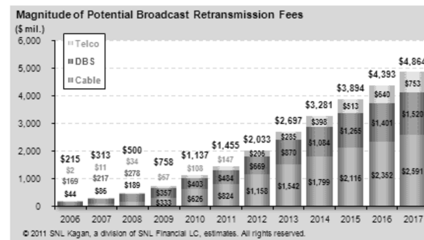
We are issuing new projections for broadcast industry retransmission revenues, based on evidence of rising fees being paid in the current round of negotiations, as TV station owners seek to boost their net intake from retrans fees even as they begin to pay network partners programming fees. We project that industry retrans fees could increase to $3.9 billion by 2015 (versus our $3.0 billion projection in May), at which time retrans fees would still represent just 8% of the almost $50 billion that multichannel operators are projected to pay to basic cable networks, regional sports networks and premium channels in affiliate fees.

TV station owners always thought that increasing retrans fees would be a stair-step process, with the traumatic initial step of going from zero to a fee of 20 cents to 30 cents per sub per month followed in the second or third round of negotiations by going to potentially twice that (higher for owned-and-operated stations). Even with recent increases, TV station owners say that they are still not at fair value given the ratings that they deliver, versus a cable network like ESPN, which we project will receive license fees of $5.06 per sub per month in 2012.

Station owners say their ability to obtain retrans fees on par with cable networks such as ESPN has been hampered, given that the negotiations are localized or in a limited number of markets and that affiliate groups do not make as much of an impact on a large multichannel operator as a cable network with a national footprint. However, if NBC succeeds in its plan to negotiate on behalf of its O&O group as well as affiliates, that dynamic would change for at least one broadcast network.

The potential for group negotiations has prompted a strong response from the multichannel industry, which is protesting arrangements that allow stations to negotiate in any sort of group outside of outright ownership. On Nov. 14, a group including the American Cable Association, Time Warner Cable Inc. and DISH Network Corp. sent a letter to the FCC (see attached) to allege that if stations affiliated with the Big Four negotiate together, they have the market power to increase carriage fees by 21.6% versus situations where Big Four stations negotiate separately. Similarly, in a press release, the ACA took issue with Raycom Media Inc.'s Nov. 15 shared services agreement with Belo Corp. to take over operations of two Belo stations in Tucson, Ariz., (affiliates of News Corp.'s FOX and MyNetworkTV) since Raycom already has an affiliate of CBS Corp.'s CBS in that market.

The fact that networks are now taking what can be half of affiliates' retrans income as a "programming fee" or other such payment means that increasing the retrans revenue stream has been made much more of an economic necessity for TV station owners, since it is no longer such a pure contribution to cash flow. That's especially true for arrangements such as one implemented by FOX, which is taking a set fee per sub per month no matter what the TV station is getting. In the larger markets, FOX is asking for 50 cents per sub per month within four years, indicating that the level received by TV stations in those markets would ideally be at least $1 per sub per month.

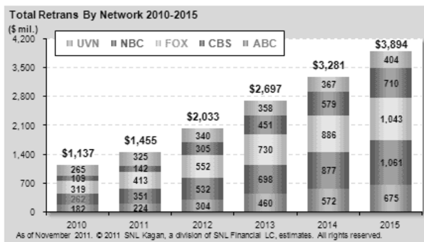


Ultimately, station owners will be faced with paying a programming fee to the networks that may not have anything to do with what they are getting from the MSOs. As Gray Television Inc. President and COO Robert Prather Jr. said at the Wells Fargo Technology, Media & Telecom conference Nov. 9, "They are not going to care what you get in retrans. They're going to say, this is our fee for providing our program and take it or leave it." Prather projected that the deals Walt Disney Co.'s ABC did last year have proven too cheap, and when his company talks to the ABC network in 2013 it will be paying closer to market rate. "I think the networks are going to wind up, in the long run, probably getting close to 50% of whatever retrans we have going forward," predicted Prather.

Article

The new affiliate agreements spell the end of rapidly waning "network comp," whereby the networks used to pay stations to carry their programming. As Les Moonves said on the company's third-quarter earnings call Nov. 3, "On the reverse comp side, we signed a new deal with one of our largest affiliate groups during the quarter. In this deal that comes into full effect next summer, we took a previous arrangement in which we had been paying our partners and turned it into a deal in which they will now be paying us the kind of compensation we've told you we can expect." The upside of the new arrangement for stations is that they are now much more important to their network partners. As Gray's Prather said, "We are going to be important customers. They're not going to be as willing to treat us like a stepchild, I think, as they have in the past."

As for rising fees, many TV station owners have recently discussed the expanding pie of retrans dollars. Gannett Co. Inc. President and CEO Gracia Martore said Oct. 17, "People need to understand that there's a lot of room for the pie to grow. So there's room to share. And the growth of that pie, we see pretty clearly as we are seeing deals being done in the marketplace and we see our opportunity over the next few years as our deals come up to expand that pie of dollars for us." Regarding increasing fees, Gray's Prather told the Wells Fargo conference Nov. 9, "I will give you an example, I won't use the names, but one of the big operators has countered our proposal and they offered more than double what they are paying right now, as just the first counter. So I think it's a good sign, we're going to get some pretty good money." For more on rising fees, click here.



Our updated retransmission revenue projections show total industry retransmission revenue rising from $1.45 billion in 2011 to $4.9 billion by 2017, with the majority of retrans revenue by 2017 still coming from cable MSOs. We have continued to assume a mix of rates between O&Os and large and small market affiliates in our projections spreadsheet (click here), yielding a blended average rate for MSOs per sub per month by 2017. As shown, the growth in retrans fees is supported by slow growth in multichannel subscribers (for more on multichannel subscriber projections, click here).

We have validated our projections by building up the number not only from the top down, but also from the bottom up. Last month, we published our detailed reverse retrans projections. In this analysis, for the first time, as shown, we have also broken out retrans fee projections by affiliate group, assembling these numbers by working on a station-by-station basis across the various affiliate groups, utilizing publicly released retransmission revenues from TV station groups, and backing into implied quarterly payments per subscriber per month by calculating multichannel subs reached by station based on data from MediaBiz. More on specific fees per sub per month by station owner can be found by clicking here.

As shown, we project that by 2015, CBS and FOX, by virtue of the size of their O&O station groups as well as emphasis on pushing rates, will be generating the largest chunks of retrans revenue, at more than $1 billion each. Given that CBS is already allocating half of its O&O retrans revenues to its networks, that would mean significantly more funds available to invest in programming than existed before the broadcast retrans funds began flowing. Station owners are counting on some of that money being invested in high-value programming to allow them to continue to grow local spot rates, deliver viewers to local news and attract political dollars. Local news is still an important revenue generator for TV stations, with early morning news increasing in importance even as late night news for some stations declines.

TV Station Retransmission Revenues by Network: 2010-2015

	2010 ($ mil.)	2011 ($ mil.)	2012 ($ mil.)	2013 ($ mil.)	2014 ($ mil.)	2015 ($ mil.)
O&O Retrans*	627	861	1,108	1,327	1,502	1,702
Affiliate Retrans	509	594	925	1,370	1,779	2,192
Total	**1,137**	**1,455**	**2,033**	**2,697**	**3,281**	**3,894**
Reverse Retrans	**23**	**146**	**473**	**745**	**1,037**	**1,290**
By Network						
O&O Retrans*						
ABC	78	104	122	149	177	205
CBS	118	181	250	299	349	398
FOX	185	257	308	358	408	459
NBC	-	16	110	186	224	263
UVN	247	303	318	334	343	378
Total	**627**	**861**	**1,108**	**1,327**	**1,502**	**1,702**
Affiliate Retrans						
ABC	105	120	183	311	395	471
CBS	144	170	282	399	528	663
FOX	134	156	244	372	478	585
NBC	109	126	194	266	354	447
UVN	17	21	22	24	24	27
Total	**509**	**594**	**925**	**1,370**	**1,779**	**2,192**
Total O&O and Affiliate Retrans						
ABC	182	224	304	460	572	675
CBS	262	351	532	698	877	1,061
FOX	319	413	552	730	886	1,043
NBC	109	142	305	451	579	710
UVN	265	325	340	358	367	404
Total	**1,137**	**1,455**	**2,033**	**2,697**	**3,281**	**3,894**
Reverse Retrans from Affiliates						
ABC	5	53	143	198	231	267
CBS	0	28	98	171	284	368
FOX	0	39	134	233	296	341
NBC	0	5	76	119	202	288
UVN	17	21	22	24	24	27
Total	**23**	**146**	**473**	**745**	**1,037**	**1,290**

* Reflects gross retrans revenue accruing for carriage of the O&O TV stations before any sharing with the network division. As of November 2011. © 2011 SNL Kagan, a division of SNL Financial LC, estimates. All rights reserved.

Broadcast Investor is a regular feature from SNL Kagan offering exclusive analysis and commentary.

APPENDIX 2

NBCU	
10 O&Os	
14 O&Os	
CNBC	
CNBC World	
MSNBC	
BRAVO	
SyFy	
Telemundo	
USA	
Oxygen	
Mun2	
Cloo	
Chiller	
Universal HD	
The Weather Channel (Partial)	
NBC Sports	
Golf Channel	
Universal Sports	
E!	

Disney	
8 O&Os	
ESPN	
ESPN2	
ESPN Classic	
ESPNEWS	
ESPN Deportes	
ESPNU	
ESPNHD	
ESPN2 HD	
ESPNEWS HD	
ESPNUHD	
Disney Channel HD	
Disney xd	
Disney Channel	
SOAPnet	
ABC Family Channel	
A&E	
The History Channel	
The Biography Channel	
History in Espanol	
Military History Channel	
Crime & Investigation Network	
A&E HD	
The History Channel HD	
Lifetime Television	
Lifetime Movie Network	
Lifetime Real Women	
History 2	

Newscorp	
27 O&Os (17 Fox, 10 MyNetwork)	
Fox Business Network	
Fox Movie Channel	
Fox News Channel	
Fox College Sports	
Fox Regional Sports Networks (16 O&O's)	
Fox Deportes	
Fox Sports Net	
Fox Soccer Channel	
Nat Geo Wild	
Fuel TV	
FX	
FX HD	
Geographic Channel (US 67% and Worldwide	
National Geographic Channel HD	
SPEED Channel	
SPEED HD	
Big Ten Network and Big Ten Network HD (49%)	

CBS	
14 O&Os	
9 O&Os (plus 5 misc O&Os)	
CBS Sports Network	
The Smithsonian Channel	
Showtime	
The Movie Channel	
Flix	
Showtime Too	
Showtime Showcase	
Showtime Extreme	
Showtime Beyond	
Showtime Next	
Showtime Women	
Showtime Familyzone	
The Movie Channel Xtra	
Showtime HD	
Showtime 2 HD	
Showtime on Demand	
The Movie Channel HD	

The CHAIRMAN. Thank you.

And now Mr. Martin Franks, Executive Vice President for Planning, Policy and Government Affairs, CBS Corporation.

STATEMENT OF MARTIN D. FRANKS, EXECUTIVE VICE PRESIDENT OF PLANNING, POLICY AND GOVERNMENT AFFAIRS, CBS CORPORATION

Mr. FRANKS. Thank you, Mr. Chairman, Ranking Member Hutchison, and members of the Committee.

Allow me several observations based on 24 years at CBS before I take your questions.

Retransmission consent is neither broken nor an antique in need of refurbishment. In the 6 years since CBS split from Viacom, we have successfully negotiated nearly 100 retrans agreements without a word of public discord between a willing seller and willing buyers, including Ms. Witmer's and Ms. Abdoulah's companies. And this, despite many Wall Street analysts pegging CBS's negotiated retrans fees at the top of the market.

While any disruptions to consumers are unfortunate, only a small handful of negotiations break down each year. That does not sound like a dysfunctional marketplace to me. In fact, bad weather is a far greater source of consumer disruption than marketplace failure.

Development of a robust retrans marketplace has helped CBS and our affiliates invest billions both to retain marquee programming, including the NFL, SEC football, the Grammy's, March Madness, the Kennedy Center honors, and the U.S. open tennis, and to continue our considerable investment in local and national news.

Calls for fixing a supposedly broken retrans system arose only after a fully competitive marketplace among video distributors developed. Retrans was basically a non-factor in carriage negotiations until it became a teenager at the same time that DirecTV, Dish, Verizon, and AT&T became full-fledged competitors to the original cable monopoly. Far from a flawed system, retrans is a triumph of Washington policymaking by restoring balance and competition to a sector previously dominated by a monopoly with a perfect business plan, namely receiving its most valuable product, broadcast television, for free, reselling it at an enviable margin, and using the proceeds to build a dominant marketplace position. Nice work if you can get it.

Some liken retrans to an antique relic of a bygone era. Gee, in every other sense a 20-year-old is barely emerging from adolescence.

Moreover, the notion that retrans has not been subject to review since its passage neglects to take into account that in 1999, when retrans was extended to DirecTV and Dish at their fervent request, then again in 2004, and most recently in 2010, retrans has been subject to review by this committee and its House counterpart and both the House and Senate Judiciary Committees in the context of the Satellite Home Viewer Act and its successors, to say nothing of countless oversight hearings and FCC and GAO reports.

Rather than a legitimate public policy problem, what we have now is an unholy alliance among distributors that are supposed to compete with each other but who have, instead, banded together to

undo retrans and return to their halcyon days of depriving broadcasters of the compensation that our popularity in the marketplace so clearly merits.

Turning to another question before this committee, with respect, those who believe doing away with retrans and the compulsory license will lead to fewer consumer disruptions are, I fear, mistaken and therefore I strongly urge the Committee to look before you leap for unanticipated consequences. Introducing even more claimants into an already challenging negotiating environment may lead to more disputes, not fewer, will be a lawyer's paradise, and is unlikely to yield any relief to consumer pocketbooks. That brave new marketplace would also be an extraordinarily capital-intensive one.

Make no mistake. CBS will do just fine. One way or the other, we will be able to invest in our content, continue to attract audiences, and figure out how to monetize our performance. But what of the impact on companies without CBS's heft and access to capital? Many smaller players, including small cable operators, will be squeezed out of the business. West Virginians may have access only to larger regional super players from Washington, D.C. and Pittsburgh, or South Carolinians may lose the wonderful localism tradition earned by their State's broadcasters in favor of service solely from Atlanta, Charlotte, or even New York City. How will local economies and consumers adapt to that change? How will a local car dealer, bank, or restaurant in Spartanburg reach its potential consumers on a broadcast originating in Atlanta?

In conclusion, for all its flaws, American television is the envy of the world. Tomorrow, as a very proud father, I am leaving for London where my younger son will coach in the Olympics. I am looking forward to every moment of the trip except for being stuck watching British television.

[Laughter.]

Mr. FRANKS. Conversely, our 500 channel universe, largely in high definition, has many somethings for everyone. Whatever you do, be careful you do not undermine the existing system that functions much more successfully than is recognized and that almost any other country in the world would gladly have instead of what their own economic, political, creative, and technological cultures have been able to achieve.

Thank you.

[The prepared statement of Mr. Franks follows:]

PREPARED STATEMENT OF MARTIN D. FRANKS, EXECUTIVE VICE PRESIDENT OF PLANNING, POLICY AND GOVERNMENT RELATIONS, CBS CORPORATION

Good afternoon, Chairman Rockefeller, Ranking Member Hutchison and members of the Committee. My name is Martin D. Franks, and I am Executive Vice President, Planning, Policy and Government Relations of CBS Corporation. I appreciate the opportunity to speak with you today about the state of the video marketplace 20 years after the Cable Act.

In a nutshell, as CBS can attest—as can I personally in my role as the principal retransmission consent negotiator for the company—the market for video programming is one of the country's most robust and competitive sectors in the U.S. economy.

I believe that the retransmission consent regime enacted in 1992 is actually one of the great Washington public policy accomplishments of the intervening two decades. It has given renewed vitality to broadcast television that prior to 1992 was being consigned to the dust heap of history. That there are some calling for a return to the old regime, when they got their most popular product for free, and then resold

it and used the proceeds to build their own businesses, is hardly a surprise. Congress should resist those entreaties, especially since retransmission consent is not broken.

It has been estimated that some 15,000 retransmission consent negotiations take place every three years. And almost all of them are completed successfully. Over the last six years CBS has completed all of its retransmission consent negotiations successfully and without incident.

Any tampering with retransmission consent laws and rules now could trigger severe negative results to a broadcast television industry that is actually contributing positively to the U.S. economy. To the extent that impasses in negotiations occur with more frequency today, it is due, at least in part, to the belief by a handful of distributors that disruptions may help them advance their public policy goals in Washington, that is, by trying to make a working model look broken. Sometimes, too, these few distributors hold back from successful conclusions to retransmission negotiations in hopes that the government will step in to assist them.

Fortunately, from my perspective, competition in the communications world has never been so robust. But that is the real concern of those in our industry calling for a change to retransmission consent. They are unnerved, nay threatened, by competition. And that is why we are here today. Because they now believe that deleting retransmission consent will end the balance of power and tip the scales in their favor. Yet, the very MVPDs who today are calling for deregulation of retransmission consent are the very same entities who have been filing reams of paper and making countless visits to the FCC over the last two or three years trying to do the very opposite, that is, to impose brand NEW retransmission consent-related regulations—such as mandated standstills and arbitration—to benefit their own bottom lines at the expense of broadcasters.

Encouraging the FCC to become an active participant in retransmission consent negotiations, as the leaders of the American Television Alliance have suggested, would serve to hinder the current free market negotiations, not set them free. Retransmission consent negotiations are complex and time-intensive negotiations that involve much more than price. Inserting a government-run arbitration provision coupled with a standstill requirement would lead to an FCC that focused on nothing but retransmission consent negotiations to the detriment of the agency's core mission. Broadcasters across the country want to be carried by distributors, and distributors want to carry broadcast television stations because of the popularity of our local and national programming. This equal amount of "skin in the game" is the best incentive to reasonable agreements.

In exchange for use of the public's spectrum, broadcasters are bound to operate in the public interest. Accordingly, to this day, we fulfill that requirement with great enthusiasm, pride and excellence. But never did we agree that the valuable programming we develop, purchase, produce and offer over-the-air on our stations can be retransmitted by another entity without our permission.

CBS understands the real world of innovation and the challenges it brings. We were one of the founders of television more than 80 years ago, and today we are a leader in the video marketplace. Our company not only has businesses with origins that date back to the dawn of the broadcasting age, it also has new ventures that operate on the leading edge of media. We own the most-watched television network in the U.S. and one of the world's largest libraries of entertainment content. We believe in innovation and the power of broadcasting.

The CBS Television Network serves almost every household in the Nation via a broadcast distribution platform made up of about 200 affiliated TV stations. These stations, in turn, supplement the CBS content we license to them with their own packages of local news and public affairs programming, as well as syndicated and other product that they either acquire from other suppliers or produce themselves. Stations do not own much of the non-news content they transmit; instead they obtain from content producers and owners the rights to broadcast it.

Each year, CBS spends billions of dollars to produce and acquire top-notch programming. As for sports, CBS pays hundreds of millions of dollars each year to the NFL and to the NCAA for rights to March Madness alone, and that is before you consider rights fees for SEC Football, regular season NCAA basketball, PGA golf and to the USTA for rights to the U.S. Open Tennis Tournament.

Our investment in superior programming helps not only the CBS network and our owned-and-operated television stations, but also our affiliated stations nationwide. When network programming is of high quality and compelling, local stations benefit. From large DMAs like Boston and Dallas to smaller DMAs like Myrtle Beach and Clarksburg-Weston, local stations are able to present this network programming to obtain advertising dollars so that they, in turn, can make significant financial investments in the production, gathering and reporting of local news, sports, weather

and other information. Local stations also are able to invest in rights to syndicated programs, such as "Wheel of Fortune," "Jeopardy," "Ellen," "Dr. Oz," "Seinfeld" and "Friends," which are obtained from other content producers.

And, may I add, broadcasting is the most desirable platform for advertisers on both the local and national levels. Advertising is a powerful engine in the U.S. economy and subsidizes much of the programming in this country. Additionally, because of the unique nature of the network-affiliate system, small businesses are able to buy promotional time at affordable rates in their communities and get the most bang for their advertising buck.

CBS looks forward to continuing to vigorously compete in the open marketplace this Committee created in 1992. As you recognized then in the report to accompany the Cable Act, "It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations." We thank the Committee for including us in discussions surrounding the future of the industry in which we plan to constructively contribute for many decades more.

The CHAIRMAN. Thank you, Mr. Franks.

Ms. Colleen Abdoulah, CEO and Chairwoman of the Board, WOW! Internet, Cable, and Phone.

STATEMENT OF COLLEEN ABDOULAH, CHAIRWOMAN AND CHIEF EXECUTIVE OFFICER, WOW! INTERNET, CABLE, AND PHONE; CHAIRWOMAN, AMERICAN CABLE ASSOCIATION

Ms. ABDOULAH. Thank you. I too really appreciate all of you for taking the initiative to open this review up because there are a lot of things to consider and it is extremely complex, especially because the pace of change is so rapid. I heard a gentleman in one of your last hearings from Microsoft, I believe, say that we will see more change in the next 18 months than we have seen in the last 5 years, and I really believe that.

We know that laws written in 1992, 1996 do not serve or support consumer behaviors and the expectations of consumers that are a direct result of the technological revolution that we are experiencing. Consumers tell me directly that what they want is more of what they want to buy and watch and they want to do so on different devices using different technologies. Yet, our outdated laws do not address these changing behaviors in consumers demands. Instead, they create significant problems for consumers.

Specifically, programming and retransmission consent negotiations are failing and they are resulting in blackouts, as was stated. In fact, 69 blackouts have occurred in 2012 alone, up 35 percent since 2011, affecting literally tens of millions of viewers. Retransmission fees are skyrocketing and consumers are paying the price. Media consolidation has led to rampant tying and bundling of unwanted, unwatched programming.

So consumers often ask us why do they have to pay for so many networks they do not want. And I believe that is what we love about the Internet. We get to choose what we pay for.

And speaking of the Internet, access to online video distribution rights is currently being withheld and slow-rolled to the smaller cable operator by the big content providers, and that puts our customers at a disadvantage.

Then we have the big broadcasting cable networks paying what I think to be crazy, astronomical fees for sports programming because they know with the current business model, they can force that cost onto consumers.

The distortions caused by these outdated rules are really serious and not without consequence, particularly for the smaller cable operator. My colleagues and I within the American Cable Association, with members in 49 states, represent the small player in the small versus big business arena. In fact, 82 percent of ACA members serve fewer than 5,000 customers; 30 percent serve fewer than 500 customers. And what I find so disturbing is that in the past 4 years alone, 800 small cable systems have literally gone out of business due in part to escalating retrans fees and overall programming costs. So we are already getting squeezed out. And when these businesses close, there is not only a loss of video to that community, there is a loss of broadband services as well. Smaller operators just simply do not have the leverage to negotiate fair market pricing for our video content.

Since 1992, the tidal wave of media consolidation between broadcasters and cable networks has given enormous bargaining power to the Big 4 networks, power that abuses the Government-sanctioned protections that may have made sense 20 years ago in a completely different business environment, but they do not today. And who pays for this? We do because we are all consumers.

This abuse of power should be outlawed. There are at least 46 cases that we know of where separately owned, same-market broadcasters coordinate their retransmission consent negotiations. Now, they use a benign term for this collusion. They call it "shared services agreements." The impact of their collusion is that broadcasters who are supposed to be competing with one another use one single broker to negotiate carriage rights for two or more competing stations. We have given evidence to the FCC that proves that this unjust practice results in fees that are 21 to 161 percent higher than the fees that are created by broadcasters who negotiate carriage separately. Now, we as operators are not allowed to practice collusion, and appropriately so. Broadcasters should not be either.

I have heard members in these hearings ask what should be done when you choose to reform the current laws. There are many improvements I think to consider, and I offer you just a few today.

Prohibit coordinated negotiations by separately owned broadcasters in the same market.

Provide special considerations for the small operators because they need them.

Require continuous carriage of signals during a retransmission consent dispute to stop consumers from being held hostage by these blackouts.

Require binding baseball-style commercial arbitration of such disputes.

And give consumers and pay-TV providers the right to embrace new technologies to access broadcast signals.

Thanks for having me. I look forward to questions.

[The prepared statement of Ms. Abdoulah follows:]

PREPARED STATEMENT OF COLLEEN ABDOULAH, CHAIRWOMAN AND CHIEF EXECUTIVE OFFICER, WOW! INTERNET, CABLE AND PHONE; CHAIRWOMAN, AMERICAN CABLE ASSOCIATION

Mr. Chairman and Ranking Member Hutchison, thank you for the opportunity to participate on this panel.

As I prepared for today's event, I reviewed recent hearings and comments from the members of this Committee and am pleased that so many of you recognize what I and my fellow small cable operators also know:

Today's communications market has moved on while the 20-year-old laws that govern it have stayed the same.

While the 1992 Cable Act may have worked for the realities of the early '90s, it has been bypassed by a technological revolution that it never anticipated and is ill-equipped to handle.

Today, we have smart phones, laptops, tablets, and other smart devices that access rich video content via Internet technologies, yet the law that governs video distribution assumes we still live in a world of one local broadcaster working with one local cable franchisee.

I appreciate your awareness that the law is outdated, and I am excited about the benefits that consumers will see through updating the law.

Consumers are harmed because the laws have not kept pace with the times.

Specifically, the 1992 Act lags behind profound technological developments and business innovation. (Truthfully, the 1996 Telecommunications Act lags behind too.) As a result, outdated laws applied to a rapidly changing marketplace create serious problems for consumers.

These consumer harms manifest themselves in a number of ways:

- Programming and retransmission consent negotiations are failing, causing blackouts.
- Retransmission consent fees, for what the broadcasters call "free over-the-air TV," are skyrocketing, and consumers pay the increased price.
- Broadcasters collusively coordinate agreements with other broadcasters in the same market, driving retransmission consent rates even higher.
- Growing media consolidation by the large networks and programming owners has led to rampant tying and bundling of unwanted, unwatched and unmarketable programming.
- Because tying and bundling is forced on Multichannel Video Programming Distributors (MVPDs) by the media giants, there is hardly any difference today in the price and packages of video services offered by cable, satellite, municipal and telco video providers, let alone any choice for the consumer.
- Access to online video distribution rights is being slow-rolled by the big content providers, giving consumers little choice for online video.

On the retransmission consent front, there is even more evidence of consumer harm. For instance, in the retransmission consent market today:

- There are regular breakdowns in negotiations between broadcasters and MVPDs, leading to a record number of blackouts. In fact, 69 blackouts have already occurred in 2012, affecting dozens of television markets across the country and literally tens of millions of TV viewers.
- Retransmission consent blackouts in 2012 are up 35 percent over 2011, and this year is hardly even half over.
- It is now the standard practice of big broadcast networks to agree to pay astronomical fees for sports programming, in part because they can force down the cost to consumers through reverse compensation and retransmission consent payments.
- The outdated retransmission consent rules give big media companies the means to require the carriage of additional, less desirable cable programming.

The impact on smaller, independent MVPDs is magnified, and systems in rural America are being lost.

Distortions caused by these outdated rules are serious and not without consequences, particularly for smaller cable operators.

My colleagues and I within the American Cable Association have a unique view of the pay-television marketplace as compared with larger MVPDs.

Our members include the smallest operators in the market. In fact, 82 percent of ACA's members serve fewer than 5,000 subscribers, and 30 percent serve fewer than 500 subscribers. Since 2008, nearly 800 of these small systems have closed across the country due in large part to escalating retransmission consent and programming costs that cannot be passed along to consumers, a trend I fear will continue in many rural communities. And the loss of a business that offers video pro-

gramming often means the devastating loss of broadband services as well, because an operator needs a healthy business model on both ends to survive.

How did we get here?

I would like to present a view of how the video marketplace has changed over the last 20 years, and why your sense is accurate that these changes demand modernization of the Cable Act, particularly with respect to the rules governing retransmission consent. As Chairwoman of the Board of the American Cable Association ("ACA"), I provide my perspective on behalf of a group of 850 cable operators, including Wide Open West!, for which I serve as Chief Executive Officer.

Retransmission consent was crafted to give broadcast stations control over the redistribution of their signals in a marketplace that existed before cable faced competition from:

- Direct broadcast satellite companies, such as DirecTV and DISH Network, providing an all-digital video service that includes local channels;
- Telephone companies, like Verizon, AT&T, and mid-sized and smaller companies, providing a wireline video service that also includes broadband and phone;
- Online video distributors, such as Netflix, Amazon, and Hulu, providing a streaming and on-demand video service, including broadcast content over the Internet, not just to TV sets but also to laptop computers, tablets like the iPad, and an assortment of hand-held mobile devices.

Moreover, the provision was written before a tidal wave of media consolidation that has left the Big 4 broadcast networks (ABC, NBC, Fox, and CBS) in the hands of media giants like Disney, Comcast, News Corp., and Viacom's Sumner Redstone, all of whom own many of the most popular cable channels. And now too retrans cash is king for CBS and the others as they predict annual earnings of billion dollar retransmission consent fees to come.

Today, retransmission consent rules fail to reflect the wide disparity in bargaining power between a pay-TV provider and a local broadcast station affiliated with a Big 4 network. In the distant past, negotiations were between one local broadcaster and one cable operator, each having exclusivity within its service territory. Although today there is still only one local station affiliated with a broadcast network per market, in nearly every market there are many multichannel video programming distributors in each market competing against one another. The original delicate balance between the two parties was predicated on the fact that both sides needed each other in roughly equal measure. However, unanticipated consolidation and business practices have transformed this situation into one in which the broadcaster can now extract evermore egregious fees from MVPDs and their subscribers as a result of government sanctioned protections that may have made sense in a completely different business environment, but not today.

Today, the MVPD still needs the Big 4 signal on its channel line-up just as much as before, but, unlike in 1992, the broadcaster no longer needs any single MVPD quite so much. In my situation, I know, and my local broadcaster also knows, that if I do not carry its signal my customer will easily go to one of my competitors to get it.

Retransmission consent fees are out of control.

To put all of this into context, but without violating the non-disclosure requirements embedded in the contracts we all must sign, I have calculated that the retransmission consent costs for WOW!, starting in January of this year, have increased at an appalling year-over-year pace of almost 90 percent. And that's in *this grim economy* for a product that Congress has legally obligated broadcast licensees to provide *free and over-the-air* to the public. This exorbitant rate hike follows on the heels of a 117 percent increase from the fees just prior to this round of retransmission consent.

According to SNL Kagan research, retrans fees will increase 18-fold by 2015, and we're talking BILLIONS per year taken from consumers. Imagine the political reaction to that kind of increase if it was forecast for corn, gasoline, clothing, or any other consumer product.

Cable consumers are forced to pay for Internet content they don't access.

Let me shed light on another disturbing trend that should concern you. Some major content distributors continue to deny ACA member companies like WOW! fair and equitable Internet distribution rights for their high-value programming. Or, they unfairly tie these media rights to access to their core programming, requiring that our customers pay for what is often also available for free on the networks' proprietary websites. In one situation with a very well-known entity, we must charge

EVERY customer on our system a fee for the right to access that company's online content over the subscriber's own broadband Internet connection, even though the programmer's audits reveal that, on average, less than two-tenths of one percent of our subscribers visit its website on any given day. If that kind of trend continues, both cable and broadband service will be priced out of reach for most consumers. This situation highlights the looming problem you will face if you do not in the very near future get ahead of the consumer and MVPD concerns surrounding video programming content and how it is distributed.

Coordinated negotiations by broadcasters stifle competition.

I believe the problems that WOW! and other MVPDs face are best illustrated by understanding the sheer unfairness of coordinated retransmission consent negotiations. Broadcasters have perverted what they call "marketplace negotiations" for retransmission consent by engaging in collusive coordinated negotiations. A longstanding fundamental policy goal of our local broadcast television licensing system is the promotion of competition among top rated, same-market broadcasters licensed by the Federal Communications Commission.

Today, there are at least 46 instances where separately owned, same-market broadcasters affiliated with a Big 4 network coordinate their retransmission consent negotiations. The practical impact of these collusive alliances is that local broadcasters, who are supposed to be competing against one another, are using a single representative to negotiate carriage rights for two or more competing stations. And consumers pay the price for this kind of collusion.

Evidence ACA members presented to the FCC shows that broadcasters who coordinate their retransmission consent charge fees that are at least 21 percent higher than the fees collected by broadcasters who negotiate carriage separately. Just imagine if the reverse were to occur. Imagine the outrage you would hear from the local broadcasters if Comcast, WOW!, DirecTV, DISH Network, and AT&T U-Verse all decided to negotiate as one block with the TV stations in a single broadcast market in which we operate. We shouldn't do that and neither should the broadcasters.

ACA brought the issue to the FCC's attention on multiple occasions, beginning as early as May 2010 in response to the FCC's request for comment on a Petition for Rulemaking to reform the rules governing retransmission consent. Each time we argued that the FCC should deem coordinated negotiations by broadcasters to be a *per se* violation of its good faith rules. More than two years later, we are still awaiting action. Our hope is that Congress will find a way to convince the FCC to act or will itself prohibit this practice in making revisions to the Cable Act.

The good news: there's no shortage of solutions!

But there is good news. After years of hearings, industry discussions, and constant debate, it's clear the time for Congress to act is now. And when it does, there will be many solutions to consider that will improve the situation for consumers and, in combination, have a material benefit. As you begin your rewrite of the 1992 Cable Act, I urge you to consider:

1. Prohibiting coordinated negotiations by separately owned broadcasters in the same market;
2. Ensuring continued carriage of signals during a retransmission consent dispute in order to stop consumers from being held hostage by blackouts;
3. Requiring binding baseball-style commercial arbitration of such disputes; and,
4. Authorizing consumers and pay-TV providers to employ new and innovative technologies that allow consumers to receive broadcast signals over-the-air as an alternative to receiving and paying for that content through retransmission consent. These are but a few possibilities, and I urge you to consider them all.

As you have noted, the broadcast signal carriage rules codified in 1992 are antiquated and have escaped reform for far too long. They reflect neither the realities of MVPD competition today engendered by the 1992 Act, nor the impact of the pervasive consolidation in the broadcast and media industry, not to mention the advent of the Internet as a platform for video programming delivery.

Mr. Chairman, if you want to provide your constituents with the best services and options that a 21st Century telecommunications network can provide, then it is time to reform and overhaul the 20th Century law that prevents cable operators from delivering them.

The status quo is unacceptable.

The CHAIRMAN. Thank you very much, Ms. Abdoulah.

And now we end with—no, we do not—Dr. Mark Cooper, Director of Research, Consumer Federation of America.

STATEMENT OF DR. MARK COOPER, DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA

Dr. COOPER. Mr. Chairman, members of the Committee, thank you for giving this opportunity.

In order to provide a fair evaluation of the Cable and Consumer Protection Act of 1992, it is important to recall that many of the most important provisions of that Act were superseded or repealed by the 1996 Act, and some of the most important policies pursued in the spectrum space since then have been outside of both the 1992 and 1996 Acts.

Nevertheless, the 1992 Cable Act does provide an important baseline because Congress recognized that the cable market was afflicted by severe anti-competitive problems and anti-consumer practices. Congress knew that access to distribution media and control of market content are critical inputs that determine the fate of competition and the treatment of consumers. Congress believed that the incumbent market power in the video space was sufficiently pernicious and tenacious, that it overrode President Bush's only veto to enact the 1992 Act into law.

Unfortunately, the competition promised by the Congress in the 1996 Act failed to develop with the sufficient speed, breadth, and scope to discipline cable market power. Relentless cable price increases returned soon after the 1996 Act and continue to this day because the multi-channel video market and the broadband wireless access market remain very highly concentrated. Competition was undermined in those markets by a series of mergers which culminated in the last few years and cross-technology mergers like Comcast/NBC and joint ventures like Verizon and big cable. A quasi-monopoly is developing where cable could compete against fiber. They have run up the white flag, and in the rest of the country, inferior technologies cannot compete against the single dominant coaxial hybrid fiber network.

The failure to deconcentrate wireline distribution is equaled by the failure to deconcentrate commercial programming. Congress granted a lucrative right in retransmission, extending the transmission rights with its retransmission rights. But it gave broadcasters those rights without new responsibilities. The broadcasters use their rights for retransmission to build cable programming bundles and force them into the cable network. Those fees paid for the cable networks—much of it goes to broadcasters.

The cable operators are not innocent in this. They used their vertically integrated programming to dominate where they could, and so the broadcasters leveraged their retransmission to respond to the cable operators' vertical market power. The end result was, of course, that independent production has disappeared in prime time.

Bargaining over retransmission has become ugly, but no matter who wins between the cable operator and the broadcasters, the consumer always loses. The public occasionally loses access to programming, frequently is forced to pay more for programming, and

always is forced to buy massive amounts of programming it never watches.

In contrast to the failure in those spaces, the success of the FCC's decision to use the spectrum from mini to mini communications is remarkable. Indeed, the biggest success has come in the area where the FCC decided that it could allow the spectrum to be used without exclusive licenses at all. It concluded that a simple set of rules for sharing the spectrum would make the public airways open to speech. It invented Wi-Fi in the junk bands of the spectrum, and WiFi today is as big as cellular in terms of traffic. The remarkable success of unlicensed spectrum requires a radical deregulatory free market shift in public policy thinking about how the spectrum is used. We can return the public airways to the public for more direct use than at any time in exactly 100 years.

And let us be clear. The original sin here is not compulsory copyright, not retransmission. It is exclusive broadcast licenses that were tolerated 100 years ago because of technology, but are a fundamental affront to the First Amendment.

If Congress intends to bring spectrum and video policy into the 21st century, it must avoid making another 100-year mistake. It must move the broadcasters out of the way and provide the maximum opportunity for all the people to use the public airways for their public purposes. If Congress intends to rely on competition to fix the video space, as it should, public policy must ensure that competition on the small number of broadband platforms is not used to impede the development of competition. Internet distribution of video must not be starved of professional content by content owners, and it must not be strangled by cable gatekeepers, especially when they seek to defend the incumbent rents left over from antiquated 20th century policies.

Thank you.

[The prepared statement of Dr. Cooper follows:]

PREPARED STATEMENT OF DR. MARK COOPER, DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA

Mr. Chairman and Members of the Committee,

My name is Dr. Mark Cooper. I am Director of Research at the Consumer Federation of America (CFA), which is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in CFA and govern it through their representatives on the organization's Board of Directors and the annual Consumer Assembly. CFA has been involved in communications, media and Internet policy for decades in legislative, regulatory and judicial arenas and has advanced the consumer view in policy and academic publications.[1]

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[1] The analyses that are most directly relevant to this testimony include: Mark Cooper, *The End of the End of Competition for Digital Access Services: The Verizon-Cable Spectrum Sale and Collaborative Agreements Mark the Final Failure of the 1996 Telecommunications Act to Provide Consumers with Effective Competition in Local Markets,* Consumer Federation, July 2012; *Efficiency Gains and Consumer Benefits of Unlicensed Access to the Public Airwaves: The Dramatic Success of Combining Market Principles and Shared Access,* Silicon Flatirons, January 2012; "Structured Viral Communications: The Political Economy and Social Organization of Digital Disintermediation," *Journal of Telecommunications and High Technology Law,* 9 (2011); The Central Role of Wireless in the 21st Century Communications Ecology: Adapting Spectrum and Universal Service Policy to the New Reality," *Telecommunications Policy Research Conference,* September 2011; "Round #1 in the Digital Intellectual Property Wars: Economic Fundamentals, Not Piracy, Explain How Consumers and Artists Won in the Music Sector," *Telecommunications Policy Research Conference,* September 2008.; *The Case Against Media Consolidation* (Donald McGannon Communications Research Center, 2007); "Will the FCC Let Local Media Rise from the Ashes of Conglomerate Failure," *International Communications Association,* May 2007. *The*

I appreciate the opportunity to offer CFA's reflections on the Cable and Consumer Protection Act of 1992, an Act to which CFA devoted a substantial amount of attention during its development. However, in order to provide a fair evaluation of the 1992 Cable Act, we believe it is important to recall that many of the most important policies adopted by the 1992 Act were repealed or superseded by the Telecommunications Act of 1996. It is also important to recall that some of the most important policies that affected the video product space in this time period (like the repeal of the Financial Interest and Syndication Rules) were implemented outside of the Act. Finally, it is important to recognize that the 1992 Cable Act dealt with and integrated rights to two media—wireless and wireline, using media in the broad sense of "*storage* and *transmission* channels or tools used to *store* and deliver *information* or *data* . . . to communicate any data for any purpose."[2] The first sentence of the Communications Act demands no less, defining the purpose of the act to be

> to make available to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient nationwide and worldwide wire and radio communications service with adequate facilities at reasonable charges.

Dealing with a big issue over a long period, especially one where there has been rapid technological and economic change, also requires that we evaluate the outcome in relation to the broadly defined media sector we have today. Because the video policy of the early 1990s affected wireless (over-the-air terrestrial and satellite) and wireline (cable) distribution media, any effort to write a new policy for the 21st century must affect both. Thus, to evaluate where we have come in the past 20 years, we really need to look at the "Video/Media Policies of the early 1990s.

Once we take this broad perspective, we should be open to another possibility. While we hope to learn important lessons from from studying those aspects of wireless and wireline communications that were addressed by the 1992 Act, we should be open to the possibility that we may learn more about what we should do in the future from what happened in the recent past in areas of wireless and wireline communications policy that were not addressed by the 1992 Cable Act.

With all that said, the 1992 Cable Act does provide an important baseline against which to evaluate the video/media policy of the early 1990s. In the 1992 Act Congress recognized that the cable market was afflicted by severe, anticompetitive problems and anti-consumer practices. Congress knew that access to distribution media and control of marque content are critical inputs that determine the fate of competition and the treatment of consumers. Congress believed the problems were sufficiently grave and so in need of repair that it overrode President Bush's only veto to put the 1992 Cable Act into law. Congress was right to express these concerns; the central lesson of the video/media policy of the early 1990s is that incumbent market power in the video space is pernicious and tenacious and it requires vigorous public policies to prevent abuse of consumers. Checking that market power remains the central policy challenge after twenty years.

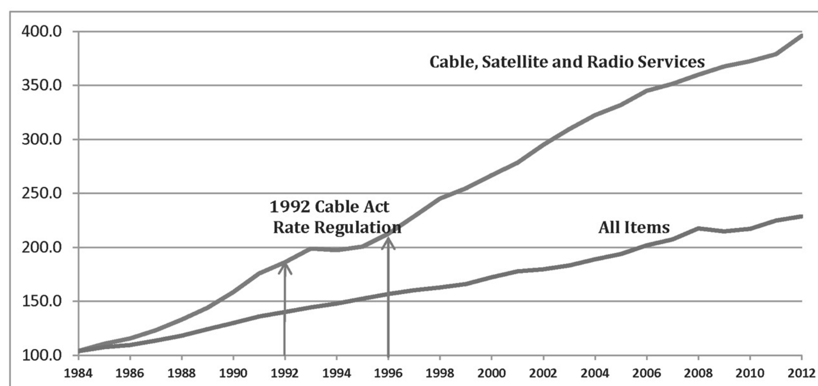
Impact of the Vertically Integrated Television-Movie Studio Oligopoly on Source diversity and Independent Production, 2006; "Independent Noncommercial Television: Technological, Economic and Social Bases of A New Model of Video Production," *Telecommunications Policy Research Conference,* October 2005; *Broken Promises and Strangled Competition: The Record of Baby Bell Merger and Market Opening Behavior* (Consumer Federation of America, June 2005); "Spectrum as Speech in the 21st Century," *The Public Airwaves as a Common Asset and a Public Good: Implications for the Future of Broadcasting and Community Development in the U.S.,* Ford Foundation, March 11, 2005; "Explorations Of Anti-Consumer, Anticompetitive Practices," *Cable TV Rates: Has Deregulation Failed?,* Manhattan Institute, November 2003; *Open Architecture as Communications Policy (*Stanford Law School, Center for Internet and Society: 2004); "Ten Principles For Managing The Transition To Competition In Local Telecommunications Markets," *Triennial Review Technical Workshop National Association of Regulatory Utility Commissioners,* Denver CO, July 27, 2003; *Media Ownership and Democracy in the Digital Information Age: Promoting Diversity with First Amendment Principles and Rigorous Market Structure Analysis* (Stanford Law School, Center for Internet and Society: 2003); *Cable Mergers and Monopolies: Market Power In Digital Media and Communications Networks* (Washington, D.C.: Economic Policy Institute, 2002); "Open Access To The Broadband Internet: Technical And Economic Discrimination In Closed, Proprietary Networks," *University of Colorado Law Review,* Vol. 69, Fall 2000; "Picking Up the Public Policy Pieces of Failed Business and Regulatory Models," *Setting The Telecommunications Agenda,* Columbia Institute For Tele-Information November 3, 2000; "Antitrust As Consumer Protection In The New Economy: Lessons From The Microsoft Case, *Hastings Law Journal,* 52: 4, April 2001; "Evolving Concepts of Universal Service," *The Federalist Society,* October 18, 1996; "Delivering the Information Age Now," *Telecom Infrastructure: 1993, Telecommunications Reports, 1993.*

[2] *http://en.wikipedia.org/wiki/Media__* (communication).

Wireline Service: The Failure of Competition to Discipline Cable Market Power

Cable Rates: The market power of the cable operators unleashed by the 1984 deregulation of cable had driven up rates dramatically. The rate regulation sections of the 1992 Act effectively controlled that runaway price escalation (see Exhibit 1). Unfortunately, the 1996 Telecom Act abandoned rate regulation and promised that competition would protect consumers. It did not. In fact, the only time when consumers have had a respite from relentless price increases for multichannel video programming services since the 1984 deregulation of cable was the brief period in which the rate regulation of the 1992 Cable Act was in place.

Exhibit 1: Bureau of Labor Statistics, Consumer Price Index (1982–83=100)



Thus the heart of the analysis of the video/media policy of the early 1990s must focus on the decision to rely on competition to replace regulation as the essential source of consumer protection in the video space. Unfortunately, the Telecom Act provisions that promised competition failed and when sufficient competition to discipline cable pricing failed to materialize, the abusive pricing returned with a vengeance. Measured by the price consumers pay for multichannel video programming services, the policy failed miserably.

Horizontal Limits: The horizontal and vertical limits policy that congress enacted in the 1992 Cable Act to help control cable market power also failed. Although the Congress told the FCC to impose horizontal and vertical limits, the language was not clear enough in the statue to overcome the steadfast opposition from cable in the courts. The FCC was not able to get a rule past the courts and cable exploited loopholes to undermine competition. The intermodal and intramodal competition that Congress hoped in the 1996 Act would replace regulation also failed to develop with sufficient speed, breadth and depth, to break the stranglehold that the incumbent distribution and content companies had on the video space. New entrants have failed to discipline cable's pricing power at the level of local of distribution and a handful of companies still dominate the prime time dial, which is where the money is in the video space.

Program Access: Congress also recognized that access to marquee content was important, if new distribution media were to have a chance to compete against entrenched incumbents. If a new distribution media is denied access to the programming that people watch most often, it cannot attract the viewers necessary to make it a viable economic operation. Access to popular programming is a huge barrier to entry. The Congress recognized that antitrust law and practice were insufficient to prevent this barrier from being used to undermine competition, so it wrote specific provisions to promote and ensure access to content under the broader, public interest standard of the Communication Act. The 1992 Act recognized that potential satellite distributors of video content had been the victims of the withholding of content by cable operators. The Act included a number of provisions to check this anticompetitive behavior.

The program access rules were among the most effective aspects of the 1992 Act that were not replaced by the 1996 Act. The program access rules did free satellite from the stranglehold of vertically integrated cable operators, but that success was limited by the weakness of intermodal competition. Because of differences in technology, satellite made its greatest inroads in rural areas, where cable was weakest,

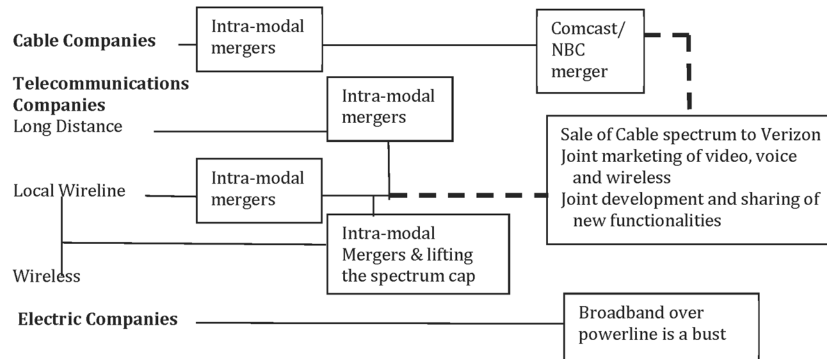
but never did discipline cable's pricing power anywhere. In urban areas, it did push cable to digitize and expand its capacity, but ultimately, that undermined satellite's ability to compete because satellite cannot deliver broadband connectivity. The cable broadband pipe now dominates the market for local digital connectivity.

