SATELLITE TELEVISION LAWS IN TITLE 17

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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SEPTEMBER 10, 2013

SATELLITE TELEVISION LAWS IN TITLE 17

TUESDAY, SEPTEMBER 10, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:04 a.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Sensenbrenner, Smith (Texas), Chabot, Farenthold, Holding, Collins, DeSantis, Smith (Missouri), Watt, Conyers, Chu, Deutch, Bass, Richmond, DelBene, Jeffries, and Jackson Lee.

Staff present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; and (Minority) Stephanie Moore, Minority Counsel.

Mr. COBLE. Good morning, ladies and gentlemen. I appreciate the witnesses' presence today. We welcome you to the Subcommittee hearing on satellite television laws contained in Title 17 of the U.S. Code.

Not unlike other copyright issues before Congress, the circumstances surrounding disputes over our satellite television laws are exceedingly complicated and important to every congressional district.

When it comes to video, I believe there are some points on which we can all agree. Americans love to watch television and want to have as many choices available at the lowest possible price.

This Committee has created three compulsory licenses to make content more available. While in some instances these licenses have served consumers and stakeholders efficiently and effectively, I believe it is safe to say that compulsory licenses are not without their shortcomings. The classic example is when a local sports competition or a popular show is suddenly unavailable. You go home looking forward to seeing that particular show involved and you are unable to get it. You are likely to turn off the television and call someone to complain. I think that is a natural result.

Regardless of what perspective a Member of Congress has on licensing issues, we can all learn one truth. Our constituents are not shy about telling us to do something about problems in the marketplace that deprive them of their favorite shows.

As we begin this review of the satellite licenses, one of our goals will be to find solutions to situations where the laws tend to benefit one party over the other. Throughout this discussion, our top priority will be to protect the interests of consumers. When there is a dispute and a resultant blackout, consumers are left with no recourse.

Again, this is an extremely complex area of copyright law, and I am pleased by our highly talented and highly qualified panel of witnesses who are participating in today's hearing.

I am now pleased to recognize the distinguished gentleman from North Carolina, the Ranking Member, Congressman Mel Watt, for his opening statement.

Mr. WATT. Thank you, Mr. Chairman.

Today is the first of what I suspect will be a series of hearings to consider the reauthorization of the Satellite Television Extension and Localism Act, or what we call STELA, which, among other things, extended the 119 license through December 31, 2014.

Enacted in 1988, the Satellite Home Viewer Act created a copyright compulsory license for the benefit of the satellite industry to retransmit distant television signals to its subscribers. The license, codified in section 119 of the Copyright Act, was originally intended to ensure the availability of broadcast programming to satellite providers and to foster competition with the cable industry, which has enjoyed a permanent compulsory license to retransmit copyrighted content contained in both local and distant broadcast television signals since passage of the Copyright Act of 1976.

The intent of providing compulsory copyright licenses was to facilitate investment in new, creative works by the satellite and cable industries by eliminating direct negotiation with the copyright owners for the use of distant signal programming.

Although the 119 compulsory license is temporary and therefore the focus of the reauthorization we will be considering, it is part of a complex statutory and regulatory framework governing cable and satellite retransmission of broadcast signals, making it virtually impossible to consider whether to reauthorize the provision in a vacuum.

For that reason, the Committee on Energy and Commerce, which has jurisdiction over key regulations and statutory provisions that govern the broadcast market, has held multiple hearings in this Congress on whether to repeal, revise, or reauthorize STELA.

Four years ago, under the leadership of Chairman Conyers, the Judiciary Committee also grappled with a number of issues that had emerged in the marketplace in an effort to simplify and modernize what was largely perceived as an anachronistic regime for the provision of broadcast programming. Most immediately we addressed the impending transition from analog to digital television. Other issues the Committee considered at that time remain unresolved while new technologies have further disrupted the market with innovations that we could not foresee less than a decade ago.

I believe we have a unique opportunity to tackle some of the big issues that will define the future of video. Compulsory licenses I think everyone will admit represent a departure from free market negotiations and are usually the last resort in the event of