The impact of the program access rules was also limited in the case of intramodal competition. Head-to-head competition between cable operators and overbuilders was undermined when cable claimed a "terrestrial loophole," which allowed it to withhold "must have" content, like local sports from overbuilders. Even large potential entrants like telephone companies have complained about the problem of access to programming.

The Failure of Competition Policy

Relying on the theory that intermodal competition from satellite and entry by telephone companies would discipline cable's market power, a series of mergers was approved that consolidated the cable's control over both the video and broadband markets in its local service area (see Exhibit 2). The long standing failure of intramodal video competition (between cable companies, between broadcasters, between telephone companies) has been joined by the dramatic failure of intermodal competition between (broadcasters and cable, between satellite and cable, between cable and telephone companies).

Exhibit 2: The Telecom Act Path to a "Collaborating" Duopoly in Local Digital Connectivity



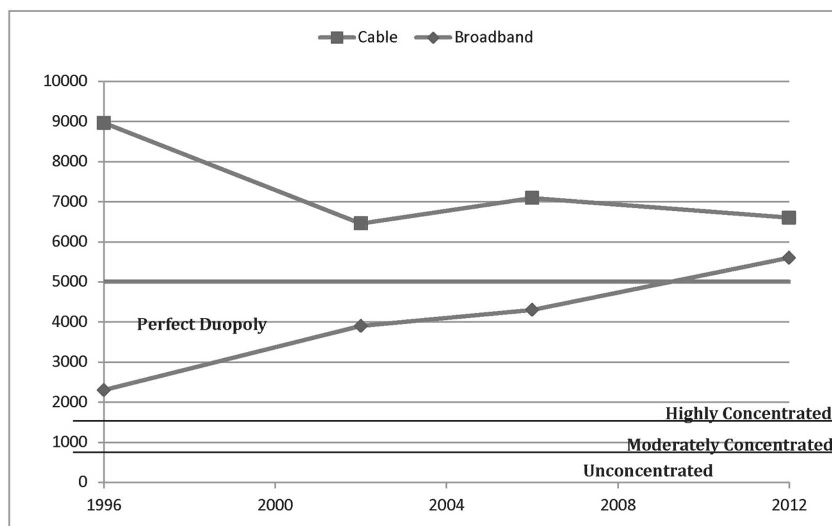
Source: Author based on *Cable Mergers and Monopolies* (Economic Policy Institute, 2002*), Broken Promises and Strangled Competition: The Record of Baby Bell Merger and Market Opening Behavior* (Consumer Federation of America, June 2005); "Picking Up The Public Policy Pieces Of Failed Business And Regulatory Models," *Setting The Telecommunications Agenda,* Columbia Institute For Tele-Information November 3, 2000.

The measure of market structure that has been used by the Department of Justice and the Federal Trade Commission for decades is the HHI index. The DOJ/FTC recently raised the threshold they use for considering a market to be highly concentrated. They have declared that when the HHI is at a level equivalent to four equal sized firms (HHI=2500) a market is considered to be highly concentrated market and likely to get close scrutiny in transactions like mergers and joint ventures.

The HHI index for local distribution shows that local distribution for MVPD service remains very highly concentrated, affording less competition than even a pure duopoly (see Exhibit 3). The fact that there is more competition than there was before the 1992 cable Act is not the most important point; the central lesson in these statistics is the fact that there is not enough competition to produce the beneficial results that competition is supposed to deliver and Congress promised.

Moreover, this simple statistic does not even fully capture how bad the situation is at the local level, as discussed below, because the competitors are not evenly matched in terms of the technologies used to supply services. The cable operators have added broadband to their video bundle and in at least three-quarters of the country they have the network that will dominate the broadband space in speed and capacity. The steady increase in the concentration of local connectivity for broadband access is evident in Exhibit 3.

Exhibit 3: HHI for Local Digital Wireline Connectivity



Source: Mark Cooper, *The End of the End of Competition for Digital Access Services: The Verizon-Cable Spectrum Sale and Collaborative Agreements Mark the Final Failure of the 1996 Telecommunications Act to Provide Consumers with Effective Competition in Local Markets,* Consumer Federation, July 2012; Eli Noam, *Media Ownership and Concentration in America,* 2009, for pre-2008; author estimates based on national trends in Federal Communications Commission reports on, High Speed Internet and Wireless applied to local market shares data in International Strategy and Investment Group, *Media and Cable,* October 24, 2011.

The 21st Century Policy Challenge: Ensuring the Emerging Quasi-Monopoly in Wireline Broadband Services the Public Interest

When cable competition policy failed, it opened the door to the dangerous possibility that these problems will persist in the age of digital distribution. The failure to introduce vigorous and effective competition into local video distribution now threatens the new distribution medium—broadband. We are repeatedly told that the broadband Internet will solve everything, but in the production and distribution of professional video, it has not yet done so and the dominant players are engaged in vigorous efforts to ensure that their dominance is preserved by manipulating access to consumers or withholding content from Internet video distribution.

The end of the end of the fairy tale of competition has been highlighted in the past two years by cross-technology mergers (Comcast-NBC) and joint ventures (Verizon and big cable). It is no longer possible to maintain the fiction that competition will protect consumers in the video market. The lesson for policymakers is quite clear.

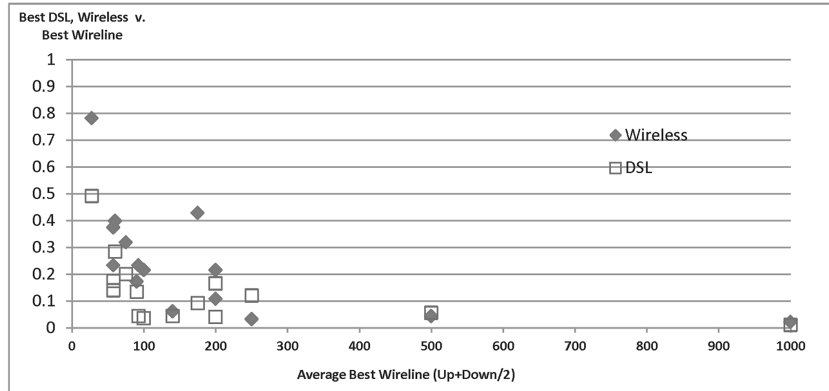
- In those parts of the nation where there are two networks that are well-matched in capacity, the competitors have waved the white flag and proposed a joint marketing agreement and strategic produce development joint venture.
- Poorly matched intermodal technologies are no substitute for head-to-head competition. Telco DSL or 4G wireless networks cannot deliver the speed and bandwidth that fiber and hybrid fiber coaxial cable networks can.

The difference between wireless broadband and wireline is quite clear. The fourth generation wireless technology aspires to deliver capacity and speed in the range of 10 to 20 megabits per second (mbps). The technologies used by advanced wireline service deliver 50 to 100 mbps. As a real world reminder of this difference, the wireline broadband service providers set their caps about 125 times as high as the wireless carriers. While none of the caps, as implemented, makes economic sense, the dramatic difference in their levels reflects the fundamental differences between the technologies.

Exhibit 4 shows a recent comparison of the best available broadband services available from each technology in fifteen cities across the globe, based on a recent analysis by the New America foundation. These 15 cities had complete data on

upload and download speeds for each of the major technologies. These are very dense areas ranging from 2300 per square mile in Riga Latvia to almost 30,000 per square mile in New York. The Exhibit 4 shows that DSL and Wireless broadband delivers a fraction of the speed that cable/fiber does. As cable and fiber move to higher speed, DSL and wireless fall farther behind.

Exhibit 4: Average Speed for "Best" Available Technologies in 15 Cities



Source: Hibah, Husain, *et al., The cost of Connectivity,* New America Foundation, July 23, 2012.

Policy Lessons

I believe mobile broadband is a terrific technology that will be at the center of the communications ecology of the 21st century digital economy, but it is not a substitute for wireline broadband. On the contrary, wireline broadband is a vitally important complement and a necessary input for wireless broadband. It is the "fat pipes" of wireline broadband that bring the exaflood of data close to the consumer, data which covers the first mile through wireless. This critically important role of wireline broadband makes it all the more alarming that we are headed to at best a quasi-monopoly of full capacity broadband networks (a duopoly with either two poorly matched or collaborating rivals). Moreover, to the extent that wireless broadband might provide competition for cable, it has the added problem in the U.S. that the dominant telephone companies also dominate the wireless broadband space. Worse still, one of he two dominant wireless broadband providers has signed a peace treaty with the major cable operators. I believe that this is illegal under the Communications Act, but if the courts find that the Act is ambiguous in this area, the Congress should make it clear that this type of close collaboration between two wireless broadband networks is unacceptable if competition is to remain the primary thrust of public policy. One and a half firms is not enough competition to protect consumers, but that is what we have in the U.S.

Twenty years of failure to break the strangle hold of the incumbent broadcasters and cable operators should have reinforced the premises on which the 1992 Cable Act rested: access to the means of distribution and "must have" content are key bottlenecks. The campaign by the cable operators and content producers to prevent content from going online or ensure that it is behind a pay wall if it gets online, is intended to defend the rents of their offline businesses. In the absence of effective competition, this rent collection is not socially productive. Rather than support the necessary infrastructure, it contributes to outrageously high rates of profit and undermines the competitiveness of and innovation in the digital distribution models.

The pattern of anti-competitive, anti-consumer behavior that cable exhibited in the pre-broadband era has been transferred to the broadband product space. Comcast was caught red-handed degrading the quality of service of applications that competed against its core product. It has recently begun to charge consumers who use competing digital distribution service over their broadband connections. In both cases, it gave its own, identical services better treatment. I believe that this is illegal under the Communications Act, but if the courts find that the Act is ambiguous in this area, the Congress should make it clear that broadband communications networks must be operating in a nondiscriminatory manner, the way all of the major communications networks have been throughout the history of the Republic.

If Congress intends to rely on competition to fix the video space, it must ensure that the Internet is not starved of content or strangled by cable gatekeepers. The very small number of distribution networks means that competition between platforms will be feeble at best. "Dynamic" duopolies just won't cut it, "collaborative" duopolies are a joke and "benevolent" monopolies are a fiction. If policymakers intend to rely to the greatest extent possible on competition, then public policy must ensure that competition on the small number of platforms is unimpeded by the market power of the network owners or the dominant content producers.

Wireless: The Failure of Broadcast Spectrum Policy

Retransmission Consent: Twenty years ago, when Congress chose to extend the lucrative transmission rights it had granted to broadcasters by adding retransmission rights, it was attempting to protect the national broadcast networks that had come to play an important part in democratic discourse in America. The retransmission consent provisions of the 1992 Act were intended to ensure that national broadcast networks were available over cable and supported by broadcasters. Unfortunately, Congress gave the broadcasters these new rights without new responsibilities and they abused them. They were not used to strengthen the broadcast networks; they were used by the broadcasters to build suites of cable programming that were crammed into the bundles that cable offered. Consumers were forced to purchase large bundles of programs, most of which they do not watch.

Repeal of FinSyn: The repeal of the FinSyn rules also contributed to this consolidation, allowing the broadcasters to eliminate independent programming from prime time, which provided the broadcasters with the incentive to purchase movies studios. The result of these policies was to unleash a wave of horizontal mergers and vertical integration, as shown in Exhibit 5.

Exhibit 5: The Evolution of the Cable/Broadcast Content Oligopoly

Year	Disney/ABC	Time Warner	Viacom/CBS	G.E-NBC	Fox	Cable Mergers
1993		Turner acquires Castle Castle/New Line			Fox acquires	
1994			NFL rights Viacom acquires Paramount			
1995		Time Warner launches WB	CBS launches UPN			Time Warner / Turner
1996	Disney acquires ABC	Time Warner acquires Turner				
1998						ATT-TCI
1999			CBS acquires King World Viacom acquires CBS	NBC acquires 30% of Paxson		
2000						ATT-MediaOne
2001					Fox duopolies LA, Minn. DC Houston	Comcast-ATT
2002				NBC acquires Telemundo NBC duopolies	Fox duopolies Chic. Orl.	
2003				GE Acquires Universal		
2005						Adelphia Comcast- Time Warner

Source: Mark Cooper, *The Impact of the Vertically Integrated Television-Movie Studio Oligopoly on Source diversity and Independent Production,* 2006; Columbia Journalism Review, *Who Owns What,* August 22, 2006.

Today the video dial is dominated by a handful of companies, many of which have proposed to collaborate, as shown in Exhibit 6.

Exhibit 6: Programming Controlled by the Content Oligopoly and Collaborators

Comcast/NBCU: A&E, A&E HD, Bio, Bio HD, Bravo, Bravo HD, Chiller, Chiller HD, Cloo, CNBC, CNBC HD, CNBC World, CNBC World HD, Crime & Investigation, Crime & Investigation HD, E! Entertainment TV, E! Entertainment TV HD, EPIX, EPIX HD, FEARnet, FEARnet HD, G4, G4 HD, Golf Channel, Golf Channel HD, History Channel, History Channel HD, History Channel en Espanol, H2, H2 HD, iN Demand, iNDemand HD, ION Life, ION TV, ION TV HD, LMN, LMN HD, Lifetime Real Women, Lifetime TV, Lifetime TV HD, Military HistoryChannel, MLB Network, MLB Network HD, The Mtn, The Mtn HD, MSNBC, MSNBC HD, mun2, Music Choice, NBC Television Network, NBC Entertainment, NBC News NBC Sports Network, NBC Sports Network HD, NHL Network, NHL Network HD, OxygenNetwork, Oxygen Network HD, PBS Kids Sprout, qubo, Retirement Living TV, ShopNBC, Sleuth, SYFY, SYFY HD, Telemundo, TV One, TV One HD, Style Network, Style Network HD, The Weather Channel, The Weather Channel HD, Weatherscan, Universal HD, USA Network, USA Network HD

CBS Corporation: CBS TV, News, Sports Network, CBS Sports Network HD, College Sports Television, College Sports Television HD, FLIX, FLIX HD, MountainWest Sports Network, MountainWest Sports Network HD, Showtime, Showtime HD, Showtime Beyond, Showtime Beyond HD, Showtime Extreme, Showtime Extreme HD, Showtime Family Zone, Showtime Family Zone HD, Showtime Next, Showtime Next HD, Showtime Showcase, Showtime Showcase HD, Showtime 2, Showtime 2 HD, Showtime Women, Showtime Women HD, Smithsonian Channel HD, TMC, TMC HD, TMC Xtra, TMC Xtra HD

Viacom Inc. :BET, BET HD, BET Gospel, BET Hip Hop. CENTIC, CMT, CMT HD, CMT Pure Country, CMT Pure Country HD, Comedy Central, Comedy Central HD, EPIX, EPIX HD, LOGO, MTV, MTV HD, MTV Hits, MTV Jams, MTV2, Nick 2, Nickelodeon/Nick at Nite Nickelodeon/Nick at Nite HD, HD Nicktoons Network, Palladia HD, Spike TV, Spike TV HD, TeenNick, EPIX HD, Tr3s, TV Land, VH1, VH1 HD, VH1 Classic, VH1 Soul

The Walt Disney Company: ABC TV Network, A&E, A&E HD, ABC Family, ABC Family HD, Bio, Bio HD, Crime & Investigation Network, Crime & Investigation HD, Disney Channel, Disney Channel HD, Disney XD, Disney XD HD, ESPN 3D HD, ESPN Classic, ESPN Classic HD, ESPN Deportes, ESPN, ESPN HD, ESPN2, ESPN2 HD, ESPNews, ESPNews HD, ESPNU, ESPNU HD, H2, History Channel, History Channel HD, History International, History International HD, LMN, LMN HD, Lifetime Real Women, Lifetime TV, Lifetime TV HD, Military History Channel, SOAPnet

Time Warner Inc.: @Max, @Max HD, 5 Star Max, 5 Star Max HD, Action Max, Action Max HD, Boomerang, Cartoon Network/Adult Swim, Adult Swim HD, Cinemax, Cinemax HD, CNN, CNN HD, CNN Airport, CNN Headline News, CNN International, HBO, HBO HD, HBO2, HBO2HD, HBO Comedy, HBO Comedy HD, HBO Family, HBO Family HD, HBO Signature, HBO Signature HD, HBO Zone, HBO Zone HD, More Max, More Max HD, NBA, NBA HD, Outer Max, Outer Max HD, TBS, TBS HD, TMC, TMC HD, Thriller Max, Thriller Max HD, TNT, TNT HD, Tru TV, Tru TV HD, WMAX WMAX HD

News Corporation:Fox Broadcast Network, Big Ten Network, BTN HD, FOX Business Network, FOX Business Network HD, FOX College Sports, FOX College Sports HD, FOX Deportes, FOX Movie Channel, FOX News Channel, FOX News Channel HD, FOX Soccer Channel, FOX Soccer Channel HD, FOX Soccer Plus, FOX Sports Net, FOX Sports Net HD, FUEL TV, FUEL TV HD, FX Network, FX Network HD, Nat Geo WILD, Nat Geo WILD HD, National Geographic Channel, National Geographic Channel HD, SPEED Channel, SPEED HD, TV Guide Network

Other Cable Collaborators

Bright House Networks: Animal Planet, Animal Planet HD, Discovery Channel, Discovery Channel HD, Discovery Espanol, Discovery Familia, Discovery Fit & Health, Discovery Fit & Health HD, HD Theater, Investigation Discovery, Investigation Discovery HD, Military Channel, OWN, OWN HD, Planet Green, Planet Green HD, Science Channel, Science Channel HD, The HUB, The HUB HD, TLC, TLC HD Turbo, Velocity HD, 3ne, House Sports Network HD, Comcast/Charter SportsNet Southwest Metro Sports (Kansas City), Metro Sports HD, Metro Sports (NE), Metro sports (NE) HD, Metro Sports 2 (Kansas City, MO), News 8 Non-Stop Sports (TX), SportsNet New York, SportsNet New York HD, SunSports, SunSports HD, TWC Connection/Sports (Mid-Ohio),TWC Connections/Sports (Southwest Ohio), TWC Sports (Albany, NY), TWC sports (Albany) HD, TWC Sports Central New York, TWC Sports (WI), TWC SportsNet (Buffalo), TWC Sports (Rochester), YNN Non-Stop Sports

Time Warner Cable: Exercise TV, GameHD, Game2HD, HDPPV, iN Demand, iN Demand HD, MLB Network, MLB Network HD, MLS Direct Kick, NBA League Pass, NHL Center Ice, Team HD, Antelope Valley Channel 3 (Southern CA), Bay News 9, Bay News 9 HD ,BEVOD (TX), Capital News 9 (Albany, NY), Channel 858 (Southern CA), Desert Cities TV (Southern CA), The Green Channel (HI), K-Life(HI), Metro Weather (Kansas City), NEON (OH), News 8 Austin (TX), News 8 Radar Now (TX), News 8 Traffic Now (TX), News 8 Non-Stop Weather (TX), News 10 Now (TX), News 14 Carolina (Charlotte, NC), News 14 Carolina (Raleigh, NC), News 14 Carolina (Greensboro, NC), News 14 Carolina (Wilmington, Jacksonville, Morehead city, NC), Nippon Golden Network (HI), NY1 News (NY), NY1 Road and Rail Report (NY), OC 16 (HI), Oiwi (HI), Rhode Island News Channel, SoCal1 (Southern CA), Texas Channel (Austin, Waco, San Antonio, Corpus Christi, TX), Texas Chanel (Dallas), Texas Channel (El Paso), TWC-TV (New England), YNN (Austin, TX), YNN Austin, YNN Austin Radar Now, YNN Austin Traffic Now, YNN Austin Weather, YNN Buffalo (NY), YNN Capital Region (Albany, NY), YNN Central NY, YNN Hudson Valley (NY), YNN Rochester (NY), Wichita Falls TV (TX)

Cox Enterprises: iN Demand, iN Demand HD, MLB Network, MLB Network HD Travel Channel, Travel Channel HD

Source: Federal Communications Commission, *In the Matter of Annual Assessment of competition in the Market for the Delivery of Video Programming: fourteenth Report,* July 20, 2012, Appendix B; Columbia Journalism Review, *Who Owns What,* July 21, 2012.

The cable operators were not entirely innocent in this process. The broadcasters were confronted with the problem that cable operators, often vertically integrated with cable programming, gave their affiliated programming preference in carriage and high fees. To match the cable operators, who were leveraging the advantage of vertical integration, the broadcaster leveraged their retransmission rights to gain carriage. For a long period the cable operators and broadcasters solved their problem by increasing the bundles and charging higher prices. The bargaining over retransmission has become contentious lately, but no matter who wins between the cable operators and the broadcasters, one thing is certain, the public always loses. The public occasionally loses access to programming, frequently is forced to pay more for programming, and always is forced to pay for massive amounts of programming it never watches.

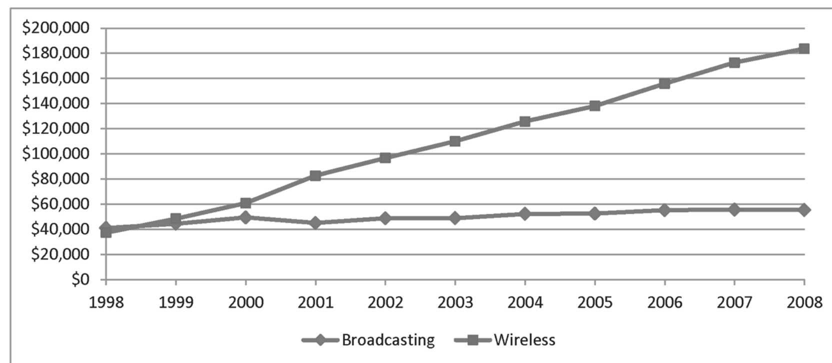
Spectrum Policy Beyond the 1992 and 1996 Acts: Time to Return the Public Airwaves to the Public

Use of the public airwaves (transmission and retransmission rights) is a good place to start a broad and meaningful reform agenda. Spectrum is a shared resource used by humans to communicate. Human speech uses the airwaves, which are accessible to all who have a voice, and people have been using technology to expand the reach of their communications through the spectrum for as long as they have been speaking. The invention of the radio a little over a hundred years ago was a technological breakthrough that vastly increased the ability to transmit signals over long distances to many more people.

Exactly a hundred years ago with the signing of the Radio Act of 1912 (August 13, 1912), public policy started down the road of granting licenses to transmit signals whose range was boosted by electronics. *Given the technology of the day,* using the spectrum to transmit one signal to many potential listeners appeared to be the best use of the spectrum. Exclusive licenses seemed to be a good way to solve two problems—(1) prevent interference between speakers by designating one, privileged person to use specific frequencies in the spectrum in specific areas and (2) provide incentives to investment in the transmitters, receivers and content that would fill the airways with sound. In exchange for the privilege of an exclusive right to use the public airwaves, broadcaster were asked to shoulder public interest obligations.

Economists have debated for decades whether broadcast licenses were the best use of the spectrum, but two remarkable experiments in the past quarter century have made it clear that, whatever the original rationale may have been, it no longer holds. About a quarter of a century ago, public policy allowed the spectrum to be used in other ways by other technologies to provide manyto-many conversations. The FCC began to issue licenses for cellular communications under the theory that licenses were still necessary to control interference and incent investment in the technology necessary to exploit the resource in this new way. As shown in Exhibit 7, the value of the economic activity in the spectrum used for two-way communications now dwarfs the value of the activity in the spectrum set aside for broadcasting, even though the broadcast spectrum is considered to be of much higher quality.

Exhibit 7: Broadcasting v. Wireless Annual Revenue (million $)



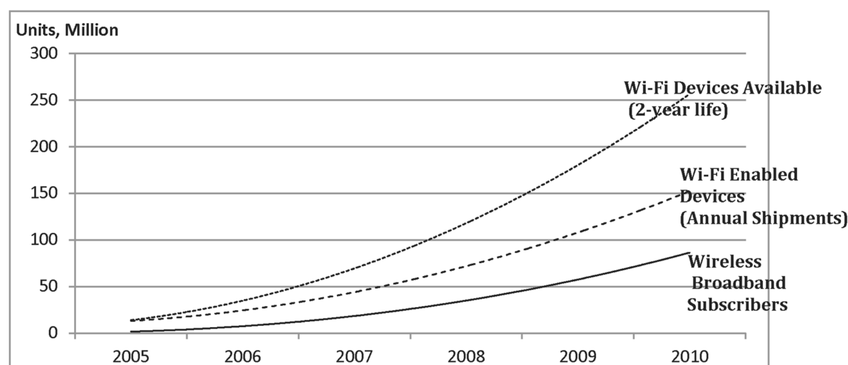
Source: *Statistical Abstract of the United States,* various issues, Information Sector Services—Telecommunications Estimated Revenue and Expenses; Mark Cooper, "The Central Role of Wireless in the 21st Century Communications Ecology: Adapting Spectrum and Universal Service Policy to the New Reality," *Telecommunications Policy Research Conference,* September 2011.

At roughly the same time, however, the FCC undertook an even more deregulatory free market experiment in the use of the spectrum. It realized that issuing licenses to transmit signals was not the only way to control interference or incent people to invest in the technology to make more communications possible. *Given new technology,* allowing everyone to use the spectrum to transmit signals, subject to simple rules of sharing, also produces an immense amount of communications without interference. WiFi was born in parts of the spectrum that had been considered "junk" or "garbage" by those wishing to use the spectrum for commercial purposes.

As shown in Exhibit 8, the number of WiFi enable devices deployed has increased at a remarkable pace. In the contemporary world of wireless broadband communica-

tions, firms that hold the privileged position of licensed cellular carriers have found it efficient and effective to dump as much as half their data traffic into the unlicensed space.

Exhibit 8: U.S. Wireless Connectivity Potential



Source: Nick Flaherty, "Consumer Wi-Fi drives Global growth," *The Embedded Blog,* May 28, 2010, Peter King, *Digital Home Wi-Fi Enabled Devices: Global Market Forecast and Outlook,"* July 2007; FCC, *Internet Access Services,* various issues; Mark Cooper, *Efficiency Gains and Consumer Benefits of Unlicensed Access to the Public Airwaves: The Dramatic Success of Combining Market Principles and Shared Access,* Silicon Flatirons, January 2012.

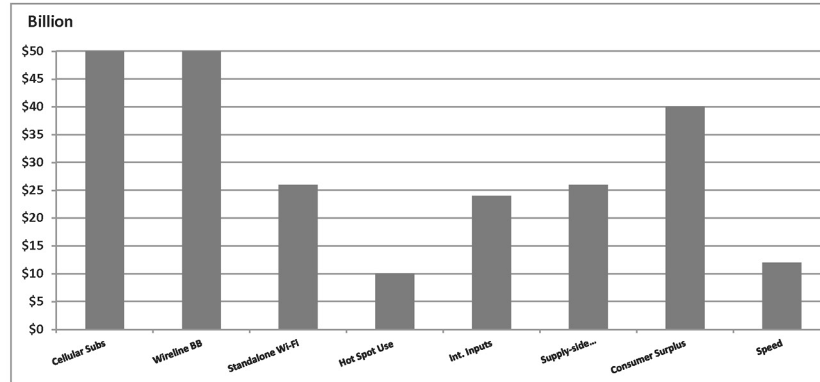
The value of unlicensed spectrum goes well beyond a convenient place for cellular services to offload their traffic. It provides a variety of services that have unique value. In a recent paper I showed that the value of the many uses of WiFi has grown to equal or exceed the value of wireless broadband and wireline broadband (as shown in Exhibit 9).[3] As the Internet of things expands, to tens of billions of transmitters, unlicensed spectrum will fill a larger and larger role. Wi-Fi is a central feature of the 21st century communications technology.

The remarkable success of unlicensed spectrum requires a radical, deregulatory, free market shift in public policy thinking about how to use spectrum. It is now possible to return the public airwaves to the public for much more direct use than at any time since the passage of the Radio Act a hundred years ago.

The unlicensed model has succeeded because it is not free. In order to utilize the unlicensed spectrum, device manufacturers must design, build and market devices that consumers buy. To induce consumers to do so, useful applications must be written and distributed. Service provides must deploy hundreds of thousands of base stations and they must pay for the transport of traffic to and from the Internet. The unlicensed model succeeded by bringing new and unique services to market, increasing the value of broadband by extending it to new devices, and providing a lower cost, more efficient avenue to deliver data to consumers.

[3] Mark Cooper, Efficiency Gains and Consumer Benefits of Unlicensed Access to the Public Airwaves: The Dramatic Success of Combining Market Principles and Shared Access, Silicon Flatirons, January 2012.

Exhibit 9: Use of Unlicensed Spectrum Accounts for a Significant Part of the Value of Broadband



Sources: Cellular data estimated as $50/month for 84,000 million subscribers year-end 2010 Industry Analysis and Technology Division, *Internet Access Services: Status as of December 2010,* Federal Communications Commission, October 2011. WiFi standalone value is calculated as 110 million users are $20 per month value based on charges for standalone Wi-Fi services (as advertised in websites of Boingo, AT&T, T-Mobile). Most cellular providers bundle Wi-Fi with cellular broadband subscriptions. Hot Spot Connectivity estimated by scaling up AT&T 1.2 billion per year to 3.6 national total valued at average per session charge of $3. Consumer surplus is from Richard Thanki, *The Economic Value Generated by Current and Future Allocations of Unlicensed Spectrum,* Perspective, 2009 (adjusting his 30 percent scenario for the current level of broadband subscribers). Speed is from, Paul Milgrom, Jonathan Levin and Assaf Eilat, *The Case for Unlicensed Spectrum,* October 12, 2011). Intermediate Inputs from Richard Thanki, *The Economic Value Generated by Current And Future Allocations of Unlicensed Spectrum,* Perspective, 2009 and Yochai Benkler, *Unlicensed Wireless vs. Licensed Spectrum: Evidence from Market Adoption,* 2011. Mark Cooper, *Efficiency Gains and Consumer Benefits of Unlicensed Access to the Public Airwaves: The Dramatic Success of Combining Market Principles and Shared Access,* Silicon Flatirons, January 2012.

- The unlicensed model removes the spectrum barrier to entry, which is the primary obstacle by allowing anyone to transmit signals for any purpose, as long as the devices used abide by the rules.
- Removing this barrier to entry removes the threat of hold up, in which the firm that controls the bottleneck throttles innovation by either refusing to allow uses that are not in its interest, or appropriating the rents associated with innovation.
- It lowers the hurdle of raising capital, by reducing the need for network investment and focusing on devices and applications.
- It fosters an end-user focus that makes innovation more responsive to consumer demand; indeed, it allows direct end-user innovation.
- It de-concentrates the supply of services compared to the exclusive licensed model, especially for high bandwidth services which tends to result in a very small number of suppliers, particularly in lower density markets.

Policy Lessons: Moving the Broadcasters out of the Way

This historical background must be the starting point for policies to address the problem of the retransmission consent. Retransmission of broadcast signals may or may not be a necessary extension of the early twentieth century broadcast license approach to using the spectrum, but the fundamental problem at the start of the 21st century is that the underlying broadcast licenses are an anachronism born of an antiquated technology. They use far too much spectrum to provide a specific form of communications that is of relatively little value compared to the alternative uses of the public airwaves that technology now makes possible. Simply put, the U.S. is wasting tens of billions of dollars a year because the broadcast licenses prevent people from using the public spectrum in much more valuable ways.

If Congress reforms retransmission rights without reforming the underlying transmission rights, it will have done only a small part of what is necessary and in the public interest. If Congress reforms the underlying transmission rights without providing the maximum opportunity for all the people to use the spectrum in

the freest manner possible, it will have failed miserably to bring the management of spectrum in to the 21st century. Congress will make another hundred year mistake.

Using 21st century technology, broadcasters can continue to transmit their signals while using much less spectrum. They should be required, not bribed, to do so. To be fair, the cost of retooling their equipment to transmit more efficiently might be defrayed with public funds, but that is it. They have no claim to the value that the spectrum can generate with other uses. Since the signals they will be able to transmit will be just as strong and clear (perhaps even better in both regards), there will be no harm to them and they deserve no special compensation. The exclusive right to transmit in the public airwaves is already a privilege of immense value. If a broadcaster does not move, the next time the broadcast license is up for renewal, part should be set aside for unlicensed use and the other part should be auctioned. If the broadcasters want it badly enough, they will win the auction and make the investment necessary to use the spectrum, just like every other potential bidder. The spectrum that is freed up by relocating the broadcasters should be split between cellular licenses and unlicensed use.

Reforming the management of the public airwaves in this way is the most important step policymakers can take, but reforming transmission rights in this way will not solve the problem of retransmission rights. Broadcasters will still have the privilege of holding exclusive rights to use the public airwaves to transmit their signals and the current law gives them retransmission right, too.

Congress could simply eliminate retransmission rights and the public interest would be no worse off. The original license to transmit was a valuable privilege. The broadcasters received the right to transmit signals over-the-air for free to the public. That is all they deserved and should have expected.

In the alternative, Congress could tie retransmission right to other public purposes for those who choose to continue their current licenses and accept the offer to move their transmission signals, much as it tied the original transmission rights to public interest obligations. In order to exercise retransmission right on multichannel video distribution platforms, broadcasters should be required to make those programs available over the Internet at the same time and on the same terms as they make their programming available over-the-air. This would replicate the original deal between the public and broadcasters—the right to transmit signals that are freely available to the public.

Conclusion

Digital distribution is a powerful, consumer-friendly, competition-friendly force in the 21st century media sector, but it is not immune to the abuse of market power by entrenched physical space incumbents. Media policy in the 21st century will have to be sensitive to the new economic reality, where small numbers of platforms play an important role. Large firms dominate platforms at the center of the digital economy because of the superior economics made possible by dramatic reductions in transaction costs and the ease and importance of vertical linkage in digital production. The economics that dictate a small number of platforms with market power, do not prevent the abuse of that market power. It becomes vitally important to ensure competition for the complements that flow on those platforms is not undermined by market power.

The need for access is a two edged sword. The owners of the platforms must not be allowed to leverage their market power to distort competition on the platform. The suppliers of the complements (content) must not be allowed to manipulate the supply of "marque" content to distort platform competition or extract monopoly rents, especially in the name of defending inefficient, outdated physical space business models.

The media policy of the early 1990s failed in large measure because it pinned its hopes on competition between media distribution platforms and gave broadcasters more rights, while failing to control cable market power. After the Comcast-NBC merger and in light of the Verizon-cable joint venture, the prospects that platform competition will provide the necessary check on the market power of incumbent content producers and network owners are dimmer than ever.

If Congress intends to legislate in the media and spectrum area, it must get back to the principle that the primary means of communications must be available to all on a nondiscriminatory basis, a principle that has been successfully applied to the dominant means of communications throughout U.S. history, regardless of the dominant technology—roads, canals, steamships, railroads, and the telephone network. It would be a grave mistake, another hundred year mistake, to allow the information superhighway to be turned into a private toll road dominated by one or two network owners.

The CHAIRMAN. I thank you, sir.

We move now on to Mr. Padden, and I could identify you. You are an Adjunct Professor of Law at the University of Colorado. Please proceed.

STATEMENT OF PRESTON PADDEN, SENIOR FELLOW, SILICON FLATIRONS CENTER, COLORADO LAW, UNIVERSITY OF COLORADO

Mr. PADDEN. Thank you, Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee. My name is Preston Padden. I am a Senior Fellow at the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado School of Law and an Adjunct Professor of Communications Law.

We have 11 of our students interning in communications-related offices in Washington this summer, and I thank the Committee very much for accommodating some of them here today.

The views I express are my own, and I have at least three things I did not have in earlier appearances before this committee. They are arthritis, hearing aids, and the broad perspective that comes from no longer being employed in one of these warring industry segments.

America's television regulatory policies have come to look like that old closet in your basement that you keep promising yourself one day you will finally clean out. I appear today to offer a full-throated embrace of S. 2008 and H.R. 3675, the Next Generation Television Marketplace Act, that would affect principled deregulation.

Priority number one must be the repeal of the cable and satellite compulsory licenses. These licenses seize all the programs on local TV stations and give them for free to Time Warner Cable and DirecTV, but not to new online video distributors like Netflix. This creates a huge impediment to the growth of online video distributors, the distributors that hold the most promise of new competition for the benefit of consumers. Since multinational and bilateral treaties prohibit Congress from enacting a compulsory license for television programs on the Internet, the only way to level the playing field between Time Warner Cable and Netflix is to repeal the cable and satellite compulsory licenses.

These licenses were first adopted in 1976 because Congress did not then believe that there was a reasonable marketplace mechanism to clear the copyrights for cable and satellite retransmission of broadcast programs. But today the programs on more than 500 non-broadcast networks, which are not subject to the compulsory licenses, get retransmitted all across the country through simple marketplace negotiations. The non-broadcast channel owners simply aggregate the rights in all of the programs on their schedule and then engage in a simple copyright-based negotiation with the cable operator or satellite operator. Broadcasters could do exactly the same thing.

The worst of all possible results would be to modify or repeal retransmission consent while leaving the compulsory copyright licenses in place. That would produce a totally unwarranted windfall

for cable and satellite operators and would do nothing to help consumers gain access to new video options from online distributors.

The bedrock principle that broadcasters and program creators deserve to be compensated when another party sells their programs at retail is not outdated. It is timeless, as old as capitalism itself. So I ask the Committee to distinguish between an antiquated regulatory structure and indeed needs to be examined and the unarguable principle that the creators of broadcast programming deserve to be compensated for their product.

S. 2008 and H.R. 3675 would bring about other much needed deregulation as further described in my written testimony. For example, because of the TV-newspaper cross-ownership rule, the *Times Picayune* newspaper did not have the option of seeking to merge with a local television station, and as a result, consumers in New Orleans now get only three newspapers a week.

By championing principled deregulation, I do not mean to tilt for or against any industry segment. I love them all. Broadcasters provide consumers with free over-the-air access to the most watched programming and to vital news and community service. Cable, led by Dr. Richard Green and his team at Cable Labs, deserve enormous praise for developing the doxis standard and investing more than $175 billion of private capital to build America's only nearly nationwide high-speed broadband network. Satellite carriers and online video distributors offer a much needed alternative source of video programming, and without the program creators, nothing else in the television ecosystem would matter.

I have confidence that all of these industry segments will thrive in a deregulated future. I understand that a regulated environment, especially one that your industry helped to shape, is known and secure, but I firmly believe that the future of all of these industry segments and of segments not yet even conceived lies not in regulation but in the freedom to innovate in the service of consumers.

Thank you very much.

[The prepared statement of Mr. Padden follows:]

PREPARED STATEMENT OF PRESTON PADDEN, SENIOR FELLOW, SILICON FLATIRONS CENTER, COLORADO LAW, UNIVERSITY OF COLORADO

"Congress gives Comcast, but not Netflix, a free copyright license for all the programs on local TV Stations. Why?" *[From testimony below]*

Chairman Rockefeller, Ranking Member Hutchison and members of the Committee, my name is Preston Padden and I am a Senior Fellow at the Silicon Flatirons Center for Law, Technology and Entrepreneurship at the University of Colorado School of Law and an Adjunct Professor of Communications Law. I enjoyed a 38 year career in the television industry during which I held senior positions in almost every segment of the business—local television stations, television networks, cable networks and satellite television, including serving as President of The ABC Television Network.

I have appeared before the Committee many times, but this is the first time that no one is paying me to advocate a particular point of view. The views I express today are my own. I am strongly pro-broadcaster, pro-cable/satellite/telco operator, pro-online video distributor and pro-content creator. I am anti-no one. Most importantly I am passionate about allowing dynamic market forces to provide consumers with the best possible television services. I am honored to be sharing the witness table with distinguished and accomplished industry leaders, including longtime friends.

America's television regulatory policies have come to look like that old closet in your basement that you keep promising yourself that one day you will finally clean out. The span of my career has allowed me to be an observer, and occasionally a participant, as one regulatory structure after another was stuffed into that closet. In my opinion, the day has come to clean it out. I appear today to offer a full-throated embrace of S. 2008 and HR. 3675, the Next Generation Television Marketplace Act.

Compulsory Licenses and Retransmission Consent

Because of the inextricable link between Communications policy and Copyright policy, I urge this Committee to find a way to move forward in lockstep with the Committee on the Judiciary as you clean out this dusty regulatory closet. Repeal of the cable and satellite Compulsory Copyright Licenses in Sections 111, 119 and 122 of Title 17 should be an absolute prerequisite to action by this Committee, or by the FCC, to repeal or modify related Communications Statutes and Regulations including Retransmission Consent. Many of the Communications Act provisions were adopted expressly to prevent unfair and unintended consequences that otherwise would flow from Compulsory Licensing. They are inseparable. Repeal of the Communications provisions without also repealing the Compulsory Copyright Licenses would result in an unjustifiable windfall for cable/satellite/telco operators ("Multichannel Video programming Distributors" or "MVPDs") at the expense of broadcasters and program creators.

Today, MVPD distribution of broadcast programming is governed by a Rube Goldberg regulatory structure. Wikipedia describes Rube Goldberg as "complex gadgets that perform simple tasks in indirect, convoluted ways." Rube would have loved our system of Compulsory Licenses and Retransmission Consent. First in 1976 and then in 1988 the government seized the private property of program creators—all the programs on local TV stations—and gave them for free to for-profit cable and satellite companies under Compulsory Licenses. Then in 1992, instead of simply repealing the Compulsory Licenses, the government layered on Retransmission Consent—a requirement that cable and satellite companies get the consent of the same local TV stations for the use of their signal, as distinguished from their programs. The end result of these two government interventions is a negotiation between the local TV stations and the cable and satellite companies. As explained below, that is the same result that most likely would have resulted if the government had adopted neither the Compulsory Licenses nor Retransmission Consent. We have created complex statutes that perform simple tasks in indirect, convoluted ways.

S. 2008 and HR. 3675 achieve the right public policy balance by repealing both the Compulsory Copyright Licenses and Retransmission Consent provisions thereby favoring no industry over another. The result would be to allow dynamic marketplace forces to manage the distribution of broadcast programming in response to consumer demand, just as those same forces have successfully managed the distribution of non-broadcast programming for the last three decades. Those marketplace forces will do a better job of serving the American people than do these ancient Statutes and Regulations that virtually lock in place viewing patterns dating back to 1972.

The Cable Compulsory Copyright License (17 U.S.C. Section 111), enacted in 1976 when television in America consisted almost entirely of just ABC, CBS and NBC, is one of the oldest and most outdated Statutes gathering dust in the back of our nation's regulatory closet. The Compulsory License is so old that very few people in the industry or in the Congress even know that it exists. Even fewer understand what it does. Unfortunately, I am so old that I was present when the Compulsory License, which commentator Adam Thierer has dubbed "the original sin of video marketplace regulation" (Forbes 2/19/12), was committed.

In November 1971, as a young law Student, I was clerking for a great lawyer and a wonderful mentor named Tom Dougherty, Assistant General Counsel of Metromedia, Inc. the then owner of channel 5 in Washington, D.C. Tom sent me to observe the latest in a series of meetings between Vince Wasilewski, President of The National Association of Broadcasters, Bob Schmidt, President of the National Cable Television Association and Jack Valenti, President of the Motion Picture Association of America. Senior Staff members of the Senate and House Commerce and Judiciary Committees and of the White House Office Of Telecommunications Policy were present at the meeting. The goal was to break the logjam of copyright and communications policy issues that had prevented the growth of cable television systems. It was my good fortune to be present as the negotiators, prodded sternly by Congressional and White House Staff, reached what became known as the "Consensus Agreement" (Appendix D to 36 FCC 2d 143 at 284–286 (1972)).

The principal components of the Consensus Agreement were:

1. The Copyright Act would be amended to make it clear that cable retransmission of the program schedule of a broadcast station would be considered a "performance" of those programs;
2. But cable operators would get a government conferred Compulsory Copyright License allowing the performance of those programs, paying nothing for retransmitting the programs on local stations and paying a statutory fee for retransmitting the programs on out-of-market stations;
3. The FCC would enact an agreed upon set of communications regulations including "must carry" and regulations designed to ameliorate the marketplace disrupting capability of the Compulsory License—the capacity of a Compulsory License to otherwise trump the rights of parties to exclusive program contracts that were negotiated in the marketplace.

The Network Non-Duplication Rule and the Syndicated Exclusivity Rule are examples communications regulations designed to ameliorate the effects of the Cable Compulsory License. These regulations do *not* confer upon the broadcaster any exclusive rights. Instead, these regulations merely allow a broadcaster to actually realize such exclusivity as it has negotiated with the program owner notwithstanding the Compulsory License bestowed on Cable by the Congress. In other words, in the absence of a government conferred compulsory license, parties in the marketplace that contract for exclusive rights can bring litigation to enforce those exclusive rights. But, when the government steps in and imposes a compulsory license, that license can "trump" negotiated licenses unless the government adopts rules like Network Non-Duplication and Syndicated Exclusivity.

Compulsory licenses are an extraordinary exception to and departure from normal copyright principles. Under a compulsory license a program creator is actually compelled by the government to license its program to a government-favored party at government-set rates. Pursuant to International Copyright Treaties and Conventions, compulsory licenses are to be used only as a last resort in instances of market failure. As memorialized in the House Report, the cable compulsory license was justified by the universal belief "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 89 (1976).

No one in the negotiating room in November 1971 thought of the possibility that the television station owner could act as a "rights aggregator"—assembling the performance rights to all of the programs that the station produced, or licensed from others, and then offering the cable operator a single point of negotiation to reach a marketplace license agreement to retransmit the station's programming. But, a few years later, the first non-broadcast television channels emerged (*e.g.,* HBO, CNN, A&E, History Channel, etc.) using exactly that rights aggregator model.

The programs on non-broadcast television channels are not subject to the Compulsory License. The owners of these channels produce or license programs, secure the right to sublicense those programs to MVPDs and then offer those MVPDs a simple "one-stop-shopping" source to license the necessary performance rights in the programs. *Today, more than 500 non-broadcast television channels are distributed by MVPDs nationwide without any need for government compulsory licensing.*

The success of the marketplace "rights aggregator" model in facilitating the distribution of the programs on non-broadcast channels demonstrates that there is no longer any need for government Compulsory Licensing of broadcast programming. Just like the non-broadcast channels, broadcast stations easily could aggregate the rights in the programs on their schedule and then negotiate with MVPDs.

In 1988 Congress extended the Compulsory Copyright License to satellite systems. Satellite Home Viewer Act of 1988, Title II, Pub. L. No. 100–667. MVPDs sell their subscribers the programming on a combination of broadcast and non-broadcast channels. By the early 1990s, Congress concluded that it was wrong for MVPDs to pay (through marketplace negotiations) for the programs on non-broadcast channels but to not pay (because of the Compulsory Licenses) for the programs on broadcast channels:

> "Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently." S. Rep. No. 102–92 (1991), at 35.

But, rather than repeal the Compulsory Licenses (as then advocated by the U.S. Copyright Office, Fox Broadcasting Company and others) Congress, in the 1992 Cable Television and Consumer Protection Act, instead created a new Communications Act Retransmission Consent right in broadcast signals. This new right re-

quires MVPDs to secure the permission of a broadcast station before retransmitting the programs on its schedule thus setting up a negotiation that essentially is a substitute for the copyright negotiations that would take place absent the Compulsory Licenses.

The creation of this new Retransmission Consent right was a major public policy accomplishment. It prevented broadcasters, and the important public interest they serve, from being left behind in the new economics of television. Broadcasters absolutely deserve to be paid by any commercial business that wishes to retransmit their programs for a fee to consumers. But, a far better course would have been to simply repeal the Compulsory licenses. The Retransmission Consent right is fundamentally flawed because it is based on a legal fiction—the notion that consumers and MVPDs are interested in a broadcast station's signal rather than in the programs on that signal.

Contrary to the Retransmission Consent legal fiction, it is absolutely clear that MVPDs negotiate with broadcast stations so that they can offer the broadcast programs, for a fee, to consumers. In defending Retransmission Consent at the FCC, a joint filing by the National Association of Broadcasters and the ABC, CBS, NBC and Fox Affiliate Associations emphasized the popularity of broadcast programming as distinguished from broadcast signals:

> "Retransmission consent fees for local stations whose *programming* service—national and local—is the most popular of *all programming* services represent but a fraction of the rates paid by MVPDs for other, less popular *programming* channels." Opposition Of The Broadcaster Associations in MB Docket 10–71, May 18, 2010 (emphasis added).

A group of eight Broadcast Companies (Barrington, Bonten, Dispatch, Gannett, Newport, Post-Newsweek, Raycom and Weigel) echoed this same argument:

> "Congress established the retransmission consent regime in order to ensure that local television broadcast stations could negotiate for fair compensation for their *programming.* " Opposition Of Local Broadcasters in MB Docket 10–71, May 18, 2010 (emphasis added).

This argument is 100 percent correct. I have made the same argument many times myself. But, this argument makes it absolutely clear that Retransmission Consent payments are made for the broadcast programs—not the broadcast signal.

In addition to being based on the legal fiction that MVPDs bargain for the broadcaster's signal rather than for the programs on the broadcaster's schedule, the decision to adopt Retransmission Consent rather than to repeal the Compulsory Licenses has adverse consequences for consumers. The Compulsory Licenses apply to broadcast stations whose carriage is deemed "local" and therefore permissible under FCC Regulations. Those Regulations actually incorporate ratings from the A.C. Nielsen Company as measured in 1972! 1972! See 47 CFR Sec 76.54. Those 1972 audience ratings were attached as Appendix B to the FCC's 1972 Cable Television Report and Order, 36 FCC 2d 143, and, subject to special administrative showings, continue to define the stations that may be carried by MVPDs. The need to legislatively override this ancient ratings data enshrined in the FCC Rules is why this Committee, and the Committee On The Judiciary, repeatedly have been dragged into controversies over what television programming is deemed "local" in what areas.

By contrast, the distribution of programs on non-broadcast channels is not governed by FCC Rules and 1972 ratings data. Programs on non-broadcast channels may be carried wherever the program owners and MVPDs sense an opportunity to satisfy consumer demand. Repeal of the Compulsory Licenses would enable program owners, broadcasters and MVPDs similarly to deliver to consumers the programs they want—not just the programs on channels buried in a 1972 FCC Appendix.

The continued existence of the Compulsory Licenses also creates a major impediment to the emergence of new competitive Online Video Distributors (OVDs) like Netflix. Congress gives Comcast, but not Netflix, a free copyright license for all the programs on local TV Stations. Why? OVDs are the technology future of television and the hope of new competitive options for consumers. But OVDs are not eligible for the Compulsory Licenses. In fact, it would violate International treaties to extend the Compulsory Licenses to OVDs. For example, the United States is a party to several free trade agreements which contain the obligation that ". . .neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders. . .." Australia FTA, U.S.-Austl., Article 17.4.10(b). See also, Dominican Republic-Central America-United States FTA, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar. FTA, Art. 15.5.10(b), Aug. 5, 2004; U.S.-Bahrain FTA, U.S.-

Bahr., art. 14.4.10(b), September 14, 2004; Morocco FTA, U.S.-Morocco, Art. 15.5.11(b), June 15, 2004. These treaty provisions clearly prohibit a statutory license for the retransmission of any broadcast television programs on the Internet.

In addition to not being eligible for the Compulsory Licenses, as a practical matter, OVDs cannot negotiate direct licenses with local broadcast stations. Because of the existence of the Compulsory Licenses, broadcast stations—unlike non-broadcast channels—do not routinely secure the right to authorize retransmissions of the programs they license for their schedule. So, the OVDs, and the consumers they seek to serve, are simply out-of-luck. Unlike cable, satellite and telcos, OVDs must try to compete without the ability to obtain the right to simultaneously retransmit the most popular programs in television—broadcast programs. This is a substantial impediment to the emergence of a more competitive video marketplace. Repeal of the Compulsory Licenses would prompt broadcasters to secure the right to authorize retransmissions of the programs on their schedule. Then all retransmitters—cable, satellite, telco and OVDs—could negotiate on a level playing field with the broadcasters.

Because the Compulsory Licenses distort the marketplace for the distribution of broadcast programming, several Federal entities have call for their repeal. The U.S. Copyright Office repeatedly has called for the repeal of the Compulsory Licenses. In it's latest Report it stated:

> "Although statutory licensing has ensured the efficient and cost-effective delivery of television programming in the United States for as long as 35 years in some instances, it is an artificial construct created in an earlier era. Copyright owners should be permitted to develop marketplace licensing options to replace the provisions of Sections 111, 119 and 122, working with broadcasters, cable operators and satellite carriers, and other licensees, taking into account consumer demands." Copyright Office Satellite Television Extension and Localism Act Section 302 Report: a report of the Register of Copyrights, August 2011.

The FCC also has called for the repeal of the Compulsory Licenses:

> "We hereby recommend that the Congress re-examine the compulsory license with a view toward replacing it with a regime of full copyright liability for retransmission of both distant and local broadcast signals. . ..Our analysis suggests that American viewers would reap significant benefits from elimination of the compulsory license." 4 FCC Rcd 6562 (Docket No. 87–25)

Today broadcasters want to maintain the status quo. Cable operators want to repeal or modify Retransmission Consent. S. 2008 and HR. 3675 would chart a third path—returning to fundamentals and repealing both the Compulsory Licenses and Retransmission Consent. After a brief transition period during which broadcasters would secure the right to authorize retransmissions of the programs on their schedules, broadcast programming would be distributed based on consumer demand just like non-broadcast programming. In my view, this is absolutely the right course.

I would like to address briefly a couple of the arguments I hear from my broadcast and cable friends.

Some cable operators complain that local network affiliate broadcasters have a "monopoly" on the programs on their network. These cable operators seek the right to retransmit the network programs as broadcast by out-of-market affiliates. But the broadcast networks and their affiliates should remain free to negotiate such exclusive or non-exclusive affiliations as they deem appropriate in the marketplace. And the outcome of those negotiations should not be superseded by government intervention. I would point out to my cable friends that the non-broadcast channels meet the same test of "monopoly". There is only one source for the non-broadcast channel "AMC", and that is AMC Networks, a "spin-off" of the cable company Cablevision. There is only one source for the non-broadcast channel "Bravo" and that is NBCUniversal, which is owned by the cable company Comcast. There is only one source for CNN, one source for Discovery, etc. All of these channels operate in an intensely competitive marketplace and the fact that there is only a single source for the rights to retransmit any one of them is no cause for government intervention.

I know that the members of this Committee would like to shield consumers from any fallout from program carriage disputes. It is noteworthy that two of the latest fights—the AMC channels dropped by DISH and the Viacom channels dropped by DirecTV—have nothing to do with Retransmission Consent. These are garden-variety disputes between buyers and sellers over price, a common occurrence in any line of commerce. I know of no way to protect consumers from the temporary inconvenience of dropped channels. If history is a guide, these channels will soon be restored to DISH and DirecTV. In the meantime, there are many substitute channels available.

Some broadcasters resist the repeal of both the Compulsory Licenses and Retransmission Consent worrying that program owners will "hold them up" when the broadcasters seek the right to authorize retransmission of the programs they have licensed to broadcast. I fully understand that broadcasters would rather maintain the legal fiction that MVPDs and consumers are seeking their signal rather than the programs. But that legal fiction is not tenable. And there is no objective basis to fear a "hold up" over retransmission rights. Program owners grant those retransmission rights every day to non-broadcast channels. Program owners, particularly an owner renewing a hit program, could "hold up" the non-broadcast channels today. But they do not do so for a very good reason. A non-broadcast channel that could not authorize MVPDs to retransmit its programs would cease to be a potential customer for program creators. Similarly, a broadcast station that could not authorize MVPDs to retransmit its programs in its market would cease to be a potential customer for program creators. There is every reason to believe that program owners and broadcasters would adapt quickly to the marketplace negotiations that work so well today for 500+ non-broadcast channels. And constitutionally based Copyright is a much stronger foundation for broadcasters to generate a second revenue stream than is Retransmission Consent.

Ownership Rules

I fully support the public policy goal of diversity in media voices. And I would strongly defend any Statute or Rule that is truly necessary to assure that consumers have access to multiple and diverse sources of news and information. But, in no small part because of the efforts of this Committee, consumers now enjoy a multiplicity and breadth of media sources and voices unmatched in our history.

Today, I find myself almost drowning in the plethora of diverse news outlets competing for my time. I start each morning in Boulder, Colorado watching multiple channels of broadcast and cable news while combing through online news sources on my iPad—*The New York Times, The Wall Street Journal, The Washington Post, The Denver Post, The Los Angeles Times, Salon, Drudge, Real Clear Politics, The Hill, Politico, The Daily Beast, The Wrap, Communications Daily, CableFax,* etc. I even still read my local newspaper—*The Daily Camera.* Some mornings I have a hard time tearing myself away from all the diverse news sources at my fingertips so that I can actually start my day.

Sitting squarely, but awkwardly, in the middle of this sea of media diversity are Media Ownership Rules designed for a bygone era. All of these Rules were sensible and necessary when adopted. But, some of these Rules have become counterproductive while others have been rendered merely nonsensical. The TV/Newspaper Cross-Ownership Rule is an example of a Rule that has become counterproductive.

It is well know that daily newspapers are under great financial stress. Recently the Pulitzer Prize-winning *Times Picayune* of New Orleans announced that it was cutting back to three printed papers per week, a devastating blow to its local readers. Because of the TV/Newspaper Cross-Ownership prohibition, the *Times Picayune* did not have the option of pursuing a merger with a local Television Station as a way of achieving the economies that might have permitted continued publication of a daily paper. The existence of this Rule clearly *disserved* the citizens of New Orleans and their interest in diverse sources of news.

The Tribune Company provides another example. This venerable source of award-winning newspaper and television journalism is struggling to emerge from an arduous three year bankruptcy proceeding. And yet, the new ownership of The Tribune Company will need waivers of the TV/Newspaper Cross-Ownership Rule just to be allowed to try to maintain the Company's existing television and print news operations.

To understand how outdated and illogical our media ownership policies have become, contrast the regulatory plight of *Tribune* and the *Times Picayune* with the recently *approved* merger of Comcast (the nation's largest cable TV and Internet Company) with NBC Universal (owner of a vast array of broadcast and cable channels, including news channels, and a major movie studio). Both consumers and industry participants should be forgiven if they have trouble following the logic of what is allowed and what is not allowed under current, but outdated, government policy.

For an example of a Rule that has become merely nonsensical, I would point to the 50 percent UHF "discount" that is a part of the limitation on ownership of multiple television stations. For the six decades of analog television broadcasting in this Country, UHF stations operated at a distinct and well documented disadvantage compared to VHF stations. UHF stations produced weaker signals and smaller coverage areas.

In light of this UHF handicap, the Rule limiting the total theoretical "reach" of TV stations that one entity is allowed to own wisely and sensibly incorporated a 50

percent UHF discount. If one owns a VHF station in a market that constitutes 3 percent of U.S. TV households, the station owner is charged with 3 percent against the theoretical maximum permissible reach of 39 percent. But, if the station is a UHF, the owner is charged with only 1½ percent. This discount continues to be applied today.

The problem is that the factual predicate for the UHF discount has evaporated. In digital broadcasting today UHF stations not only are *not* at a disadvantage: they actually provide coverage superior to VHF stations. For example, after the digital transition, the ABC Owned television station in Chicago continued to operate on VHF channel 7. However, the propagation of the VHF channel 7 digital signal was so deficient that the station's engineers had to scramble to find a vacant UHF channel and promptly switched to UHF channel 44 with dramatically improved results. Other stations around the Country also switched from VHF channels to UHF. The superiority of UHF frequencies in the digital world was evident in the lobbying over the recent Incentive Auction legislation. The National Association of Broadcasters advocated successfully for statutory language ensuring that no television station would be forced to shift from a UHF channel to a VHF channel as part of the "repacking" process.

So, why not simply repeal the 50 percent discount? Because the result would be to require unjustifiable, and politically untenable, divestitures by broadcasters that relied on the discount in assembling their station groups. "Grandfathering" these station groups would be profoundly unfair to future competitors. And so, like the Emperor's Clothes, we all just look the other way and pretend that the UHF discount continues to make sense.

S. 2008 would recognize the reality of today's robust marketplace of diverse and competitive media voices and would repeal outdated media ownership restrictions that are relics of a bygone era of scarcity. Our Nation's anti-trust laws would continue to be available to address any undue concentrations of power and any market failure.

Conclusion

I urge this Committee to follow the roadmap of S. 2008 and HR. 3675 and repeal the many outdated provisions in our nation's Television Regulatory closet. In particular I urge the Committee to work in lock step with the Committee on the Judiciary to repeal the Compulsory Licenses before considering repeal or modification of Retransmission Consent. Television consumers will best be served if broadcast programs can be distributed based on viewer demand and if new market forces like OVDs are given a chance to compete on a level playing field.

The CHAIRMAN. Thank you very much.

The Chairman has obviously made a mistake here because we started at 2:30. It is now 3:30, and that is fundamentally unfair to Members who came, some of whom have already departed. I checked with the Ranking Member. What we are going to do—and all those who gave testimony, obviously they have come long distances. They wanted to do their 5 minutes. Some went beyond that. But in any event, what we are going to do now is skip me, skip Kay Bailey—Senator Hutchison, that is—Senator DeMint. We are going to start with Senator Isakson and then go to those who did not give opening statements but who are still here.

STATEMENT OF HON. JOHNNY ISAKSON, U.S. SENATOR FROM GEORGIA

Senator ISAKSON. Thank you, Mr. Chairman. I appreciate that as one who came hoping to get out before I had the chance to ask a question.

[Laughter.]

Senator ISAKSON. I appreciate the great opportunity you have given me.

Let me say this. I am a cable subscriber who watches the Sunday shows that are delivered by the broadcasters, and I appreciate retransmission allowing me to be able to subscribe to cable and see

those shows on TV. So all of you, I am a customer of all that you sell.

And I listened to all the testimony because I know there is a lot of contention, and the number of phone calls I have gotten in the office lead me to believe there is going to be probably a lot more contention. But the best way to get all the facts on the table are to have hearings like this, and I appreciate the Chairman doing so.

And I might add, the Chairman and I also share an interest. We both are big fans of the Atlanta Braves, and thanks to access at night, I can go home and watch my Atlanta Braves on TV even though I am 800 miles away. So I appreciate the services you all bring us.

I actually have a few questions, all of which were raised by comments that you made, and I will start with Mr. Padden. Are you a doctor?

Mr. PADDEN. No. I am a recovering lawyer.

Senator ISAKSON. Recovering lawyer. Good. Those are the best kind.

Let me ask this. You said the marketplace is better than licensing for the future. Is that right?

Mr. PADDEN. Yes, sir.

Senator ISAKSON. And you were evidently employed by one of these entities 20 years ago when the cable bill passed. Is that right?

Mr. PADDEN. Yes. I was at Fox Broadcasting Company.

Senator ISAKSON. Would you elaborate on the licensing platform that caused the licensing regime to be set up in 1992?

Mr. PADDEN. Well, actually it starts in 1976. The Supreme Court had twice ruled that cable retransmission of broadcast programming was not a performance under the then 1909 Copyright Act. So no copyright liability attached to retransmitting broadcast programming. And the Supreme Court urged Congress to amend the Copyright Act, and that was done in 1976 to make retransmission of broadcast programming a performance for which copyright was due. But because at the time everyone thought it would be unduly burdensome for the cable operator to have to negotiate with the owner of each individual program on the schedule, Congress conferred a compulsory license, a rare act to be done only when there is a market failure and the rights cannot be cleared in the marketplace.

Subsequent to that, cable networks were invented, channels like HBO and The History Channel, and they are not subject to this compulsory license because they were not around when it was adopted. So what they did was the channel owner licenses programming from various parties and gets the right to sublicense that programming to cable and satellite operators. So the cable and satellite operators do not have to negotiate with all these different program owners. They just have a single negotiation with the channel owner.

And my proposition to you today is the fact that more than 500 of these non-broadcast channels are distributed all across the country without needing this Government intervention of a compulsory copyright license shows that the broadcast channels could be distributed exactly the same way. Each station, Channel 7 here in

Washington, in addition to licensing a show like Oprah would get the right to sublicense that show to the cable operators in the Washington area. The cable operators would have a single negotiation with that station, and you could get rid of a whole bunch of Communications Act regulation that was adopted specifically to ameliorate the impact of the compulsory license. And I wish it was simpler to explain this.

Senator ISAKSON. You have still got a little lawyer left in you.

[Laughter.]

Senator ISAKSON. Thank you for that answer.

Dr. Cooper, you used a term I need an explanation for. I did not quite understand it. You said "cable gatekeepers." In what context did you use that?

Dr. COOPER. Well, I used that in the context of the cable companies putting together big bundles of packages, as Senator Rockefeller mentioned, and then deciding which programming gets into those bundles. Consumers do not get a choice of channels. They get to choose a couple of big bundles, and as Senator Rockefeller mentioned, they end up paying for many more channels than they ever watch. So they are the gatekeepers between the consumer and the programming, and they actually have a very large market presence. They have a market share at the local level which is, of course, the only way I can reach those programs, see those programs. They have a very large market share. There is more competition than there was in 1992, for sure, but there is not enough to break that anti-consumer bundling. So they are the gatekeeper.

Senator ISAKSON. Mr. Chairman, can I have just one more question? Would that be OK?

The CHAIRMAN. With rapidity.

Senator ISAKSON. All right. Well, I will tell you what. Knowing the question I am going to ask, it is not going to be a rapid response. So I will yield back to my next time. Thank you.

The CHAIRMAN. You are a gentleman.

Senator Pryor?

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

Senator PRYOR. Thank you, Mr. Chairman. And thank you both for having this hearing today.

Let me just jump right in. Ms. Abdoulah, you know, when I think of the Cable Act, it is 20 years old. What I see when I look at the landscape is I see a lot of innovation, a lot of investment, a lot of creative efforts, and a lot of really good things. So I guess my question is why should we change that, and how do we know, if we do make some changes, it is actually going to be better?

Ms. ABDOULAH. A great question.

On the latter, I think it is just with real thoughtful consideration to the consequences when reform and changes are made, to really try to think through those consequences.

To the former question, why should we change it, for the reasons I have said. I love the competitive landscape. We know how to compete. That is what we are all about. So it is not about wanting to limit competition, innovation, and creativity. We welcome that. We want that as a small operator or large operators. It is simply tak-

ing regulation that currently allows monopolistic activity to go on—to remove that so that it truly is based on a fair market and fair market pricing because, unfortunately, Dr. Cooper is wrong in that we are not gatekeepers from the standpoint of being able to—we do not decide how we offer our programming. I wish we could. I wish I could offer a sports tier so that 50 percent of our viewers who do not watch sports are not subsidizing these enormous sports costs. I do not have that right. The programmers, the broadcasters, tell us and mandate—and the laws help them do this—how we carry it. So that is why it has to change because consumers are saying give me choice, give me what I want when I want it, and we cannot do that due to the rules today, and that is why they have to change to allow more innovation and more flexibility.

Senator PRYOR. If I have time, I want to come back to that, but I do want to ask Mr. Smith a question. It is always great to see my former colleague. Welcome back.

One of the things you mentioned—and I just want to make sure I have this clear is that the Cable Act's requirement and sort of the connection to localism and retransmission, and why they are connected. I know why localism is important. I see it every day in my local TV stations, but tell me what the connection is there.

Mr. SMITH. I believe what this committee and the Congress intended was to make sure that in retransmission consent, small broadcasters in Arkansas and other small rural communities, along with their networks, had an opportunity to recoup the value of their content but also their signal. Both things have great value. And when you consider retransmission consent, must-carry, compulsory copyright, this is a three-legged stool. You pull one of those legs out and you will dramatically damage the rural broadcaster. You will dramatically damage those who are underprivileged and cannot afford $150 a month for cable. You will dramatically damage the ability of rural states to be able to sell a car in Pierre, South Dakota. They may have to go to Minneapolis. They may have to go to Denver. And I think that it is very important. If you want a robust, national system that focuses on the localism, the resources have to get to local, as well as to networks. And so it is a very careful balance that is structured, and I just was offering caution.

Senator PRYOR. Ms. Witmer, let me ask you. I saw that you nodded your head when Ms. Abdoulah a few minutes ago was talking about the cost of programming and things like that. And I know the cost of programming is high, or at least I understand it is high. But also I understand that that is not a very transparent system. So as a subscriber, when I buy a local cable package, whatever it is, I do not always know what my cable provider, *i.e.,* what I am paying for, but what my cable provider had to pay for all the various programming. A lot of it, as we have all talked about—we all agree. A lot of it we do not want, but it is just part of the package.

So what is wrong with more transparency. Why should the consumer, the subscriber, the end user, not have a right to know how much you all have paid for it to know if we are being charged fairly?

Ms. WITMER. Thank you for your question, Senator Pryor.

I think that for us, our consumers, first of all, are first and foremost in our minds.

I also was nodding at Ms. Abdoulah's characterization of us not being gatekeepers. We operate in an incredibly competitive environment. I think one of the things that may not be well understood is the competitive environment in which we are operating every day. And we are consumer-facing. We are dealing with consumers directly. We are in their homes. We are talking to them from our call centers, and we bill them for their services and engage directly with consumers. So we are very, very close to them, and the competition we face is all about the consumer. So we understand their desire for transparency.

What we find from our consumers is they do not well understand the system through which they buy television and they receive content. We still find many consumers do not necessarily understand, first of all, that cable operators do not program the networks that they receive, and they do not necessarily understand that we actually pay for and negotiate for licenses to carry all of that programming.

There is no doubt that the biggest issue facing video customers of multi-channel operators today is skyrocketing programming costs. I was unable to see the chart from this side, but I can tell you that Time Warner Cable spends—— nearly 60 percent of our costs every year in programming are paying owners of broadcast stations. We spend over $2 billion a year compensating those companies. So we know that the system feels that it lacks some transparency for consumers. I think they understand not a lot about how it works, and more transparency might help them. At the end of the day, though, for the consumer that wants to watch a single program, their perception of value may be very different from one network to the next, and that transparency is not always an immediate translation for them.

Ms. ABDOULAH. And more specifically, we cannot. We cannot tell you what we pay. The programming agreements that we have to sign do not allow us to share it with anyone, to share it with consumers, with each other, with anyone.

Senator PRYOR. Mr. Chairman, thank you. I am beyond my time.

I understand what you are saying on that last statement. I do not like that aspect of the agreements.

Ms. ABDOULAH. Yes, right on.

Senator PRYOR. I do not like the lack of transparency.

But, Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you, Senator Pryor.

Senator Thune, to be followed by Senator Udall.

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

Senator THUNE. Thank you, Mr. Chairman. I appreciate this hearing. I hope that we can find 21st century solutions to 21st century challenges. One thing about the television marketplace is that we have seen just remarkable improvements over time. With technology and all the change that has occurred out there, it has been, I think, very good for most Americans. But obviously there are issues that come up along the way that need to be addressed, and

I think this committee needs to be informed by all of your input as we try and address that.

Senator Smith, welcome back. Nice to have you with us again here today.

One of the things that I hear is that television blackouts due to disputes between providers and distributors are on the rise—and I think everybody has alluded to various statistics that bear that out today—and are likely to increase if we retain the current regulatory regime for television.

I ask this question as someone who believes in the free market, whose instincts are that deregulation is a good, solid, preferred approach. My question is with regard to those types of blackouts, what is your assessment as to whether we are going to see fewer TV blackouts or more TV blackouts if we were to completely deregulate and to go to an approach like what Senator DeMint has proposed in his legislation. I open that up to whomever. Senator?

Mr. SMITH. Senator Thune, good to see you.

As I said in my testimony, I think when you increase by 10 times the number of rights holders that would have to come to an agreement, you are apt to have a tenfold increase in the likelihood of disruptions of some kind. That is just logical to me, but perhaps others have a perspective on that.

Ms. WITMER. I think the other perspective that I would share is that part of the regulatory landscape that we are dealing with here is that the 1992 Act requires cable operators to sell broadcast stations as a point of entry to purchasing anything else from us, and that is unlike any other platform. Satellite providers are not required to sell the broadcast stations. Certainly access to entry to viewing content, even broadcast content, on the Web does not require that subsidy to be paid in order to be able to use any other form of content.

And so part of the tension I think for the operator, as these costs are skyrocketing, is that we cannot sell a consumer anything else without being obligated by virtue of the privileges of this law to pay those broadcasters. And it is unique to cable and it is placing greater and greater tension on our ability to compete and our ability to provide consumers with access to other content that they want without having to pay that toll to enter our store.

Mr. FRANKS. Senator Thune, if I may. I guess two points.

As I said in my testimony, I guess my fear is, along the lines of what Senator Smith said, if you introduce more players—and some of these players are hard to find even to clear the rights. So I fear that it is going to lead to many more disputes rather than fewer.

But I guess I would like to make a related point if I may. I was in a situation last year in a negotiation where we were getting fairly close, and the FCC announced its proceeding and the operator pulled back because he thought that he was on the verge of getting a better deal from Washington. And it is frustrating to me.

As a company, we own television stations. So CBS only negotiates for the stations we own. Our CBS O&O's cover 32 percent of the country. So that is 32 million television households. And I have been doing this for 6 and a half years. We have done 100 agreements, including two with Ms. Abdoulah and one with Ms. Witmer. We have not had blackouts. And so I almost do not recog-

nize the environment in which I am sitting because they are describing a world that does not exist amongst our three companies.

So I guess my concern is I know that you are all worried about the current system. For a businessman who needs to make a plan—we invest $5.5 billion a year in programming. $5.5 billion a year. We need to be able to plan. We need to know what the rules are going to be. We know how this system works. It has its flaws, but it basically works. Abandoning it for some whole new system or a system that repeals retrans and leaves the compulsory license, I guess we prefer the devil we know.

Ms. ABDOULAH. Well, I think we all have something to say.

Two things on that is that we may like this. Some people may like the model that is for lots of reasons, but the consumers do not and the consumers do not have that same model on the Internet. It is time that the businesses that we are talking about create a new, sustainable, innovative business model that serves consumers and reduces confusion. That is one point.

The second point is I sure hope we do not evaluate the success of deals getting done based on blackouts because that is not the only measure of success or failure. There is a failure in the fact that we have these double-digit, triple-digit increases that are not rationalized by ratings or anything else on many networks. They are not rationalized. We have to pass them through to consumers, and every year they take the brunt of those increases. That is failure in my mind because I can tell you the services that we do manage, Internet and phone, we have not taken those services up. We have not taken an increase in years. And I can represent many ACA members who will tell you the same thing, some that have not taken HSD or phone up for 10 years. Where are the price increases coming from? Programming on video.

Dr. COOPER. Let me briefly follow up. We have testified together before.

The only way to reform this market is to restore consumer sovereignty, to make sure that consumers have the right to choose to pay for the programs they want. That is the fundamental problem in this marketplace. And you can fool around with retrans. You will just shift the balance from one big entity to another big entity. The only way to break the market power is to ensure that the consumers have choices of what to pay for and not being forced to buy these huge bundles. That is what she wants because she faces the consumer, and she is willing to face consumer sovereignty. She does not have any market power. The big cable operators and the big broadcasters, content providers, do have market power.

The CHAIRMAN. With all due respect, I have to cut that question off here because we are already 2 minutes and 20 seconds over, and Senator Udall is waiting.

STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Rockefeller and Ranking Member Hutchison. And I really thank the panel. I think this has been very lively and a very, very good discussion.

I understand my cousin, Senator Smith, reminisced a little bit earlier about his service on the Committee, on the Commerce Com-

mittee, and also about the Udall tradition of public service. I can vouch for that. We are very close cousins. I am not going to go down the road, Senator Smith, of saying I regret—my one big regret is not serving with you in the Senate because, as you know, you were succeeded by a Democrat. And I am going to get myself in big trouble there.

[Laughter.]

Mr. SMITH. Yes. You can stop there, Tom.

Senator UDALL. OK. I am going to stop there.

But I wanted to start with you on a question, and others may be interested in this. I have heard from a small religious broadcaster based in New Mexico about the importance of must-carry rules for making their programming available to cable and satellite TV customers. And there is a proposal that you all have been talking about before the Committee to abolish these rules. If must-carry rules went away, would small local channels, such as a religious broadcaster with a relatively small audience or regional focus, have the same access to TV audiences as they do today?

Mr. SMITH. Senator Udall, when I served on this committee, there was an appropriate concern for diversity and fostering niche markets, and I understand some do not like the must-carry provision, but the idea was to foster that in America. To get rid of must-carry—most of my members do not count on must-carry, but some do, and who are they? They are the religious broadcaster. They are the rural. They are the foreign language. They are often minority communities. I mean, you would not have Univision today, you would not have Fox today—you might like that, Mr. Chairman——

[Laughter.]

Mr. SMITH. These great networks developed with must-carry because of the wisdom and foresight of this committee to foster this diversity, this niche, this service of all of America in its great complexions and its great needs.

So must-carry is important to many small rural communities, and if it goes away—again, I go back to if you want to sell a Chevy in Pierre, South Dakota and must-carry goes away, Rapid City may have to go to Denver, and if you are a Chevy dealer, you are not going to be able to afford that. Sioux Falls may have to go to Minneapolis. You will not be able to afford those markets. So if you want to continue fostering localism, must-carry is important.

Senator UDALL. Ms. Abdoulah, small cable companies that operate in rural parts of New Mexico tell me they pay more in retransmission consent fees than larger cable companies pay in places like New York or Los Angeles. What explains this difference in cost for these smaller companies versus larger cable and satellite TV providers?

Ms. ABDOULAH. Great question. Leverage. They do not have the leverage in the negotiation. So in they walk with the same service, same delivery system, same costs, and they charge us double-digit, higher rates than the big guy because if I say to them, oh, I am going to take off 1,000 customers if you do not get reasonable, they say OK. But if Comcast says be reasonable, give me what I want or I am going to shut off 24 million customers, they have a lot more leverage. So it comes down to the big versus small guy.

Senator UDALL. Mr. Franks?

Mr. FRANKS. I am real worried about Ms. Abdoulah here. She is just suffering so horribly in the marketplace and needs protection. She does just fine when she is at the table with CBS. And in fact, there is a cable network we own called the CBS Sports Network that we wish she was carrying. We could not persuade her to do it. We did not have the leverage and the clout. The big, bad media company in New York could not persuade the struggling ACA member to carry one of our channels. This notion that there are these weak players that need protection—let me tell you they are not in the negotiating rooms I am in. They do just fine.

Ms. ABDOULAH. It is not a notion. We can prove that we pay more. We can prove. And if there was more transparency, you would know exactly how much more. I would welcome that.

Mr. FRANKS. So are you going to carry the sports network for me?

Ms. ABDOULAH. No.

Mr. FRANKS. Why not?

Ms. ABDOULAH. It is not a good value. Customers are not asking for it.

[Laughter.]

Senator UDALL. Mr. Chairman, I am out of time. So you can intervene here.

The CHAIRMAN. Why do not each of you send us the numbers to find out which of you is telling the truth?

Ms. ABDOULAH. I wish we could, sir. We are not allowed to. Our contracts do not allow us to share what we pay for this programming.

The CHAIRMAN. I am a very confidential source.

[Laughter.]

The CHAIRMAN. Senator Udall, go ahead if you want.

Senator UDALL. I am out of time.

The CHAIRMAN. Yes, you are.

Senator UDALL. So I was urging you to intervene in the middle of that so I could get out of it.

The CHAIRMAN. I was enjoying it.

Senator DeMint and then Senator Hutchison, and then Senator Hutchison and I need to talk. And I will be brief in the way I thank all of you, and Senator Hutchison and I will go behind the door here, but please forgive me for that. OK? Senator DeMint?

Senator DEMINT. Thank you, Mr. Chairman.

The CHAIRMAN. And you will be brief, I know.

Senator DEMINT. This has really been a very helpful hearing today. I am convinced if we kept talking, that you would convince yourselves that this free market approach is the best approach because, as Mr. Franks was just saying, they do not need protection. We have got a very dynamic market and I am convinced that if we let this continue to work, it would work a lot better. I am convinced, Senator Smith, that broadcasters would find themselves in the catbird seat because of their owning control of such a package of content, local, national, syndicated programs, that you negotiate. It is essentially your property through contracts. All the other distributors have to negotiate with you to get it. So I think your broadcasters would be in a great position to do this.

And I think we need to realize that the innovation and a lot of the dynamic that is going on in the market that you talk about is going on with these 500 or more channels that do not operate under any kind of compulsory license or retransmission. When we are talking about taking away retransmission, we are not talking about taking away carriage negotiations which again the broadcasters will have the ability to continue to do. My bill does not affect non-commercial, PBS, most religious broadcasters. And as you know, Senator Smith, with the new digital signals, all of these broadcasters have the ability to send a free, crystal clear signal to 100 percent of the market that is in their DMA. So we have an amazing dynamic. If cable or other distributors are not willing in this environment to deliver a la carte programming that the consumers want, someone will give it to them, and that is why you see the growth of streaming or Netflix types of programming today.

But again, instead of asking a question, I just hope, Mr. Chairman, we can continue to do this because the more everyone talks, I think the more we realize that we have got a very dynamic and competitive marketplace, and if in a thoughtful, systematic way we let this work, I think we would find that the consumer gets what they want, but at the same time, there is another player, Mr. Chairman. We certainly want the consumer to have the choices they want, but private property, whether it be copyrights, content control, is our responsibility as well. And I do not think the Government should be telling the cable companies what they have to buy or the broadcasters what they have to sell or the networks what they charge. I am convinced again that we would find a very competitive and active, dynamic marketplace with lots of choices if we continue to talk through this.

But thank you all for coming and getting this conversation started. I think that is what it is. And I heard from a lot of the folks on the panel here that there may be a lot of common ground if we proceed through this thoughtfully.

So thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Hutchison?

Senator HUTCHISON. Thank you, Mr. Chairman.

I just have one more question. I think we have had a great discussion here, but I want to go back to the newspaper-television cross-ownership rules which, Senator Smith, you and I had as issues when you were on this committee. And I thought Mr. Padden's remarks were very interesting. I was a strong proponent of that cross-ownership ban because there were two markets, one with which I was very familiar, Dallas, Texas, but also Atlanta, Georgia, where there was such a lock on the media outlets with the only newspaper in town plus the major television station being owned by the same companies in a grandfather that superseded the ban.

However, I have quickly retreated from my position because of the proliferation of media outlets, which came just in the last 10 years and changed the whole marketplace. And I think, Mr. Padden, you mentioned the New Orleans situation which now is the opposite and has caused great harm to the *Picayune,* which is one of our nation's oldest and most revered newspapers, because

they could not invest in television which would be the money that would keep the newspaper going.

So my question to Mr. Smith and Mr. Padden is, if the FCC either eliminated or modified the cross-ownership ban, do you think it would hurt localism or do you think, in fact, as you have stated, that in some cases it would actually promote localism? And are there other instances where you think it could have the opposite effect, or do you think that would be universal? I would be interested in both of your views.

Mr. SMITH. Senator Hutchison, I think it is very clear that we live in a different world on this score, and there are many, particularly our brothers and sisters in the newspaper industry, and the journalism, the solid journalism, that they do is under assault and real threat. We care about them. And every market is a little bit different, and that is why the NAB has supported relaxation, particularly in some communities, of the cross-ownership rule so that there are economies of scale that a radio, a TV, and a newspaper in a small community could pool together and be able to survive so that you have legitimate journalism in this country without a taxpayer subsidy but with the logic that comes with those kinds of synergies and economies of scale. So we support a relaxation.

Senator HUTCHISON. Thank you.

Mr. Padden?

Mr. PADDEN. Yes, Senator Hutchison. I agree with Senator Smith. There was a time when newspapers and television stations were the only games in town. Thanks largely to the efforts of this committee, we now have a much more robust media marketplace. We have cable. We have the Internet. We have everything else. But one side effect of that wonderful new diversity is it has gotten tougher for the entities that used to be the only games in town. So I really think before newspapers and small market local television stations completely wither and die, I urge you to provide some relief from that rule so that they can combine and survive.

And if I could very quickly respectfully disagree with Senator Smith and Mr. Franks that passage of Senator DeMint's bill would cause more blackouts because there would be a tenfold increase in the number of parties that would have to negotiate. I just do not think that is true at all. What we have today is the compulsory license confers the program rights to cable, and then the cable operator negotiates with the broadcaster regarding the signal. In the world that Senator DeMint's bill would create, there would still only be a single negotiation between the broadcaster and the cable company only instead of it being this legal fiction that it is about the signal, it would be a negotiation about the program rights. And there is no reason in the world why that should lead to an increase in the number of blackouts.

Dr. COOPER. Senator Hutchison, may I submit a written answer to your question from a somewhat different point of view, to your question on newspaper-TV cross-ownership?

Senator HUTCHISON. Well, I would be happy for you to disagree right now.

Dr. COOPER. Oh, I was not going to disagree. I was actually going to point out that they did relax the rules in the last round and we supported that relaxation and the court upheld that relaxation. So

in the markets where the newspapers have been under the most pressure and where there are the most alternatives, they did relax the rules. I have to go back and look to see where exactly New Orleans fell. But there have been no mergers in those markets.

Senator HUTCHISON. You have to go before the FCC to go through——

Dr. COOPER. Yes, but there is no—no, the presumption was that the merger would be found in the public interest, rebuttable, but it shifted the burden. It said it could happen, and we supported that change.

In addition, if there is a failing firm problem, there has always been that exception. So if the *Picayune* wanted to declare themselves a failing firm and get bought out by a TV station, they have always had that option. So to look at that case and say it was the result of this bad policy, I think is misleading.

Senator HUTCHISON. Well, I think my view is it is obsolete now, and I am 180 degrees different from where I was because I felt like it stifled any other voice in the market 20 years ago or 15 years ago. But now, as Mr. Smith said, with which I agree, we need legitimate news organizations to be able to function and have a voice because there is such a proliferation of voices with no capability for in-depth reporting or even in some cases ethical standards. So I think that we do want to save newspapers and legitimate broadcasters to the extent that we can even when I disagree with them 100 percent.

Dr. COOPER. We should not equate journalism with newspapers. There may well be other ways to have legitimate journalism in this new world that do not involve newspapers, and that is the transition we are going in.

Senator HUTCHISON. Well, absolutely. I did not mean to indicate that there is no journalism except in newspapers, but certainly newspapers and other legitimate broadcasters have exhibited standards that I think we want to assure have a voice in the marketplace as well and not get drowned out with a proliferation of voices that might not have even the resources for in-depth reporting.

So I thank you all.

The CHAIRMAN. I thank you, and I thank all of you very, very much. Senator Hutchison and I are going to disappear behind closed doors for a second. And it may be some time before I have six witnesses again. However, you did very well, and it was a very interesting discussion, and I think we all learned a lot from it. I thank you.

And the hearing is adjourned.

[Whereupon, at 4:15 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

I commend Chairman Rockefeller for convening this hearing to consider the impact of the Cable Television Consumer Protection and Competition Act of 1992 on the modern television marketplace. I agree with the Chairman that consumers should be the focal point of our discussions. As he noted, although consumers often have the choice of video providers, rates continue to go up faster than the rate of inflation.

Local broadcasters are an important source of news, emergency services, and entertainment in our communities. I request unanimous consent to include in the hearing record a letter dated July 20, 2012, from the Hawaii Association of Broadcasters relating to the issues before the Committee today.

Broadcasters should be allowed to negotiate for fair value and carriage of their signals. The unanswered question is how to protect consumers when there is an impasse in negotiations. Whenever signals are pulled as a result of a retransmission consent dispute, consumers lose. The impact is magnified in areas such as the State of Hawaii where a single multichannel video programming distributor (MVPD) dominates the state.

I look forward to continuing the dialog on these important issues with my colleagues on the Commerce Committee.

ABC TELEVISION AFFILIATES ASSOCIATION

July 20, 2012

Senator John D. Rockefeller IV,
Chair, Senate Commerce Committee,
Washington, DC.

Senator Kay Bailey Hutchison,
Ranking Member, Senate Commerce Committee,
Washington, DC.

Dear Senator Rockefeller and Senator Hutchison:

It is our understanding the issue of retransmission consent, among other matters, will be discussed during the Senate Commerce Committee hearing on July 24. The ABC Television Affiliates Association, whose members consist of some 170 local television stations throughout the country affiliated with the ABC Television Network, respectfully submits these comments to the Committee with the request that they be incorporated into, and made part of the record of, the hearing.

It would be difficult to overstate the importance of retransmission consent to the economic sustainability of network-affiliated, local television stations. Without retransmission consent revenues, local stations simply could not afford, today, to purchase popular, national network entertainment and sports programming nor produce the expensive local news, weather, sports, public safety, and public interest programming on which the American people have come to rely. The core economics of television have changed in dramatic ways over the years from a time when local broadcast stations were the only viable local distribution platforms for network programming.

The local video distribution market today is a highly competitive market. Robust competition between video distributors affords program producers and aggregators (*i.e.,* national networks and syndicators) multiple program distribution platforms. Having produced or acquired expensive national program content, networks, understandably, have a fiduciary duty to their shareholders to maximize the return on that investment, and, in doing so, they now have the ability to select among competing platforms (*i.e.,* local television stations, cable systems, satellite companies, the Internet, or other video platforms) for the most financially advantageous distribution arrangement.

To compete in the program acquisition market, local network-affiliated stations now have to compensate their networks for programs, not only as in the past, by

providing them significant amounts of local advertising inventory for network commercials, but, unlike the past, also by paying large sums of cash in "program fees" for the right to broadcast network programs. If affiliates are financially unable to pay a competitive market-based rate for those programs, the networks will place them on a local fee-based platform, *i.e.,* cable, satellite, or the Internet. This is simply a function of a competitive program distribution market—a public policy goal long advocated by public officials and consumer groups.

To illustrate, Disney, which owns and operates both the ABC Television Broadcast Network and ESPN, bids and competes in a competitive market against Fox, CBS, NBC, Turner, and other aggregators for expensive sports programming. After acquiring that content, Disney must decide which distribution platform, the ABC Television Network or ESPN, will yield the highest return on that investment. Placement of sports programming on ESPN, reportedly, yields Disney program fees in excess of $5.00 per month for each cable and satellite subscriber, along with substantial cable and satellite commercial advertising inventory. If placed on the ABC Television Network for *free, over-the-air* broadcast, Disney now demands and receives both commercial advertising inventory and a program fee from its affiliated stations. Otherwise, Disney, understandably, will place its most expensive and popular programs on cable and satellite. Thus, it is not surprising that so many of the most popular traditional broadcast sports programs have migrated in recent years to ESPN's advertiser-based and fee-based cable and satellite platforms.

The above illustration applies equally to entertainment programming, and the same local platform distribution choices for that programming are made by the parent companies of the CBS, Fox, and NBC Television Networks.

Therefore, to compete for the most popular national programming with cable and satellite fee-based and advertiser-based revenue streams, local television stations, of necessity, must now charge fees to their competitors for the retransmission and resale of their signals. It is indisputable that if the ability of local stations is handicapped or impaired by Congress or the FCC in developing a fee-based revenue stream from the resale, for profit, of their signals by competitive cable, satellite, and other video distributors, local television stations simply will no longer be competitive in the acquisition of national programming, and they will, plainly, not be able to afford to produce and broadcast local news, weather, sports, public safety, and public interest programming. Two revenue streams will always trump one, and if local television stations are not permitted to compete, at arm's length, in a competitive market, the best programming will ultimately migrate to subscription-based cable, satellite, or Internet platforms. The reality is consumers will ultimately pay for that programming, one way or the other.

Not only do local stations compete with cable, satellite, and other video distributors for program content, they also compete head-to-head with cable, satellite, and other distributors for audience share and advertising revenue. Congress recognized in 1992, with adoption of the current statutory retransmission consent requirement, the absurdity of allowing competitors of local television stations to pirate and resell their signals for profit without their consent and adopted a regulatory framework to allow local television stations to negotiate at arm's length in a competitive market for the resale of their signals.

Looked at another way, laws that prohibit cable and satellite companies from pirating, retransmitting, and reselling the signals of local television stations without their consent are no more unfair or unreasonable than laws that prohibit a local television station from pirating and retransmitting the signals of satellite and cable companies—without their consent—or the signals of other television stations, for that matter.

Volumes have been written and spoken about the fundamental fairness and procompetitive aspects of the Communications Act's retransmission consent requirements. Retransmission consent is more important today than when it was enacted for preservation of America's *free,* over-the-air, local television broadcast service.

We, therefore, respectfully urge the Committee not to impair or handicap the ability of local television stations to control the distribution of their signals by other competitive video distribution platforms.

Sincerely,

DAVID BOYLAN,
Chair.

cc: Members of the Senate Commerce Committee

HAWAII ASSOCIATION OF BROADCASTERS, INC.
Honolulu, HI, July 20, 2012

Hon. Daniel K. Inouye,
United States Senate,
Washington, DC.

Dear Senator Inouye:

As the Senate Committee on Commerce, Science, and Transportation prepares to hold a hearing to examine video issues and related aspects of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"), I write on behalf of Hawaii's local television broadcasters to underscore the importance of both the current regulations, and the extension of their underlying principles to the online video market.

Every one of the Hawaii television stations who are members of the Hawaii Association of Broadcasters believe these bedrock principles remain as vital today as when the Cable Act was enacted.

As you are aware, our local ABC-TV affiliate, KITV just yesterday resolved an impasse with Time Warner Cable over retransmission consent negotiations. While an unfortunate disruption of service left Hawaii cable TV viewers without the KITV signal for a number of days, the parties were able to resolve the issue and come to a retransmission consent agreement through a fair market-based discussion.

Since the enactment of The Cable Act, literally thousands of retransmission consent contracts have been successfully negotiated in Hawaii to the mutual benefit of broadcasters, pay television companies and consumers. In the increasingly competitive video market, these deals ensure the continued viability of local broadcasters and our ability to deliver local news, emergency services and high quality programming to the communities that we serve.

It is Hawaii viewers who are the real beneficiaries of the current retransmission consent process. Retransmission consent fees enable stations to hire reporters and engineering staff, buy live remote trucks, cameras, and production equipment, maintain transmission towers and the infrastructure necessary to produce daily programming and produce high quality local news that is an increasingly expensive proposition. Retransmission consent compensation allows stations to reinvest in valuable local content and services to our communities, providing more choices and better programming for all consumers.

It is these very fees that allow TV stations to produce and provide meaningful local programming in prime time hours such as the week-long Merrie Monarch Festival, the Kamehameha Schools Song Contest, The Na Hoku Hano Hano Music Awards and others.

This Committee was wise to craft legislation that recognized the value of local broadcasting. The Hawaii Association of Broadcasters asks that you support our local television stations in the upcoming Senate hearing on video carriage and further resist any efforts to eliminate retransmission consent, which allows our local stations to freely negotiate with pay television providers for carriage of those signals. The current system is good for your local television stations and your constituents, and it supports the continued creation of locally driven, community-focused programming.

Sincerely,

JAMIE HARTNETT,
Executive Director,
Hawaii Association of Broadcasters, Inc.

RLTV
Baltimore, MD, July 23, 2012

Hon. John D. Rockefeller IV,
Chairman,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Dear Chairman Rockefeller:

I serve as the President and Chief Executive of RLTV, which began service as a 24/7 linear programming network in 2008. Our core purpose is to create, acquire and distribute compelling content—both television and online—for those who are 50 years of age and older, a group we term "Generation 50+." There are over 100 million of us with $3 billion of spending power. As active, highly engaged and experi-

enced citizens, we care deeply not only about issues and pursuits that will enhance this next stage in our personal lives, but also about the future well-being of our children, grandchildren and other loved ones who are among the 40 million caregivers in this country.

There is no other network like RLTV. But unlike most networks or programming channels today, we are an "independent." RLTV started with a vision and the financial resources of our founder, John Erickson. But lacking the deep pockets and brand awareness of large media companies, RLTV and a handful of other independent programmers have had to compete on a very uneven surface to secure distribution and advertiser acceptance. The result for RLTV and the other handful of independent programmers is a fundamentally longer, more difficult and certainly more costly undertaking and, as such, one that imposes great odds against the successful introduction and nurturing of additional independent editorial voices from which the public can choose.

One particular cause of this circumstance is retransmission consent. For example, unlike the broadcasters, RLTV has no special government granted privileges, such as mandatory carriage rights or basic tier placement guarantees. When retransmission consent was created in 1992, it was intended to preserve local broadcasting, not to subsidize national broadcast television networks. In effect retransmission consent has had the unintended consequence of limiting choice and imposing more difficult playing field conditions for programmers such as RLTV.

Despite these conditions, MVPDs such as Comcast, Verizon FiOS, and several dozen distributors fortunately have validated our mission. Additional carriage later this year, due in part to Time Warner Cable and Bright House Networks, will result in RLTV being seen in almost 30 million homes compared to the 14 million plus households we're in today. For this we are greatly appreciative. Still, this is a long way from where RLTV should be.

Recently, the Chairman and Chief Executive of a large MVPD was quoted in a recent interview that he felt "badly for independent companies in general because they don't have the leverage against the distributors. It's not a fair fight," he added. No, it's not, Mr. Chairman. But unfortunately for distributors and independent networks such as RLTV, the ground rules, as noted above, have put us both between a rock and a very hard place.

Reform of retransmission consent will be a good start toward fixing unintended consequences and enhancing the prospects of independent voices such as RLTV to be seen and heard.

Sincerely,

PAUL A. FITZPATRICK,
President and CEO,
RLTV.

SON BROADCASTING NETWORK
Albuquerque, NM, July 24, 2012

Hon. JOHN D. ROCKEFELLER IV,
Chairman,
Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Chairman Rockefeller:

I understand that the United States Senate Committee on Commerce, Science, and Transportation plans to examine video carriage issues and related aspects of the 1992 Cable Act at an upcoming hearing, including the current "must-carry" regulations. On behalf of our station and others throughout the nation, I write to emphasize the importance of these "must-carry" regulations to our station, which has provided New Mexicans with unique high quality Christian programming for more than 25 years.

Congress enacted the "must-carry" regulations to prevent a cable system from refusing to carry lower-rated local television stations on its system. At that time, Congress found, after establishing a significant record, that if these local broadcast stations lost access to their cable audiences, it would diminish the quality and diversity of programming available in local communities. The Supreme Court agreed that the public benefits of must-carry far outweigh the minimal burdens it would impose on cable systems.

The public benefits of "must-carry" that Congress anticipated at the time of the Cable Act's enactment have been borne out over the past two decades. While in 1992, there were only three nationwide sources of broadcast programming, must-

carry laws have succeeded in creating an explosion of diverse broadcast television content across the country. Fox, Univision, the CW, MyNetwork, ION, Azteca, Telemundo and others—all began as "must-carry" stations. "Must carry" provided them with the broad exposure that introduced them to new audiences and enabled them to thrive.

Today, viewers across New Mexico continue to benefit from "must-carry" regulations through the services that our station provides to the local community. Back in 1984 when we went on the air only a fraction of viewers in our Santa Fe/Albuquerque DMA were able to pick up our signal. Viewers, businesses and ministries advocated to the cable companies on our behalf from 1984–1992 at no avail. And it wasn't until the 1992 Cable Act went into effect that we were able to fully serve the viewers in our community.

Since then we have produced thousands of hours of local programming covering a variety of formats from health and healing, to issues, entertainment, and talk programs that continue to serve the community and highlight the lives and stories of New Mexicans. Included are culturally diverse programs that are featured on our station. Ministries across our state who rely on us to share their stories of servicing the needs of New Mexicans would also be affected. As you may not be aware, our state has many needs; some of which are homelessness, hunger, drug addiction, family issues, health problems, and poverty. Our Christian television station has been a strong vehicle to address these issues and works with other ministries and agencies to communicate the services they offer. Son Broadcasting continues to provide a prayer line for people to call when they need encouragement, hope and prayer. There have been cases of suicide and financial need where we have bridged the caller to the appropriate professional or non-profit that can help with the particular need.

Eliminating "must-carry" would threaten our ability to exist and we would no longer be able to serve the community with local quality Christian programming. We currently broadcast to the entire Santa Fe/Albuquerque DMA, close to 800,000 households. Without "must-carry" we would be reduced down to serving approximately 18 percent of our current DMA, and many other stations around the country would be affected this same way. I ask that you stand in support of our station, and other local broadcasters that serve communities throughout the country in the upcoming Senate hearing on video carriage. Please resist any legislative efforts that eliminate the "must-carry" regulations.

Thank you for your consideration.

ANNETTE GARCIA,
President,
Son Broadcasting—KCHF TV 11.

TESTIMONY OF BENJAMIN ORR WHITE, PRIVATE CITIZEN, STATE OF HAWAII

U.S. Senate Committee on Commerce, Science, and Transportation
Attention—Senator John D. Rockefeller IV, Chairman

Senator Kay Bailey Hutchinson, Ranking Member

Senator Daniel Inouye, Past Chairman (2007–2009)

Fellow Senators and Committee Members
Washington, DC.

The following testimony is respectfully submitted to Chairman, John D. Rockefeller and fellow Committee members of the U.S. Senate Committee on Commerce, Science, & Transportation on July 23, 2012 for your consideration from the perspective of a "Private Citizen" from the State of Hawaii regarding the Cable Act at 20 hearing scheduled for July 24, 2012 at 14:30 in the Russell Senate Office Building—253.

The Cable Television and Consumer Protection Act of 1992 authored by Senator John C. Danforth has become legacy legislation which has protected the consumer, cable companies, and programming media over the past twenty years. It has met the burden of protecting a substantial governmental interest in promoting a diversity of views provided through multiple technology media. The 1992 Cable Act has with stood the challenges of the Judicial Branch being upheld by the U.S. Supreme Court in *Turner Broadcasting System, Inc.* v. *FCC* (95–992), 520 U.S. 180 (1997). In 1992 the estimate was 56,000,000 households, over 60 percent of the households with televisions subscribe to cable television and the number has definitely grown since the legislation's enactment.

In the case of private citizen from Hawaii like myself please allow me to explain how this legislation has had an imperative attempt on protecting Consumer and First Amendment rights in Hawaii within the past month. On July 11, 2012 Oceanic Time Warner Cable a subsidiary of Time Warner Cable blacked out the local commercial broadcast station KITV an American Broadcasting Company (ABC) affiliate owned and managed by Hearst Television. Oceanic then removed KITV from their cable line up without any notice to the consumer. All parties (Time Warner, Oceanic Time Warner, Hearst Television, and KITV) began to blame each other for the removals over a failure to come to a fiscal agreement regarding retransmission consent. For the next ten days 350,000 Oceanic Time Warner Cable subscribers and citizens in Hawaii were held hostage to the negotiations of these corporations. Cable subscribers were not able to watch ABC's news and programming (a national affiliate). The existing legislation requires cable companies to provide a 30 day advance notice to their subscribers of any changes. This did not occur. As a private citizen I sought to seek remedy through the FCC, FTC, and State Cable Division and failed to receive any recourse. As a last result a Federal lawsuit was filed to seek recourse. (See attached documentation) Without the 1992 Cable Act there would have been no consumer protection from the infringement of first amendment rights by cable companies and programming media.

Moving forward more and more media is being viewed over the Internet. It is important to establish legislation that will protect media companies, consumers, and Internet providers. More and more Internet cable companies are charging for the amount of data citizens are viewing on the Internet thus making the overall cost of media and freedom a speech quite expensive. Future legislation needs to look at how the Internet is competing against cable television. Cable television is an organized medium governed by individual station programming. The Internet is not governed by scheduled programming but by individual preferences with global implications. The Cable Act of 1992 did a great job of protecting local commercial and non commercial broadcast stations. Any future legislation should provide the same first amendment protection to view media over the Internet.

On a more personal note I am proud to say that I am Veteran of 16 years who takes great pride in having had the opportunity to defend this legislation, freedom and First Amendment Rights. I have been to other countries where the freedom of speech is restricted over cable networks, satellite providers, and Internet cable companies.

Thank you for your consideration and may God Bless this Committee, the U.S. Senate, the U.S. Legislative Branch and the United States of America.

Respectfully submitted,

BENJAMIN ORR WHITE.

STATE OF HAWAII
CABLE TELEVISION DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. Box 541
Honolulu, HI 96809
Phone: (808) 586-2620
Fax: (808) 586-2625

COMPLAINT/INQUIRY FORM

Ms. ( )
Mrs. ( )
Mr. (✓) Benjamin White
Your Name (Complainant)

2227 Apoepoe Street
Address (Forwarding, if applicable)

Pearl City HI 96782
City State Zip Code

(808) 386-5784 (808) 386-5784
Residence Phone Business Phone

COMPLAINT. Please type or print clearly your specific complaint against the cable company/organization (Respondent). Include photocopies of all pertinent documents (contract, letters, billings, receipts, or other relevant documents); and the names and telephone numbers of persons you contacted in trying to resolve your complaint. If you attach a credit card or bank statement, be sure your account number is removed or obliterated. If you need additional space, continue on a separate sheet of paper and attach to this form.

Name of cable company/organization (Respondent) against whom this complaint is made: Oceanic Time Warner Cable

Date(s) problem occurred: 11 JUL 12 - Present

Date(s) complained to the cable company/organization: 11 JUL 12

Person(s) to whom you complained to: Customer Service

DESCRIPTION OF COMPLAINT:

Oceanic Time Warner has a cable license to operate in the state of Hawaii. They have an obligation to the consumer to carry cable stations as well as national broadcast station like ABC, NBC, CBS.

Currently Oceanic has made the decision to stop carrying KITV (Hawaii's ABC affiliate) based on a fiscal disagreement.

Oceanic is failing to provide its basic cable package which includes ALL local broad cast affiliates. As a consumer not all promised services are being provided.

An acceptable resolution to my complaint is: (I understand that what I want as a resolution may not be within the authority of your office)

Revoke or suspend Oceanic Time Warner's Cable license until KITV's (ABC) is restored to broadcast over Oceanic's cable network.

Also notify Oceanic that a compliant has been filed against their license.

Benjamin O. White — **Your Signature**

13 JUL 12 — **Date**

A copy of this complaint may be given to the Respondent. It will also become a public record. If there is information that you feel is confidential, such as an unlisted home telephone number, or Social Security number, please do not include it on this form or any attachment. Thank you.

09/06

FCC Consumer Complaints Page 1 of 1

FCC Consumer Complaints

Complaint Submission

Form 2000 – Submission Confirmation

FCC Submission Confirmation: 2000E

Acknowledgement of Submission from Benjamin White on 07/11/2012, reference number 12-C00409060.

Thank you for your information. The FCC will contact you if additional information is required. Please keep this information for future reference.

ATTENTION: When submitting additional information using this FCC Submission Confirmation sheet, please attach only one unsolicited fax advertisement (or multiple advertisements **from the same sender**) that matches your complaint number and carrier company named in this complaint. DO NOT include multiple unsolicited faxes from different senders with this unique case number. Your complaint is subject to be rejected, if more than one unsolicited fax advertisement from different senders accompanies this FCC Submission Confirmation sheet.

Please use this page as a Fax Cover Sheet when faxing additional details to the FCC at (866) 418-0232.

FCC Home |

Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Phone: 1-888-CALL-FCC (1-888-225-5322)
TTY: 1-888-TELL-FCC (1-888-835-5322)
Fax: 1-866-418-0232
E-mail:

FTC Bureau of Consumer Protection - Consumer Information Page 1 of 1

FTC Complaint Assistant

We have received your complaint.

Thank you for filing a complaint with the Federal Trade Commission. Based on the information you have given us, we recommend that you take the following steps, if you have not already.

Step 1: You should contact the company in question regarding your situtation.

Step 2: You may find useful information on our Consumer Protection web site.

Step 3: If you have done the above steps and have any additional questions or any additional information you would like to add to your file, please call **877-382-4357** to speak with a counselor. When you call, please have this reference number: **38884932** to help us quickly retrieve your information.

Submit Another Complaint

OMB #3084-0047

ORIGINAL

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
JUL 19 2012
at 1 o'clock and 50 min. P M.
SUE BEITIA, CLERK

BENJAMIN O. WHITE
2227 Apoepoe Street
Pearl City, Hawaii 96782
Telephone: (808) 386-5784; (512) 535-2397(f)
bw968488@gmail.com
Plaintiff in Pro Per

UNITED STATE DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BENJAMIN ORR WHITE, Plaintiff, vs. TIME WARNER CABLE, OCEANIC TIME WARNER CABLE, HEARST TELEVISION, KITV, Defendants.	CIVIL NO: CV12 00406 BMK COMPLAINT; ~~SUMMONS~~ DEMAND FOR JURY TRIAL

COMPLAINT

BENJAMIN ORR WHITE, Plaintiff above-named, sets forth the following Complaint against Defendants TIME WARNER CABLE, OCEANIC TIME WARNER CABLE, HEARST TELEVISION, and KITV, and alleges and avers as follows:

JURISDICTION

1. This action is brought pursuant to The Communications Act of 1934, as amended , Title 47 U.S.C. 614, *et seq*., and The Cable & Television Consumer Protection Act of 1992, as amended, Title 47 U.S.C. Section 533, *et seq*.

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. Section 1331, which states that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties, of the United States.

3. This Court has personal jurisdiction over the parties as a result of the Defendants' wrongful acts hereinafter complained of which violated the Plaintiff's rights as a consumer and cable subscriber. The Defendants' wrongful act consisted of failing to notify the Plaintiff as a consumer and cable television subscribers of a cable operator's change to programming. The change in programming occurred in the State of Hawaii.

VENUE

4. Pursuant to Title 47 U.S.C. Section 614, venue is proper in the District of Hawaii because a substantial part of the events or Omissions giving rise to the claim occurred in this District.

THE PARTIES

5. The Plaintiff, BENJAMIN ORR WHITE, is and at all relevant times mentioned was, a private citizen with sole residence located at 2227 Apoepoe Street, Pearl City, Hawaii 96782

6. Plaintiff is informed and believes, and alleges thereon Defendants TIME WARNER CABLE a national parent cable, and/or media corporation headquartered in New York, New York, and/or owner, and/or an entity with dominion, control, oversight and management of OCEANIC TIME WARNER CABLE a cable, and/or media, and/or owners, and/or operators, and/or licensees, and/or permitees, and/or corporation rebroadcasting national commercial affiliates and cable station herein referred to as television media station broadcasting over a cable network in the State of Hawaii with executive offices at 200 akamainui Street, Mililani, Hawaii 96789.

7. Plaintiff is informed and believes, and alleges thereon Defendants HEARST TELEVISION owner, and/or operator of 29 television stations, and two radio stations wholly owned by the Hearst Corporation with corporate headquarters in New York, New York is the parent, and/or owner, and/or operator, and/or an entity with dominion, control, oversight and management of KITV an American Broadcasting Company affiliate also hereinafter referred to as abc was

broadcasting nation commercial programming in the State of Hawaii located at 801 S. King Street, Honolulu, Hawaii 96782.

STATEMENT OF FACTS

8. Defendant OCEANIC TIME WARNER CABLE rebroadcast KITV an abc affiliate on OCEANIC TIME WARNER CABLE channel six. On or about July 11, 2012 defendant TIME WARNER CABLE ordered, and/or directed, and/or mandated OCEANIC TIME WARNER CABLE to terminate rebroadcast of KITV on channel six thus blackening out hereinafter referred as blacked out channel six and replacing it within 24 hours with the Hallmark Channel, a national cable programming station.

9. Plaintiff BENJAMIN ORR WHITE after the blackout of KITV was informed July 12, 2012 and believes therein were a fiscal dispute, and/or financial disagreement, and/or negotiation failure between defendants TIME WARNER CABLE and HEARST TELEVISION resulting in the aforementioned black out of KITV programming on OCEANIC TIME WARNER CABLE network

10. Defendants TIME WARNER CABLE, OCEANICE TIME WARNER CABLE, HEARST TELEVISION, and KITV have not provided the defendant BENJAMIN ORR WHITE or the OCEANIC TIME WARNER CABLE network subscribers with a specific restoration date of KITV over the OCEANIC TIME WARNER CABLE NETWORK to channel six.

11. Plaintiff BENJAMIN ORR WHITE is informed and believes OCEANIC TIME WARNER CABLE was a cable television network provider to 350,000 household, and/or domiciles in the State of Hawaii providing a minimum basic cable television network service package costing $14.88 per calendar month for 23 national and local commercial broadcast stations to include KITV resulting in an average channel cost of $0.65 per calendar month.

12. Plaintiff BENJAMIN ORR WHITE makes a monthly financial payment on the second day of every calendar month of $110.95 to OCEANIC TIME WARNER CABLE, P.O. Box 30050, Honolulu, Hawaii 96820-0050 under the Plaintiff BENJAMIN ORR WHITE's OCEANIC TIME WARNER CABLE account number, 1-199932-01-7.

13. Defendant OCEANIC TIME WARNER CABLE is the only cable television provider in the State of Hawaii resulting in a monopoly on cable television.

14. Defendant KITV is the only abc affiliate in the State of Hawaii.

CLAIM I

(Violation of Title 47 U.S.C. Section 533)

15.Plaintiff BENJAMIN ORR WHITE, hereby incorporates by reference all of the allegations contained in paragraphs 1-14, inclusive, as though set forth herein at length.

16. By consumer and cable subscriber contract, Plaintiff BENJAMIN ORR WHITE paid a cable television network subscription package to OCEANIC TIME

WARNER CABLE for commercial cable and national broadcast stations herein referred to as channels.

17. Title 47 U.S.C Section 614, *et seq*., mandates a cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station.

18. Plaintiff BENJAMIN ORR WHITE believes defendants TIME WARNER CABLE, OCEANIC TIME WARNER CABLE, HEARST TELEVISION, and KITV failed to resolve their fiscal dispute leading to of Title 47 U.S.C. Section 614, *et seq*. and are equitably responsible for the violation.

19.By reason of the aforesaid mentioned conduct, the aforementioned Defendants violated Title 47 U.S.C. Section 614, et seq. by failing to provide written notice to the local commercial television station, KITV and the Plaintiff BENJAMIN ORR WHITE as a cable subscriber and viewer of KITV.

20. By doing the acts described above in Paragraph 17, Defendants caused and/or permitted the violation of the Plaintiff's protection under The Cable & Television Consumer Protection Act of 1992, thereby entitling Plaintiff to seek damages.

CLAIM II
(Violation of Title 47 U.S.C. 552)

21. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1-20, inclusive, as though set forth herein at length.

22. By consumer of Defendants TIME WARNER CABLE and OCEANIC TIME WARNER CABLE network services, and/or cable stations, and/or cable channels the Plaintiff BENJAMIN ORR WHITE is entitled to consumer protection and customer service from said Defendants.

23. Title 47 U.S.C. Section632, *et seq*, establishes standards which cable operators may fulfill their customer service requirements, such standards shall include , at a minimum, requirements governing installations, outages, and service calls; and communications between the cable operator and the subscriber.

24. By reason of the aforesaid mentioned conduct, Defendants TIME WARNER CABLE and OCEANIC TIME WARNER CABLE violated Title 47 U.S.C. 552 Section 632(b)(2)(3).

25. By doing the acts described above in Paragraph 22, Defendants caused and/or permitted the violation of the Plaintiff's protection under The Cable & Television Consumer Protection Act of 1992, thereby entitling Plaintiff to seek damages.

CLAIM III

26. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1-26, inclusive, as though set forth herein at length.

27. The Communications Act of 1934 was amended to increased consumer protection and promotes increased competition in the cable television and related

markets. An act amending the Communications Act of 1934 will herein and thereafter be referred to as Cable Television Consumer Protection and Competition Act of 1992.

28. Section 2(a)(1)(2)(3)(6)(9) of Cable Television Consumer Protection and Competition Act of 1992 covers the substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.

29. By actions taken resulting in the removal of KITV from OCEANIC TIME WARNER CABLE's network the Defendants TIME WARNER CABLE, OCEANIC TIME WARNER, HEARST TELEVISION, AND KITV infringed on the Plaintiff's First Amendment Right during their alleged carrier negotiations.

CLAIM IV

30. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1-30, inclusive, as though set forth herein at length.

31. Section 2(b)(1)(2)(3)(4)(5) covers the policy of Congress in matter pertaining to the Cable Television Consumer Protection and Competition Act of 1992.

32.By actions taken resulting in the removal of KITV from OCEANIC TIME WARNER CABLE's network the Defendants TIME WARNER CABLE, OCEANIC TIME WARNER, HEARST TELEVISION, AND KITV violated

Congressional Policy through their willful neglect to settle a carriage agreement resulting in the disregard of consumer interest and furthermore each defendant respectively created undue market power vis-à-vis video programmers and consumers.

PRAYER FOR RELIEF

A. For statutory damages, declaratory and injunctive relief pursuant Title 47 U.S.C. 533 Section 614(9) of $50,000.

B. For statutory damages, declaratory and injunctive relief pursuant Title 47 U.S.C. 552 Section 632(b)(2) of $230,000 including each willful violation an additional amount of enhanced damages of $230,000 pursuant to Title 47 U.S.C. 552 Section 632(b)(3).

C. For willful disregard of Section 2(a)(1)(2)(3)(6)(9) of the Cable Television Consumer Protection and Competition Act of 1992, damages, declaratory and injunctive relief of $450,000.

D. For willful disregard of Section 2(b)(1)(2)(3)(4)(5) of the Cable Television Consumer Protection and Competition Act of 1992, damages, declaratory and injunctive relief of $450,000.

E. Compensatory damages in an amount according to proof against Defendants.

F. Punitive damages in an amount according to proof against

Defendants.

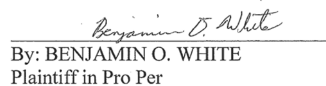
G. For attorney fees and costs pursuant to statute.

H. For such other and further relief as this Honorable Court may deem

just and proper.

Dated: Honolulu, Hawaii 7/19/2012

Respectfully submitted,



By: BENJAMIN O. WHITE
Plaintiff in Pro Per

2227 Apoepoe Street
Pearl City, Hawaii 96782
808 386-5784
512-535-2397 (Fax)
Bw968488@gmail.com

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO HON. GORDON H. SMITH

Question 1. Whenever signals are pulled as a result of a retransmission consent dispute, consumers lose. The impact is magnified in areas where a single MVPD dominates an entire state. What is the best way to protect consumers while companies work to resolve disputes and impasses in negotiations for the carriage of broadcast signals?

Answer. Broadcasters all across the country have a strong incentive to conclude retransmission consent negotiations successfully and avoid carriage disputes, which result in the immediate loss of both retransmission consent compensation and advertising revenues for local stations and networks. As a result, retransmission consent negotiations are almost always concluded successfully, with disruptions affecting only hundredths of one percent of annual television viewing hours. In the rare instance of a negotiating impasse, broadcasters take steps to educate our viewers about available options.

Understanding the unique circumstances we have in Hawai'i, where Time Warner Cable has near-monopoly control of the market, our signal is available free, over-the-air to your constituents. Furthermore, as I mentioned in my opening statement, it would be beneficial to arm consumers with more protections in the rare event of a disruption. First, more information should be given with enhanced notice of a potential service disruption. Second, consumers who pay for an MVPD package should be reimbursed for loss of service and allowed to change systems without penalty.

Question 2. Should any special consideration be given to protect consumers in geographic locations where a single MVPD serves a high percentage (more than 50 percent) of total MVPD subscribers in a state?

Answer. Senator, ten MVPDs serve over 90 percent of the pay-TV subscriber base nationally, in addition to geographic cable system "clusters." Local broadcasters often have to negotiate retransmission consent agreements with extremely large systems with vertically integrated programming that are competing for the same local and national advertisements. All in all, we feel that consumers should be given more options in the retransmission consent process, outlined in our previous answer.

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

Question 1. In her testimony, Ms. Witmer of Time Warner Cable notes that national broadcast networks "have begun demanding reverse compensation from their affiliates," which she alleges is contributing to the increase in retransmission fees local affiliates have been requesting in renegotiations.

Please respond to this point, providing detail on the extent that national broadcast networks are involved in retransmission fee negotiations, including any relevant information on the percentage of retransmission fees for affiliate signals that are allocated to national broadcast networks.

Answer. As a trade association, NAB does not have access to the specific contractual terms of either network affiliation agreements or retransmission consent agreements. Indeed, as a matter of antitrust law, it would not be appropriate for NAB to have information on the specific terms and conditions of the agreements between and among its members (such as network affiliation agreements) or between and among its members and entities within the pay-TV industry (such as retransmission consent agreements). Information about network involvement in retransmission consent negotiations and any retransmission consent-related compensation arrangements would only be available from the actual agreements and/or the networks and stations that are parties to such agreements.

Question 2. What are NAB's views on Senator Kerry's idea of requiring alternative styles of negotiation—i.e. baseball-style arbitration—to be used in disputes between multichannel video programming distributors and affiliates to ensure viewers are not treated unfairly when retransmission consent negotiations breakdown?

Answer. There are several reasons why requiring arbitration would be contrary to the public interest and contrary to existing law.

Under the retransmission consent system established by Congress, the government does not and should not attempt to choose winners or losers among broadcast stations and pay-TV providers but instead allows broadcasters and MVPDs to negotiate freely and reach marketplace agreements. Government-enforced arbitration would undermine this market-based system and disrupt the carefully balanced combination of laws and regulations governing carriage of television broadcast signals.

The complexity of retransmission consent negotiations makes mandatory arbitration or a similar dispute resolution mechanism neither viable nor practical.

Retransmission consent negotiations typically involve many complex and multi-dimensional issues, including such matters as video on demand, purchase of broadcast advertising by the MVPD (and vice-versa), broadcast station promotion by the MVPD (and vice-versa), connectivity between the station's studio/transmitter and the MVPDs headend/local receive facility, digital and multicast channel carriage, electronic program guide placement, and news insertion options, to name a few. Given the complexity of these agreements, significant experience and unique expertise would be required to assist parties in resolving disputes. For this reason, retransmission consent agreements generally also address matters such as the manner of dispute resolution, venue and jurisdiction. NAB believes that mandating arbitration would result in costly battles between economists and lawyers, bleeding economic resources that local stations could better use to invest in high-quality programming and public service stewardship. This would only be compounded with smaller stations in California negotiating against MVPDs with far greater leverage.

Question 3. In recent years, the breakdown of retransmission consent negotiations has threatened the television access of millions of Americans to major events like the Super Bowl, the World Series, and the Oscars, not to mention the critical access of viewers to local news broadcasts. The FCC has proposed to strengthen notice requirements for consumers when there is the possibility that certain services may lapse. Does NAB support this proposal?

Answer. NAB agrees that viewer notification requirements should be strengthened. In comments filed with the FCC last year, NAB urged the FCC to adopt certain changes to its rules to promote the interests of viewers.

First, we urged the FCC to extend its consumer notice requirements to all MVPDs. This requirement, which requires advance notice to consumers of any changes to their channel line-ups, currently applies only to cable operators. Extending this rule to all MVPDs would ensure that consumers have adequate information to make informed decisions about how to access programming in the rare instances when they may be impacted by a negotiating impasse.

We also proposed two other changes that we anticipate will assist viewers. We observed that many MVPDs now require that their subscribers pay early termination fees ("ETFs") when canceling services prior to the termination of a service agreement, which could impede subscribers' ability to cancel and/or change their MVPD service in the event of a retransmission consent dispute. NAB urged the Commission to ensure that the ability and freedom of consumers to make such decisions are not impeded by the use of ETFs. Finally, NAB has noted that there is a dearth of information about MVPD ownership, operations, and geographic coverage. Current information about such matters is critical to broadcasters' ability to make timely carriage elections and retransmission consent-related communications. Accordingly, we urged the FCC to consider rules that require MVPDs to periodically file with the FCC data on their ownership (including contact information), operation, and geographic coverage. This greater transparency could be achieved in a manner that is not unduly burdensome but would promote more effective and timely communications between broadcasters and MVPDs.

Question 4. Does NAB support requiring affiliate broadcast signals to remain on the air—*i.e.,* continuous carriage—during retransmission consent disputes?

Answer. Since the establishment of the current system of retransmission consent, thousands of major sporting and entertainment events have come and gone without incident or disruption to any consumer. The system works so well that studies show that consumers are more likely to face a power outage or an outage of their entire pay-TV service than to be affected by a retransmission consent dispute. Even in the rare instances that a disruption occurs, local stations' signals remain available free over-the-air, and can also be viewed via other pay-TV services.

The current regime specifies that both broadcaster and pay-TV parties must, as part of their good faith negotiation obligations, negotiate at reasonable times and locations, and must not unreasonably delay negotiations. Further government intervention into the timing of the negotiating process, including when those agreements commence or terminate, easily could create disincentives to timely reaching agreement. Certainly the requirement on broadcasters proposed in this question would substantially reduce the incentives of pay-TV providers to conclude retransmission negotiations, if those operators know they can continue to use broadcasters' signals for their own profit, even in the absence of any agreement between them.

I also want to stress that, during many retransmission negotiations, television stations reach short-term agreements with pay-TV providers, allowing them to continue carrying the stations' signals while negotiations continue.

Question 5. Local broadcasting provides local programming and assistance in times of emergency. Broadcasters increasingly recognize that compensation from retransmission consent fees is an important revenue stream going forward. Can you explain what the retransmission consent fees paid to a broadcast station support?

Answer. Retransmission consent fees help support the quality, quantity and diversity of broadcast programming and services. Broadcasters are airing ever-increasing amounts and types of programming through the use of multiple programming streams or "multicasting." The total number of over-the-air television channels skyrocketed from 2,518 channels as of year-end 2010 to 4,552 channels as of year-end 2011.[1] Multicasting has fostered the development of entirely new programming networks, many of which are aimed at meeting the needs and interests of specific ethnic groups. Another significant development is the increase in programming available in high definition ("HD") format, with an estimated three-fifths of broadcasters having upgraded their production facilities so that they can offer local news in HD. Mobile DTV also is on the rise, with more than 130 stations in 30 states now making significant amounts of programming accessible via handheld mobile devices.

As you have observed, television broadcast stations are an unrivaled source of local and national news and vital emergency information and alerts. Broadcast television is the leading news source, with 37.4 percent of American adults reporting that they consider broadcast television to be their *primary* source of news.[2] Recent surveys also show that viewers consider local television news more trustworthy than other news sources.[3]

To meet the needs and high expectations of their viewers, local television stations invest heavily in their local news operations. Recent survey data show that television news staffing has risen to the second highest levels on record, with stations adding 1,131 jobs for a total of 27,653 full time staff in 2011. In addition, 42.4 percent of stations added to their newscasts last year, and a significant number (31.2 percent) plan to increase news during the coming year. Despite challenging economic times, most stations either increased or maintained their news budgets during the past year.[4]

Significantly, free over-the-air broadcast signals are relied upon by an increasing proportion of the American public. The most current data show that 17.8 percent of U.S. television households—a total of 20.7 million households (or 53.8 million Americans)—rely solely on free over-the-air broadcast television. Broadcast-only households are more likely to be racial and ethnic minorities, have lower household incomes, and are younger.[5]

Local television stations today increasingly rely upon revenue streams other than over-the-air advertising to support the varied services described above. Thus, the ability to engage in fair negotiations with pay-TV providers for the value of the broadcast signal is critical to broadcasters' ability to generate revenue and re-invest those dollars in local news operations and a range of digital services. Changes to the current system would impair the ability of local stations to serve their local markets.[6]

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[1] *TV Stations Multiplatform Analysis '12 Update: New Digital Networks, Mobile TV Channels Expand Content Options,* SNL Kagan (Jan. 31, 2012) at 1.

[2] Television Bureau of Advertising, TV Basics Report (June 2012) at 25, available at: *http://www.tvb.org/media/file/TV_Basics.pdf.* Local television broadcast stations also are the top source for local weather, traffic and sports. *Id.*

[3] *See* University of Southern California, *National USC Annenberg-Los Angeles Times Poll Shows Local Television News Rules with Voters,* Press Release (Aug. 27, 2012), available at: *http://www.usc.edu/uscnews/newsroom/news_release.php?id=2795* (visited Aug. 28, 2012); The Pew Research Center for People and the Press, Further Decline in Credibility Ratings for Most News Organizations at 5 (Aug. 16, 2012), available at: *http://www.people-press.org/files/2012/08/8-16-2012-Media-Believability1.pdf* (visited Aug. 28, 2012).

[4] Bob Papper, RTDNA/Hofstra University, "2012 TV and Radio Staffing and News Profitability Survey," summarized at *http://www.rtdna.org/pages/media_items/2012-tv-and-radio-news-staffing-and-profitability-survey2094.php,* Part I–II.

[5] *See* GfK-Knowledge Networks, *Home Technology Monitor 2012 Ownership Survey and Trend Report* (Spring 2012-March 2012). *See also* NAB, *Over-the-Air TV Viewership Soars to 54 Million Americans,* Press Release (Jun. 18, 2012), available at: *http://www.nab.org/documents/newsroom/pressRelease.asp?id=2761.*

[6] *See* Jeffrey A. Eisenach & Kevin W. Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting 1 (2011), Attachment A to Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011) in NAB Reply Comments to *Notice of Proposed Rulemaking* in MB Docket No. 10–71, at Appendix A (filed June 27, 2011).

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO HON. GORDON H. SMITH

Question 1. Broadcasters tend to argue that retransmission consent fees are critical to broadcasters being able to support local news broadcasts. WWOR, owned by FOX, has faced significant criticism for its coverage of local New Jersey news. Since FOX and Cablevision came to an agreement on retransmission fees after a blackout during the World Series in 2010, New Jersey customers have not seen real improvement of local news coverage on WWOR. If broadcasters get use of the public airwaves for free, while also charging retransmission fees, what are New Jersey customers getting in return?

Answer. Senator, broadcasters are proud stewards of the Nation's airwaves. In fact, most broadcasters were not given anything for "free" as they purchased their licensed stations at market price and perform countless hours of public interest services, on the air and in the community. In return, broadcasters continue to reinvest retransmission consent revenues in local news and other programming services. For example, in 2011, broadcasters hired more than 1,100 additional anchors, reporters, producers and news staff. Total employment in local television newsrooms grew by 4.3 percent to 27,653 employees. This is the second highest total on record, thanks to retransmission consent in many cases. New Jersey residents are served by WWOR–TV, a broadcast television station licensed to Secaucus, New Jersey, which is affiliated with MyNetworkTV and owned by Fox Television Stations. In addition to MyNetworkTV entertainment programming, WWOR–TV provides local viewers with local news coverage, public affairs programming, special election coverage and children's educational programming.

Question 2. Do broadcasters have an obligation to provide local news coverage? If so, how much is adequate?

Answer. Local broadcasters are licensed by the FCC on the condition that they will serve the public interest. Each and every station is different and tailors its programming to fit the needs of the community.

Question 3. S. 2008, the Next Generation Television Marketplace Act of 2011, would provide for the deregulation of retransmission consent. But as we saw last month with DirecTV and Viacom, blackouts occur due to disputes between cable programmers and cable providers in a non-regulated environment too. If we see customers, like those who subscribe to DirecTV, suffering in a deregulated world, why would we want to deregulate the negotiation process for broadcasters too?

Answer. Removing important laws like retransmission consent and must-carry will harm local stations and television viewers alike. For example, certain proposals would eliminate the ability of the FCC to enforce privately negotiated contracts between program distributors and stations for the distribution of network and syndicated programming. Allowing pay-TV providers to import from distant markets signals carrying duplicative network and syndicated programming ultimately will harm viewers, by undermining local stations' economic base for producing local news and information—including critical emergency information. Specifically, limiting broadcasters' ability to enter into and/or enforce exclusive contracts will jeopardize stations' advertising revenues because the lack of program exclusivity in a market makes television stations less attractive to advertisers. Without sufficient advertising revenue streams, local stations cannot afford to invest in valued informational and entertainment programming. Both local stations and their viewers would be severely harmed if pay-TV providers could undermine stations' exclusivity rights by importing distant stations' signals.

Furthermore, if some legislative proposals were to become law, many believe that the number of consumer disruptions will multiply. Removing the compulsory copyright license, for instance, would exponentially increase the number of rights holders that need to grant permission before a station's programming is carried by a cable or satellite company, thereby increasing the likelihood of consumer disruptions. In addition to this, many stations, particularly smaller and independent stations, may be unable to undertake the expensive and cumbersome responsibility of direct licensing, and such a change might affect the ability of local stations to serve their local markets.

Question 4. News Corporation, a member of the National Association of Broadcasters (NAB), has been found to have misled the British Parliament, has been accused of misrepresenting itself to the FCC, and has seen its employees arrested for crimes including bribery of police, phone hacking, e-mail hacking, and the perversion of justice. What, if anything, does the NAB do to ensure that its members are living up to the character requirements expected of a broadcast licensee?

Answer. NAB advocates on behalf of a broad membership, which is comprised of local radio and television stations and broadcast TV networks. To be a member of NAB, stations must hold a valid broadcast license from the Federal Communications Commission.

Question 5. In light of the numerous allegations against News Corporation, is the NAB conducting investigations into or taking any action against News Corporation?

Answer. No.

Question 6. Today's video marketplace is very different than what it was in 1992. Since the enactment of the Cable Act, satellite carriers and telephone companies offering video services compete with cable operators. And in the last few years, we have seen the enormous growth of online video. In your view, given these changes in the video marketplace, are the existing rules working? Why or why not?

Answer. NAB feels that the system established by the 1992 Act is functioning as Congress intended and serving the public interest. Some local broadcasters are for the first time receiving monetary compensation for carriage of their signals, and consumers are benefiting with enhanced local offerings and other highly valued sports and entertainment programming. As new entrants, such as online video distributors, provide consumers with even more options we believe that applying the same basic principles for retransmission consent and exclusivity to both new and traditional providers is paramount. Leaving broadcasters unable to control Internet distribution of their signals, and without the means to negotiate for fair compensation for others' commercial use of their signals, would contradict Congress' mandate that "anyone engaged in retransmission consent by whatever means" obtain stations' consent, and would seriously undermine local stations' ability to fulfill their public service obligations.

REPSONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO HON. GORDON H. SMITH

Question 1. Stakeholders on all sides of the retransmission consent debate appear to agree that the visibility and frequency of retransmission disputes has increased over the last few years. Some have argued that retransmission consent is working and that some growing pains are reasonable because many broadcast stations are electing to pursue deals instead of must-carry for the first time since enactment of the 1992 Cable Act which created the dual regimes of must carry and retransmission consent. On the other hand, distributors argue that private sector retransmission consent deals are taking longer to negotiate, and that it is becoming harder to reach agreement regarding mutually agreeable terms.

If you believe must-carry and retransmission consent are important to localism, how do you recommend that the Congress measure the success of localism?

If you believe retransmission consent is failing, what evidence can you provide?

Answer. Must carry and retransmission consent have yielded important benefits for American television viewers, whether they access broadcast television over-the-air, via pay-TV services, or online.

Must-Carry. Congress adopted "must-carry" because it found that cable systems were increasingly refusing to carry certain local television stations or carrying them in ways that made it difficult to receive them (such as placing them on channels that could only be received with additional equipment).

Congress found, after assembling a massive record, that if stations lost access to the cable audience, their ability to provide quality diverse programming to their local communities would decline, and those stations would either be forced to change to less expensive programming or go off the air altogether, reducing the diversity of programming available to local communities.

The must-carry policy has succeeded. Congress can measure that success by looking at the results. In 1992, there were only three nationwide sources of broadcast programming. In the past 20 years, new and diverse programming networks have grown, including Univision, Fox, the CW, MyNetwork, ION, Telemundo, Azteca and others. Each of them first obtained widespread distribution over must-carry stations and produce local news thus serving localism. Other local stations that provide foreign language or other niche programming are able to operate only because they can reach the entire audience due to must-carry requirements.

Although some cable companies complain that must-carry reduces the opportunity for new cable programming, the facts don't support that claim. Must-carry stations occupy no more than one to two percent of the capacity of most cable systems, and as cable systems convert to all-digital operations, their capacity grows even further. Those cable systems also often devote many channels to carrying feeds of popular cable networks from multiple time zones.

Television broadcasters are committed to providing a wide variety of channels and programming that connect the cultures and communities they serve and reflect the diverse nature of their viewing audiences. Must-carry laws have succeeded in helping broadcasters accomplish these goals.

Retransmission Consent. Retransmission consent allows stations electing this option to negotiate with pay-TV providers in good faith for the value of their signals. Retransmission consent fees help support the quality, quantity and diversity of broadcast programming and services. Broadcasters are airing ever-increasing amounts and types of programming through the use of multiple programming streams or "multicasting," which has resulted in enhanced localism. The total number of over-the-air television channels skyrocketed from 2,518 channels as of year-end 2010 to 4,552 channels as of year-end 2011.[7] Multicasting has fostered the development of entirely new programming networks, many of which are aimed at meeting the needs and interests of specific ethnic groups and community focused programming. Another significant development is the increase in programming available in high definition ("HD") format, with an estimated three-fifths of broadcasters having upgraded their production facilities so they can offer local news in HD. Mobile DTV also is on the rise, with more than 130 stations in 30 states now making significant amounts of programming accessible via handheld mobile devices.

Television broadcast stations are an unrivaled source of local and national news and vital emergency information and alerts. Broadcast television is the leading news source, with 37.4 percent of American adults reporting that they consider broadcast television to be their *primary* source of news.[8] Recent surveys also show that viewers consider local television news more trustworthy than other news sources.[9] To meet the needs and high expectations of their viewers, local television stations invest heavily in their local news operations. Recent survey data show that television news staffing has risen to the second highest levels on record, with stations adding 1,131 jobs for a total of 27,653 full time staff in 2011. In addition, 42.4 percent of stations added to their newscasts last year, and a significant number (31.2 percent) plan to increase news during the coming year. Despite challenging economic times, most stations either increased or maintained their news budgets during the past year.[10]

Local television stations today increasingly rely upon revenue streams other than over-the-air advertising to support the varied services described above. Thus, the ability to engage in fair negotiations with pay-TV providers for the value of the broadcast signal is critical to broadcasters' ability to generate revenue and re-invest those dollars in local news operations and a range of digital services. Changes to the current retransmission consent system would impair the ability of local stations to serve their local markets.[11]

Question 2. Some distributors have indicated concerns about the ability of content creators to tie affiliated programing to retransmission consent deals because they argue this practice contributes to programming cost increases. Broadcasters and content creators argue that current practices provide necessary financial support for a greater variety of programming options which they say is a benefit to consumers.

To what extent should Congress be concerned about programming cost increases over the past several years?

If you believe programming cost increases merit a fresh look at the 1992 Cable Act, do you believe cost savings garnered by distributors should be passed onto consumers? If so, how would any savings be realized by consumers?

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[7] *TV Stations Multiplatform Analysis '12 Update: New Digital Networks, Mobile TV Channels Expand Content Options,* SNL Kagan (Jan. 31, 2012) at 1.

[8] Television Bureau of Advertising, TV Basics Report (June 2012) at 25, available at: *http://www.tvb.org/media/file/TV_Basics.pdf.* Local television broadcast stations also are the top source for local weather, traffic and sports. *Id.*

[9] *See* University of Southern California, *National USC Annenberg-Los Angeles Times Poll Shows Local Television News Rules with Voters,* Press Release (Aug. 27, 2012), available at: *http://www.usc.edu/uscnews/newsroom/news_release.php?id=2795* (visited Aug. 28, 2012); The Pew Research Center for People and the Press, Further Decline in Credibility Ratings for Most News Organizations at 5 (Aug. 16, 2012), available at: *http://www.people-press.org/files/2012/08/8-16-2012-Media-Believability1.pdf* (visited Aug. 28, 2012).

[10] Bob Papper, RTDNA/Hofstra University, "2012 TV and Radio Staffing and News Profitability Survey," summarized at *http://www.rtdna.org/pages/media_items/2012-tv-and-radio-news-staffing-and-profitability-survey2094.php.*

[11] *See* Jeffrey A. Eisenach & Kevin W. Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting 1 (2011), Attachment A to Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011) in NAB Reply Comments to *Notice of Proposed Rulemaking* in MB Docket No. 10–71, at Appendix A (filed June 27, 2011).

If you support changes to current law, would your company provide consumers with the same flexibility to pursue a la carte programming options? If not, why not?

Answer. As a threshold matter, it is important to recognize that programming costs are *declining,* not rising, relative to other key economic indicators in the pay-TV industry. Thus, pay-TV industry contentions that retransmission consent fees drive consumer are patently false.

For years, cable operators consistently refused to pay cash for retransmission consent of local broadcast signals.[12] Despite this, the average monthly rate subscribers were charged for the combined basic and expanded-basic tiers of service *rose* from $26.06 in 1997 to $36.47 in 2002—a 40 percent increase over the five years.[13] This rate of increase was much greater than the general rate of inflation, as measured by the Consumer Price Index ("CPI"), which rose 12 percent over the same period.[14] Clearly, these rate increases were entirely unrelated to broadcast retransmission consent compensation.

Even today, the prices paid by MVPDs for retransmission consent are very modest when compared to other key indicators, such as MVPDs' other programming-related expenses, revenues and profits. Broadcasters' compensation is significantly less than that paid to non-broadcast program providers whose programming earns lower ratings. For example, in 2009, MVPDs paid an average of $2.08 per subscriber per month to carry one of the four most expensive cable networks and $1.49 per subscriber per month to carry one of the four most heavily viewed cable networks, while each of the "Big 4" broadcast network affiliates only received an average of approximately $0.14 per subscriber per month in retransmission consent fees.[15] MVPDs paid almost *fifteen times* more in fees for carriage of the four most expensive cable networks and approximately *ten times* more for carriage of the four most heavily viewed cable networks than they paid in retransmission consent fees for carriage of the Big 4 broadcast network affiliates.

As further evidence that retransmission consent fees are not driving higher cable rates, programming expenses, of which retransmission consent fees account for only a small fraction, are rising more slowly than other sectors of the cable industry's overall economic structure. For example, between 2005 and 2010, with respect to six publicly-traded cable operators:

- the share of cost of revenue accounted for by programming costs declined from 54 percent to 49 percent;
- the share of cost of revenue, plus selling, general, and administrative costs accounted for by programming costs declined from 36 percent to 34 percent;
- the ratio of programming expenses to total cable operating costs decreased (from 27 percent in 2005 to 26 percent in 2010);
- Cable operators monthly revenue per subscriber *increased* by $53.06 per subscriber per month, from $80.95 to $134.01, while programming expenses increased by just $10.03 per subscriber per month (from $18.21 to $28.24); stated differently, for every dollar increase in programming expenses, MVPDs raised monthly subscription rates by $5.29.
- The average retransmission fee per cable subscriber per month increased from *zero* in 2005 to $0.86 in 2010. Thus, in 2010, retransmission consent fees, at $0.86 per subscriber per month, were approximately *six tenths of one percent of cable operator revenues.*[16]

Further, retransmission consent fees are not expected to drive up cable subscriber rates in the future. A March 2009 study estimated that cable revenues per subscriber are predicted to rise *45 times* more than retransmission consent fees between 2006 and 2015.[17]

Accordingly, NAB does not believe that programming costs generally have driven the steady increases in consumer prices for pay-TV service. In particular, the modest retransmission consent fees paid to broadcasters are not the cause of consistent

[12] *See* GAO, *Issues related to Competition and Subscriber Rates in the Cable Television Industry,* GAO–04–8 at 43 (Oct. 2003) ("few retransmission consent agreements include cash payment for carriage of the local broadcast station").

[13] *Id.* at 20, 43–44.

[14] *Id.*

[15] SNL Kagan, *Economics of Basic Cable Networks 2009* and SNL Kagan, *Nielsen November 2009 Prime-Time Live Coverage.*

[16] *See Declaration of Jeffrey Eisenach and Kevin Caves,* Attachment to NAB Comments in MB Docket No. 10–71 (filed May 27, 2011) at 16–24.

[17] Jeffrey A. Eisenach, *The Economics of Retransmission Consent* (March 2009), attached to Reply Comments of NAB, MB Docket No. 07–269 (filed Jun. 22, 2009) at 33.

subscriber rate increases above the rate of inflation. We therefore do not see any reason for modifications to the current system.

Question 3. Given that retransmission consent deals are private sector negotiations under the 1992 Cable Act, it is difficult for observers and participants to track pricing trends.

Do you believe pricing transparency for distributors and for consumers could help to alleviate tensions over content deals? If not, why not?

If you do believe pricing transparency could be beneficial, please provide specific recommendations for such a proposal could be implemented.

Answer. There are several reasons why disclosure of retransmission consent pricing would not be helpful, and could in fact be harmful, to the current system of retransmission consent.

First, such proposals implicitly assume that retransmission consent negotiations are only about money. To the contrary, retransmission consent negotiations typically involve many complex and multidimensional issues, including such matters as video on demand, purchase of broadcast advertising by the MVPD (and vice-versa), broadcast station promotion by the MVPD (and vice-versa), connectivity between the station's studio/transmitter and the MVPD's headend/local receive facility, digital and multicast channel carriage, electronic program guide placement, and news insertion options, to name a few. Disclosure of "price" is not a simple matter, there are often myriad elements beyond cash fees that constitute the overall price compensation in a retransmission consent agreement.

Another issue to consider is whether such disclosures could effectively establish either a "floor" or a "ceiling" for retransmission consent fees in a given market. This could harm broadcasters and/or pay-TV providers because each transaction should reflect unique and specific marketplace circumstances involving the parties to that transaction. For example, a broadcaster may wish to offer a lower rate to a specific MVPD because that MVPD is able to offer the broadcaster a unique video-on-demand partnership. When other MVPDs learn of the reduced rate, they may seek that same rate when their retransmission consent agreements are up for renewal (even if they are not willing or able to offer the same types of non-price terms and conditions). In light of that likely outcome, the broadcaster in this scenario may be deterred from offering a lower rate and entering an arrangement that would otherwise have created new programming options for viewers. As you can see, disclosure could create disincentives that harm both the industry and the viewing public.

Finally, it is important to consider how one-sided it would be to require only retransmission consent rates to be disclosed. Interestingly, the pay-TV providers who have supported proposals for rate disclosure do not seek "transparency" across the board. Rather, these providers wish for broadcasters to lay all their cards on the table while pay-TV providers get to keep theirs close to the vest. Under their proposals, MVPDs would not have to disclose the rates that they pay to non-broadcast programming services with substantially less audience appeal, or any of the data relevant to determining their costs per channel.

Question 4. Going forward, how should Congress and/or the Federal Communications Commission measure whether or not the current system is working? Please provide specific metrics to support your answer.

Answer. I think there are several key indicators that the existing retransmission consent system is working, and that these indicators can continue to be monitored by Congress and/or the Commission. The leading indicator is that the overwhelming majority of retransmission consent deals are getting done. Studies that show that retransmission consent disputes affect only hundredths of a percent of annual television viewing hours. Congress and the FCC could use such metrics to help assess the extent and nature of negotiating impasses. Congress and the Commission also should consider the extent to which certain pay-TV providers are repeatedly involved in disputes with broadcasters and other programmers. Such repetitive conduct suggests that these pay-TV providers may be more focused on generating interest in government intervention on their behalf than engaging in genuine attempts to reach agreement.

Another key indicator that the system is working is the extent to which broadcasters are upgrading and expanding their services to the public. Retransmission consent fees help support the quality, quantity and diversity of broadcast programming and services. As discussed in response to question #1 above, this includes offering ever-increasing amounts and types of programming through the use of multicasting, more HD programming, mobile DTV, and the local news and emergency information on which so many Americans rely. Because local television stations today increasingly rely upon revenue streams other than over-the-air advertising to support the varied services they offer, the ability to engage in fair negotiations with

pay-TV providers for the value of the broadcast signal is critical to broadcasters' ability to generate revenue and re-invest those dollars in local news operations and a range of digital services.

Question 5. If Congress were to revisit the 1992 Cable Act, are there improvements to the law which you believe Congress should consider?

Answer. NAB believes that the current systems of must carry and retransmission consent are functioning effectively. In comments filed with the FCC in 2011, however, NAB proposed a small number of modifications to FCC rules that we believe would assist American television viewers. These proposals could certainly be taken up by Congress in an effort to promote the interests of viewers as part of a review of the 1992 Cable Act.

First, NAB urged the FCC to extend its consumer notice requirements to all MVPDs. This requirement, which requires advance notice to consumers of any changes to their channel line-ups, currently applies only to cable operators. Extending this rule to all MVPDs would ensure that consumers have adequate information to make informed decisions about how to access programming in the rare instances when they may be impacted by a negotiating impasse.

Second, NAB observed that many MVPDs now require that their subscribers pay early termination fees ("ETFs") when canceling services prior to the termination of a service agreement, which could impede subscribers' ability to cancel and/or change their MVPD service in the event of a retransmission consent dispute. NAB urged the Commission to ensure that the ability and freedom of consumers to make such decisions are not impeded by the use of ETFs.

Finally, NAB has noted that there is a dearth of information about MVPD ownership, operations, and geographic coverage. Current information about such matters is critical to broadcasters' ability to make timely carriage elections and retransmission consent-related communications. Accordingly, we urged the FCC to consider rules that require MVPDs to periodically file with the FCC data on their ownership (including contact information), operation, and geographic coverage. This greater transparency could be achieved in a manner that is not unduly burdensome but would promote more effective and timely communications between broadcasters and MVPDs.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE TO HON. GORDON H. SMITH

Existing FCC Authority

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") amended the Communications Act to include Section 325, which provides television stations with certain carriage rights on local market cable television systems. The Commission established rules related to the retransmission/mandatory carriage election cycle, but did not adopt rules governing the negotiation process of retransmission consent.

However, the statute clearly calls for the FCC to ensure that broadcasters act in "*good faith during negotiations.*" During the Sinclair-Mediacom dispute back in 2007, the Commission didn't intervene because then Chairman Martin interpreted the law didn't and stated that the agency didn't have the authority to impose binding arbitration. At the time, he stated "It's not clear to me that the commission does have the authority to order arbitration."

Yet, during that time in January 2007, Senator Inouye and the late Senator Stevens wrote the FCC stating that the Commission did indeed have authority to intervene and, if necessary, use binding arbitration to resolve any failed negotiations.

Question 1. Given the existing statute and the Congressional letter, couldn't the current Commission interpret the statue differently than Chairman Martin to where they do have the statutory authority to be involved in any disputes? What is precluding them from doing so?

Answer. The short answer to your question is—as the Commission has consistently concluded—it does not have the authority to require mandatory arbitration.[1] Mandatory arbitration would be inconsistent with Section 325 of the Act. Section 325(b) expressly states that broadcasters, and only broadcasters, can provide multichannel video programming distributors (MVPDs) with authority to retransmit their

[1] *See, Amendment of the Commission's Rules Related to Retransmission Consent,* 26 FCC Rcd 2718, 2728–29, ¶18 (2011) (FCC concludes that it lacks "authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations").

broadcast signals.[2] The plain language of Section 325(b) makes clear that no party—neither the FCC nor an arbiter—can authorize an MVPD to transmit a station's broadcast signal without the broadcaster's consent. If the FCC were to mandate that broadcasters and MVPDs engage in arbitration to resolve retransmission consent disputes, the parties would have no choice but to submit to arbitration, which, by definition, involves the arbitrator rendering a "final and binding" decision. Thus, the adoption of mandatory binding arbitration as a mechanism to resolve retransmission consent disputes contravenes the plain language of Section 325(b) because it would permit the arbitrator, not the broadcaster, to decide the terms upon which to grant permission to a MVPD to carry a broadcaster's signal.

Mandatory arbitration is contrary to the most fundamental premise of the retransmission consent marketplace established by Congress, in which local television stations have the opportunity to negotiate for compensation from MVPDs in exchange for the right to retransmit and resell their broadcast signals.[3] Congress made it quite plain that this retransmission consent marketplace is to function without government intervention. In particular, Congress emphatically rejected the notion that it or the Commission should or would "dictate the outcome" of the negotiations between broadcasters and MVPDs.[4] By forcing the parties into mandatory binding arbitration, the FCC would impermissibly intervene in retransmission consent negotiations. Thus, mandatory arbitration contravenes congressional intent.

Mandatory arbitration is also contrary to the Administrative Dispute Resolution Act ("ADRA") which authorizes an agency to use arbitration only when all parties consent.[5] The ADRA expressly prohibits an administrative agency from requiring arbitration. In particular, Section 575(a)(3) of the United States Code states that: "an agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit."[6] This "prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides."[7]

Question 2. If Congress directed the FCC to ensure broadcasters act in "good faith" during negotiations, how do you believe the FCC can go about fulfilling that responsibility and to limit or prevent the disruption of programming to cable and/or satellite customers?

Answer. The FCC has established rules implementing the statutory good faith negotiation requirement and has a process in place for adjudicating complaints of violations of the good faith rules. In the cases that the FCC has decided on the merits, broadcasters have never been found to have violated the good faith negotiation standard, although one MVPD was found to have violated the standard,[8] and another was found to have abused the complaint process.[9]

NAB has urged the FCC to adopt certain changes to its rules to promote the interests of viewers. First, we urged the FCC to extend its consumer notice requirements to all MVPDs. This requirement, which requires advance notice to consumers of any changes to their channel line-ups, currently applies only to cable operators. Extending this rule to all MVPDs would ensure that consumers have adequate information to make informed decisions about how to access programming in the rare instances when they may be impacted by a negotiating impasse. Second, NAB observed that many MVPDs now require that their subscribers pay early termination fees ("ETFs") when canceling services prior to the termination of a service agreement, which could impede a subscriber's ability to cancel service in the event of a retransmission consent dispute. NAB urged the Commission to ensure that the ability and freedom of consumers to make such decisions are not impeded by the use of ETFs. Third, NAB has noted that there is a dearth of information about MVPD ownership, operations, and geographic coverage. Current information about such matters is critical to broadcasters' ability to make timely carriage elections and retransmission consent-related communications. Accordingly, we urged the FCC to consider rules

[2] 47 U.S.C. § 325(b)(1)(A).

[3] *See* S. Rep. No. 102–92 ("Senate Report") at 36 (stating that the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") created a "marketplace for the disposition of the rights to retransmit broadcast signals").

[4] *Id.*

[5] 5 U.S.C. § 575(a)(1). *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party,* Internal Policy Statement and Order, 6 FCC Rcd 5669 (1991). *See also* S. Rep. No. 101–543 at 13 (1990).

[6] 5 U.S.C. § 575(a)(3).

[7] S. Rep. No. 101–543 at 13 (1990).

[8] *See Letter from Steven Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable T.V.,* 22 FCC Rd 4933 (2007) (cable operator failed to meet good faith standard).

[9] *See EchoStar Satellite Corp.* v. *Young Broadcasting, Inc.,* Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of FCC processes and lack of candor).

that require MVPDs to periodically file with the FCC data on their ownership (including contact information), operation, and geographic coverage. This greater transparency could be achieved in a manner that is not unduly burdensome but would promote more effective and timely communications between broadcasters and MVPDs.

Reasonable Basic Service Tier Rates

Question 3. While I understand programming costs are growing, I am concerned about the significant increase in retransmission compensation that has occurred over the past several years. For example, retransmission consent revenue climbed more than 30 percent for six broadcasters in the first nine months of 2008. *By 2017, SNL Kagan—an industry analysis firm—projects retransmission fees will grow to $3.61 billion, with average per-subscriber fees potentially doubling.* So, as broadcasters look to increase revenue streams through retransmission fee, it seemingly puts upward pressure on the price of basic cable and ultimately consumers. Such increase may also infringe upon the existing statute.

Section 623(b)(1) requires the FCC to ensure that basic cable service rates are reasonable. In addition, Section 325(b)(3)(A) requires the Commission to consider the impact that retransmission consent has on basic cable service rates and that any regulations do not conflict with the FCC's "obligation under Section 623(b)(1)" to ensure such rates are reasonable.

According to SNL Kagan, the average cable TV subscriber in 2011 paid $78 a month compared to only $40 per month in 2001. Whereas the average household income fell 6 percent between 2006 and 2010, according to the U.S. Census.

Do you know if the FCC is actively examining the impact of increasing retransmission fees in relation to basic cable rates?

Answer. In its rulemaking proceeding on retransmission consent initiated last year, the FCC specifically inquired whether there is an impact on the basic service rate that consumers pay as the result of retransmission consent fees or disputes.[10] Various parties commented on that issue, as well as the myriad others raised in the *Notice.* This proceeding remains pending at the FCC. As discussed in response to Question 4 below, NAB has presented evidence demonstrating that rising cable rates are not caused by retransmission consent fees. In fact, retransmission fees are miniscule in comparison to cable revenues.

Question 4. Can you elaborate on what impact these retransmission fees have on the cost of basic cable service? What percentage of a cable customer's monthly cable bill is attributed to retransmission fees paid to the broadcasters (a rough estimate will suffice) for (1) a customer subscribing to basic cable and (2) a customer subscribing to the most expensive cable TV package?

Answer. Any suggestion that retransmission consent fees drive the rates subscribers pay for MVPD service is patently false. For years, cable operators consistently refused to pay cash for retransmission consent of local broadcast signals.[11] Nevertheless, the average monthly rate subscribers were charged for the combined basic and expanded-basic tiers of service rose from $26.06 in 1997 to $36.47 in 2002—a 40 percent increase over the five years.[12] This rate of increase was much greater than the general rate of inflation, as measured by the Consumer Price Index ("CPI"), which rose 12 percent over the same period.[13] These rate increases were entirely unrelated to broadcast retransmission consent fees.

Even now, the prices paid by MVPDs for retransmission consent are very modest when compared to other key indicators, such as MVPDs' other programming-related expenses, revenues and profits. Broadcasters' compensation is significantly less than that paid to other programmers of equal or lower, ratings. For example, in 2009, an MVPD paid an average of $2.08 per subscriber per month to retransmit one of the Top 4 most expensive cable networks and $1.49 per subscriber per month to retransmit one of the Top 4 most heavily viewed cable networks, while each of the "Big 4" broadcast network affiliates only received an average of approximately $0.14 per subscriber per month in retransmission consent fees in 2009.[14] MVPDs paid almost *fifteen times* more in fees for carriage of the Top 4 most expensive cable net-

[10] *See Amendment of the Commission's Rules Related to Retransmission Consent,* 26 FCC Rcd 2718, 2727 ¶ 17 (2011).

[11] *See* GAO, *Issues related to Competition and Subscriber Rates in the Cable Television Industry,* GAO–04–8 at 43 (Oct. 2003) ("few retransmission consent agreements include cash payment for carriage of the local broadcast station").

[12] *See* GAO, *Issues related to Competition and Subscriber Rates in the Cable Television Industry,* GAO–04–8 at 20, 43–44 (Oct. 2003).

[13] *Id.*

[14] SNL Kagan, *Economics of Basic Cable Networks 2009* and SNL Kagan, *Nielsen November 2009 Prime-Time Live Coverage.*

works and approximately *ten times* more for carriage of the Top 4 most heavily viewed cable networks than they paid in retransmission consent fees for carriage of the Big 4 broadcast network affiliates.

As further evidence that retransmission consent fees are not driving higher cable rates, programming expenses, of which retransmission consent fees account for only a small fraction, are rising more slowly than other sectors of the cable industry's overall economic structure. For example, between 2005 and 2010, with respect to six publicly-traded multiple system operators ("MSOs"):

- the share of cost of revenue accounted for by programming costs declined from 54 percent to 49 percent;
- the share of cost of revenue, plus selling, general, and administrative costs accounted for by programming costs declined from 36 percent to 34 percent;
- the ratio of programming expenses to total MSO operating costs decreased (from 27 percent in 2005 to 26 percent in 2010);
- MSOs' monthly revenue per subscriber *increased* by $53.06 per subscriber per month, from $80.95 to $134.01, while programming expenses increased by just $10.03 per subscriber per month (from $18.21 to $28.24); stated differently, for every dollar increase in programming expenses, MVPDs raised monthly subscription rates by $5.29.
- the average retransmission fee per cable subscriber per month increased from *zero* in 2005 to $0.86 in 2010. Thus, in 2010, retransmission consent fees, at $0.86 per subscriber per month, were approximately *six tenths of one percent of cable MSO revenues.*[15]

Further, retransmission consent fees are not expected to drive cable subscriber rates in the future. A March 2009 study estimated that cable revenues per subscriber are predicted to rise *45 times* more than retransmission consent fees between 2006 and 2015.[16]

Eliminating Retransmission Consent and Compulsory Licenses

Question 5. While there is no question that Congress must examine and reform outdated provisions in the statute, there are legislative proposals before Congress that propose sweeping changes to laws governing cable and broadcast obligations. In particular these bills propose repealing retransmission consent, must carry, and the Copyright Act's "compulsory license" provisions.

During the hearing, witnesses provided conflicting testimony on the impact such eliminations would have on the marketplace and with retrans negotiations—some said it would only increase disputes and others said it would wouldn't.

Can you elaborate, in detail, on how negotiations between MVPDs and broadcasters (and/or programming/content owners and anyone else that might now be included) would be carried out, if the compulsory license, must carry, and retransmission consent provisions were eliminated? Please lay out the process and parties that would exist in negotiating the rights to use programming/content. Also, please compare/contrast the new negotiation process that would result versus the current retransmission consent negotiations.

Answer. If the compulsory licenses for MVPDs were eliminated, in order for an MVPD to carry a broadcast signal, some party would be required to obtain the necessary copyright clearances for every copyrighted work that was broadcast on that signal. This would include the copyright owners of movies, syndicated programs, sports, news and information programs, and all segments contained therein, all music included in any program, etc. Some of these rights are held directly by the program creator. Others are assigned or licensed to program syndicators or collectives who have the rights to negotiate for the public performance of a work by a television station, but currently probably do not have the rights necessary for an MVPD to retransmit a program or piece of music included in a station's signal.

In studies, the Copyright Office has identified three possible user entities that could negotiate for these rights: broadcast stations, the MVPDs, or possibly some sort of rights collective.[17] None are particularly satisfactory, and it is anticipated that any of these parties would incur extraordinary expense in making such a transition. The typical broadcast station simply is not equipped, either with the per-

[15] *See Declaration of Jeffrey Eisenach and Kevin Caves,* Attachment to NAB Comments in MB Docket No. 10–71 (filed May 27, 2011) at 16–24.
[16] Jeffrey A. Eisenach, *The Economics of Retransmission Consent* (March 2009), attached to Reply Comments of NAB, MB Docket No. 07–269 (filed Jun. 22, 2009) at 33.
[17] United States Copyright Office, *Satellite Television Extension and Localism Act Section 302 Report, A Report of the Register of Copyrights* (Aug. 29, 2011) at 66–128.

sonnel, resources or expertise, to undertake such complicated and multifaceted negotiations. Moreover, it is unlikely that a station could begin to recoup such costs in negotiations with multiple MVPDs. For the same reasons, most MVPDs also have no desire to undertake these licensing tasks. Before the Copyright office, associations for small and large cable systems have opposed elimination of these licenses.

The third option would be the formation of licensing collectives. The paradigm for these would be ASCAP and BMI, the large music collectives. The history of these collectives is that they were sued for antitrust violations, entered into consent decrees, and the license fees and conditions they impose are administered by a Federal rate court. It is difficult to see how that paradigm is any improvement over the existing compulsory licenses.

There are several other consequences detrimental to the public interest that could be foreseen by elimination of the compulsory licenses. First, because rights for certain programs or categories of programs (such as certain sports programming) might not be obtainable by individual stations, they might simply disappear from free over-the-air television. Specifically, there could be the problem of the "holdout" where, for example, the rights to a program were secured, but not the music within it. Depending on the timing of these negotiations, the holder of such rights could be in a position to demand confiscatory rates. Second, there is the possibility that some quality programming now available on free over-the-air television would migrate to pay channels which are better equipped to negotiate such rights. Third, whatever entities undertook these new and extensive negotiations would seek to recoup their costs, which could well be passed on to consumers.

The response to this question would not be complete without pointing out that under currently introduced legislation, a station's property right in its signal would be eliminated. Hence, stations would have far less to negotiate with, their only remaining rights being those in the programming which they produce and in which they owned the copyrights.

Question 6. If you believe that eliminating these provisions would lead to more disputes, can you elaborate, in detail, on why?

Answer. Elimination of the compulsory licenses would significantly increase the potential for many more disputes, simply because there would be scores more individual negotiations for each program and program segment, any one of which could result in disputes, stalemates or, at the least, delays.

Question 7. If you believe that eliminating these provisions would lead to less disputes, can you elaborate, in detail, on why?

Answer. Eliminating these provisions would *not* lead to fewer disputes, but would increase the number of disputes. *See* response to Question 6.

Question 8. In witness testimony, it was indicated that for 2012, to date, there have already been 69 disputes regarding retransmission consent. How many disputes have occurred between MVPDs and non-broadcast networks/programmers?

Answer. NAB does not keep track of the number of disputes that occur between MVPDs and non-broadcast networks/programmers. We checked with a leading media industry research/analysis firm, which reported that it did not compile this data either.

However, there have been and continue to be a number of carriage disputes between MVPDs and non-broadcast networks that result in interruptions of service to consumers, some of which last for months. For example, the continuing dispute between the AMC Networks and DISH had led to AMC being unavailable to DISH subscribers since June 30, 2012. There also have been service disruptions this year due to disputes between DirecTV and Viacom's non-broadcast networks (*e.g.,* Comedy Central, MTV, Nickelodeon, etc.) and high profile disputes between Time Warner Cable and sports programmers, such as the New York-based MSG network.

Question 9. It is my understanding that while there has been a 15 percent increase in commercials television stations from 1996 to 2010, there has also been a 33 percent decrease in the number of station owners. There has also been a continued dearth of ownership by minorities and women—which is approximately only 5 percent and 3.3 percent of TV market share, respectively (both well below their population representation). Both indicate a significant deficit in achieving the policy goals of localism and diversity.

A free exchange of a wide range of viewpoints is the lifeblood of our democracy, and the print and broadcast media serve an indispensable function by exposing our society to diverse thoughts and viewpoints.

What would the impact of eliminating must carry requirements from the law have on local and independent stations? Without must carry how could a local independent station get carried by a MVPD? Is there any obligation of the MVPD to carry the station?

Answer. Elimination of the must-carry requirements would have devastating consequences for a number of stations, typically those unaffiliated with major networks and often serving niche audiences, including minority and foreign-language speaking viewers and religious groups. Without must-carry, it is possible that the only way some of these stations could obtain carriage, if at all, would be by paying the MVPD, which niche stations generally cannot afford.

Elimination of these rules would also significantly impede the introduction of new and diverse programming to the viewing public—programming that is not owned or selected by the MVPD. A number of the now popular Hispanic-oriented networks and even the Fox broadcast network relied on must-carry at their inception.

Studies have confirmed that must-carry promotes Congress' goal of helping to preserve a multiplicity of free, over-the-air broadcast stations and that must-carry is especially important for the preservation of independent stations.[18] Elimination of the must-carry rules and the consequent loss of audience and advertising revenues clearly could result in the loss of many these stations and their unique and diverse programming, which benefits both MVPD subscribers and non-subscribers alike.

Question 10. Would the elimination of must carry possibly lead to more concentration in the media market and, as a result, further muting the diversity of media voices, which has been a resolute policy of our nation's telecommunications and media laws?

Answer. For the reasons set forth in response to Question 9, the elimination of the must-carry rules clearly would lead to more concentration in the media marketplace and in the muting of the diversity of media voices. The religious, ethnic, and culturally diverse programming carried on the generally small, non-major network affiliated must-carry stations is not duplicated elsewhere on MVPD channel lineups. And these stations are not owned or controlled by the MVPDs, unlike many other program networks that they typically carry. Cable operators, along with Verizon and AT&T, collectively control about 70 percent of the pay-TV market,[19] and the ten largest MVPDs (including satellite operators) control 91.3 percent of that market.[20] At least one leading industry analyst sees satellite and telephone company market penetration peaking, while forecasting future growth for cable.[21] With these concentration levels for cable specifically and for MVPDs generally, must-carry is essential to maintaining the diversity of media voices.

Online Video vs. Traditional Video

Question 11. According to Nielsen Media, the average American watches over 153 hours of video per month on traditional television compared to only 4.5 hours per month of online video. Also, approximately 97 percent of American households have a television whereas 68 percent of households have broadband (the U.S. currently ranks 23rd in broadband penetration).

In addition, a 2011 Project for Excellence in Journalism survey found that local TV remains America's most popular source of local news and information, particularly for weather and breaking news—89 percent of surveyed adults get information about local weather and 80 percent follow local breaking news through local television. Only about 51 percent of smartphone users use the device to get news.

While the Internet is a very value medium for media and news and provides incredible benefit to users, most Americans still rely heavily on traditional television for programming, local news, and even weather.

With the current penetration and marketplace, is the Internet a "perfect substitute" to traditional television programming and local broadcast news? If not, what do believe is required for it to be a substitutable good to traditional television and local news?

Answer. The Internet provides consumers with access to information, news and entertainment from innumerable sources around the world. These online sources increasingly compete with traditional broadcast television stations for viewers' time and attention and for advertisers' dollars. However, the Internet is far from a "perfect substitute" for traditional television programming, especially for local news and emergency information. I think the Internet might more accurately be described as one of the mix of platforms and sources that consumers now use to access information and entertainment.

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[18] *See, e.g.,* G.S. Ford and J.D. Jackson, "Preserving Free Television? Some Empirical Evidence on the Efficacy of Must-Carry," 13 J. Media Econ. 1 (2000).

[19] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Fourteenth Report),* FCC 12–81 (rel. July 20, 2012) at p. 3.

[20] *See 2012 SNL Kagan Media Census Estimates,* First Quarter 2012.

[21] *U.S. Telecommunications and U.S. Cable & Satellite: Nature Versus Nurture,* Sanford C. Bernstein & Co. (May, 2012) at pp. 63–94.

Another reason the Internet is not a perfect substitute for local television is the relative availability of the two mediums. Broadband access has increased rapidly and is continuing to increase today, but—unlike broadcast television—it is not yet universal and certainly not free. The broadcast television availability advantage is especially apparent when Americans need access to critical information, as they would during severe weather or other emergencies. No other medium matches the ability of local broadcasters to deliver potentially life-saving information to local communities. Particularly when the power fails and Internet connections and wireless networks are overwhelmed, nothing surpasses the one-to-many architecture of over-the-air broadcasting, both TV and radio, to provide uninterrupted critical information to citizens.

Finally, I note that no web-only company makes the same kind of commitment to local journalism as local TV stations. A 2012 survey by the Radio Television Digital News Association found that, despite the struggling economy, television news employment is at its second highest level ever and that the average television station set a new record last year for the amount of local news aired (five and half hours per weekday).

Value of Public Broadcasting

Question 12. Harris Interactive, an independent, non-partisan research firm, found—for the ninth year in a row—that PBS (Public Broadcasting Service) is the Nation's most-trusted institution by the American public. PBS ranked higher than our court system, newspapers, our Federal government, and, surprisingly, even Congress.

In addition, 74 percent of the American public surveyed believe Federal funding for PBS is money well spent. PBS was also the most trusted and safe place for children to watch television—88 percent of Americans surveyed agreed.

What role do you see public television playing in providing local programming?

Answer. Public broadcasting continues to be a valuable part of the local television environment.

Question 13. To your knowledge, do you believe PBS or any other public broadcasting station would be adversely impacted by any of the legislative proposals (that would do away with must carry, retrans, or compulsory licenses) currently in Congress?

Answer. I believe that public broadcasters share many of the same concerns that commercial broadcasters have (as expressed above) with the pending proposals.

Gentlemen's Agreement Not to Pull Signal

Question 14. Several of the negotiation disputes have threatened or have actually disrupted cable customers' viewing of major television programming—whether that is sporting events, season finales of shows, or the Oscars. It is my understanding cable operators are prohibited from pulling broadcast signals during sweeps when ratings determine advertising rates—the life blood of your business.

Why shouldn't there be a similar prohibition on broadcasters to not pull their signals in a retransmission negotiation impasse during a major sporting event or other highly watched programming like the Oscars—in order to limit the disruptive nature of negotiation disputes to consumers?

Answer. Since the establishment of the current system of retransmission consent, hundreds of major sporting and entertainment events have come and gone without incident or disruption to any consumer. The system works so well that data shows that consumers are more likely to face a power outage or an outage of their entire pay-TV service than to be affected by a retransmission consent dispute. Even in the rare instances that a disruption occurs, local stations' signals have not been "pulled"—they remain available free over-the-air, and can also be viewed via other pay-TV services.

The current regime specifies that both broadcaster and pay-TV parties must, as part of their good faith negotiation obligations, negotiate at reasonable times and locations, and must not unreasonably delay negotiations. Further government intervention into the timing of the negotiating process, including when those agreements commence or terminate, easily could create disincentives to timely reaching agreement. Certainly the prohibition on broadcasters proposed in this question would substantially reduce the incentives of cable operators to conclude retransmission negotiations prior to a major sporting event or a "highly watched" program (however defined), if those operators knew they could continue to use broadcasters' signals for their own profit, even in the absence of any agreement between them.

Question 15. Would you (and/or your affiliates/members) agree to voluntarily adopt an arrangement of where you would not pull your signal prior to a major

sporting or highly watched/anticipated event if negotiations are at an impasse? You could obviously still pull your signal after the event, if you so desired.

Answer. For the reasons discussed above in responding to Question 14, I do not think this will benefit the public. Under the current system, both broadcasters and pay-TV providers have strong incentives to reach agreement prior to the termination of retransmission consent agreements. Modifications to the system, including additional public commitments by broadcasters to offer extensions of existing agreements because of a major sporting or other special event, could delay final resolution of negotiations and reduce incentives for pay-TV providers to negotiate in a timely manner prior to these events. Ultimately, consumers are unlikely to benefit from policies that reduce incentives to negotiate in good faith.

I also want to stress that, during many retransmission negotiations, television stations reach short-term agreements with pay-TV providers, allowing them to continue carrying the stations' signals while negotiations continue. On occasion, however, pay-TV providers have attempted to condition their agreement to these short-term carriage arrangements on the broadcaster *not* providing notice to its viewers of a potential programming disruption. *See* response to Question 2 above.

Local Programming & Independent Programming

Question 16. I have long been a champion of promoting localism and diversity in television. Local media—be it newspaper, radio, or television—play a critical role in informing citizens about important decisions made by their local, state, and Federal officials. *Even with the Internet and other media sources, a 2011 Project for Excellence in Journalism survey found that local TV remains America's most popular source of local news and information, particularly for weather and breaking news—89 percent of surveyed adults get information about local weather and 80 percent follow local breaking news through local television.* Also, locally owned stations also air more local news and programming than non-locally owned stations, typically 5 1/2 minutes more per day.

It seems to me that one way to make sure that local television stations can continue to invest in local journalism is to allow them to recoup the investments they make in local programming. I am concerned about the impact that various legislative proposals would have on localism. Some have proposed to significantly alter the negotiating leverage of the parties in a way that could make it more difficult for local broadcasters or independent programmers to receive fair value for their programming.

Do you agree? Can you discuss your concerns with the various legislative proposals and its impact on local stations and the availability of local programming to consumers that rely on overthe-air broadcasting?"

Answer. I wholeheartedly agree. Television broadcast stations are an unrivaled source of local and national news and vital emergency information and alerts. Broadcast television is the leading news source, with 37.4 percent of American adults reporting that they consider broadcast television to be their *primary* sourceof news.[22] Recent surveys also show that viewers consider local television news more trustworthy than other news sources.[23]

To meet the needs and high expectations of their viewers, local television stations invest heavily in their local news operations. Recent survey data show that television news staffing has risen to the second highest levels on record, with stations adding 1,131 jobs for a total of 27,653 full time staff in 2011. In addition, 42.4 percent of stations added to their newscasts last year, and a significant number (31.2 percent) plan to increase news during the coming year. Despite challenging eco-

[22] Television Bureau of Advertising, TV Basics Report (June 2012) at 25, available at: *http://www.tvb.org/media/file/TV Basics.pdf* ("TV Basics Report"). Local television broadcast stations also are the top source for local weather, traffic and sports. *Id.*

[23] *See* University of Southern California, *National USC Annenberg-Los Angeles Times Poll Shows Local Television News Rules with Voters,* Press Release (Aug. 27, 2012), available at: *http://www.usc.edu/uscnews/newsroom/news release.php?id=2795* (visited Aug. 28, 2012); *See* The Pew Research Center for People and the Press, Further Decline in Credibility Ratings for Most News Organizations at 5 (Aug. 16, 2012), available at: *http://www.people-press.org/files/2012/08/8–16–2012-Media-Believability1.pdf* (visited Aug. 28, 2012) ("believability ratings for local TV news are [currently] higher than those for the three cable news outlets" and, over the years, "credibility ratings for local TV news have remained more stable than have ratings for the three main cable news outlets").

nomic times, most stations either increased or maintained their news budgets during the past year.[24]

Local television stations today increasingly rely upon revenue streams other than over-the-air advertising. Thus, the ability to engage in fair negotiations with pay-TV providers for the value of the broadcast signal is critical to broadcasters' ability to generate revenue and re-invest those dollars in local news operations. Legislative proposals that would eliminate broadcasters' retransmission consent rights are fraught with risks of greater disruptions in service and the possibility that broadcasters will no longer be able to secure compensation for the value of their signals. Although I understand that the intent of these proposals is for broadcasters to maintain control of their copyright interests through direct licensing and to allow for carriage negotiation, local broadcasters' value in their signals is not the same as the copyright interests in the differing programming elements (*e.g.,* network, syndicated, local). Many stations may be unable to undertake the expensive and cumbersome responsibility of direct licensing (see response to Question 5 above), and such a change likely will impair the ability of local stations to serve their local markets.

Similarly, any legislation that would interfere with privately negotiated exclusivity contracts between broadcasters and networks or syndicators also would harm the public interest. Some legislative proposals would eliminate the FCC's rules permitting the enforcement of privately-negotiated non-duplication and syndicated exclusivity agreements. NAB stresses that these rules do not actually create any exclusive rights. Rather, they provide a means for parties to the exclusive contracts to efficiently enforce them. In fact, the FCC's rules actually limit and restrict program exclusivity by limiting the geographic area in which television stations may enter into program exclusivity agreements with network and syndicated program suppliers.

Moreover, allowing pay-TV providers to import from distant markets signals carrying duplicative network and syndicated programming ultimately will harm viewers, by undermining local stations' economic base for producing local news and information—including critical emergency information. Specifically, limiting broadcasters' ability to enter into and/or enforce exclusive contracts will jeopardize stations' advertising revenues because the lack of program exclusivity in a market makes television stations less attractive to advertisers. Without sufficient advertising revenue streams, local stations cannot afford to invest in valued informational and entertainment programming. Both local stations and their viewers would be severely harmed if pay-TV providers could undermine stations' exclusivity rights by importing distant stations' signals.

Question 17. How important are media ownership rules to promoting competition, diversity, and localism? Some broadcasters have called for relaxing media ownership rules but could that cause greater consolidation and concentration, which would be counter to goals in the statute of promoting competition, localism, and diversity?

Answer. I disagree that reforming out-of-date ownership restrictions would undermine localism, competition and diversity. As NAB has explained in detail in many FCC submissions, these broadcast-only ownership restrictions do not reflect today's multichannel, multiplatform marketplace. These limitations distort marketplace competition and place local broadcasters at a severe disadvantage. The rules limit broadcasters' ability to respond to market forces, as satellite, cable and Internet-based outlets proliferate and compete for audiences and advertising revenues without comparable restrictions. As a result, many broadcast stations struggle to maintain their economic vibrancy and to continue providing a high level of service to local communities. Broadcast outlets in small markets with more limited advertising potential face a particularly challenging economic environment.

Reform of these outmoded restrictions would enhance competition by strengthening the ability of local stations to compete against their multichannel and online competitors. Competitively viable local stations will have both the resources and the incentives to offer programming that meets the needs and interests of their diverse communities, including niche audiences and smaller demographic groups that are increasingly better served through stations' digital capabilities, particularly multicasting.

Finally, numerous studies, including a number conducted by or for the FCC, have shown that common ownership enhances local service in local markets, including stations' news and informational programming. In its previous quadrennial reviews of the broadcast ownership rules, the FCC has found that common ownership of

[24] Bob Papper, RTDNA/Hofstra University, "2012 TV and Radio Staffing and News Profitability Survey," summarized at *http://www.rtdna.org/pages/media__nitems/2012-tv-and-radio-news-staffing-and-profitability.survey2094.php.* Part I–II.

multiple media outlets in local markets can enhance localism, a finding that has been upheld by the courts.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JIM DEMINT TO HON. GORDON H. SMITH

Question 1. If enacted as written, would the Next Generation Television Marketplace Act, S. 2008, allow a pay-TV company to retransmit the programming aired on broadcast signals without consent?

Answer. Although I understand the intent of these proposals is for local television stations to maintain control of their copyright interests through direct licensing and to allow for carriage negotiation, local broadcasters' value in their signals is not the same as the copyright interests in the differing programming elements (*e.g.,* network, syndicated, local). Many stations may be unable to undertake the expensive and cumbersome responsibility of direct licensing, and such a change likely will impair the ability of local stations to serve their local markets.

Question 2. A written statement delivered by David Barrett, on behalf of the National Association of Broadcasters (the NAB), at a June 27, 2012, House Energy and Commerce Hearing on "The Future of Video", included the following:

> Two bills currently before Congress, H.R. 367S and S. 2008, both known as "The Next Generation Television Marketplace Act of 2011," will harm local stations and television viewers in at least three ways. First, they would turn back the clock to a time when cable and satellite providers confiscated and resold broadcast signals to their subscribers without obtaining broadcasters' consent—a time when broadcasters were forced to subsidize their pay-TV competitors. . .

Will you please provide for the Committee the legal analysis used by the NAB to reach this understanding of these pieces of legislation?

Answer. That statement appears to be a general reference to a time before broadcasters had a right to negotiate for compensation for carriage of their signals. This prompts a broader discussion on current bill language and whether it fully protects the broadcast "signal" versus protecting various aspects of the content through copyright. Several legal analysts have drawn distinctions between the two—signal vs. copyright—and may have suggestions on how that may be better addressed.

Question 3. Are cable subscribers required by Federal law to purchase a certain package of channels when they buy cable video service?

Answer. Perhaps this may be better answered by the cable witnesses, but my understanding is that the broadcast tier is a component of any cable package given the critical nature of the service provided by local broadcasters and their public and community value.

Question 4. Are cable providers prevented by Federal law from selling a subscriber only a single channel, Discovery Channel for example, or only a package of sports channels?

Answer. Again, the cable witnesses may be better suited to answer. My understanding is that beyond the basic tier requirements, a la carte type packaging is neither required nor prohibited by the current regulatory structure.

Question 5. Do you believe it is "free market" for Federal law to force cable companies to carry your member stations—whether by must-carry or retransmission consent—on the "basic tier" and effectively force cable subscribers to purchase the basic tier? (47 USC § 543(b)(7)(A))

Answer. Congress has long-held the view that local television stations are a foundational part of any community. The public interest obligations are unique to local broadcast and the corresponding service in times of emergency is unparalleled. I think the decades long policy direction has and continues to be correct.

Question 6. Currently, more than 500 non-broadcast channels engage in copyright-based negotiations with pay-TV companies for carriage of their programming. Many of your broadcast members negotiate based on a different model, retransmission consent. Copyright is a Constitutionally-based property right. Retransmission consent, on the other hand, is a right made up by Congress 20 years ago, and consequently will likely always be under threat. I believe my bill, S. 2008, would actually strengthen property rights for the creators of programming, like broadcasters. Do you agree? And if not, please explain.

Answer. I appreciate and understand the intent. We may want to spend more time discussing whether changing to the protections envisioned under the bill will fully and easily—especially for small broadcasters—protect the broadcast signal, as opposed to protecting content under copyright. The broadcast signal is a compilation

of various copyrighted content and rights holders, and differs significantly from that of non-broadcast channels.

Question 7. The NAB's comments in the FCC's ongoing retransmission consent proceeding include the following statement:

> Contrary to Petitioners' assertions, viewers will not "lose access" to a broadcast station's programming if retransmission consent negotiations with an MVPD break down. Each television station's signal is available at all times to all consumers over the air and for free, and it is also available from other competing MVPDs.

The 1992 Cable Act includes a finding that:

> Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals.

a. Is the 1992 Cable Act wrong or is the NAB filing wrong?

b. Do you have an idea of how many households in America today cannot receive satisfactory over the air television broadcast signals?

Answer. The delivery of the local broadcast signal has improved dramatically over the years, and significantly in 2009 when television stations transitioned to digital. Local broadcast signals are always on and always available—free and over-the-air. Regardless of which provider a household may subscribe to, the fact remains that consumers can get their local broadcast signals free and over-the-air with a digital antenna. The recent STELA law and FCC data may be instructive in defining how many households cannot receive a satisfactory signal off-the-air. At the same time, broadcast industry statistics show the number of broadcast only homes continues to grow to 54 million consumers.

Question 8. You and NAB members have consistently made the observations:

- Broadcast television is available at all times to all consumers over the air and for free;
- 95 of the top 100 rated shows are on free broadcast television;
- A record amount of local news is now available for free on broadcast television;
- Much of the most popular live sports and entertainment events are available for free; and,
- Since the recent DTV transition, many new multicast channels are now available for free.

With all of that popular content available to every TV household in America for free, why do you think so many people, in fact nearly 90 percent of those households, spend around $1,000 every year on pay-TV subscriptions.

Answer. Current industry statistics show that 17.8 percent of households are broadcast only. That said, it seems the majority of consumers today want broad access to content and channels. One trend, at least of concern to local broadcasters, is the migration of sports to pay-TV as opposed to their continued availability on local broadcast stations. The broadcast product continues to evolve, improve, and is enhanced with mobile and multi-cast options, which we believe will be a continued attractive option to consumers.

Question 9. You spend the majority of your testimony explaining the local focus and local content created by your member stations that elect retransmission consent and their relatively large viewership compared to non-broadcast channels. But, you make only a passing note of must-carry regulations and their impact on local news programming and local services.

a. Do you have data available to quantify the amount of local programming produced by your commercial must-carry member stations and the viewership of those stations' programs?

b. What is your understanding of S. 2008's effect on must carry regulations, specifically for public television, educational, and non-commercial television broadcasters?

Answer. My understanding is that the legislation exempts certain must-carry stations while also eliminating this carriage option for many others. With respect to data, that is not something the trade association would be able to compile. Stations maintain information about programming that addresses the needs and interests of their communities in their public inspection files and must certify that this information is available as part of the FCC license renewal process.

Question 10. Does Federal law in any way limit a cable company's ability to negotiate with broadcasters regarding how they sell their programming to subscribers?

Answer. Both broadcasters and pay-TV providers are required by statute and related FCC rules to negotiate retransmission consent in good faith.[1] Among other things, the good faith negotiation standards prohibit broadcasters and pay-TV providers from refusing to negotiate; refusing to designate a negotiating representative; refusing to meet at reasonable times/locations; refusing to put forth more than a single, unilateral proposal and failing to respond to proposals. The FCC also has a separate "totality of the circumstances" test. If the negotiating tactics of a broadcaster or cable operator violated these standards, they would violate Federal law. I do not know of other Federal laws affecting cable operator's ability to negotiate with broadcasters.

Question 11. Are you comfortable that Federal law mandates that cable subscribers purchase local broadcast channels whether or not they want them? (47 USC § 543(b)(7)(A))

Answer. As also referenced in Question #5, there is a public value to a local broadcast station and the service provided to their communities. There are unique requirements and obligations as part of their license, and local broadcasters embrace that public service role. I am sure many broadcasters might welcome regulatory relief from the current structure, making them more like any non-broadcast channel on an MVPD's line-up. The fact remains that local broadcast stations are not like any other channel. They are a critical part of their communities, viewers deserve the opportunity to see those stations, and they are the most watched and most desired because of their service.

Question 12. You indicate that monetary compensation for retransmission consent is a recent development. How much do you attribute this recent change in the nature of retransmission compensation to the growth of competition among MVPDs?

Answer. There may be several factors involved and MVPD competition may be one of those. As MVPDs have come to pay more and more for non-broadcast channels, the weekly and annual ratings show that broadcast television dominates the viewer ratings. That realization perhaps more than any other is to account for the change.

Question 13. The FCC's latest video competition report indicates that the "Big Four" broadcast networks and several broadcast television group owners own about 100 non-broadcast cable networks, including many of the most-watched cable channels in the market. How has the viewership and related advertising revenue of NAB member stations been affected by the development of these broadcaster-affiliated cable channels?

Answer. Unfortunately, I may not be able to offer an informed perspective on this question. Broadcasters compete within markets for viewership, ratings, and advertising revenue against other local broadcast stations. As opposed to non-broadcast channels, viewers will continue to attract to those stations due to their local service and coverage. I'm not sure what affect ownership of non-broadcast channels might have on that competition within markets.

Question 14. In your testimony, you indicate that retransmission consent revenue has provided broadcasters the resources to hire more employees, such that "total employment in local television newsrooms . . . in 2011 . . . (was) the second highest total on record." A recent survey conducted by Hofstra University supports that finding. That same study also states that there were more stations doing local news in the year 2000. Why were more local broadcasters doing local news and employing more newsroom staff at a time when they were unable to realize retransmission consent revenue?

Answer. As you point out, it is interesting that the study shows a previous employment high in the year 2000. While the economy may have been the contributing factor, certainly the growth of online and alternative news outlets over the last decade has affected traditional news organizations, newspapers, and journalism. What is known today is that retransmission consent compensation is contributing to the renewed growth in news resources with local television. We are very proud of that growth and hope the trend continues.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KELLY AYOTTE TO HON. GORDON H. SMITH

Question 1. I wanted to get your opinion on free-markets and how they are defined. In March of this year, the American Conservative Union sent a letter to the Hill on retransmission consent calling it "a functioning market". The day before the

[1] *See* 47 U.S.C.§ 325(b)(3)(c); 47 C.F.R § 76.65.

hearing, I received a letter from Citizens against Government Waste claiming the current system, as currently structured "inhibits the free market" and "reduces competition". What are your thoughts on the free market as it relates to retransmission consent?

Answer. The retransmission consent process is simply the right to negotiate between two private parties. It is a business-to-business discussion between broadcasters and MVPDs. These discussions occur and are common in so many other industries in the private sector where a producer of a good or service negotiates with another who wants to purchase and re-sell that service. The fact remains that retransmission consent agreements are reached all the time and without fanfare. More recently, some have hoped to publicize agreements that may not have been reached in a timely manner to try to paint a picture that the underlying policy is wrong or needs reform. The current retransmission consent framework is a true free-market process of negotiation. There is no guarantee of an outcome or of compensation to a broadcaster. Those are left to the parties to negotiate privately, business-to-business, and in the free market.

Question 2. My constituents are adamant about receiving local news coverage. Even in the southern-most part of my state, we want New Hampshire news, not Boston news. One of the objectives of the 1992 Cable Act was to ensure consumers have access to locally originated programming. Has this goal succeeded? Are your members producing more or less local programming today? Are there any proposed changes to the Cable Act that could reverse this trend? How can we maintain and maximize localism?

Answer. Local television stations serving their local communities is the foundation of broadcasting, and telecommunications policy over time has served to strengthen and enhance that goal. Recent survey data shows that television news staffing has risen to the second highest level on record, with stations adding jobs to bolster their local coverage. As for potential future impacts on this growth, the ability to engage in fair negotiations with pay-TV providers for the value of the broadcast signal is critical to broadcasters' ability to generate revenue and re-invest those dollars in local news operations. Legislative proposals that would eliminate broadcasters' retransmission consent rights pose the risk of greater disruptions in service and the possibility that broadcasters will no longer be able to secure compensation for the value of their signals.

Question 3. Federal law prohibits blackouts during "sweeps," which are critical to broadcasters. Federal law, however, permits blackouts before marquee events like the Super Bowl and the Oscars, which are most important to viewers. Do you think this disparity contributes to blackouts?

Answer. Since the establishment of the current system of retransmission consent, hundreds of major sporting and entertainment events have come and gone without incident or disruption to any consumer. The system works so well and data shows that consumers are more likely to face a power outage or an outage of their entire pay-TV service than to be affected by a retransmission consent dispute. Even in the rare instances that a disruption occurs, local stations' signals are not "blacked out"—they remain available free over-the-air, and can also be viewed via other pay-TV services.

The current law requires broadcasters and pay-TV providers to negotiate in good faith. As part of that obligation, the parties must negotiate at reasonable times and locations and must not unreasonably delay negotiations. Further government intervention into the retransmission consent negotiating process, such as placing limits on when those agreements may commence or terminate, easily could create disincentives to timely reaching agreement. Placing new restrictions on stations' control of their signals actually would *reduce* the incentives of MVPDs to conclude retransmission negotiations, perhaps especially prior to marquee events, if those MPVDs knew they could continue to use broadcasters' signals for their own profit, even in the absence of a retransmission agreement.

In my opinion, the reduction of the currently strong incentives for both broadcasters and pay-TV providers to reach agreement on retransmission would ultimately lead to more disruptions for consumers, not fewer. Finally, I want to emphasize that, during many retransmission negotiations, television stations reach short-term agreements with pay-TV providers, allowing them to continue carrying the stations' signals while negotiations for a final agreement continue.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO MELINDA WITMER

Question 1. Whenever signals are pulled as a result of a retransmission consent dispute, consumers lose. The impact is magnified in areas where a single MVPD dominates an entire state. What is the best way to protect consumers while companies work to resolve disputes and impasses in negotiations for the carriage of broadcast signals?

Answer. Time Warner Cable shares the Senator's concern about the growing harm to consumers under the current retransmission consent regime. While many new video competitors have entered most local areas over the past 20 years, even in areas where a single MVPD serves an especially high percentage of consumers, broadcast stations still have all the leverage in retransmission consent negotiations. They are able to exploit territorial exclusivity protections, tier-placement rights, and a host of other government-granted preferences to pull down their signals as a negotiating tactic, which harms consumers and drives up fees. As these disputes have grown increasingly contentious, consumers, confronted with either losing access to popular programming or switching to another video provider facing the same blackout threats from broadcasters, are caught in the middle.

TWC believes that the best way to protect consumers in the long run is to do away with the retransmission consent regime altogether. Eliminating the various artificial preferences for broadcasters in the rules would help discourage them from engaging in brinkmanship and, in turn, should reduce service disruptions. Pending such legislative changes, the FCC has authority to make targeted changes to its rules to protect consumers. In particular, the FCC can establish dispute-resolution mechanisms and provide for interim carriage while a dispute is ongoing. The Senator presciently observed as early as 1992 that viewers would be harmed in those "instances in which [retransmission consent] agreements are not reached," and explained that the FCC has broad authority under Section 325 of the Communications Act to "address" those instances by "requir[ing] arbitration" and other dispute resolution methods. *See* Letter from Sens. Inouye and Stevens to Chairman Kevin Martin, Federal Communications Commission (Jan. 30, 2007) (quoting statements of Sen. Inouye during the drafting of the 1992 Cable Act). Later, in a 2007 letter to the FCC, the Senator urged the FCC to begin actively engaging in dispute resolution, noting that, "[a]t a minimum, Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [FCC resolution]." *Id.* TWC supports the Senator's call to action and believes that such reforms would go a long way toward preventing broadcast programming blackouts and threats of blackouts.

Question 2. Should any special consideration be given to protect consumers in geographic locations where a single MVPD serves a high percentage (more than 50 percent) of total MVPD subscribers in a state?

Answer. While it is clear that a broadcaster that pulls its signal from a large MVPD affects a greater number of consumers, TWC believes that any loss of a broadcast signal affiliated with one of the four major broadcast networks causes significant consumer harm, and that *any* actual or threatened blackout by a broadcaster is at odds with the broadcaster's obligation to act in the public interest.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO MELINDA WITMER

Question 1. In recent years, the breakdown of retransmission consent negotiations has threatened the television access of millions of Americans to major events like the Super Bowl, the World Series, and the Oscars, not to mention the essential access of viewers to local news broadcasts. The FCC has proposed to strengthen notice requirements for consumers when there is the possibility that certain services may lapse. Does Time Warner Cable support this proposal?

Answer. TWC believes that the existing notice rules are sufficient, and that broadcasters' efforts to impose additional notice obligations on MVPDs are driven only by their desire to apply greater pressure on MVPDs to give into their outrageous demands. In particular, as broadcasters increasingly resort to blackout threats as a negotiating ploy, rigid notice requirements that force *MVPDs* to state well in advance that a *broadcast station* may withdraw retransmission consent likely would be counterproductive. TWC always attempts to apprise its customers of possible service disruptions, but imposing new notice obligations on MVPDs seems backwards, as the MVPD often does not know until the moment before a retransmission consent agreement expires whether the broadcast station will grant an extension.

It would be far more sensible for the FCC to require the broadcast station to provide clear notice of its intention to withdraw its signal by a date certain.

In addition, imposing rigid notice requirements on MVPDs likely would only heighten subscriber anxieties. Broadcasters already run advertisements and "crawls" telling consumers to switch providers because they might lose access to broadcast programming. Such switching, however, again places consumers in the position of shouldering burdens and inconvenience that they should not face. If consumers decide to switch MVPDs, they often are forced to choose a less-preferred provider simply to ensure access to over-the-air content (of which the retransmission consent regime was supposed to ensure continuous availability). And a customer who switches MVPDs may soon find her new provider in a similar dispute with a broadcast station, facing the prospect of having to undertake the time and expense of switching yet again. The FCC should reject any proposals that would facilitate broadcast stations' manipulation of consumers. (Also see the response to question 4.)

Question 2. Does Time Warner Cable believe that continuous carriage during retransmission consent disputes would help end disputes?

Answer. To the extent that the retransmission consent regime remains in place, an interim carriage remedy not only would help resolve retransmission consent disputes once they arise, but also would help avert disputes before they begin. The availability of interim carriage would prevent broadcasters from using actual or threatened blackouts as a negotiating ploy, thereby reducing the risk of programming loss for consumers and ensuring that negotiations produce reasonable and non-coercive rates for retransmission consent. Interim carriage also would prevent broadcasters from undermining the government's interest in localism by exploiting their government-granted preferences while withholding their signal from a substantial portion of the viewing public.

Question 3. Ms. Abdoulah's written testimony noted WOW!'s support for requiring alternative styles of negotiation, like baseball-style arbitration, in retransmission consent disputes. Does Time Warner Cable agree?

Answer. While TWC continues to believe that the best path to reform ultimately is to do away with regulatory impediments to efficient carriage negotiations between broadcasters and MVPDs, TWC agrees that, unless and until these deregulatory reforms are adopted, the establishment of some type of alternative dispute resolution mechanism or other rate-setting procedure is necessary to prevent broadcaster abuses of the current system. The FCC has clear authority under Section 325 of the Communications Act to protect consumers by ensuring that the rates charged by broadcasters are fair and reasonable. Section 325(b)(3) instructs the Commission to consider "the impact of the grant of retransmission consent by television stations may have on the rates for the basic service tier"; to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable"; and to prevent broadcasters from insisting on rates that are not "based on competitive marketplace considerations." 47 U.S.C. §§ 352(b)(3)(A), (C).

Question 4. Cable consumers who have the ability to shop for different providers often face exorbitant termination fees to switch services, limiting competition. The FCC indicated this was an issue in their recent Notice of Proposed Rulemaking. Please provide for the record information on Time Warner Cable's termination fee policy. Has Time Warner Cable examined dropping these fees in the future?

Answer. TWC subscribers generally are not required to pay termination fees to switch services. In any event, any focus on termination fees risks missing the broader point that retransmission consent disputes impose unnecessary burdens on consumers. Congress and the FCC should emphasize reforms that protect consumers from the inconvenience of switching providers in order to avoid broadcaster blackouts. Such switching frustrates consumer choice, as many consumers choose a provider not only for its video service, but also for its broadband, voice, and wireless offerings. Switching also imposes unnecessary costs on consumers who must obtain new equipment and stay home to switch providers. And switching is ultimately ineffective as a strategy for avoiding broadcaster blackouts; all MVPDs must regularly renegotiate their carriage agreements with broadcasters and face increasing threats from broadcasters to go dark unless their cash demands for retransmission consent are met. Thus, as discussed above, any reform effort either should focus on the elimination of the artificial, government-granted preferences that enable broadcasters to make good on threats to pull their signals frustrating consumer access to broadcast programming and to the service providers of their choice, or should take advantage of existing rulemaking authority to protect consumers caught in the middle of these disputes.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO MELINDA WITMER

Question 1. S. 2008, the Next Generation Television Marketplace Act of 2011, would provide for the deregulation of retransmission consent. But as we saw last month with DirecTV and Viacom, blackouts occur due to disputes between cable programmers and cable providers in a non-regulated environment too. If we see customers, like those who subscribe to DirecTV, suffering in a deregulated world, why would we want to deregulate the negotiation process for broadcasters too?

Answer. TWC believes that eliminating the substantial regulatory distortions that characterize negotiations between MVPDs and broadcasters would reduce the number of blackouts, even if it does not eliminate them entirely. Notwithstanding the highly publicized dispute between DirecTV and Viacom, there have been fewer disputes between MVPDs and pay television programmers in recent years than disputes arising under the retransmission consent regime. In 2012, for example, there have been more than 80 retransmission consent blackouts, as compared to only two known blackouts involving a cable programming service. This discrepancy is due in part to the significant differences between the operative legal rules. Unlike cable programming, for which MVPDs acquire a simple copyright license negotiated in a free market setting without intrusive government regulation, broadcast programming is subject to the artificial and heavily intrusive retransmission consent regime, which Congress made clear was separate and in addition to copyright law. *See* S. Rep. No.102–92, at 36 (1991), *reprinted in*1992 U.S.C.C.A.N. 1133, 1169 (noting that Congress was "careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of the copyright holders in the programming contained on the signal"). And while Congress in 1992 believed that the retransmission consent regime would help preserve viewers' access to local broadcast television, today the rules are undermining that purpose by enabling and encouraging broadcasters to pull their signals and "go dark" on MVPD systems as a negotiating tactic. Based on TWC's substantial experience negotiating with pay television programmers and broadcasters, we expect that a truly 5 market-based approach to broadcast carriage negotiations would better protect consumers than the existing regime, which has seen an alarming increase in blackouts and dramatically escalating fee demands.

Question 2. Today's video marketplace is very different than what it was in 1992. Since the enactment of the Cable Act, satellite carriers and telephone companies offering video services compete with cable operators. And in the last few years, we have seen the enormous growth of online video. In your view, given these changes in the video marketplace, are the existing rules working? Why or why not?

Answer. The existing rules are now undermining rather than advancing the goals Congress identified when it enacted the Cable Act in 1992. Congress and the FCC created retransmission consent and must-carry based on conditions that existed in 1992. Among other things, that marketplace was characterized by broadcast networks' paying compensation to their broadcast affiliates and far fewer choices for consumers among MVPDs. Based on those circumstances, Congress granted powerful protections and new rights to broadcast stations. These rights for broadcasters included the ability to seek compensation from cable operators for the carriage of broadcast signals (even though cable operators already pay a separate fee to the Copyright Office for the programming contained in those signals), and the ability to prevent a cable operator from importing a distant signal containing the same network programming. But the emergence of strong competition among MVPDs nationwide has greatly reduced cable operators' bargaining power and increased that of broadcast networks, who have gained additional leverage from their "must have" programming and from collusive tactics. The broadcast networks are also increasingly interfering in the retransmission consent negotiations of their affiliated local stations—a dynamic that upends the intent of Congress in creating retransmission consent by contravening the plain language of Section 325(b)(1), which provides that retransmission consent is a right that belongs to the "station," not to the network. Broadcasters thus can wield these one-sided rules in ways that Congress did not expect in 1992—namely, to demand excessive retransmission consent fees by credibly threatening to go dark on one or more local MVPD systems. Broadcasters' ability to hold consumers hostage by threatening to withhold programming is antithetical to the reason Congress established retransmission consent and must carry in the first place: to ensure that local communities retain access to the "diversity of voices" and local programming that broadcasters have a public interest obligation to provide.

Question 3. Packages of programming are getting bigger and more expensive. Shouldn't consumers have a range of programming options at variety of price points? Why does that not seem to be the case?

Answer. TWC agrees that smaller and more flexible tiers would be better for consumers, and we actively seek ways to offer these options to our subscribers. For instance, in 2010, TWC launched a service called "TV Essentials," which offers access to a subset of our programming at a lower cost, but our flexibility in creating that package was limited by programmers. Indeed, the size and cost of virtually all of our programming packages is largely programmer-driven. Not only do video programmers typically insist that MVPDs purchase their full line of programming services as a condition of purchasing any programming service, but they also demand tiering or penetration requirements that dictate how broadly an MVPD must distribute those programming services to subscribers. Cable operators in many local areas also are required by law to carry all local television signals on a basic service tier "to which subscription is required for access to any other tier of service." 47 U.S.C. § 543(b)(7). Absent these contractual and regulatory impediments, TWC would have far more flexibility to meet consumer demand by offering smaller and less expensive programming packages.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO MELINDA WITMER

Question 1. Stakeholders on all sides of the retransmission consent debate appear to agree that the visibility and frequency of retransmission disputes has increased over the last few years. Some have argued that retransmission consent is working and that some growing pains are reasonable because many broadcast stations are electing to pursue deals instead of must-carry for the first time since enactment of the 1992 Cable Act which created the dual regimes of must carry and retransmission consent. On the other hand, distributors argue that private sector retransmission consent deals are taking longer to negotiate, and that it is becoming harder to reach agreement regarding mutually agreeable terms. If you believe must-carry and retransmission consent are important to localism, how do you recommend that the Congress measure the success of localism?

Answer. TWC does not believe that today's retransmission consent regime is advancing the governmental interest in localism. To the contrary, the regime is *undermining* localism by enabling broadcasters to pull their signals and deprive MVPD subscribers of local content as a negotiating tactic. Moving forward, Congress should measure the success of localism by evaluating the extent to which industry participants are actually investing in local content. Multiple recent studies show that broadcast stations are retreating from localism, as their increasing use of "sharing" agreements has precipitated a significant decline in original, diverse local news and public affairs programming. By contrast, TWC is an active contributor to localism in the communities it serves, having launched local news channels and local interest channels that focus on public affairs, politics, sports, cultural affairs, entertainment, and other content of interest to the community. Critically, TWC has done so not because of any regulatory mandate, but in response to the needs of its subscribers.

Question 1a. If you believe retransmission consent is failing, what evidence can you provide?

Answer. No one seriously disputes the fact that retransmission consent disputes have grown increasingly contentious in the past few years and have led to greater number of programming blackouts for consumers. There have been more than 80 retransmission consent disputes so far this year. And as broadcasters have grown increasingly willing to use blackout threats to increase their negotiating leverage— and to make good on those threats when MVPDs do not accede to demands for significant increases in compensation—the fees that MVPDs pay for retransmission consent have risen dramatically. SNL Kagan estimates that MVPDs paid $758 million in retransmission consent fees in 2009, $1.24 billion in 2010, and $1.76 billion in 2011, and projects that those fees will soar to a staggering $6.05 billion by 2018. *See* Robyn Flynn, SNL Kagan, *Retrans projections update: $6B by 2018,* at 1 (Oct. 18, 2012) ("October 2012 SNL Kagan Report"). Recent studies show that this precipitous rise in retransmission consent fees is a significant contributor to the overall rise in programming costs industry-wide by nearly 10 percent a year, and that retransmission consent payments will drive 30 to 40 percent of the industry's total programming cost growth through 2014—all of which translates into higher prices for MVPD subscribers. *See, e.g.,* Morgan Stanley, *Cable/Satellite: Pricing, Programming, and Payout Keys to 2010,* at 11 (Jan. 26, 2010).

There is also growing evidence that, even though Congress made clear that retransmission consent is a right that belongs to *stations* and not to the networks, all four major broadcast networks (ABC, CBS, NBC, and FOX) are interfering in the retransmission consent negotiations of their independently owned affiliates and are requiring those affiliates to pay a substantial portion of their retransmission consent revenues to the networks. SNL Kagan estimates that today the four major networks are collecting $487 million annually from their independently owned affiliates as a cut of their retransmission consent revenues, and that this amount will almost triple to $1.37 billion by 2015. *See* October 2012 SNL Kagan Report at 2. These demands from the networks put even greater upward pressure on retransmission consent fees and, in turn, on the rates consumers pay for MVPD service.

These spiraling fees and increasingly contentious negotiations directly undercut the purpose of the 1992 Cable Act. Congress created retransmission consent and must-carry because it believed that preserving access to broadcast television would benefit the American consumer. But broadcasters' abuses of the retransmission consent regime are now harming consumers—by depriving MVPD subscribers of broadcast signals as a bargaining tactic, and by driving up the fees that MVPDs and their subscribers pay for supposedly free, over-the-air broadcast programming. The retransmission consent regime is undeniably broken, and Congress and the FCC must take swift action to reform the regime and protect consumers once again.

Question 2. Some distributors have indicated concerns about the ability of content creators to tie affiliated programing to retransmission consent deals because they argue this practice contributes to programming cost increases. Broadcasters and content creators argue that current practices provide necessary financial support for a greater variety of programming options which they say is a benefit to consumers. To what extent should Congress be concerned about programming cost increases over the past several years?

Answer. The skyrocketing cost of programming should be of significant concern to Congress, and Congress should further examine the conduct that results in these higher costs. Your question correctly targets program tying as one of the major culprits for programming cost increases. Each of the four major broadcast networks typically requires MVPDs to purchase the network's affiliated programming services in a package that includes retransmission consent for the network's owned-and-operated stations. Program tying thus enables programming providers to obtain carriage for affiliated cable networks on more favorable terms than they would otherwise enjoy, while also crowding out non-affiliated program networks and damaging their ability to obtain carriage. TWC has urged the FCC to prohibit program tying as a *per se* violation of a broadcaster's duty to negotiate in good faith, but the Commission has taken no action to date.

Question 2a. If you believe programming cost increases merit a fresh look at the 1992 Cable Act, do you believe cost savings garnered by distributors should be passed onto consumers? If so, how would any savings be realized by consumers?

Answer. If legislative changes curbed abusive tying practices and otherwise resulted in programming cost savings, consumers would undoubtedly (and should) benefit from those savings. In today's competitive environment, any MVPD that failed to pass on savings to subscribers would be quickly underpriced by its competitors. TWC also has urged the FCC to expressly confirm that cable operators are permitted to make subscription to the basic tier optional in areas that satisfy the statutory standard of "effective competition," or to carry broadcast stations that elect retransmission consent in such areas on a separate tier, so that subscribers can avoid paying for these stations as the stations' fee demands continue to spiral upward.

Question 2b. If you support changes to current law, would your company provide consumers with the same flexibility to pursue *a la carte* programming options? If not, why not?

Answer. TWC is eager to introduce smaller and less expensive programming tiers for our customers who would prefer such packages, but programmer demands combined with today's legal restrictions impair our ability to do so. If Congress were to address those impediments, TWC likely would offer a variety of new service options. TWC has managed—even under existing constraints—to offer the slimmer "TV Essentials" package mentioned above, as well as certain programming services on an *a la carte* channel basis or on an *a la carte* program basis. But it is not in consumers' interests to mandate a one-size-fits-all model, whether that model resembles today's tier-based approach or requires *a la carte*-only distribution. Instead, Congress should eliminate artificial constraints on the ability of MVPDs to innovate in programming packaging and to meet consumer demand. Indeed, in TWC's experience, many consumers would prefer not to subscribe to channels on a pure *a la carte* basis. An *a la carte* distribution model also could be less efficient and more expen-

sive for some consumers, and could force some independent programmers out of business.

Question 3. Given that retransmission consent deals are private sector negotiations under the 1992 Cable Act, it is difficult for observers and participants to track pricing trends. Do you believe pricing transparency for distributors and for consumers could help to alleviate tensions over content deals? If not, why not?

Answer. Reforms targeted only at increasing transparency would not address the core problems with the retransmission consent regime. It is not clear, for example, that a rule requiring parties to reveal their latest offers to consumers or "observers" would affect the outcome of a dispute. In a handful of recent disputes, each side's offers were widely reported in the press, and yet these reports had no apparent effect on the negotiating postures of the parties. In addition, consumers probably have little interest in refereeing disputes between broadcasters and MVPDs by sorting out whose offer is more "fair."

Other transparency-based proposals, such as requiring broadcasters to reveal the rates they charge to MVPDs, may be useful in providing negotiating parties with more context, but would do little to help consumers who simply want to avoid blackouts of the video programming that they have come to rely on. It also is not clear that greater transparency would constrain broadcasters' excessive demands; many of these demands become widely known during and after the disputes, and yet broadcasters persist in making them.

Question 3a. If you do believe pricing transparency could be beneficial, please provide specific recommendations for such a proposal could be implemented.

Answer. As noted in response to Question 3a, TWC believes that adopting transparency requirements likely would not solve the core problems with retransmission consent.

Question 4. Going forward, how should Congress and/or the Federal Communications Commission measure whether or not the current system is working? Please provide specific metrics to support your answer.

Answer. Among other potential metrics for evaluating whether the rules are working, Congress and the FCC should look to the growing number of disputes leading to programming disruptions each year, the annual increase in retransmission consent fees (well above the rate of inflation), and the resulting increases to MVPDs' overall programming costs. Congress and the FCC should also track how much of the retransmission consent fees broadcasters obtain goes to support local programming. Going forward, independent industry analysts uniformly believe that, without significant reforms by Congress and/or the FCC, disputes will grow more common, retransmission consent fees will continue their rapid rise for the foreseeable future, and broadcasters will continue to spend less on local programming.

Question 5. If Congress were to revisit the 1992 Cable Act, are there improvements to the law which you believe Congress should consider?

Answer. TWC has suggested two possible paths for preventing the disruptions caused by broadcaster abuses of the retransmission consent regime.

First, Congress and the FCC could pursue a deregulatory path aimed at eliminating the special protections for broadcasters under the existing rules and thus facilitating genuine market-based negotiations—including by repealing the network non-duplication and syndicated exclusivity provisions, clarifying and modifying the tier-placement requirements applicable to stations electing retransmission consent, and amending the good-faith rules to prevent anticompetitive conduct by networks and stations alike. TWC looks forward to working with this Committee as it continues to consider such reforms.

Alternatively, if such regulatory interventions remain in place, Congress or the FCC should amend the current rules to create a more balanced regime that curbs broadcasters' abuses of the regulatory regime, including in particular their use of blackout threats and actual blackouts to drive up retransmission consent fees. Such reforms could include new rules that would establish rate-setting and dispute-resolution mechanisms and require interim carriage in the event of negotiating impasses. As TWC explained in response to post-hearing questions from Senator Snowe, the FCC already has ample authority under Title III of the Communications Act to address harms occurring in the retransmission consent process.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE TO MELINDA WITMER

Question 1. Given the existing statute and the Congressional letter, couldn't the current Commission interpret the statue differently than Chairman Martin to where

they do have the statutory authority to be involved in any disputes? What is precluding them from doing so?

Answer. There is no legal impediment that prevents the Federal Communications Commission ("FCC") from concluding that it has authority under Section 325 of the Communications Act to adopt dispute resolution mechanisms. As an initial matter, Chairman Martin's statement in 2007 that the FCC's authority in this regard was "not clear" was by no means an official interpretation of the statute by the full Commission; rather, he made that statement in an interview with reporters after testifying before this Committee. In any event, the FCC's broad authority to order arbitration *is* clear from the plain language of Section 325, as Senators Inouye and Stevens pointed out in their January 2007 letter to the FCC. Section 325(b)(3)(A) empowers the FCC "to govern the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A). In addition to that general mandate, Congress directed the FCC to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable." *Id.* This authority dovetails with the FCC's power to ensure that broadcast stations, as FCC licensees, act in accordance with "the public interest, convenience, and necessity" under Section 309(a), *see id.* § 309(a), as well as the good-faith negotiation requirement in Section 325(b)(3)(C), which instructs the FCC to ensure that the terms and conditions for retransmission consent are "based on competitive marketplace considerations," *id.* § 325(b)(3)(C)(i)-(ii). These far-reaching grants of authority empower the FCC to adopt specific measures—including dispute resolution procedures—to ensure that the retransmission consent regime conforms to the public interest.

Question 2. If Congress directed the FCC to ensure broadcasters act in "good faith" during negotiations, how do you believe the FCC can go about fulfilling that responsibility and to limit or prevent the disruption of programming to cable and/or satellite customers?

Answer. In comments filed at the FCC, Time Warner Cable ("TWC") has laid out two possible paths for preventing the disruptions caused by broadcaster abuses of the retransmission consent regime.

First, Congress and the FCC could pursue a deregulatory path aimed at eliminating the special protections for broadcasters under the existing rules and thus facilitating genuine market-based negotiations—including by repealing the network non-duplication and syndicated exclusivity provisions, clarifying and modifying the tier-placement requirements applicable to stations electing retransmission consent, and amending the good-faith rules to prevent anticompetitive conduct by networks and stations alike. TWC looks forward to working with this Committee as it continues to consider such reforms.

Alternatively, if such regulatory protections for broadcasters remain in place, the FCC should amend its rules to curb broadcasters' abuses of the regulatory regime, including in particular their use of blackout threats and actual blackouts to drive up retransmission consent fees. Such reforms could include new rules that would establish rate-setting and dispute-resolution mechanisms and require interim carriage in the event of negotiating impasses. As explained above in response to Question 1, the FCC has ample authority under Title III of the Communications Act to address harms occurring in the retransmission consent process.

Question 3. Do you know if the FCC is actively examining the impact of increasing retransmission fees in relation to basic cable rates?

Answer. I am unaware of any active FCC examination of the impact of rising retransmission consent fees on basic cable rates. The FCC's 2011 Notice of Proposed Rulemaking on retransmission consent asked commenters to weigh in on whether "there [is] an impact on the basic service rate that consumers pay as a result of the retransmission consent fees or disputes." *See Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 17 (2011). But it is unclear what, if anything, the FCC has done with the information provided by commenters in response indicating that rising fees have a substantial and growing effect on basic cable rates.

Question 4. Can you elaborate on what impact these retransmission fees have on the cost of basic cable service? What percentage of a cable customer's monthly cable bill is attributed to retransmission fees paid to the broadcasters (a rough estimate will suffice) for (1) a customer subscribing to basic cable and (2) a customer subscribing to the most expensive cable TV package?

Answer. The impact of rising retransmission consent fees on overall programming costs—and by extension on the downstream cost to consumers for MVPD service—is significant. Recent studies show that retransmission consent fees have been in-

creasing by roughly 40 percent annually, that this precipitous rise is helping to drive up overall programming costs industry-wide by nearly 10 percent a year, and that retransmission consent payments will drive 30 to 40 percent of the industry's total programming cost growth through 2014.

Question 5. Can you elaborate, in detail, on how negotiations between MVPDs and broadcasters (and/or programming/content owners and anyone else that might now be included) would be carried out, if the compulsory license, must carry, and retransmission consent provisions were eliminated? Please lay out the process and parties that would exist in negotiating the rights to use programming/content. Also, please compare/contrast the new negotiation process that would result versus the current retransmission consent negotiations.

Answer. If Congress were to eliminate retransmission consent, must-carry, and the compulsory licensing regime, there would be a number of possible alternatives for MVPDs to clear the rights to retransmit broadcast programming to consumers. For instance, under the proposed Next Generation Television Marketplace Act, S. 2008, a local station presumably would aggregate the necessary copyrights from content owners and negotiate an omnibus sublicense with the requesting MVPD. If this approach were adopted, the identity of the negotiating parties would likely remain the same as under today's regime. The Copyright Office identified a handful of other possible approaches in last year's Section 302 Report to Congress, each with its own particular advantages and disadvantages. For instance, content owners could empower some entity other than the local station to act as a clearinghouse, or could negotiate individually with MVPDs to clear the rights to particular programs. In TWC's view, the latter alternative would impose substantial transaction costs on MVPDs and could significantly drive up the cost of MVPD service to consumers.

At a minimum, however, each of these proposals would do away with the legal fiction on which the retransmission consent regime is based—that stations ought to be compensated merely for their "signals," over and above the compensation paid to the owners of the programming content contained in those signals under the copyright licensing regime. In addition, a deregulatory approach presumably would eliminate the various other regulatory advantages enjoyed by broadcasters in negotiations with cable operators, such as the FCC's territorial exclusivity protections and statutory tier placement rights. As a result, broadcasters would be forced to compete on the merits of their program offerings rather than rely on artificial, government-granted preferences. Competition should enhance the quality of broadcast programming, moderate the burgeoning cost of that programming for MVPDs and their subscribers, and reduce the incentive and ability of broadcasters to wield blackout threats as a weapon in carriage negotiations.

Question 6. If you believe that eliminating these provisions would lead to more disputes, can you elaborate, in detail, on why?

Answer. TWC believes that eliminating these provisions would lead to fewer disputes, for the reasons set forth in response to Question 7.

Question 7. If you believe that eliminating these provisions would lead to less disputes, can you elaborate, in detail, on why?

Answer. The deregulation of carriage negotiations between broadcasters and MVPDs would lead to fewer disputes for multiple reasons. As I explained during my initial testimony, the retransmission consent regime is fraught with artificial, government-granted preferences for broadcasters, and eliminating these preferences would help discourage broadcasters from engaging in brinkmanship and reduce disruptions for consumers. For instance, eliminating the FCC's network non-duplication and syndicated exclusivity rules, which allow broadcasters to prevent cable operators from mitigating the effects of a blackout by replacing a local signal with a distant signal containing the same network and syndicated programming, *see* 47 C.F.R. §§ 76.92, 76.101, would limit the effectiveness of broadcasters' holdout strategies and encourage them to reach agreement. Moreover, eliminating the requirement that cable operators place broadcasters on the basic service tier, *see* 47 U.S.C. § 543(b)(7), would facilitate the ability of cable operators to offer broadcast stations to subscribers on an optional basis, thus helping to temper broadcasters' excessive fee demands. Congress thus should strongly consider eliminating these and other unjustified and harmful preferences for broadcasters in the law.

Question 8. In witness testimony, it was indicated that for 2012, to date, there have already been 69 disputes regarding retransmission consent. How many disputes have occurred between MVPDs and non-broadcast networks/programmers?

Answer. Although I am unaware of the exact number of disputes involving non-broadcast programmers this year, I believe there have been fewer non-broadcast disputes than the 69 retransmission consent disputes that had occurred by July (notwithstanding the highly publicized impasses this summer between DISH Network

and AMC and between DirecTV and Viacom). The reason for this disparity is clear: Negotiations with non-broadcast programmers involve far less regulatory distortion than do negotiations with broadcasters over retransmission consent—which is the product of a government-created regime premised on a two-decades-old conception of the video marketplace.

Question 9. What would the impact of eliminating must carry requirements from the law have on local and independent stations? Without must carry how could a local independent station get carried by a MVPD? Is there any obligation of the MVPD to carry the station?

Answer. If the must-carry statute were repealed, local independent stations would bargain for carriage just like any other broadcaster. Because it is in MVPDs' interest to carry programming that their subscribers demand, a station that offers attractive programming should be able to secure carriage on the merits of its content under appropriate and reasonable economic terms. Moreover, while cable operators faced far less competition in 1992 when the must carry provisions were adopted, today broadcasters today have many other avenues for reaching viewers.

Question 10. Would the elimination of must carry possibly lead to more concentration in the media market and, as a result, further muting the diversity of media voices, which has been a resolute policy of our Nation's telecommunications and media laws?

Answer. The elimination of must-carry should not adversely affect diversity. As mentioned above, stations that once relied on must-carry rights would have the option to negotiate for carriage on the merits of their programming. And even if some stations were unable to obtain carriage without must-carry rights, the loss of those stations still would not significantly affect diversity, as must-carry stations rarely provide original programming and often rely instead on syndicated programming and local newscasts borrowed from other broadcasters. The very notion that guaranteeing cable carriage to local independent stations is necessary to enhance diversity is an anachronism in today's vibrant media landscape, where consumers have access to a growing number of outlets for news, information, and entertainment programming. In particular, the emergence of the Internet and online video distribution affords consumers substantially more source and content diversity than ever. Indeed, compelling carriage of broadcast stations ultimately harms diversity by displacing other programming services that viewers would prefer.

Question 11. With the current penetration and marketplace, is the Internet a "perfect substitute" to traditional television programming and local broadcast news? If not, what do believe is required for it to be a substitutable good to traditional television and local news?

Answer. No video service is a "perfect substitute" for another; each one has its own particular advantages and disadvantages. But the Internet has numerous advantages over broadcast television as a video distribution platform. Internet video is more accessible than traditional television programming, as it is available not only on Internet-connected television sets but also on computers, smartphones, and tablets. Moreover, whereas video programming aired by a broadcast station typically can be viewed only in the station's local area, video content uploaded to the Internet can be viewed anywhere in the world. Internet video also enables a far more customizable viewing experience for consumers. And unlike local broadcast stations, Internet video providers do not need to hold scarce spectrum resources in order to offer service.

Question 12. What role do you see public television playing in providing local programming?

Answer. Public television has played a valuable role in producing and providing informational and educational programming to viewers for decades. TWC has long viewed public television stations as key partners in delivering high-quality content, including local programming, to our subscribers.

Question 13. To your knowledge, do you believe PBS or any other public broadcasting station would be adversely impacted by any of the legislative proposals (that would do away with must carry, retrans, or compulsory licenses) currently in Congress?

Answer. TWC does not believe that PBS stations or other public broadcasting stations would be affected by current proposals for legislative or regulatory reform. Notably, the Next Generation Television Marketplace Act, S. 2008 would not repeal Section 535 of the Communications Act, which governs the carriage of noncommercial educational television stations. *See* 47 U.S.C. § 535. Moreover, when regulatory reforms have presented carriage issues for public television in the past, the cable industry and public television stations have worked together to resolve these issues on an industry-wide basis. For instance, in 2005, when the transition to digital tele-

vision was underway, the National Cable and Telecommunications Association reached an omnibus agreement with the Association of Public Television Stations for multicast carriage of public television stations once the transition was complete.

Question 14. While this might seem appropriate, I am concerned about the impact such allowance would have on localism. As the Supreme Court has stated "fairness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece." If this scenario was allowed, how could we protect localism? What safeguards could be implemented to ensure local programming?

Answer. No regulatory safeguards are necessary to ensure access to local programming; to the extent viewers value local programming, the market will find a way to deliver it. Moreover, it is no longer correct to assume that protecting local broadcasters from market forces necessarily promotes localism or improves the quality or quantity of local programming. Multiple recent studies show that broadcast stations are retreating from localism, as their increasing use of "sharing" agreements has precipitated a significant decline in original, diverse local news and public affairs programming. *See, e.g.,* Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism,* at 18–25 (Nov. 2011), available at *http://www.americantelevisionalliance.org/wp-content/uploads/2011/11/Retransmission Consent-and-Localism-Paper-by-Napoli-FINAL.pdf;* Danilo Yanich, *Local TV News & Service Agreements: A Critical Look,* at 105–07 (Oct. 2011), available at *http://www.udel.edu/ocm/pdf/DYanichSSAFINALReport-102411.pdf.* By contrast, TWC is an active contributor to localism in the communities it serves, having launched local news channels and local interest channels that focus on public affairs, politics, sports, cultural affairs, entertainment, and other content of interest to the community.

Question 15. How feasible is it actually for a cable or satellite operator to negotiate with out of market affiliate? There is still the primary owner of the content—the programmer. If the cable operator is having a dispute with the in-market Fox or Disney broadcaster, how could the cable company turn to an out-of-market Fox or Disney affiliate and successfully negotiate? It's still Fox or Disney and it seems that if the out-of-market affiliate did engage, Disney could threaten to pull the affiliation to prevent such action?

Answer. Although TWC has entered into numerous agreements that include broad rights for "out of market" carriage, broadcast networks often do impose restrictions on their affiliates in the sale of retransmission consent to MVPDs, making it challenging to secure the necessary carriage rights. In particular, the networks have increasingly hijacked the retransmission consent process by dictating when, where, and at what price their affiliates may enter into agreements with MVPDs, and by extracting a "cut" of affiliates' retransmission consent revenues for themselves. As TWC has explained to the FCC on several occasions, this network interference in affiliates' retransmission consent negotiations is starkly anticompetitive, undercuts the FCC's localism goals, and harms consumers. Network interference increases the risk of impasse in retransmission consent negotiations, siphons off funds intended to support local broadcasting, and drives up the cost of retransmission consent to MVPDs and their subscribers. TWC and many other parties accordingly have asked the FCC to prohibit network interference in stations' retransmission consent negotiations.

Question 16. If a MVPD feels that the retransmission fee the broadcasters is asking for is not reasonable then why not just simply not pay it, stop retransmitting the signal over the cable plant indefinitely, and, if need be, give every customer in the market an antenna? It seems over time, the number of subscribers MVPDs have (over 101 million subs) would make broadcasters come to the table sooner rather than later.

Answer. MVPDs compete vigorously in the video distribution marketplace and thus can hardly leverage their total subscriber count to "make broadcasters come to the table." Since cable operators face vigorous competition in nearly every local area from an array of satellite, telecommunications, and Internet-based distribution platforms, broadcasters can play one distributor against another and wield blackout threats in an effort to maximize their bargaining leverage in negotiations. Moreover, the suggestion that an MVPD may respond to broadcasters' tactics by dropping a station's signal "indefinitely" overlooks the fact that consumers—and not just MVPDs—are harmed by the loss of network-affiliated broadcast programming.

Consumers cannot avoid these harms simply by switching to another video provider. All MVPDs must regularly renegotiate their carriage agreements with broadcasters, and because broadcasters are increasingly threatening to go dark unless their cash demands for retransmission consent are met, consumers may be forced

to engage in an endless cycle of switching among MVPDs in an effort to avoid the potential for a blackout. Such switching is not only a source of inconvenience for consumers, but imposes unnecessary costs on consumers who must obtain new equipment and stay home to switch providers. Additionally, many consumers are not just purchasing video service and may have chosen their video provider also for its broadband and voice services.

Moreover, those cable subscribers who would rather forego purchasing broadcast stations as part of their cable package—and thereby avoid the spiraling cost of retransmission consent—are prohibited from doing so under Federal law. As explained below in response to Senator DeMint's questions, 47 U.S.C. § 543(b)(7) limits the flexibility of cable operators to offer broadcast stations on an optional basis. Congress should strongly consider eliminating not only the "tier buy-through" requirement responsible for this, but also the various other regulatory distortions in the retransmission consent regime that actively harm consumers. .

Question 17. If all MVPDs feel that the retransmission fees are unreasonable then why don't you all agree not to pay the broadcasters—hold an industry-wide boycott?

Answer. Even apart from the antitrust issues presented by group boycotts generally, such an approach would not serve the interests of consumers. Any action to curb broadcaster abuses of the current system should focus on *preserving* consumers' access to broadcast programming, not depriving consumers of that programming.

Question 18. Are you concerned if we go too far with reforming retransmission consent and/or copyright law that might limit rights of broadcasters and/or programmers we could possibly erode the fundamental protections to intellectual property and copyright that this country has enforced?

Answer. Reforming the broken retransmission consent regime would not erode traditional protections for copyright or other intellectual property. Indeed, when Congress created this regime in 1992, it took pains to clarify that the retransmission consent right is *not* a copyright interest. *See* S. REP. NO. 102–92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169 ("The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of the copyright holders in the programming contained on the signal."). Rather, retransmission consent is an artificial right granted by the government to local stations with the understanding that stations, as stewards of a valuable public spectrum resource, would exercise the right in the public interest. But when stations use retransmission consent as a weapon to black out broadcast programming and drive up programming costs for MVPDs and their subscribers, Congress should not hesitate to reform the regime to protect consumers.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JIM DEMINT TO MELINDA WITMER

Question 1. If enacted as written, would the Next Generation Television Marketplace Act, S. 2008, allow a pay-TV company to retransmit the programming aired on broadcast signals without consent?

Answer. No. The Next Generation Television Marketplace Act ("NGTMA") requires MVPDs to obtain the consent of a local television broadcast station before retransmitting the programming broadcast by the station. *See* NGTMA § 3(c)(5)(C).

Question 2. Are Time Warner Cable subscribers required by Federal law to purchase a certain package of channels when they buy your video service?

Answer. Yes. As a general matter, Section 623(b)(7) of the Communications Act, as amended, provides that a cable operator "shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service," and that basic service tier must include "any signal of any television broadcast station" provided to subscribers in a given local area. 47 U.S.C. § 543(b)(7). In the local areas where this provision applies, broadcasters can insist on automatic placement on the basic service tier despite the fact that, in a more competitive marketplace, broadcasters would be required to compete on price and quality to gain access to desired tiers. As a result, skyrocketing retransmission fee increases must be built into the mandatory basic cable rates that subscribers cannot avoid paying. And as long as consumers are forced to subscribe to (and pay for) broadcast programming—creating an effective tax on access to cable programming—there is no market-based mechanism to discipline retransmission consent fees. While eliminating the tier buy-through requirement is a necessary step, such a move would not be sufficient, on its own, to prevent harms to consumers. Carriage negotiations between MVPDs and broadcasters will never be a truly market-based

process unless Congress eliminates *all* of the regulatory distortions pervading the retransmission consent regime.

Question 3. Is Time Warner Cable prevented by Federal law from selling a subscriber only a single channel, Discovery Channel for example, or only a package of sports channels?

Answer. Yes. As mentioned above, cable operators in many local areas are required to provide subscribers with a basic service tier containing a statutorily mandated lineup of programming services, and to make the purchase of the basic tier a prerequisite to the purchase of all additional programming services. *See* 47 U.S.C. § 543(b)(7). Moreover, video programmers often require cable operators to purchase a bundle of programming services all at once and to sell those programming services to consumers on highly penetrated cable tiers.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. KELLY AYOTTE TO MELINDA WITMER

Question. I wanted to get your opinion on free-markets and how they are defined. In March of this year, the American Conservative Union sent a letter to the Hill on retransmission consent calling it "a functioning market." The day before the hearing, I received a letter from Citizens against Government Waste claiming the current system, as currently structured, "inhibits the free market" and "reduces competition." What are your thoughts on the free market as it relates to retransmission consent?

Answer. Retransmission consent does not involve "free market" negotiations for carriage. Since its creation in 1992, retransmission consent has existed as part of a complicated system of government-created rights designed to promote policy goals regarding the perceived special importance of free over-the-air television. That system of rights includes a host of special protections—such as must-carry, preferential tier placement and channel positioning rights, territorial exclusivity, and the "sweeps" rule—that further *prevent* market forces from operating. In a truly "free market," a station would not be able to demand automatic placement on the basic tier, but rather would have to bargain for such favorable positioning based on the popularity of its programming. Likewise, a station operating in a "free market" would not be able to insulate itself from competition by invoking the FCC's territorial exclusivity rules; instead, that station would be required to compete with other stations on quality, price, and other bases. The current regime thus bears little resemblance to a "free market." It is entirely a creature of regulation, and that regulatory regime needs to be updated to prevent abuses by broadcasters that harm consumers.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO MARTIN FRANKS

Question 1. Whenever signals are pulled as a result of a retransmission consent dispute, consumers lose. The impact is magnified in areas where a single MVPD dominates an entire state. What is the best way to protect consumers while companies work to resolve disputes and impasses in negotiations for the carriage of broadcast signals?

Answer. CBS has been an independent company since 2006, and in that time has concluded nearly 100 retransmission consent agreements without a single public dispute with an MVPD. Therefore, we are pleased to report that the viewers in the markets served by CBS owned-and-operated stations have not had to deal with MVPD disruptions of our programming.

I believe that in a free marketplace, the best way to serve consumers is to arm them with information about options and choices, particularly with respect to how they can continue to obtain the programming they want during an MVPD-programmer disruption.

I have often praised Congress for succeeding in achieving its goal of competition in the video marketplace. Today, thanks to this congressional focus, the American viewer in a given local market has robust options with respect to video distribution platforms, including at least one cable operator, two satellite services, as many as two telcos and, of course, several broadcast television stations. When a disruption of broadcast programming occurs on a particular platform, the viewer can always count on the originating platform—the broadcast television station—to continue service. Contrary to the allegations of some MVPDs, there is no "blackout" and a television station does not "go dark" when a disruption occurs. Rather, the station

still operates in the public interest and transmits its signal over the air to almost every household with a television receiver. In addition, that station's programming is still available on competing MVPD platforms not engaged in a dispute with that station.

It is important to note that any disruptions involving retransmission consent are local in nature, affecting an individualized market and a limited amount of MVPD subscribers, while disruptions involving non-broadcast programmers affect the nationwide carriage of that programming and, therefore, millions of MVPD subscribers.

Question 2. Should any special consideration be given to protect consumers in geographic locations where a single MVPD serves a high percentage (more than 50 percent) of total MVPD subscribers in a state?

Answer. Congress has succeeded in its goal of establishing a highly competitive video distribution market. A disruption of a single station's service to one MVPD provides an opportunity for a competing MVPD to acquire a new subscriber. That's how competition works: Consumers shop where the products they want are available. Thus, where a lone MVPD has more than half of all MVPD subs in a given state, a disruption just might have the collateral benefit of creating greater competition among video distributors. Specifically, in Hawaii, a retrans disruption with Time Warner Cable could inure to the benefit of DirecTV and DISH.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO MARIN FRANKS

Question 1. In her testimony, Ms. Witmer of Time Warner Cable notes that national broadcast networks "have begun demanding reverse compensation from their affiliates", which she alleges is contributing to the increase in retransmission fees local affiliates have been requesting in renegotiations.

Please respond to this point, providing detail on the extent that CBS is involved in retransmission fee negotiations, including any relevant information on the percentage of retransmission fees for affiliate signals that are allocated to CBS.

Answer. At CBS, we view our affiliated broadcast television stations as true partners in helping us deliver high quality network entertainment, news, information and sports programming to the American public. And our affiliates realize that that partnership is good for them, in large part because of what the network is delivering, as a complement to their locally provided content. The network-affiliate relationship is symbiotic.

Most of our affiliates are still on long-term contracts that do not expire for several more years. The renewal of those contracts will be the point at which reverse compensation will be negotiated. We have said publicly that the structure of the reverse comp deals varies, but in most cases, we are asking for a fixed fee rather than a percentage of the affiliates' retrans fee.

The value of a CBS affiliation goes far beyond what the station can secure from retransmission consent. Our time-period-winning 10 PM dramas bring a larger audience to a local station's 11 PM broadcasts in which they sell all of the advertising and retain all of that revenue. The opportunity to sell spots in the network's news, sports and entertainment programming brings a local affiliate additional value.

When we assess the value of a CBS Television Network affiliation, we take into account all of the ways we help to create value for a local station and negotiate a mutually beneficial agreement accordingly—and utterly independent of how much that station may obtain in retrans fees from a given MVPD.

Question 2. What are CBS's views on Senator Kerry's idea of requiring alternative styles of negotiation—i.e. baseball-style arbitration—to be used in disputes between multichannel video programming distributors and affiliates to ensure viewers are not treated unfairly when retransmission consent negotiations breakdown?

Answer. Section 325(b) expressly states that only broadcasters can provide MVPDs with authority to retransmit their signals. Therefore, neither the FCC nor an arbiter can authorize an MVPD to carry a station's signal without the station's consent.

As the FCC states in the NPRM which launched its pending proceeding on retransmission consent:

> "[W]e believe that mandatory binding dispute resolution procedures would be inconsistent with both Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the Administrative Dispute Resolution Act

("ADRA"), which authorizes an agency to use arbitration "whenever all parties consent."

Broadcasters spend hundreds of millions of dollars to produce or acquire content that is popular with viewers—much of which is produced in California and employs thousands of Californians. Mandating carriage of our content –even for a limited time—effectively would put the government's thumb on the MVPDs' side of the scale. The consequences of such government intervention in the free market of negotiations likely would result in lower fees to broadcasters which, in turn, would impair our ability to produce and obtain the high quality programming that viewers want.

Let me emphasize that when a retrans disruption occurs and a station's signal is not available on a particular MVPD platform, that station's programming is still widely available –via competing MVPDs in the market, as well as over the air.

Finally, if Congress were to take the extraordinary step of granting the FCC the authority to arbitrate or mediate disputes, with the thousands of retrans negotiations that occur each year on average, it is likely that parties would run to the Commission instead of trying to work out issues in the marketplace. At such point, the FCC would become the "Federal Arbitration Commission," with retrans disputes tying up a substantial portion of valuable agency resources. The marketplace has worked –and with very few disruptions and, even in those rare cases, have lasted only a short time.

Question 3. In recent years, the breakdown of retransmission consent negotiations has threatened the television access of millions of Americans to major events like the Super Bowl, the World Series, and the Oscars, not to mention the critical access of viewers to local news broadcasts. Consumers should not be losing access to programming that they have paid for because of the failure of retransmission consent negotiations. The FCC has proposed to strengthen notice requirements for consumers when there is the possibility that certain services may lapse. Does CBS support this proposal?

Answer. While I do not advocate further regulation or rules, I believe that it is important for MVPD subscribers to be notified of their options for obtaining the programming of a station in a retrans dispute. Perhaps subscribers should be given a heads up when it appears as if a retrans term is set to expire and negotiations are going badly and a signal disruption is anticipated in order to give them adequate time to connect an antenna or seek another multi-channel provider who has secured access to the relevant programming.

Question 4. Does CBS support requiring affiliate broadcast signals to remain on the air—*i.e.,* continuous carriage—during retransmission consent disputes?

Answer. CBS would be "on the air" in any event in that our free, over-the-air broadcast is always available to anyone who chooses to employ an antenna.

Having clarified that point, no, we do not support any proposal that would require us to provide our signals to MVPDs against our will. Not only is this type of proposal prohibited under Section 325(b) of the Communications Act, but such a requirement would lead to the same result described in response to the preceding question. However, we may elect to grant an extension of a retrans deadline as part of the to-and-fro of negotiations in a free market. Indeed, we have done so in the past when we believe that discussions were going well with the MVPD. These extension periods have covered major broadcast events. But these extensions were made in our discretion, and not based on a regulatory obligation to do so.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO MARTIN FRANKS

Question 1. S. 2008, the Next Generation Television Marketplace Act of 2011, would provide for the deregulation of retransmission consent. But as we saw last month with DirecTV and Viacom, blackouts occur due to disputes between cable programmers and cable providers in a non-regulated environment too. If we see customers, like those who subscribe to DirecTV, suffering in a deregulated world, why would we want to deregulate the negotiation process for broadcasters too?

Answer. I agree that any attempt to transform the retransmission consent regime into one looking more like the national cable network model would be misguided.

In the end, I believe that eliminating retrans and the compulsory license would lead to far more disruptions, not fewer. Introducing even more claimants into an already challenging negotiating environment likely will lead to more, not fewer, disputes. In the end consumers will suffer.

While this reorganized retrans marketplace would also be an extraordinarily capital intensive one, I testified that in that new world CBS would do just fine. One way or another, we will be able to invest in our content, continue to attract audiences, and figure out how to monetize our performance. But the adverse impact on smaller companies –both on the broadcaster *and* MVPD sides—could be substantial.

Question 2. Today's video marketplace is very different than what it was in 1992. Since the enactment of the Cable Act, satellite carriers and telephone companies offering video services compete with cable operators. And in the last few years, we have seen the enormous growth of online video. In your view, given these changes in the video marketplace, are the existing rules working? Why or why not?

Answer. Actually, the marketplace is even more competitive now, and therefore not only is retransmission consent not broken, it is more suited to today's vibrant marketplace, with manifold alternate sources of programming for consumers.

I believe that the retransmission consent regime enacted in 1992 is one of the great Washington public policy accomplishments of the last two decades. It has given renewed vitality to broadcast television that prior to 1992 was being consigned to the dust heap of history.

Estimates are that some 15,000 retrans negotiations take place every three years and almost all of them are completed successfully and without disruption. As the principal retransmission consent negotiator for CBS, I can tell you that over the last six years, since CBS split from Viacom, we have completed ALL of our negotiations successfully and without incident.

Question 2a. Why are we even discussing changes to a system that works?

Answer. Because there are some in the MVPD industry calling for a return to the old days, when they got their most popular video product for free and then resold it and then used the proceeds to build their own businesses. We urge Congress to resist calls for change. To the extent that impasses in retrans negotiations occur with more frequency lately, it is due, at least in part, to the belief by a handful of distributors that disruptions may cause Congress to act—and in a way that would end the current balance of power to tip the scales in their favor. Congress should resist calls for legislation because some MVPDs today use this in negotiations in an attempt to gain leverage over broadcasters. Legislation only serves to slow down negotiations or leads to increased disruptions.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO MARTIN FRANKS

Question 1a. Stakeholders on all sides of the retransmission consent debate appear to agree that the visibility and frequency of retransmission disputes has increased over the last few years. Some have argued that retransmission consent is working and that some growing pains are reasonable because many broadcast stations are electing to pursue deals instead of must-carry for the first time since enactment of the 1992 Cable Act which created the dual regimes of must carry and retransmission consent. On the other hand, distributors argue that private sector retransmission consent deals are taking longer to negotiate, and that it is becoming harder to reach agreement regarding mutually agreeable terms. If you believe must-carry and retransmission consent are important to localism, how do you recommend that the Congress measure the success of localism?

Answer. As I stated at the hearing, I believe that the retransmission consent regime enacted 20 years ago has given renewed vitality to broadcast television.

In adopting retrans, Congress recognized that broadcast programming "remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations." Congress found that cable operators enjoyed great benefits from the local broadcast signals that they were able to carry without broadcaster consent. Thus, Congress adopted retransmission consent provisions to allow broadcasters to negotiate to receive compensation for the value of their signals.

Retrans, therefore, was meant to address more than just localism. It was meant to allow broadcasters to monetize their performance in the marketplace.

Broadcast television stations around the country deliver top-notch local news, public affairs and emergency content to their hometown viewers. But local stations deliver much more than that—that is, they provide national network content that represents some of the highest quality sports and entertainment programming in the world. In a tough economy, it is no small benefit to Americans that they can sit in their living rooms and access via broadcast television, free of charge, major

sporting and entertainment events that would cost hundreds of dollars to view at a sports arena or movie theater.

The ability of broadcasters to provide this superior product to the American consumer is due, in great part, to retransmission consent fees.

With great respect, I urge Congress not to get in the business of measuring "success" of localism or any other aspect of video programming. The American viewer should be the final arbiter of what content they wish to view. And by most accounts, local broadcast news is considered the most popular and credible while broadcast network programming is the most watched. There are plenty of organizations studying broadcaster performance, some commercial and some not-for-profits. For example, entities such as the Pew Research Center and the Knight Foundation regularly issue reports on the state of local news. And there are commercial ratings enterprises, such as Nielsen and new entrant Rentrak, which are in the business of measuring the country's television viewing habits. In the end, satisfying viewers is what motivates broadcasters.

Question 1b. If you believe retransmission consent is failing, what evidence can you provide?

Answer. I do not believe that retransmission consent is failing in any sense of the word.

Question 2a. Some distributors have indicated concerns about the ability of content creators to tie affiliated programing to retransmission consent deals because they argue this practice contributes to programming cost increases. Broadcasters and content creators argue that current practices provide necessary financial support for a greater variety of programming options which they say is a benefit to consumers. To what extent should Congress be concerned about programming cost increases over the past several years?

Answer. Again, with respect, I urge Congress not to get involved in the costs of video programming. American television is considered the best in the world, thanks to the innovation and flexibility of the marketplace. And it in this weakened economy, television is one of the sectors performing quite strongly and is not in need of a "fix." In fact, any regulation of programming costs likely would lead to the deterioration of the product.

In the marketplace, if a product is too costly or is undesirable, demand will wane. And the industry will adapt accordingly. CBS is committed to investing in programming. Our ability to invest in the acquisition of broadcast rights to premier sporting events, as well as in the production of the highest quality entertainment and news programming, is made possible today by a variety of revenue streams, including advertising and retransmission consent fees. In a free, unfettered market, broadcasters should be permitted to obtain revenues from any combination of sources as it can in order to provide the American consumer with a service that almost every household can access free of charge. Costs of providing this service should be determined in the market and not through regulation.

Question 2b. If you believe programming cost increases merit a fresh look at the 1992 Cable Act, do you believe cost savings garnered by distributors should be passed onto consumers? If so, how would any savings be realized by consumers?I do not believe that Congress should review programming cost increases. And I would not support any resurrection of rate regulation of my MVPD partners.

Answer. I do not believe that Congress should review programming cost increases. And I would not support any resurrection of rate regulation of my MVPD partners.

Question 2c. If you support changes to current law, would your company provide consumers with the same flexibility to pursue a la carte programming options? If not, why not?

Answer. Tiering options are available today from various MVPDs. If the American viewer demands more tailored, channel-by-channel, a la carte options, the market will supply it.

Question 3a. Given that retransmission consent deals are private sector negotiations under the 1992 Cable Act, it is difficult for observers and participants to track pricing trends. Do you believe pricing transparency for distributors and for consumers could help to alleviate tensions over content deals? If not, why not?

Answer. Those seeking retrans pricing trends need only search the Internet for the numerous analyst reports available to the public.

Providing the public with the wholesale cost of retrans is a solution in search of a problem. Some MVPDs assert that disclosure of retrans pricing, especially to consumers, would benefit the public. I am mystified as to how the public would be better positioned by the disclosure of such discrete information in the absence of the same disclosure with respect to MVPD costs for non-broadcast programming and their set-top boxes and other equipment. These are ALL costs which are passed

along by MVPDs to their customers. Thus, forced disclosure of the wholesale cost of retrans is akin to forced disclosure of the wholesale costs of only a few ingredients in a loaf of bread. It would reveal no meaningful information for the consumer. Moreover, I question whether such disclosure of this retrans fee might be a vehicle for price-signaling among competitors.

Question 3b. If you do believe pricing transparency could be beneficial, please provide specific recommendations for such a proposal could be implemented.

Answer. See response to Question 3(a).

Question 4. Going forward, how should Congress and/or the Federal Communications Commission measure whether or not the current system is working? Please provide specific metrics to support your answer.

Answer. That the current system is working or not working should be based on consumer reaction. The hue and cry to "fix" retrans is not coming from consumers. Rather, it is coming from MVPDs. Calls for fixing a supposedly broken retrans system arose only after a fully competitive marketplace among video distributors developed.

Retrans was essentially a non-factor in carriage negotiations until several years back when DirecTV, DISH, Verizon and AT&T became full-fledged competitors to the cable monopoly. Yes, when a retrans disruption occurs, consumers in a given local market may experience inconvenience. But disruptions are few and far between. It has been estimated that some 15,000 retrans negotiations take place every three years. And almost all of them are completed successfully.

There is no need to overhaul a well functioning retrans system that has inured to the benefit of consumers –in the form of continued high-quality broadcast service. Congressional and/or FCC involvement in retrans would serve to hinder negotiations, not assist them. Broadcasters across the country want to be carried by distributors and distributors want to carry broadcast television stations because of the popularity of our local and national programming. As long as this balance exists, the system is working.

Finally, let me note again that to the extent that impasses in retrans negotiations occur with more frequency lately, it is due, at least in part, to the belief by a handful of distributors that disruptions may cause Congress to act—and in a way that would end the current balance of power to tip the scales in their favor. Congress should resist calls for legislation because some MVPDs today use this in negotiations in an attempt to gain leverage over broadcasters. Legislation only serves to slow down negotiations or leads to increased disruptions.

Question 5. If Congress were to revisit the 1992 Cable Act, are there improvements to the law which you believe Congress should consider?

Answer. I believe that the retransmission consent regime enacted in 1992 is one of the great Washington public policy accomplishments of the last two decades. Therefore, I do not see the need for Congress to address any part of the 1992 Cable Act pertaining to retrans.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE TO MARTIN FRANKS

Existing FCC Authority

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") amended the Communications Act to include Section 325, which provides television stations with certain carriage rights on local market cable television systems. The Commission established rules related to the retransmission/mandatory carriage election cycle, but did not adopt rules governing the negotiation process of retransmission consent.

However, the statute clearly calls for the FCC to ensure that broadcasters act in "*good faith during negotiations.*" During the Sinclair-Mediacom dispute back in 2007, the Commission didn't intervene because then Chairman Martin interpreted the law didn't and stated that the agency didn't have the authority to impose binding arbitration. At the time, he stated "It's not clear to me that the commission does have the authority to order arbitration."

Yet, during that time in January 2007, Senator Inouye and the late Senator Stevens wrote the FCC stating that the Commission did indeed have authority to intervene and, if necessary, use binding arbitration to resolve any failed negotiations.

Question 1. Given the existing statute and the Congressional letter, couldn't the current Commission interpret the statue differently than Chairman Martin to where they do have the statutory authority to be involved in any disputes? What is precluding them from doing so?

Answer. Section 325(b) expressly states that only broadcasters can provide MVPDs with authority to retransmit their signals. Therefore, neither the FCC nor an arbiter can authorize an MVPD to carry a station's signal without the station's consent.

As the NPRM in the pending proceeding at the FCC on retransmission consent states:

> "[W]e believe that mandatory binding dispute resolution procedures would be inconsistent with both Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the Administrative Dispute Resolution Act ("ADRA"), which authorizes an agency to use arbitration "whenever all parties consent."

Question 2. If Congress directed the FCC to ensure broadcasters act in "good faith" during negotiations, how do you believe the FCC can go about fulfilling that responsibility and to limit or prevent the disruption of programming to cable and/or satellite customers?

Answer. Congress has, on two occasions, directed the FCC to adopt rules that compel both broadcasters *and* MVPDs to negotiate for retransmission consent in good faith. In response, the FCC has established rules that guide parties as to what conduct is deemed good faith in retrans negotiations and has implemented an enforcement regime. However, there have been very few complaints filed alleging violations of the rules. There has only been one finding that a party to a retransmission consent agreement negotiated in bad faith—and that party was an MVPD.

Reasonable Basic Service Tier Rates

While I understand programming costs are growing, I am concerned about the significant increase in retransmission compensation that has occurred over the past several years. For example, retransmission consent revenue climbed more than 30 percent for six broadcasters in the first nine months of 2008. *By 2017, SNL Kagan an industry analysis firm—projects retransmission fees will grow to $3.61 billion, with average per-subscriber fees potentially doubling.* So, as broadcasters look to increase revenue streams through retransmission fee, it seemingly puts upward pressure on the price of basic cable and ultimately consumers. Such increase may also infringe upon the existing statute.

Section 623(b)(1) requires the FCC to ensure that basic cable service rates are reasonable. In addition, Section 325(b)(3)(A) requires the Commission to consider the impact that retransmission consent has on basic cable service rates and that any regulations do not conflict with the FCC's "obligation under Section 623(b)(1)" to ensure such rates are reasonable.

According to SNL Kagan, the average cable TV subscriber in 2011 paid $78 a month compared to only $40 per month in 2001. Whereas the average household income fell 6 percent between 2006 and 2010, according to the U.S. Census.

Question 3. Do you know if the FCC is actively examining the impact of increasing retransmission fees in relations to basic cable rates?

Answer. The FCC has a pending proceeding on retransmission consent. I do not know whether the FCC is studying programming fees as part of this proceeding or any other.

Question 4. Can you elaborate on what impact these retransmission fees have on the cost of basic cable service? What percentage of a cable customer's monthly cable bill is attributed to retransmission fees paid to the broadcasters (a rough estimate will suffice) for (1) a customer subscribing to basic cable and (2) a customer subscribing to the most expensive cable TV package?

Answer. I have no independent knowledge of the impact of retransmission fees on the cost of cable service, but public analysts' reports state that they are but a fraction of a cable operator's overall programming expenses and a minute portion of its revenues. In comments in the FCC's pending retransmission consent proceeding, NAB submitted an economic report that contained the following conclusions:

> In 2008, for example, the average MVPD programming expense per subscriber per month was approximately $26 and average MVPD revenue was more than $99 per subscriber per month. In contrast, as noted above, in 2009 MVPDs paid retransmission consent fees totaling only $0.70 per subscriber per month. Thus, retransmission consent fees are just 2.7 percent of programming expenses and about 0.71 percent of revenues. A March 2009 study estimated that cable revenues per subscriber are predicted to rise *45 times* more than retransmission consent fees through 2015.

These conclusions are well illustrated in an article in an MVPD industry trade publication, which I have included with my response.

Eliminating Retransmission Consent and Compulsory Licenses

While there is no question that Congress must examine and reform outdated provisions in the statute, there are legislative proposals before Congress that propose sweeping changes to laws governing cable and broadcast obligations. In particular these bills propose repealing retransmission consent, must carry, and the Copyright Act's "compulsory license" provisions.

During the hearing, witnesses provided conflicting testimony on the impact such eliminations would have on the marketplace and with retrans negotiations some said it would only increase disputes and others said it would wouldn't.

Question 5. Can you elaborate, in detail, on how negotiations between MVPDs and broadcasters (and/or programming/content owners and anyone else that might now be included) would be carried out, if the compulsory license, must carry, and retransmission consent provisions were eliminated? Please lay out the process and parties that would exist in negotiating the rights to use programming/content. Also, please compare/contrast the new negotiation process that would result versus the current retransmission consent negotiations.

Answer. As I noted at the hearing, introducing even more claimants into an already challenging negotiating environment may lead to more disputes, not fewer, will be a lawyer's paradise, and is unlikely to yield any relief to consumer pocketbooks.

That brave new marketplace would also be an extraordinarily capital intensive one. I testified that in that new world CBS would do just fine. One way or the other, we will be able to invest in our content, continue to attract audiences, and figure out how to monetize our performance. But the adverse impact on smaller companies –both on the broadcaster *and* MVPD sides—could be substantial.

Many smaller players will be squeezed out of the business. West Virginians may have access only to larger regional super players from Washington, D.C. and Pittsburgh, or South Carolinians may lose the wonderful localism tradition earned by their state's broadcasters in favor of service solely from Atlanta, Charlotte or even New York City.

This move to a more regional system will come at the expense of local economies and consumers.

Question 6. If you believe that eliminating these provisions would lead to more disputes, can you elaborate, in detail, on why?

Answer. I believe that in the absence of a compulsory license and retransmission consent there would be far more disputes if for no other reason than that many, many more parties would be involved.

As the Copyright Office concluded in a 2011 report to Congress pursuant to the Satellite Television Extension and Localism Act (STELA):

> In the absence of the statutory licenses, the businesses of cable operators and satellite carriers would be much different, and presumably more difficult, because they would have to negotiate with copyright owners through private transactions for the public performance rights to copyrighted broadcast content.

Question 7. If you believe that eliminating these provisions would lead to less disputes, can you elaborate, in detail, on why?

Answer. Please see response to Question 6.

Question 8. In witness testimony, it was indicated that for 2012, to date, there have already been 69 disputes regarding retransmission consent. How many disputes have occurred between MVPDs and non-broadcast networks/programmers?

Answer. I have no independent information as to such disputes, but there have also been reports of numerous disruptions of non-broadcast programming in 2012. It is important to note that any disruptions involving retransmission consent are local in nature, affecting an individualized market and a limited amount of MVPD subscribers, while disruptions involving non-broadcast programmers affect the nationwide carriage of that programming and, therefore, millions of MVPD subscribers.

CBS has been an independent company since 2006, and in that time has concluded nearly 100 retransmission consent agreements without a single public dispute with the relevant MVPD.

Question 9. It is my understanding that while there has been a 15 percent increase in commercials television stations from 1996 to 2010, there has also been a 33 percent decrease in the number of station owners. There has also been a continued dearth of ownership by minorities and women—which is approximately only 5

percent and 3.3 percent of TV market share, respectively (both well below their population representation). Both indicate a significant deficit in achieving the policy goals of localism and diversity.

A free exchange of a wide range of viewpoints is the lifeblood of our democracy, and the print and broadcast media serve an indispensable function by exposing our society to diverse thoughts and viewpoints.

What would the impact of eliminating must carry requirements from the law have on local and independent stations? Without must carry how could a local independent station get carried by a MVPD? Is there any obligation of the MVPD to carry the station?

Answer. But for one instance in which a station we acquired had already elected must carry, CBS does not rely on must carry and would not be affected, but the impact on smaller stations and the ensuing diversity of voices Congress strives to provide might be adversely impacted. I note this despite the fact that any adverse impact may benefit CBS from a competitive standpoint.

Question 10. Would the elimination of must carry possibly lead to more concentration in the media market and, as a result, further muting the diversity of media voices, which has been a resolute policy of our Nation's telecommunications and media laws?

Answer. Please see response to Question 9.

Online Video vs. Traditional Video

According to Nielsen Media, the average American watches over 153 hours of video per month on traditional television compared to only 4.5 hours per month of online video. Also, approximately 97 percent of American households have a television whereas 68 percent of households have broadband (the U.S. currently ranks 23rd in broadband penetration).

In addition, a 2011 Project for Excellence in Journalism survey found that local TV remains America's most popular source of local news and information, particularly for weather and breaking news—89 percent of surveyed adults get information about local weather and 80 percent follow local breaking news through local television. Only about 51 percent of smartphone users use the device to get news.

While the Internet is a very value medium for media and news and provides incredible benefit to users, most Americans still rely heavily on traditional television for programming, local news, and even weather.

Question 11. With the current penetration and marketplace, is the Internet a "perfect substitute" to traditional television programming and local broadcast news? If not, what do believe is required for it to be a substitutable good to traditional television and local news?

Answer. In economic terms, a good or service is deemed to be a "perfect substitute" if it is completely substitutable with another good or service. The American public looks to and depends upon their local television stations –and not to the Internet—as the primary "go to" source for news, weather, traffic and information. Moreover, local television stations offer a news service and platform that is ubiquitous and free of charge. While broadcasters compete with the Internet for audience and advertisers, local broadcasters do not merely aggregate or regurgitate news from other sites. Instead, they invest millions of dollars annually to produce news and information programming that is original and fresh. This means investing in personnel—including reporters, writers, producers, camera operators—and purchasing technical equipment that allows live coverage of local events and the production of high-quality content. This is a model the Internet is not currently able to match. Therefore, the Internet is not yet a perfect substitute for local broadcast news.

Value of Public Broadcasting

Harris Interactive, an independent, non-partisan research firm, found—for the ninth year in a row—that PBS (Public Broadcasting Service) is the Nation's most-trusted institution by the American public. *PBS ranked higher than our court system, newspapers, our Federal government, and, surprisingly, even Congress.*

In addition, *74 percent of the American public surveyed believe Federal funding for PBS is money well spent.* PBS was also the most trusted and safe place for children to watch television—88 percent of Americans surveyed agreed.

Question 12. What role do you see public television playing in providing local programming?

Answer. All local broadcasters, including public television stations, compete against each other for viewers. Competition is good and we hope to see public television stations remain vibrant.

Question 13. To your knowledge, do you believe PBS or any other public broadcasting station would be adversely impacted by any of the legislative proposals (that would do away with must carry, retrans, or compulsory licenses) currently in Congress?

Answer. I defer to our PBS colleagues on this question as I have no particular expertise on the challenges facing public broadcasting.

Gentlemen's Agreement Not to Pull Signal

Several of the negotiation disputes have threatened or have actually disrupted cable customers' viewing of major television programming—whether that is sporting events, season finales of shows, or the Oscars. It is my understanding cable operators are prohibited from pulling broadcast signals during sweeps when ratings determine advertising rates—the life blood of your business.

Question 14. Why shouldn't there be a similar prohibition on broadcasters to not pull their signals in a retransmission negotiation impasse during a major sporting event or other highly watched programming like the Oscars—in order to limit the disruptive nature of negotiation disputes to consumers?

Answer. I would oppose such a prohibition. As noted in response to Question 1 above, under Section 325(b), consent for retransmission of a station's broadcast signal is within the sole province of the station. No party, not even the FCC, can permit retransmission of a signal, even for a short period of time or for a given program. Broadcasters spend hundreds of millions of dollars to produce or acquire content that is popular with viewers. Thus, mandating carriage of our content –even for a limited time—effectively would put the government's thumb on the MVPDs' side of the scale. The consequences of such government intervention in the free market of negotiations likely would result in lower fees to broadcasters which, in turn, would impair our ability to produce and obtain the high quality programming that viewers want. Finally, let me emphasize that when a retrans disruption occurs and a station's signal is not available on a particular MVPD's platform, that station's programming is still widely available –via competing MVPDs in the market, as well as over the air.

Question 15. Would you (and/or your affiliates/members) agree to voluntarily adopt an arrangement of where you would not pull your signal prior to a major sporting or highly watched/anticipated event if negotiations are at an impasse? You could obviously still pull your signal after the event, if you so desired.

Answer. Making such a "voluntary" commitment across the board would lead to the same result described in response to Question 14. However, we may elect to grant an extension of a retrans deadline as part of the to-and-fro of negotiations in a free market. Indeed, we have done so in the past when we believe that discussions were going well with the MVPD. These extension periods have covered big-ticket broadcast events, such as the Super Bowl. But these extensions were made in our discretion, and not based on a regulatory obligation to do so.

Local Programming & Independent Programming

I have long been a champion of promoting localism and diversity in television. Local media—be it newspaper, radio, or television—play a critical role in informing citizens about important decisions made by their local, state, and Federal officials. *Even with the Internet and other media sources, a 2011 Project for Excellence in Journalism survey found that local TV remains America's most popular source of local news and information, particularly for weather and breaking news—89 percent of surveyed adults get information about local weather and 80 percent follow local breaking news through local television.* Also, locally owned stations also air more local news and programming than non-locally owned stations, typically 5 1/2 minutes more per day.

It seems to me that one way to make sure that local television stations can continue to invest in local journalism is to allow them to recoup the investments they make in local programming. I am concerned about the impact that various legislative proposals would have on localism. Some have proposed to significantly alter the negotiating leverage of the parties in a way that could make it more difficult for local broadcasters or independent programmers to receive fair value for their programming.

Question 16. Do you agree? Can you discuss your concerns with the various legislative proposals and its impact on local stations and the availability of local programming to consumers that rely on over-the-air broadcasting?"

Answer. I am also concerned that the various legislative proposals relating to retransmission consent would have an adverse impact on local broadcasting. For further detail, please see response to Question 5.

Question 17. How important are media ownership rules to promoting competition, diversity, and localism? Some broadcasters have called for relaxing media ownership rules but could that cause greater consolidation and concentration, which would be counter to goals in the statute of promoting competition, localism, and diversity?

Answer. CBS has been one of the broadcasters calling for less restrictive ownership rules. Today, broadcasters compete with an ever-increasing and constantly changing array of alternative sources of news, information, and entertainment. Broadcasters undoubtedly contribute to competition, localism and diversity, and if we are to continue to do so, we must be released from structural regulations that do not bind our competitors.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JIM DEMINT TO MARTIN FRANKS

Question 1. If enacted as written, would the Next Generation Television Marketplace Act, S. 2008, allow a pay-TV company to retransmit the programming aired on broadcast signals without consent?

Answer. No.

Question 2. Besides several local CBS broadcast stations, like WCBS–TV in New York City, your company owns the non-broadcast Showtime and Smithsonian Channels. Your company negotiates copyright-based carriage agreements for these channels with pay-TV providers without any compulsory license or retransmission consent legal structure involved.

a. Are you able to receive fair compensation from pay-TV companies for carriage of Showtime and Smithsonian Channels?

Answer. Yes, based on free market negotiations.

b. Are pay-TV providers able to retransmit Showtime and Smithsonian Channel programming without your consent?

Answer. No.

c. My legislation envisions you negotiating carriage agreements in that same manner for WCBS–TV and your other broadcast stations. Could CBS negotiate for carriage of its broadcast stations the way it does for its non-broadcast properties if pay-TV compulsory licenses and retransmission consent were both repealed?

Answer. Eventually, yes, but only after a period of several years of considerable disruption. And to what end? As I noted at the hearing, I can say without equivocation from my position as the principal retransmission consent negotiator for CBS, the market for video programming is already one of the country's most robust and competitive sectors in the Nation. Retransmission consent is not broken and not currently hampered by government intervention. In fact, the mere suggestion of Federal legislation has made retransmission consent negotiations more difficult. Any tampering with it now could negatively impact consumers and trigger severe negative results to a broadcast television industry that is positively contributing to the U.S. economy.

Question 3. In your testimony, you explain how CBS affiliates leverage CBS network programming into advertising revenue. You state, "When network programming is of high quality and compelling, local stations benefit . . . (by) . . . using this network programming to obtain advertising dollars." They then use those advertising revenues to produce local programming and obtain syndicated programming. I was surprised that you did not discuss retransmission consent revenue received by CBS affiliates or the way in which they use that revenue.

a. How much retransmission consent revenue did CBS make from its owned & operated (O&O) stations last year?

Answer. CBS has publicly reported that we expect retransmission consent revenues of approximately $250 million in 2012.

b. Does CBS charge its non-O&O affiliates reverse compensation or some similar fee in exchange for their affiliation?

Answer. CBS negotiates with each of our affiliated stations over the various terms of their carriage of CBS Television Network programming. In many cases, affiliates do compensate us for that carriage.

c. How much reverse compensation or similar revenue did CBS receive last year from its affiliates?

Answer. We do not break out that revenue. Moreover, most of our affiliates are still on long term contracts that do not expire for several more years. The renewal of those contracts is the point at which reverse compensation will be negotiated.

d. How much retransmission consent revenue did CBS's non-O&O affiliates receive last year?

Answer. We have no access to the retrans revenues of our affiliates.

Question 4. Your prepared remarks indicate that "CBS pays hundreds of millions of dollars each year to the NFL and to the NCAA for rights to March Madness alone." You also mention fees paid for "SEC Football, regular season NCAA basketball, PGA golf, and the U.S. Open tennis tournament." How much of the cost of these programs is covered by the revenue from advertising sold within these programs?

Answer. CBS's ability to invest in the acquisition of broadcast rights to premier sporting events, as well as in the production of the highest quality entertainment and news programming, is made possible today by a variety of revenue streams, including advertising and retransmission consent fees. In a free, unfettered market, broadcasters should be permitted to obtain revenues from any combination of sources as it can in order to provide the American consumer with a service that almost every household can access free of charge.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. KELLY AYOTTE TO MARTIN FRANKS

Question. Mr. Franks, if compulsory licensing is eliminated, what would be the effect on smaller providers? Would individual deals need to be cut? Is it easier for those already in the marketplace, therefore hurting competition?

Answer. As I noted at the hearing, introducing even more claimants into an already challenging negotiating environment may lead to more disputes, not fewer, will be a lawyer's paradise, and is unlikely to yield any relief to consumer pocketbooks.

That brave new marketplace would also be an extraordinarily capital intensive one. I testified that in that new world CBS would do just fine. One way or the other, we will be able to invest in our content, continue to attract audiences, and figure out how to monetize our performance. But the adverse impact on smaller companies—both on the broadcaster *and* MVPD sides—could be substantial.

Many smaller players will be squeezed out of the business. West Virginians may have access only to larger regional super players from Washington, D.C. and Pittsburgh, or South Carolinians may lose the wonderful localism tradition earned by their state's broadcasters in favor of service solely from Atlanta, Charlotte or even New York City.

This move to a more regional system will come at the expense of local economies and consumers.

Where Your Cable Dollar Goes

(OR HOW AN OPERATOR SPENDS ITS MONEY)

Just where does the average dollar of cable revenue go? As cable operators struggle to win back customers, juggle their finances to adapt to a changing economy and find new ways to package services for cost-conscious consumers, that question stands out. For most operators, the bulk of every dollar generated from voice, video and data service is plowed right back into the business (about **80%**). But that other **20%** does find some interesting homes — taxes, for one (contrary to industry lore, many cable operators do pay taxes now) and profit, another once-elusive metric for cable. *Multichannel News* took a detailed look at the financial statements of several publicly traded MSOs and spoke with analysts and industry associations to come up with a snapshot that would represent how a typical cable operator spends its money. All numbers are averages and are based on financial reports, industry estimates, SNL Kagan research and *MCN* estimates. No figures are intended to reflect the practices of any individual cable operator.

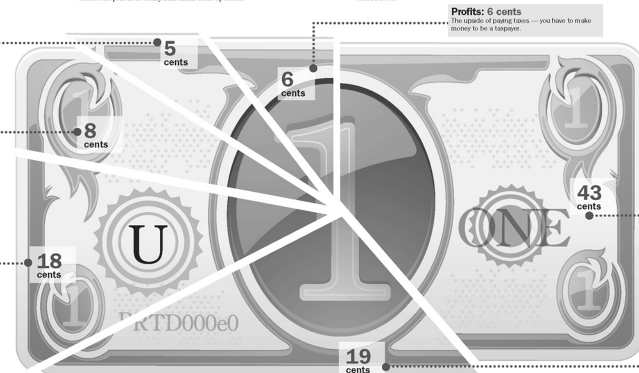
— *Mike Farrell*

Taxes: 5 cents
Once a dirty word in the cable industry, more cable operators are paying the tax man as interest expense has fallen, revenue has grown and capital expenditures on equipment and upgrades have declined. Some larger operators have been paying taxes for several years.

Interest Expense: 8 cents
Another big expense item that is waning as capex needs decline and debt markets offer favorable rates. For some operators, interest expense has declined by double digits in the past three years.

Depreciation & Amortization: 18 cents
At **15 cents**, capex makes up most of depreciation and amortization (loss in asset value), but those outlays are on the decline as the fiber buildout is finished. Capex as a percentage of revenue has fallen from more than 20% in 2008 to about 15% in 2010.

Profits: 6 cents
The upside of paying taxes — you have to make money to be a taxpayer.



Operating Expenses: 43 cents

Video Programming: 22 cents Programming remains the largest expense item for cable operators, accounting for 47% of all operating expenses and 40% of total video revenue.

Retransmission Consent: 2 cents According to SNL Kagan, retransmission-consent fees were expected to be about 1.2% of total video revenue in 2010, rising to 2% by 2014. At that rate, retrans currently makes up about 3% of total video expenses.

Cable Networks: 20 cents Affiliate fees at networks — ranging from about $4.75 per month per customer for ESPN to 1 cent per month for RFD-TV, according to SNL Kagan — have been growing at a double-digit annual clip. And those increases could rise even higher as networks that had accepted lower carriage fees roll off those long-term deals and seek what they feel is fair value.

Selling, General & Administrative Expenses: 19 cents

Marketing: 4 cents Marketing has traditionally been cable's Achilles heel, but is attracting greater attention as competition heats up and new products emerge. Marketing spend for the major cable operators rose about 12% in 2010.

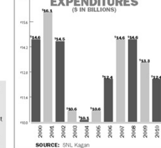
Customer Service: 5 cents Another segment that is getting more attention. In the past three years, customer-service expenditures have grown about 3% for some major MSOs.

Employee: 10 cents Includes labor costs, as well as expenditures for delivery trucks and other equipment.

CABLE-INDUSTRY REVENUE: ($ IN MILLIONS)

YEAR	RESIDENTIAL REVENUE	OTHER REVENUE	TOTAL REVENUE
2000	$32,541	$9,575	$42,116
2001	$35,734	$9,743	$45,477
2002	$36,738	$11,160	$47,898
2003	$39,338	$15,056	$54,394
2004	$41,813	$18,212	$60,025
2005	$43,832	$21,846	$65,678
2006	$46,518	$25,354	$71,872
2007	$49,105	$29,719	$78,824
2008	$51,467	$33,788	$85,255
2009	$53,040	$36,861	$89,901

SOURCE: SNL Kagan



RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO COLLEEN ABDOULAH

Question 1. Whenever signals are pulled as a result of a retransmission consent dispute, consumers lose. The impact is magnified in areas where a single MVPD dominates an entire state. What is the best way to protect consumers while companies work to resolve disputes and impasses in negotiations for the carriage of broadcast signals?

Answer. I believe that one of the best ways to protect consumers while companies work to resolve disputes and impasses in negotiations for the carriage of broadcast signals is to grant MVPDs and broadcasters the right to interim carriage. This is not a novel idea. Over the last decade, as part of conditions in several media mergers, the FCC has granted interim carriage rights to MVPDs while they seek to resolve their programming disputes.

An additional way to protect consumers is for Congress or the Commission to provide a market-oriented means for resolving these disputes and impasses. I believe that "baseball style" ("final offer") commercial arbitration, another remedy imposed by the FCC on several media mergers, including most recently the Comcast-NBCU merger, can be an effective way to encourage the parties in a negotiating dispute to reach a resolution prior to dropping a signal. The FCC's use of baseball-style arbitration is based on the theory that the availability of arbitration alone will push the parties towards agreement prior to a breakdown in negotiations. The FCC has found that "final offer" arbitration has the attractive ability to induce the two sides to reach their own agreement lest they risk the possibility that the arbitrator will choose the relatively extreme offer of the other side. The prospect of submission of a dispute to arbitration supports market forces and aids in preventing a transaction from distorting the marketplace. Since "baseball style" commercial arbitration can take time to resolve, it is important that MVPDs be permitted to continue carrying the networks that are the subject of the dispute during the pendency of the dispute resolution process. Moreover, while "baseball style" commercial arbitration can be prohibitively costly for small cable operators, the Commission could adopt special rules for operators of this size to make it work in a cost-effective manner.

Question 2. Should any special consideration be given to protect consumers in geographic locations where a single MVPD serves a high percentage (more than 50 percent) of total MVPD subscribers in a state?

Answer. The consumer dislocations caused by broadcaster blackouts may be of greater breadth in geographic locations where a single MVPD serves a high percentage of total MVPD subscribers in a DMA, however, consumers served by the market's smallest MVPDs—who, rather than the largest, are taken advantage of the most in retransmission consent negotiations,—are most in need of special consideration.

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO COLLEEN ABDOULAH

Question 1. In recent years, the breakdown of retransmission consent negotiations has threatened the television access of millions of Americans to major events like the Super Bowl, the World Series, and the Oscars, not to mention the essential access of viewers to local news broadcasts. The FCC has proposed to strengthen notice requirements for consumers when there is the possibility that certain services may lapse. Does WOW! support this proposal?

Answer. WOW! questions whether the consumer benefits of the notice requirements proposed by the Commission would be outweighed by consumer harm and confusion. In some instances, consumers might respond to the notice of a potential loss of service by switching providers only to learn afterwards that such action was unnecessary because the dispute was resolved without any consumer impact. In other instances, consumers might heavily discount or ignore the notice believing that the dispute will be resolved, realizing that there would be no agreement only after losing service. We believe a better approach to addressing the problem of consumers losing access to broadcast stations is to reform the underlying retransmission consent rules.

Question 2. Your written testimony indicated your support for continuous carriage. Why does WOW! believe continuous carriage during retransmission consent disputes would help end disputes?

Answer. WOW! supports continuous carriage in order to ensure that consumers are not unnecessarily harmed while retransmission consent negotiations are ongoing. In particular, interim carriage can be an effective way to protect consumers

while the FCC determines whether the good faith rules have been violated by either party. This is not a novel idea. Over the last decade, as part of conditions in several media mergers, the FCC has granted interim carriage rights to MVPDs while they seek to resolve their programming disputes.

Question 3. Please provide for the record information on WOW!'s termination fee policy.

Answer. WOW! does not require residential customer to sign contracts for our services, therefore we have neither termination fees nor policies regarding them. Rather, we rely on the quality of our service and products as the incentive for continued customer loyalty.

Question 4. Has your company examined dropping these fees in the future?

Answer. Please see above answer.

Question 5. Your written testimony noted WOW!'s support for requiring alternative styles of negotiation, like baseball-style arbitration, in retransmission consent disputes. Can you elaborate on why you feel this would be beneficial?

Answer. WOW! believes that "baseball style" ("final offer") commercial arbitration, a remedy imposed by the FCC on several media mergers, including most recently the Comcast-NBCU merger, can be an effective way to encourage the parties in a negotiating dispute to reach a resolution prior to dropping a signal. The FCC's use of baseball-style arbitration is based on the theory that the availability of arbitration alone will push the parties towards agreement prior to a breakdown in negotiations. The FCC has found that "final offer" arbitration has the attractive ability to induce the two sides to reach their own agreement lest they risk the possibility that the arbitrator will choose the relatively extreme offer of the other side. The prospect of submission of a dispute to arbitration supports market forces and aids in preventing a transaction from distorting the marketplace. Since "baseball style" commercial arbitration can take time to resolve, it is important that MVPDs be permitted to continue carrying the networks that are the subject of the dispute during the pendency of the resolution process. Moreover, while "baseball style" commercial arbitration can be prohibitively costly for small cable operators, the Commission could adopt special rules for operators of this size to make it work in a cost-effective manner.

In addition to arbitration, the FCC has found it necessary, as part of its media merger conditions, to require interim carriage of the broadcast signal while negotiations are ongoing under the prices, terms and conditions of the expired agreement to protect consumers against loss of access to broadcast programming.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO COLLEEN ABDOULAH

Question 1. S. 2008, the Next Generation Television Marketplace Act of 2011, would provide for the deregulation of retransmission consent. But as we saw last month with DirecTV and Viacom, blackouts occur due to disputes between cable programmers and cable providers in a non-regulated environment too. If we see customers, like those who subscribe to DirecTV, suffering in a deregulated world, why would we want to deregulate the negotiation process for broadcasters too?

Answer. We believe that reform of the existing system is necessary to ensure that consumers are protected. With regard to some rules that are part of the retransmission consent regulatory scheme, deregulation may be appropriate. In instances where both parties at the negotiation table have roughly the same market power, there may be less need for regulations to avoid disruption to the consumer. However, this is not always the case, and in some cases, new rules may be necessary.

Question 2a. Today's video marketplace is very different than what it was in 1992. Since the enactment of the Cable Act, satellite carriers and telephone companies offering video services compete with cable operators. And in the last few years, we have seen the enormous growth of online video. In your view, given these changes in the video marketplace, are the existing rules working?

Answer. No.

Question 2b. Why or why not?

Answer. The rules were designed for a period of time when a cable operator was the dominant provider of multichannel video service in its franchise area. Times have changes, and the rules governing the market need to change as well.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO COLLEEN ABDOULAH

Question 1a. Stakeholders on all sides of the retransmission consent debate appear to agree that the visibility and frequency of retransmission disputes has increased over the last few years. Some have argued that retransmission consent is working and that some growing pains are reasonable because many broadcast stations are electing to pursue deals instead of must-carry for the first time since enactment of the 1992 Cable Act which created the dual regimes of must carry and retransmission consent. On the other hand, distributors argue that private sector retransmission consent deals are taking longer to negotiate, and that it is becoming harder to reach agreement regarding mutually agreeable terms. If you believe must-carry and retransmission consent are important to localism, how do you recommend that the Congress measure the success of localism?

Answer. If Congress wants to determine whether retransmission consent is important to localism, Congress should inquire as to how much of broadcasters' retransmission consent revenue is being invested into the production of local programming.

Question 1b. If you believe retransmission consent is failing, what evidence can you provide?

Answer. Failed retransmission consent negotiations have resulted in 80 blackouts this year alone, which is the largest number of blackouts in a year since the rules were passed in 1992. Moreover, the wholesale prices for retransmission consent are rising despite the fact that the ratings for these stations are dropping.

Question 2a. Some distributors have indicated concerns about the ability of content creators to tie affiliated programing to retransmission consent deals because they argue this practice contributes to programming cost increases. Broadcasters and content creators argue that current practices provide necessary financial support for a greater variety of programming options which they say is a benefit to consumers. To what extent should Congress be concerned about programming cost increases over the past several years?

Answer. Congress should be very concerned about the programming cost increases over the past several years because these costs are largely passed along to consumers in the form of higher subscription rates. These rate increases are felt most acutely by consumers at the lowest end of the economic scale, because they have the least amount of discretionary income (or, more pointedly, no discretionary income), to spend. Bernstein Research has published a series of studies starting in 2009 on what it calls a "looming affordability crisis in Pay TV and telecommunications" where "dislocations at the low end of the income scale in the wake of the Great Recession must be viewed as structural rather than cyclical." Their most recent research reveals that the bottom 40 percent of households not only has no discretionary income with which to purchase pay-TV and telecom services after meeting the most basic necessities of food, shelter, transportation and health care, they "are already underwater to the tune of $1,322 annually, or more than $100 per month." [Craig Moffett, Bernstein Research, U.S. Cable & Satellite Broadcasting, "Weekend Media Blast: The Poverty Problem 2012 (Oct. 12, 2012)] For residents of areas where a good quality over-the-air broadcast signal does not reach because of topography, this can mean the complete loss of access to vital news, emergency information, and entertainment for an entire household.

Increased programming costs from the major content companies also threaten independent programming voices whose opportunities for carriage are threatened by the outsized demands of the media giants.

Question 2b. If you believe programming cost increases merit a fresh look at the 1992 Cable Act, do you believe cost savings garnered by distributors should be passed onto consumers? If so, how would any savings be realized by consumers?

Answer. Given the amount of competition among MVPDs in the market, I believe that market forces will cause cost savings to be passed onto consumers, either through lower prices, or more limited rate increases.

Question 2c. If you support changes to current law, would your company provide consumers with the same flexibility to pursue a la carte programming options? If not, why not?

Answer. WOW! would like the flexibility to provide its customers some channels or blocks of channels on an a la carte or tiered basis, particularly higher cost networks, such as broadcast stations, regional sports networks, and national sports networks.

Question 3a. Given that retransmission consent deals are private sector negotiations under the 1992 Cable Act, it is difficult for observers and participants to track

pricing trends. Do you believe pricing transparency for distributors and for consumers could help to alleviate tensions over content deals? If not, why not?

Answer. Generally speaking, I believe that greater transparency for distributors and for consumers would help alleviate tensions over content deals. However, greater transparency must come with certain safeguards to prevent sellers and buyers from using the available information to collude.

Question 3b. If you do believe pricing transparency could be beneficial, please provide specific recommendations for such a proposal could be implemented.

Answer. The FCC should be required to gather data and evidence for the purpose of producing a pricing report to Congress on the costs of retransmission consent. Today, unfortunately, the non-disclosure provisions that are part of nearly every retransmission consent agreement prevent even the FCC from knowing what MVPDs are paying for broadcast programming, or the level of pricing discrepancies among MVPDs of varying sizes.

Question 4. Going forward, how should Congress and/or the Federal Communications Commission measure whether or not the current system is working? Please provide specific metrics to support your answer.

Answer. The Commission should seek access to the prices, terms, and conditions of retransmission consent agreements, and issue an annual report to Congress on the matter. At a minimum, the report should measure how many blackouts have occurred in the covered period. Moreover, it should include an analysis of the difference in prices paid by small MVPDs versus large ones.

Question 5. If Congress were to revisit the 1992 Cable Act, are there improvements to the law which you believe Congress should consider?

Answer. At a minimum, Congress should consider adopting interim carriage to ensure that consumers do not lose access to broadcast stations during retransmission consent disputes, and adoption of baseball style commercial arbitration as a means of resolving impasses. Neither of these ideas are novel. Over the last decade, as part of conditions in several media mergers, the FCC has adopted these solutions. But Congress must go further to ensure adequate protections for small MVPDs, similar to those adopted by the FCC in its recent Comcast-NBCU merger order, such as one-way fee shifting if a small MVPD prevails in arbitration, and right of an MVPD with 3 million or fewer subscribers to use a bargaining agent to negotiate and arbitrate. In addition, Congress should adopt a ban on coordinated retransmission consent negotiations by separately owned, same market broadcast stations.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE TO COLLEEN ABDOULAH

Existing FCC Authority

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") amended the Communications Act to include Section 325, which provides television stations with certain carriage rights on local market cable television systems. The Commission established rules related to the retransmission/mandatory carriage election cycle, but did not adopt rules governing the negotiation process of retransmission consent.

However, the statute clearly calls for the FCC to ensure that broadcasters act in "*good faith during negotiations.*" During the Sinclair-Mediacom dispute back in 2007, the Commission didn't intervene because then Chairman Martin interpreted the law didn't and stated that the agency didn't have the authority to impose binding arbitration. At the time, he stated "It's not clear to me that the commission does have the authority to order arbitration."

Yet, during that time in January 2007, Senator Inouye and the late Senator Stevens wrote the FCC stating that the Commission did indeed have authority to intervene and, if necessary, use binding arbitration to resolve any failed negotiations.

Question 1. Given the existing statute and the Congressional letter, couldn't the current Commission interpret the statue differently than Chairman Martin to where they do have the statutory authority to be involved in any disputes? What is precluding them from doing so?

Answer. Yes, the current Commission can interpret the statute differently from previous Commissions, and it is my belief that the Commission has the statutory authority to be significantly more involved in helping to resolve retransmission consent disputes. I do not know what is precluding the current Commission from being more involved in dispute resolution.

Question 2. If Congress directed the FCC to ensure broadcasters act in "good faith" during negotiations, how do you believe the FCC can go about fulfilling that

responsibility and to limit or prevent the disruption of programming to cable and/or satellite customers?

Answer. The Commission could prohibit separately owned, same-market broadcasters from coordinating their retransmission consent negotiations as a *per se* violation of the good faith rules. Also the Commission could prohibit all forms of third-party interference with the exercise of retransmission consent for out-of-market carriage as a *per se* violation of the good faith rules.

Moreover, the Commission could make available dispute resolution mechanisms in cases where retransmission consent negotiations have reached an impasse and the broadcaster and MVPD cannot reach a deal on prices, terms, or conditions of carriage, even in the absence of a showing that a broadcaster has not acted in "good faith."

It could also create a process that provides interim carriage based on the terms of expiring retransmission consent deals while (i) an MVPD continues to negotiate in good faith towards a carriage agreement; or (ii) during the pendency of a dispute resolution proceeding.

Reasonable Basic Service Tier Rates

While I understand programming costs are growing, I am concerned about the significant increase in retransmission compensation that has occurred over the past several years. For example, retransmission consent revenue climbed more than 30 percent for six broadcasters in the first nine months of 2008. *By 2017, SNL Kagan—an industry analysis firm—projects retransmission fees will grow to $3.61 billion, with average per-subscriber fees potentially doubling.* So, as broadcasters look to increase revenue streams through retransmission fee, it seemingly puts upward pressure on the price of basic cable and ultimately consumers. Such increase may also infringe upon the existing statute.

Section 623(b)(1) requires the FCC to ensure that basic cable service rates are reasonable. In addition, Section 325(b)(3)(A) requires the Commission to consider the impact that retransmission consent has on basic cable service rates and that any regulations do not conflict with the FCC's "obligation under Section 623(b)(1)" to ensure such rates are reasonable.

According to SNL Kagan, the average cable TV subscriber in 2011 paid $78 a month compared to only $40 per month in 2001. Whereas the average household income fell 6 percent between 2006 and 2010, according to the U.S. Census.

Question 3. Do you know if the FCC is actively examining the impact of increasing retransmission fees in relations to basic cable rates?

Answer. No, I do not know. However, increasing retransmission consent rates are having a large impact on our basic cable rates, and we would strongly encourage the FCC to launch such an examination.

Question 4. Can you elaborate on what impact these retransmission fees have on the cost of basic cable service? What percentage of a cable customer's monthly cable bill is attributed to retransmission fees paid to the broadcasters (a rough estimate will suffice) for (1) a customer subscribing to basic cable and (2) a customer subscribing to the most expensive cable TV package?

Answer. We are prohibited by confidentiality language in our retransmission consent agreements from disclosing fees paid to the stations. However, during the past two retransmission consent cycles we have seen an average of 100 percent increases when the agreements get renegotiated. The internal year-over-year increases then moderate for the balance of the term of the agreement but essentially always represent a multiple of the consumer price index (CPI).

Based on the retransmission consent agreements we are negotiating now for 2013 and beyond we expect that trend to continue, if not worsen.

WOW!, like all other MVPDs, has no real option other than to pass some or all of these costs along to our customers. The impact of out-of-control programming cost increases, including retransmission consent fees, is felt most acutely by elderly and low-income customers.

Eliminating Retransmission Consent and Compulsory Licenses

While there is no question that Congress must examine and reform outdated provisions in the statute, there are legislative proposals before Congress that propose sweeping changes to laws governing cable and broadcast obligations. In particular these bills propose repealing retransmission consent, must carry, and the Copyright Act's "compulsory license" provisions.

During the hearing, witnesses provided conflicting testimony on the impact such eliminations would have on the marketplace and with retrans negotiations—some said it would only increase disputes and others said it would wouldn't.

Question 5. Can you elaborate, in detail, on how negotiations between MVPDs and broadcasters (and/or programming/content owners and anyone else that might now be included) would be carried out, if the compulsory license, must carry, and retransmission consent provisions were eliminated? Please lay out the process and parties that would exist in negotiating the rights to use programming/content. Also, please compare/contrast the new negotiation process that would result versus the current retransmission consent negotiations.

Answer. If these provisions were eliminated, the copyright owners of the content that airs on broadcast stations would gain greater control over the distribution of their content. Some of these copyright owners may choose to license their content to MVPDs on their own, and others may choose to grant broadcasters the right to sublicense their content to MVPDs

The new negotiation process that would emerge from the elimination of the statutory license and the retransmission consent provisions seems likely to carry with it at least as many of the same flaws as the current process, with the added problem that the changeover would inject a great deal of uncertainty into the marketplace that could be significantly harmful to consumers and competition.

If the must carry requirements were eliminated from the law, there would be no obligation on an MVPD to carry any broadcast station, and station owners that had relied on the must carry rules would have to negotiate for carriage with MVPDs, similar to the way retransmission consent stations negotiate carriage with MVPDs.

Question 6. If you believe that eliminating these provisions would lead to more disputes, can you elaborate, in detail, on why?

Answer. To the extent that MVPDs have to negotiate carriage deals with an increased number of copyright holders and their sub-licensees, the likelihood of negotiating impasses would be greater. The result may be fewer total broadcast signal blackouts, but more partial content blackouts where individual programs are no longer available to the viewer.

Question 7. If you believe that eliminating these provisions would lead to less disputes, can you elaborate, in detail, on why?

Answer. I do not believe that eliminating all of these provisions would lead to fewer disputes.

Question 8. In witness testimony, it was indicated that for 2012, to date, there have already been 69 disputes regarding retransmission consent. How many disputes have occurred between MVPDs and non-broadcast networks/programmers?

Answer. Carriage disputes between MVPDs and non-broadcast networks/programmers seem to occur less often than disputes regarding retransmission consent. I am aware of only two such disputes this year, each involving satellite providers. First, Dish Network continues to be unable to reach to reach a carriage deal with AMC Networks, which includes AMC, WE, IFC, and Sundance. This dispute has been ongoing since July. Second, DirecTV could not reach a carriage deal with Viacom for its 26 channels, including MTV, Nickelodeon and Comedy Central. The networks were off DirecTV for nine full days.

It is my understanding that while there has been a 15 percent increase in commercial television stations from 1996 to 2010, there has also been a 33 percent decrease in the number of station owners. There has also been a continued dearth of ownership by minorities and women—which is approximately only 5 percent and 3.3 percent of TV market share, respectively (both well below their population representation). Both indicate a significant deficit in achieving the policy goals of localism and diversity.

A free exchange of a wide range of viewpoints is the lifeblood of our democracy, and the print and broadcast media serve an indispensable function by exposing our society to diverse thoughts and viewpoints.

Question 9. What would the impact of eliminating must carry requirements from the law have on local and independent stations? Without must carry how could a local independent station get carried by a MVPD? Is there any obligation of the MVPD to carry the station?

Answer. If the must carry requirements were eliminated from the law, there would be no obligation on an MVPD to carry any broadcast station, and station owners that had relied on the must carry rules would have to negotiate for carriage with MVPDs, similar to the way retransmission consent stations negotiate carriage with MVPDs.

Question 10. Would the elimination of must carry possibly lead to more concentration in the media market and, as a result, further muting the diversity of media voices, which has been a resolute policy of our Nation's telecommunications and media laws?

Answer. If must carry stations could not strike carriage deals with an MVPD, and as a result these stations went out of business, then it is possible that one would perceive there to be greater concentration in the media market due to these stations' exit. However, one must then assess the magnitude of the impact of the loss of these stations on the diversity of media voices in the current marketplace.

Online Video vs. Traditional Video

According to Nielsen Media, the average American watches over 153 hours of video per month on traditional television compared to only 4.5 hours per month of online video. Also, approximately 97 percent of American households have a television whereas 68 percent of households have broadband (the U.S. currently ranks 23rd in broadband penetration).

In addition, a 2011 Project for Excellence in Journalism survey found that local TV remains America's most popular source of local news and information, particularly for weather and breaking news—89 percent of surveyed adults get information about local weather and 80 percent follow local breaking news through local television. Only about 51 percent of smartphone users use the device to get news.

While the Internet is a very value medium for media and news and provides incredible benefit to users, most Americans still rely heavily on traditional television for programming, local news, and even weather.

Question 11. With the current penetration and marketplace, is the Internet a "perfect substitute" to traditional television programming and local broadcast news? If not, what do believe is required for it to be a substitutable good to traditional television and local news?

Answer. I do not believe that today Internet video is a "perfect substitute" for traditional television programming and local broadcast news. Thus far, we have seen little evidence that significant numbers of consumers are abandoning traditional MVPD services ("cutting the cord") and relying instead entirely on video delivered over the Internet, which is how an economist would view a "perfect substitute." Rather, most Internet video appears to be complementary to MVPD offerings, with many consumers using both services.

Value of Public Broadcasting

Harris Interactive, an independent, non-partisan research firm, found—for the ninth year in a row—that PBS (Public Broadcasting Service) is the Nation's most-trusted institution by the American public. *PBS ranked higher than our court system, newspapers, our Federal government, and, surprisingly, even Congress.*

In addition, *74 percent of the American public surveyed believe Federal funding for PBS is money well spent.* PBS was also the most trusted and safe place for children to watch television—88 percent of Americans surveyed agreed.

Question 12. What role do you see public television playing in providing local programming?

Answer. While many of the smaller markets we serve don't receive much if any locally originated programming from their respective PBS affiliates, we continue to believe that PBS programming is an important service for our subscribers and expect it to remain a valued part of our channel lineups.

Question 13. To your knowledge, do you believe PBS or any other public broadcasting station would be adversely impacted by any of the legislative proposals (that would do away with must carry, retrans, or compulsory licenses) currently in Congress?

Answer. The elimination of the must carry rules and the compulsory license could have a near term adverse impact on PBS and other public broadcast stations. However, I believe that many MVPDs would continue to carry one or more PBS stations on their systems even without the must carry rules in place. Nonetheless, these stations would need to quickly adapt to the new regulatory environment, particularly a marketplace without a statutory license, and their success would depend on how well they make the transition.

Affiliate Negotiation & Impact on Localism

One of the arguments for reform is that the current law is outdated and doesn't allow for true marketplace negotiations because it allows local stations to block cable systems from importing network programming from another affiliate of the same broadcast network. For example, the network non-duplication rule prohibits distributors from negotiating with other suppliers of the same content—taking away a basic component of any free market.

Some have stated that this prohibits "free market" negotiations since cable operators have only one source to receive the programming. And therefore have rec-

ommended to open up the market where a cable or satellite operator could negotiate with an out-of-market affiliate.

Question 14. While this might seem appropriate, I am concerned about the impact such allowance would have on localism. As the Supreme Court has stated "fairness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece." If this scenario was allowed, how could we protect localism? What safeguards could be implemented to ensure local programming?

Answer. The relationship between elimination of the network non-duplication and syndicated exclusivity rules and the amount of local programming aired on local broadcast stations is indirect, at best.

Question 15. How feasible is it actually for a cable or satellite operator to negotiate with out of market affiliate? There is still the primary owner of the content—the programmer. If the cable operator is having a dispute with the in-market Fox or Disney broadcaster, how could the cable company turn to an out-of-market Fox or Disney affiliate and successfully negotiate? It's still Fox or Disney and it seems that if the out-of-market affiliate did engage, Disney could threaten to pull the affiliation to prevent such action?

Answer. It is increasingly difficult for small cable operators to negotiate retransmission consent with broadcasters for out-of-market carriage. It is now common for the national broadcast networks to prohibit contractually their affiliates from granting an MVPD the right to re-broadcast their signal outside of their local market. At the same time, in-market broadcasters are increasingly conditioning their grant of retransmission on MVPDs agreeing not to import out-of-market broadcast stations. These practices mostly harm consumers who benefit from receiving out-of-market stations in some circumstances where the out-of-market station offers in-state news and more relevant weather compared with the in-market station.

Where not restricted by exclusivity rules and contractual provisions, carriage of out-of-market stations is often made available to MVPDs at a more competitive price than the in-market affiliate. This often has the effect of moderating the demands made by the in-market affiliate, thus creating savings that can be passed through to consumers.

Retransmission Fee

As mentioned in a prior question, I am concerned about the significant increase in retransmission fees that has occurred over the past several years. But at the same time, given that retransmission consent is a negotiation between private parties, the MVPD is under no obligation to pay the fee being demanded by the broadcaster or carry the signal under Section 325(b)(4).

Question 16. If a MVPD feels that the retransmission fee the broadcasters is asking for is not reasonable then why not just simply not pay it, stop retransmitting the signal over the cable plant indefinitely, and, if need be, give every customer in the market an antenna? If seems over time, the number of subscribers MVPDs have (over 101 million subs) would make broadcasters come to the table sooner rather than later.

Answer. If an MVPD stops retransmitting the signal of a Big 4 broadcast network affiliate, the MVPD would expect to lose a significant number of subscribers, which will threaten their competitive standing in the marketplace. Providing an antenna to every customer using traditional antenna technology is not an option, particularly for smaller MVPDs serving rural areas, because not all customers can receive a good quality broadcaster signal over the air.

MVPDs don't object to paying a retransmission consent fee to broadcasters. MVPDs are troubled that rules and regulations that were created 20 years ago have not kept up with the times, and now give broadcasters advantages in negotiations which allow them to charge prices that are above fair market value.

Question 17. If all MVPDs feel that the retransmission fees are unreasonable then why don't you all agree not to pay the broadcasters—hold an industry-wide boycott?

Answer. Such an act would be considered collusion prohibited under the Sherman Antitrust Act.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JIM DEMINT TO COLLEEN ABDOULAH

Question 1. If enacted as written, would the Next Generation Television Marketplace Act, S. 2008, allow a pay-TV company to retransmit the programming aired on broadcast signals without consent?

Answer. No.

Question 2. Are WOW! subscribers required by Federal law to purchase a certain package of channels when they buy your video service?

Answer. Yes, current Federal law requires that WOW! subscribers must purchase at a minimum a basic cable service tier, which MUST include must carry signals, local public, educational and governmental access programming required under its franchises, and any signal of any television broadcast station that WOW! provides to any subscriber. Broadcast stations that elect retransmission consent generally require carriage in the basic cable service tier as a non-negotiable condition of retransmission consent. [Note the operator must put ALL broadcast signals on the basic tier without distinction as to whether they are there under must carry or retrans. See Section 623(b)(7)(A)(iii). The above paragraph has been modified.]

Question 3. Is WOW! prevented by Federal law from selling a subscriber *only* a single channel, Discovery Channel for example, or *only* a package of sports channels?

Answer. Except as set forth above in my answer to question 2, Federal laws do not prevent WOW! from selling a subscriber a single channel, like Discovery Channel, or a package (tier) of sports channels. However, in practice, media conglomerates that own many channels condition carriage of their most popular channel with carriage of their less popular channels and require them to be distributed on MVPD's most widely sold packages. Moreover, media conglomerates also require that their programming be carried in the same package of service as programming owned by other media conglomerates. The result for the consumer is a bloated and expensive tier of cable channels where the consumer has little to no choice in what channels to purchase.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. KELLY AYOTTE TO COLLEEN ABDOULAH

Question. Mr. Franks, if compulsory licensing is eliminated, what would be the effect on smaller providers? Would individual deals need to be cut? Is it easier for those already in the marketplace, therefore hurting competition?

Answer. No answer provided.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO DR. MARK COOPER

Question 1a. Whenever signals are pulled as a result of a retransmission consent dispute, consumers lose. The impact is magnified in areas where a single MVPD dominates an entire state. What is the best way to protect consumers while companies work to resolve disputes and impasses in negotiations for the carriage of broadcast signals?

Answer. No answer provided.

Question 1b. Should any special consideration be given to protect consumers in geographic locations where a single MVPD serves a high percentage (more than 50 percent) of total MVPD subscribers in a state?

Answer. No answer provided.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO DR. MARK COOPER

Question 1. S. 2008, the Next Generation Television Marketplace Act of 2011, would provide for the deregulation of retransmission consent. But as we saw last month with DirecTV and Viacom, blackouts occur due to disputes between cable programmers and cable providers in a non-regulated environment too. If we see customers, like those who subscribe to DirecTV, suffering in a deregulated world, why would we want to deregulate the negotiation process for broadcasters too?

Answer. No answer provided.

Question 2a. Today's video marketplace is very different than what it was in 1992. Since the enactment of the Cable Act, satellite carriers and telephone companies offering video services compete with cable operators. And in the last few years, we have seen the enormous growth of online video. In your view, given these changes in the video marketplace, are the existing rules working?

Answer. No answer provided.

Question 2b. Why or why not?

Answer. No answer provided.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO DR. MARK COOPER

Question 1a. Stakeholders on all sides of the retransmission consent debate appear to agree that the visibility and frequency of retransmission disputes has increased over the last few years. Some have argued that retransmission consent is working and that some growing pains are reasonable because many broadcast stations are electing to pursue deals instead of must-carry for the first time since enactment of the 1992 Cable Act which created the dual regimes of must carry and retransmission consent. On the other hand, distributors argue that private sector retransmission consent deals are taking longer to negotiate, and that it is becoming harder to reach agreement regarding mutually agreeable terms. If you believe must-carry and retransmission consent are important to localism, how do you recommend that the Congress measure the success of localism?

Answer. No answer provided.

Question 1b. If you believe retransmission consent is failing, what evidence can you provide?

Answer. No answer provided.

Question 2a. Some distributors have indicated concerns about the ability of content creators to tie affiliated programing to retransmission consent deals because they argue this practice contributes to programming cost increases. Broadcasters and content creators argue that current practices provide necessary financial support for a greater variety of programming options which they say is a benefit to consumers. To what extent should Congress be concerned about programming cost increases over the past several years?

Answer. No answer provided.

Question 2b. If you believe programming cost increases merit a fresh look at the 1992 Cable Act, do you believe cost savings garnered by distributors should be passed onto consumers? If so, how would any savings be realized by consumers?

Answer. No answer provided.

Question 2c. If you support changes to current law, would your company provide consumers with the same flexibility to pursue a la carte programming options? If not, why not?

Answer. No answer provided.

Question 3a. Given that retransmission consent deals are private sector negotiations under the 1992 Cable Act, it is difficult for observers and participants to track pricing trends. Do you believe pricing transparency for distributors and for consumers could help to alleviate tensions over content deals? If not, why not?

Answer. No answer provided.

Question 3b. If you do believe pricing transparency could be beneficial, please provide specific recommendations for such a proposal could be implemented.

Answer. No answer provided.

Question 4. Going forward, how should Congress and/or the Federal Communications Commission measure whether or not the current system is working? Please provide specific metrics to support your answer.

Answer. No answer provided.

Question 5. If Congress were to revisit the 1992 Cable Act, are there improvements to the law which you believe Congress should consider?

Answer. No answer provided.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE TO DR. MARK COOPER

Existing FCC Authority

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") amended the Communications Act to include Section 325, which provides television stations with certain carriage rights on local market cable television systems. The Commission established rules related to the retransmission/mandatory carriage election cycle, but did not adopt rules governing the negotiation process of retransmission consent.

However, the statute clearly calls for the FCC to ensure that broadcasters act in "*good faith during negotiations.*" During the Sinclair-Mediacom dispute back in

2007, the Commission didn't intervene because then Chairman Martin interpreted the law didn't and stated that the agency didn't have the authority to impose binding arbitration. At the time, he stated "It's not clear to me that the commission does have the authority to order arbitration."

Yet, during that time in January 2007, Senator Inouye and the late Senator Stevens wrote the FCC stating that the Commission did indeed have authority to intervene and, if necessary, use binding arbitration to resolve any failed negotiations.

Question 1. Given the existing statute and the Congressional letter, couldn't the current Commission interpret the statue differently than Chairman Martin to where they do have the statutory authority to be involved in any disputes? What is precluding them from doing so?

Answer. Changing statutory interpretations are quite challenging. One must prove a material change in circumstances to reverse an earlier interpretation. Should the FCC try to do so, it would certainly be sued.

Question 2. If Congress directed the FCC to ensure broadcasters act in "good faith" during negotiations, how do you believe the FCC can go about fulfilling that responsibility and to limit or prevent the disruption of programming to cable and/or satellite customers?

Answer. If the Congress has the will and ability to take action, it should do a lot more than "good faith." Good faith negotiations will require arbitration and enforcement. Congress will do better o mandate specific criteria or standards.

Reasonable Basic Service Tier Rates

While I understand programming costs are growing, I am concerned about the significant increase in retransmission compensation that has occurred over the past several years. For example, retransmission consent revenue climbed more than 30 percent for six broadcasters in the first nine months of 2008. *By 2017, SNL Kagan—an industry analysis firm—projects retransmission fees will grow to $3.61 billion, with average per-subscriber fees potentially doubling.* So, as broadcasters look to increase revenue streams through retransmission fee, it seemingly puts upward pressure on the price of basic cable and ultimately consumers. Such increase may also infringe upon the existing statute.

Section 623(b)(1) requires the FCC to ensure that basic cable service rates are reasonable. In addition, Section 325(b)(3)(A) requires the Commission to consider the impact that retransmission consent has on basic cable service rates and that any regulations do not conflict with the FCC's "obligation under Section 623(b)(1)" to ensure such rates are reasonable.

According to SNL Kagan, the average cable TV subscriber in 2011 paid $78 a month compared to only $40 per month in 2001. Whereas the average household income fell 6 percent between 2006 and 2010, according to the U.S. Census.

Question 3. Do you know if the FCC is actively examining the impact of increasing retransmission fees in relations to basic cable rates?

Answer. I do not.

Question 4. Can you elaborate on what impact these retransmission fees have on the cost of basic cable service? What percentage of a cable customer's monthly cable bill is attributed to retransmission fees paid to the broadcasters (a rough estimate will suffice) for 1) a customer subscribing to basic cable and 2) a customer subscribing to the most expensive cable TV package?

Answer. Retransmission fees are a small part of the total bill. However, retransmission has played a large part in driving up cable bills. By giving the broadcasters the ability to create bundles that have driven up costs.

Eliminating Retransmission Consent and Compulsory Licenses

While there is no question that Congress must examine and reform outdated provisions in the statute, there are legislative proposals before Congress that propose sweeping changes to laws governing cable and broadcast obligations. In particular these bills propose repealing retransmission consent, must carry, and the Copyright Act's "compulsory license" provisions.

During the hearing, witnesses provided conflicting testimony on the impact such eliminations would have on the marketplace and with retrans negotiations—some said it would only increase disputes and others said it would wouldn't.

Question 5. Can you elaborate, in detail, on how negotiations between MVPDs and broadcasters (and/or programming/content owners and anyone else that might now be included) would be carried out, if the compulsory license, must carry, and retransmission consent provisions were eliminated? Please lay out the process and parties that would exist in negotiating the rights to use programming/content. Also,

please compare/contrast the new negotiation process that would result versus the current retransmission consent negotiations.

Answer. Repeal of these provision would completely unbalance the bargaining process. MVPDs have market power over access to viewers. MVPDs would eat the lunch of the broadcasters. Consumers would ultimately pay the price.

Question 6. If you believe that eliminating these provisions would lead to more disputes, can you elaborate, in detail, on why?

Answer. I do not believe they would lead to more disputes. The MVPDs' would prevail on terms that suite them.

Question 7. If you believe that eliminating these provisions would lead to less disputes, can you elaborate, in detail, on why?

Question 8. In witness testimony, it was indicated that for 2012, to date, there have already been 69 disputes regarding retransmission consent. How many disputes have occurred between MVPDs and non-broadcast networks/programmers?

Answer. I do not have this information.

Question 9. What would the impact of eliminating must carry requirements from the law have on local and independent stations? Without must carry how could a local independent station get carried by a MVPD? Is there any obligation of the MVPD to carry the station?

Answer. They could not gain carriage.

Question 10. Would the elimination of must carry possibly lead to more concentration in the media market and, as a result, further muting the diversity of media voices, which has been a resolute policy of our Nation's telecommunications and media laws?

Answer. Elimination of must carry would reduce the availability of local broadcasting. The local broadcasting would be replaced by content from dominant firms.

Online Video vs. Traditional Video

According to Nielsen Media, the average American watches over 153 hours of video per month on traditional television compared to only 4.5 hours per month of online video. Also, approximately 97 percent of American households have a television whereas 68 percent of households have broadband (the U.S. currently ranks 23rd in broadband penetration).

In addition, a 2011 Project for Excellence in Journalism survey found that local TV remains America's most popular source of local news and information, particularly for weather and breaking news—89 percent of surveyed adults get information about local weather and 80 percent follow local breaking news through local television. Only about 51 percent of smartphone users use the device to get news.

While the Internet is a very value medium for media and news and provides incredible benefit to users, most Americans still rely heavily on traditional television for programming, local news, and even weather.

Question 11. With the current penetration and marketplace, is the Internet a "perfect substitute" to traditional television programming and local broadcast news? If not, what do believe is required for it to be a substitutable good to traditional television and local news?

Answer. The Internet is, at best an emerging partial substitute. Professional, long form video is a distinct product that is dominated by a handful of vertically integrated media conglomerates, who have controlled the availability of their content on the Internet to prevent it from becoming an effective distribution mechanism for this content.

Value of Public Broadcasting

Harris Interactive, an independent, non-partisan research firm, found—for the ninth year in a row—that PBS (Public Broadcasting Service) is the Nation's most-trusted institution by the American public. *PBS ranked higher than our court system, newspapers, our Federal government, and, surprisingly, even Congress.*

In addition, *74 percent of the American public surveyed believe Federal funding for PBS is money well spent.* PBS was also the most trusted and safe place for children to watch television—88 percent of Americans surveyed agreed.

Question 12. What role do you see public television playing in providing local programming?

Answer. In 50 years public television has not played a significant role in providing local content and there is no reason to believe it will do so in the foreseeable future.

Question 13. To your knowledge, do you believe PBS or any other public broadcasting station would be adversely impacted by any of the legislative proposals (that

would do away with must carry, retrans, or compulsory licenses) currently in Congress?

Answer. I do not know.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JIM DEMINT TO DR. MARK COOPER

Question 1. If enacted as written, would the Next Generation Television Marketplace Act, S. 2008, allow a pay-TV company to retransmit the programming aired on broadcast signals without consent?

Answer. Cable would have to reconfigure distribution as a private performance, as Aereo has done.

Question 2. Do you believe the Federal law requiring cable subscribers to purchase the so-called "basic tier" of channels prescribed by the government is at odds with consumer choice, since it effectively forces consumers to purchase channels they may not want? *(47 USC § 543(b)(7)(A))*

Answer. Mandatory unbundling would be in the consumer interest, but it must cover all programming, not just the basic tier.

Question 3. Do you believe wireless voice services and VoIP services are an adequate substitute for traditional wireline telephony for consumers?

Answer. No.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. KELLY AYOTTE TO DR. MARK N. COOPER

Question. Mr. Franks, if compulsory licensing is eliminated, what would be the effect on smaller providers? Would individual deals need to be cut? Is it easier for those already in the marketplace, therefore hurting competition?

Answer. No answer provided.

RESPONSES TO WRITTEN QUESTION SUBMITTED BY HON. DANIEL K. INOUYE TO PRESTON PADDEN

Question. What is the best way to protect consumers while companies work to resolve disputes and impasses in negotiations for the carriage of broadcast signals? Should any special consideration be given to protect consumers in geographic locations where a single MVPD serves a high percentage (more than 50 percent) of total MVPD subscribers in a state?

Answer. The television marketplace is moving toward more consumer choice among video distributors, more package options and, with services like ABC.com, Hulu and Netflix, more a la carte offerings. As this pro-consumer migration continues, not every channel is going to be a part of every video distribution platform and every service offering. For example, DISH recently decided to not carry the channels of AMC Networks. In our free market economy, DISH is perfectly free to make that decision. Fans of the AMC channels are equally free to abandon DISH and to choose a different subscription video provider.

As sports costs escalate, it seems inevitable that some subscription television platform will decide that there is a market for a less expensive service without sports channels. One day (after the concept of "Must Carry" is retired), some cable/satellite subscription platform will elect to go to market without broadcast signals concluding that there is a market to serve consumers who can receive broadcast channels well over-the-air. And, someday one or more broadcasters and/or non-broadcast channels will elect to not even offer their channels to one or more distribution platforms—perhaps because those platforms insist on stripping out the channels' commercial foundation.

My point in painting this vision of what I believe to be the inevitable future of the television marketplace is respectfully to nudge the Congress (and hopefully the FCC) away from the notion that every instance of non-carriage of a TV channel on some cable/satellite video distribution platform is a matter for government intervention. Respectfully, in my opinion, it is not.

Thanks to the leadership of this Committee, American consumers are now served by a workably competitive video distribution marketplace featuring competition between cable companies, two nationwide satellite companies, telephone companies and emerging Online Video Distributors. Instead of maintaining statutes and regulations designed to manage the channel lineups of each cable/satellite video service offering, I urge the Congress to focus on removing outdated statutes and regulations

left over from a bygone era of scarcity—regulations designed to enforce some government preferred outcome such as the inclusion of every channel on every video service offering. The dynamics of competition between multiple and diverse video offerings will be a far better servant of consumers than is detailed government regulation.

A market where a single MVPD serves more than 50 percent of total MVPD customers does come closer to a situation that warrants government intervention. But, I would urge the Congress to take steps to promote more distribution competition (for example by repealing the cable and satellite compulsory licenses that currently disadvantage emerging online distributors) rather than trying to regulate the behavior of any distributor.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. FRANK R. LAUTENBERG TO PRESTON PADDEN

Question. If we see customers, like those who subscribe to DirecTV, suffering in a deregulated world, why would we want to deregulate the negotiation process for broadcasters too? In your view, given these changes in the video marketplace, are the existing rules working? Why or why not?

Answer. Please see the answer to Senator Inouye's questions above.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO PRESTON PADDEN

Question 1. If you believe must-carry and retransmission consent are important to localism, how do you recommend that the Congress measure the success of localism? If you believe retransmission consent is failing, what evidence can you provide?

Answer. Please see the answer to Senator Inouye's questions above.

Question 2. To what extent should Congress be concerned about programming cost increases over the past several years? If you believe programming cost increases merit a fresh look at the 1992 Cable Act, do you believe cost savings garnered by distributors should be passed onto consumers? If so, how would any savings be realized by consumers? If you support changes to current law, would your company provide consumers with the same flexibility to pursue a la carte programming options? If not, why not?

Answer. The best antidote to program cost increases is to maximize the number of distributors offering service to consumers. In my opinion, competition is always a better servant of consumers than is regulation, no matter how well intended the regulation. There have been numerous studies of government mandated a la carte. Most of those studies have concluded that in an a la carte world, consumers would pay more and get less. The studies also show that government mandated a la carte would diminish program diversity. Online distributors like Hulu and Netflix are beginning to offer consumers a la carte options without government mandates. These options are likely to increase in the future. Congress should repeal the cable and satellite compulsory licenses that presently discriminate against the online distributors.

Question 3. Do you believe pricing transparency for distributors and for consumers could help to alleviate tensions over content deals? If not, why not?

If you do believe pricing transparency could be beneficial, please provide specific recommendations for such a proposal could be implemented.

Answer. There are good and valid reasons why confidentiality provisions are a part of most contracts in American free market commerce. In my opinion, there is no reason for the government to mandate a departure from this nearly universal business practice with respect to television programming.

Question 4. Going forward, how should Congress and/or the Federal Communications Commission measure whether or not the current system is working? Please provide specific metrics to support your answer.

Answer. Please see the answer to Senator Inouye's questions above.

Question 5. If Congress were to revisit the 1992 Cable Act, are there improvements to the law which you believe Congress should consider?

Answer. In my opinion, Congress should repeal the cable and satellite compulsory licenses that discriminate in favor of cable and satellite distributors and against online distributors. I do not understand why Congress chooses to discriminate in this manner.

One of the most important public policy benefits of S. 2008 is that it would remove this huge current impediment to the development of competitive Online Video

Distributors. The compulsory copyright licenses apply to cable and satellite systems, but not to Online Video Distributors. That means that the government gives cable and satellite—but not Online Video Distributors—a royalty free license to use all the programs on local broadcast stations. In other words, the government gives a huge windfall to cable and satellite but not to Online Video Distributors.

Even worse, because of the existence of the compulsory licenses, broadcasters (unlike non-broadcast channels) traditionally contract only for the right to broadcast a program—not for the right to sublicense that program to distributors who wish to retransmit the program. Because they have never needed to do so (because the compulsory license was there to fulfill this role), broadcasters typically do not contract for the right to authorize anyone to retransmit their programs. So, the poor Online Video Distributor not only cannot get the right to retransmit broadcast programs from the compulsory license; the OVD also cannot get the rights directly from the broadcaster.

There are two ways to fix this glaring problem. The first would be to add Online Video Distributors to the parties covered by compulsory licensing. As outlined in my written testimony, the problem with this approach is that the United States is a party to numerous International agreements and treaties that expressly prohibit granting compulsory licenses for Internet retransmission of television programs. The second way to solve the problem is to repeal the antiquated compulsory licenses so that cable, satellite and online distributors are all on a level playing field when it comes to securing rights in broadcast programming. This is the approach embodied in S. 2008.

In my opinion, consumers would reap huge benefits from the increased television distribution competition that would result from repeal of the cable and satellite compulsory licenses.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KAY BAILEY HUTCHISON TO PRESTON PADDEN

Question 1. Given the existing statute and the Congressional letter, couldn't the current Commission interpret the statue differently than Chairman Martin to where they do have the statutory authority to be involved in any disputes? What is precluding them from doing so?

Answer. The television marketplace is moving toward more consumer choice among video distributors, more package options and, with services like ABC.com, Hulu and Netflix, more a la carte offerings. As this pro-consumer migration continues, not every channel is going to be a part of every video distribution platform and every service offering. For example, DISH recently decided to not carry the channels of AMC Networks. In our free market economy, DISH is perfectly free to make that decision. Fans of the AMC channels are equally free to abandon DISH and to choose a different subscription video provider.

As sports costs escalate, it seems inevitable that some subscription television platform will decide that there is a market for a less expensive service without sports channels. One day (after the concept of "Must Carry" is retired), some cable/satellite subscription platform will elect to go to market without broadcast signals concluding that there is a market to serve consumers who can receive broadcast channels well over-the-air. And, someday one or more broadcasters and/or non-broadcast channels will elect to not even offer their channels to one or more distribution platforms—perhaps because those platforms insist on stripping out the channels' commercial foundation.

My point in painting this vision of what I believe to be the inevitable future of the television marketplace is respectfully to nudge the Congress (and hopefully the FCC) away from the notion that every instance of non-carriage of a TV channel on some cable/satellite video distribution platform is a matter for government intervention. Respectfully, in my opinion, it is not.

Thanks to the leadership of this Committee, American consumers are now served by a workably competitive video distribution marketplace featuring competition between cable companies, two nationwide satellite companies, telephone companies and emerging Online Video Distributors. Instead of maintaining statutes and regulations designed to manage the channel lineups of each cable/satellite video service offering, I urge the Congress to focus on removing outdated statutes and regulations left over from a bygone era of scarcity—regulations designed to enforce some government preferred outcome such as the inclusion of every channel on every video service offering. The dynamics of competition between multiple and diverse video offerings will be a far better servant of consumers than is detailed government regulation.

Question 2. If Congress directed the FCC to ensure broadcasters act in "good faith" during negotiations, how do you believe the FCC can go about fulfilling that responsibility and to limit or prevent the disruption of programming to cable and/ or satellite customers?

Answer. As described above, the video marketplace is moving from a world of a limited number of platforms offering nearly identical channel lineups to a far more consumer friendly world of many platforms offering diverse and differentiated channel lineups. This evolution, which inevitably will involve some disruption, is wildly pro-consumer. The forces of competition and diversity will be a much better servant of consumer interests than government regulation ever could be. Therefore, I urge the FCC to find a lack of good faith negotiating in only the most egregious circumstances.

Question 3. Do you know if the FCC is actively examining the impact of increasing retransmission fees in relations to basic cable rates?

Answer. Retransmission fees to broadcasters are increasing rapidly to correct for several decades in which cable companies paid nothing for the use of broadcast channels—the most popular and valuable channels that the cable companies sell to consumers. I do not know whether the FCC is investigating this long overdue marketplace correction. I do know that in 1992 this Committee stated, "Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently." S. Rep. No. 102–92, at 35.

Question 4. Can you elaborate on what impact these retransmission fees have on the cost of basic cable service? What percentage of a cable customer's monthly cable bill is attributed to retransmission fees paid to the broadcasters (a rough estimate will suffice) for 1) a customer subscribing to basic cable and 2) a customer subscribing to the most expensive cable TV package?

Answer. I do not have access to the data necessary to answer this question. I do know that for decades cable operators charged consumers approximately $15 or more per month for "Lifeline" services consisting almost exclusively of broadcast channels and paid the broadcasters nothing. That the transition from this patently unfair situation would have some impact on consumer cable bills is not surprising.

Question 5. Can you elaborate, in detail, on how negotiations between MVPDs and broadcasters (and/or programming/content owners and anyone else that might now be included) would be carried out, if the compulsory license, must carry, and retransmission consent provisions were eliminated? Please lay out the process and parties that would exist in negotiating the rights to use programming/content. Also, please compare/contrast the new negotiation process that would result versus the current retransmission consent negotiations.

Answer. There is no need to guess or to speculate about how negotiations between broadcasters and cable/satellite distributors would work in the absence of compulsory licensing. One need only look at the current negotiations between NON-broadcast channels—channels NOT subject to the existing cable/satellite compulsory licenses—and the cable/satellite distributors. The channels not subject to compulsory licensing routinely engage in a single negotiation with program owners for both (1) the copyrights necessary to telecast a program and (2) the right to sublicense the program to cable/satellite distributors. Then these non-broadcast channels engage in a single negotiation with each cable/satellite distributor providing them with the necessary copyright clearances to exhibit ALL of the programs on the channel's schedule. The process is simple, straightforward and has resulted in cable/satellite carriage of more than 500 non-broadcast channels nationwide without any difficulty, complication or "hold-outs".

When the compulsory licenses are repealed (as surely will happen at some point), broadcasters and program owners will need a brief period (perhaps 12 or 18 months) to adjust their existing contracts to include the right to sublicense programs to cable/satellite distributors. Today, program owners routinely give these sublicensing rights to non-broadcast channels when those channels license a program for their schedule. There is absolutely no reason to believe that the process would work any differently for broadcast channels.

Some proponents of continued compulsory licensing fear that clearing these cable/ satellite-sublicensing rights in the marketplace could be messy and difficult creating the opportunity for program owners to "hold up" the broadcast channels. These fears can be convincingly laid to rest by the fact that hundreds of non-broadcast channels today obtain these cable/satellite-sublicensing rights in the free market without mess, difficulty or "hold-ups".

Other proponents of continued compulsory licensing fear that small broadcasters lack the staff and expertise necessary to negotiate the same cable/satellite-sub-

licensing rights routinely secured today by non-broadcast channels. This fear also is unfounded. For programs licensed today to non-broadcast channels, the burden of assembling all the necessary rights, including music rights, is borne by the program owner. Then, the non-broadcast channels engage in a single, simple negotiation with the program owner. Again, there is no reason to believe that the process would work any differently for broadcast channels after the end of compulsory licensing.

Finally, some advocates of continued compulsory licensing fear that program owners (sometimes referred to as "Hollywood") would charge broadcasters above and beyond the basic program exhibition license fee for the right to sublicense to cable/satellite distributors. To test this fear I sought the advice of a major television programming syndicator. I asked the direct question, "Would you charge broadcasters extra for the right to sublicense program rights to cable/satellite distributors". The Syndication Executive did not answer immediately but instead met with that organization's rank and file syndication salespeople to consider the question. In the end they concluded that there would be no additional charge. Their reasoning was as follows. Today, the syndication salespeople fly to a city, make presentations to the likely buyers among the local TV stations, play those stations against each other and seek to extract the highest possible license fee for their program—leaving no money "on the table." After repeal of compulsory licensing, the program sales process would unfold in exactly the same way with the program sales executive seeking the highest possible license fee. With no change in the negotiating dynamics, there is no reason to expect a different outcome.

To summarize, today broadcasters engage in a one-on-one negotiation with cable and satellite companies for the right to retransmit the broadcast *signal.* Following repeal of compulsory licensing, broadcasters would engage in a one-on-one negotiation with cable and satellite companies for the right to retransmit the broadcast *programs.* After a brief transition period, repeal of compulsory licensing would not introduce any complexity or complication to the process. And, a copyright-based negotiation is the strongest possible foundation for broadcasters to seek fair compensation for cable and satellite use of their programming.

Questions 6 and 7. If you believe that eliminating these provisions would lead to more disputes, can you elaborate, in detail, on why?

If you believe that eliminating these provisions would lead to less disputes, can you elaborate, in detail, on why?

Answer. In my opinion, repeal of compulsory licensing would not cause any change in the number of disputes between broadcasters and cable/satellite distributors.

NAB President and CEO Gordon Smith and CBS Executive VP Marty Franks, both good friends of mine and both highly respected industry leaders, testified to their opinion that repeal of compulsory licensing would increase the number of parties "at the table" by ten-fold and therefore would increase the number of disputes. Although I have no doubt that their testimony reflected their sincere beliefs, I respectfully disagree with their opinions. I believe that they may misperceive how the market would operate.

The best evidence of how a market without compulsory licensing would work is to look at the process that takes place today regarding cable/satellite retransmission of non-broadcast channels. The programs on those channels are not subject to compulsory licensing and therefore provide a real world example of how broadcast negotiations with cable/satellite distributors would work in the absence of compulsory licensing.

Today, non-broadcast channels engage in a single negotiation with a program seller for both (1) the right to include a program on their channel and (2) the right to sublicense that program to cable/satellite distributors. After securing those copyright rights, the channel then engages in a single negotiation with any cable/satellite distributor who wishes to distribute their channel. The process is simple. It happens every day without complication and without a tenfold increase in the parties "at the table".

There is absolutely no reason why broadcast channels could not operate in exactly the same way in the absence of compulsory licensing—no tenfold increase in parties and no increase in disputes.

Question 8. In witness testimony, it was indicated that for 2012, to date, there have already been 69 disputes regarding retransmission consent. How many disputes have occurred between MVPDs and non-broadcast networks/programmers?

Answer. I do not know the answer to this question. But, as I explained in Answer number 1, there is every reason to expect disputes between programmers and cable/satellite distributors as the market transitions from a world with only a few dis-

tribution platforms with identical channel lineups to a world with more numerous distribution platforms with diverse channel lineups. This transition is underway and is decidedly pro-consumer.

Question 9. What would the impact of eliminating must carry requirements from the law have on local and independent stations? Without must carry how could a local independent station get carried by a MVPD? Is there any obligation of the MVPD to carry the station?

Answer. The following answer relates exclusively to commercial television stations.

As President of the Association Of Independent Television Stations from 1985 to 1990, I was a strong advocate for "Must Carry". At the time, cable systems had no competition in the subscription television market—no competition from satellite television distributors like DirecTV and DISH, no competition from Telco television distributors like FIOS and U-Verse and no competition from online television distributors like Hulu and Netflix. Government regulation in the form of Must Carry was necessary to protect consumers from cable's then monopoly power. By documenting numerous instances of cable systems not carrying or dropping independent stations, I helped to build the factual record that the Congress relied upon in 1992 to codify Must Carry, and that the Supreme Court subsequently relied upon to affirm the Must Carry statute.

But, today's television marketplace is radically different from the circumstances that existed in the late 1980s and early 1990s. Today consumers and broadcasters have the opportunity to interface with multiple distribution platforms. Broadcasters can authorize distribution of their programming by cable, satellite, telephone companies and on the Internet. Some broadcasters already stream a portion of their program schedule online and that trend will only grow.

In my opinion, these marketplace changes call into the question the continued need for Must Carry. Moreover, earlier this year Congress authorized the FCC to conduct Incentive Auctions to reclaim some broadcast spectrum so that it can be auctioned for wireless broadband. The broadcast stations most likely to give up their spectrum are the same stations most likely to elect Must Carry. Therefore, these auctions will almost certainly drastically reduce the universe of Must Carry stations raising further questions about the continuing need for a Must Carry statute.

Congress will need to decide the future of Must Carry. In any event, repeal of the compulsory licenses should proceed. In the absence of compulsory licensing, commercial stations electing Must Carry would simply need to certify that in acquiring their programming they had secured the copyrights necessary to enable cable/satellite distributors to retransmit those programs.

Question 10. Would the elimination of must carry possibly lead to more concentration in the media market and, as a result, further muting the diversity of media voices, which has been a resolute policy of our Nation's telecommunications and media laws?

Answer. The elimination of Must Carry would not lead to concentration in the media market. The media market is exploding with competitive and diverse voices. As outlined in my written testimony, consumers today have access to more, and more diverse, media options than at any time in history. As just one consumer, I frequently find myself drowning in diverse media options.

Some of these new media options are on the Internet. But other new options are sprouting up in traditional media environments including broadcast television. For example, Bounce TV, created by co-founders Andrew Young and Martin Luther King III, describes itself as "the first 24/7 digital multicast broadcast network created exclusively for African Americans". There is no reason to fear that repeal of Must Carry would lead to more concentration in the media market.

Question 11. With the current penetration and marketplace, is the Internet a "perfect substitute" to traditional television programming and local broadcast news? If not, what do believe is required for it to be a substitutable good to traditional television and local news?

Answer. Clearly the Internet is not yet as ubiquitous as television. But, it is rapidly closing the gap. And, the Internet has characteristics that make it better than merely a substitute for broadcast news. Traditionally broadcast news was available at only certain hours—hours selected by the broadcaster. Cable news channels offered consumers the first taste of "on-demand" news. Some broadcasters have taken advantage of the digital transition to offer consumers free on-demand news on a multicast channel. For example, Station KMGH, the ABC Affiliate in Denver, owned by Scripps Howard Broadcasting, provides consumers with 24/7 news on a digital multicast channel.

The Internet provides consumers with a vast array of diverse on-demand news "channels". At any time they choose, consumers can go online and find multiple sources of mainstream news, business news, political news, minority news, women's news, foreign news, automobile news, culinary news, motorcycle news, etc. The Internet is far better than merely a substitute for broadcast news.

Question 12. What role do you see public television playing in providing local programming?

Answer. My experience is limited to commercial television. I have no expertise in public television.

Question 13. To your knowledge, do you believe PBS or any other public broadcasting station would be adversely impacted by any of the legislative proposals (that would do away with must carry, retrans, or compulsory licenses) currently in Congress?

Answer. S. 2008 was drafted to not have any impact on the cable carriage rights of public broadcasting stations.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JIM DEMINT TO PRESTON PADDEN

Question 1. If enacted as written, would the Next Generation Television Marketplace Act, S. 2008, allow a pay-TV company to retransmit the programming aired on broadcast signals without consent?

Answer. No. If enacted, S. 2008 would require subscription television companies to negotiate with broadcasters for the right to retransmit their programs. S. 2008 would repeal the cable and satellite compulsory copyright licenses in Title 17 of the United States Code. Under these outdated statutes, the government seizes the programs broadcast by TV stations and grants to cable and satellite distributors a government conferred copyright license to make those programs a part of the service that the cable/satellite companies sell to consumers.

By repealing the compulsory copyright licenses, S. 2008 makes the retransmission consent provision of Title 47 of the United States Code unnecessary. Currently, the retransmission consent provision requires cable/satellite distributors to negotiate for the right to use a broadcaster's signal. After repeal of compulsory licensing, cable/satellite distributors will be required to negotiate for the right to use a broadcaster's programs.

In my opinion as a Thirty-Eight year veteran of the television business, S. 2008 actually strengthens the position of local broadcasters. I say that because a negotiation based on traditional, and unarguable, copyright grounds is the strongest possible foundation for broadcasters to seek fair compensation for cable/satellite use of broadcast programming. S. 2008 would give broadcasters the same copyright based negotiating platform enjoyed today by non-broadcast channels like ESPN.

Question 2. How did the existence of video compulsory licenses impact the creation of retransmission consent by Congress in 1992?

Answer. Retransmission consent was enacted in 1992 to counter the effect of the compulsory copyright licenses.

In 1992, this Committee stated, "Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently." S. Rep. No. 102–92, at 35. It is the compulsory license that enabled cable operators to offer broadcast programs to their customers without paying for those programs (unlike the programs of non-broadcast channels). The most direct way to achieve the result desired by the Committee would have been to simply repeal the compulsory license.

But, this Committee does not have jurisdiction over the compulsory license because it is in Title 17 of the United States Code. Retransmission consent was conceived as a Commerce Committee vehicle to require cable operators to pay for broadcast programs.

S. 2008 would correct the 1992 jurisdictional "end around" by straightforwardly repealing both the compulsory licenses and retransmission consent.

Question 3. Do you believe a copyright-based carriage negotiation for broadcast programming, as envisioned by S. 2008, would necessarily increase the number of negotiating parties and increase "blackouts"?

Answer. No. In my opinion, passage of S. 2008 would not increase the number of negotiating parties and would not increase the number of disputes between broadcasters and cable/satellite distributors.

NAB President and CEO Gordon Smith and CBS Executive VP Marty Franks, both good friends of mine and both highly respected industry leaders, testified to their opinion that S. 2008, by repealing the compulsory license, would increase the number of parties "at the table" by ten-fold and therefore would increase the number of disputes. I respectfully disagree with their opinions. I believe that they may misperceive how the market would operate.

The best evidence of how a market without compulsory licensing would work is to look at the process that takes place today regarding cable/satellite retransmission of non-broadcast channels. The programs on those channels are not subject to compulsory licensing and therefore provide a real world example of how broadcast negotiations with cable/satellite distributors would work in the absence of compulsory licensing.

Today, non-broadcast channels engage in a single negotiation with a program seller for both (1) the right to include a program on their channel and (2) the right to sublicense that program to cable/satellite distributors. After securing those copyright rights, the channel then engages in a single negotiation with any cable/satellite distributor who wishes to distribute their channel. The process is simple. It happens every day without complication, without government involvement and without a tenfold increase in the parties "at the table".

There is absolutely no reason why broadcast channels could not operate in exactly the same way in the absence of compulsory licensing—no tenfold increase in parties and no increase in disputes.

Question 4. Would S. 2008 allow pay-TV providers to buy broadcast programming from anywhere?

Answer. S. 2008 would restore the right of program creators (including broadcasters), and their contractual licensees, to maximize the availability of broadcast programming to consumers based on market demand. The compulsory licenses take away those rights. Under the compulsory licenses, the question of what broadcast programs may be distributed to which consumers is governed by audience ratings from 1972. (I know this sounds so stupid that it is hard to believe but I promise that it is true.) 1972! Some things have changed since 1972—but not the rules governing which broadcast programs may go where.

Under S. 2008, program creators, networks and stations would work together to satisfy consumer demand. In a free market, if there is a program consumers want to see, a distribution platform to get it to them and money to be made doing so, it will happen.

Historically, program syndicators and networks have granted local stations exclusive rights to exhibit their programs to the viewers in their market. I would expect that to continue. But, S. 2008's repeal of compulsory licensing also would enable the parties in the marketplace to respond to any demonstrated consumer demand. Specifically, after enactment of S. 2008 getting in-State news to viewers will no longer take an act of Congress to override antiquated rules based on 1972 ratings.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KELLY AYOTTE TO PRESTON PADDEN

Question 1. My constituents are adamant about receiving local news coverage. Even in the southern-most part of my state, we want New Hampshire news, not Boston news. One of the objectives of the 1992 Cable Act was to ensure consumers have access to locally originated programming. Has this goal succeeded? Are there any proposed changes to the Cable Act that could reverse this trend? How can we maintain and maximize localism?

Answer. In my opinion, the problem being experienced by your constituents is caused by the outdated compulsory copyright license. This government-conferred license uses 1972 audience ratings by the A.C. Nielsen Company to dictate where broadcast programs may be distributed by cable. The 1972 ratings actually are enshrined in the FCC's Rules that govern where cable systems may distribute broadcast programs.

S. 2008 repeals the compulsory license and the 1972 ratings. After passage of S. 2008 New Hampshire broadcasters and cable/satellite companies serving New Hampshire households will be able to work together to satisfy consumer demand for New Hampshire news. And it will be easier for consumers to receive messages from their State's elected leaders.

Question 2. Mr. Padden, you have spent a large part of your distinguished career working for a broadcast company, and in your testimony you argue that the 1992 Act is outdated and that it stifles innovation by maintaining hurdles for Online Video Distributors to get into the market. New Hampshire is home to countless

numbers of innovators, especially smaller ones just trying to penetrate a competitive marketplace. Can you elaborate from your testimony on the affect The Act has on innovation?

Answer. In my opinion, one of the most important public policy benefits of S. 2008 is that it would remove a huge current impediment to the development of competitive Online Video Distributors. The compulsory copyright licenses apply to cable and satellite systems, but not to Online Video Distributors. That means that the government gives cable and satellite—but not Online Video Distributors—a royalty free license to use all the programs on local broadcast stations. In other words, the government gives a huge windfall to cable and satellite but not to Online Video Distributors.

Even worse, because of the existence of the compulsory licenses, broadcasters (unlike non-broadcast channels) traditionally contract only for the right to broadcast a program—not for the right to sublicense that program to distributors who wish to retransmit the program. Because they have never needed to do so (because the compulsory license was there to fulfill this role), broadcasters typically do not contract for the right to authorize anyone to retransmit their programs. So, the poor Online Video Distributor not only cannot get the right to retransmit broadcast programs from the compulsory license; the OVD also cannot get the rights directly from the broadcaster.

There are two ways to fix this glaring problem. The first would be to add Online Video Distributors to the parties covered by compulsory licensing. As outlined in my written testimony, the problem with this approach is that the United States is a party to numerous International agreements and treaties that expressly prohibit granting compulsory licenses for Internet retransmission of television programs. The second way to solve the problem is to repeal the antiquated compulsory licenses so that cable, satellite and online distributors are all on a level playing field when it comes to securing rights in broadcast programming. This is the approach embodied in S. 2008.

In sum, the best way to end the discrimination against online innovators in New Hampshire is to pass S. 2008.

Question 3. Mr. Padden, can you elaborate on your contention that retransmission consent and compulsory licensing are linked together?

Answer. The only reason that it was necessary for the Congress to enact retransmission consent in 1992 was because of the existence of the compulsory license.

In 1992, this Committee stated, "Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently." S. Rep. No. 102–92, at 35. It is the compulsory license that enabled cable operators to offer broadcast programs to their customers without paying for those programs (unlike the programs of non-broadcast channels). The most direct way to achieve the result desired by the Committee would have been to simply repeal the compulsory license.

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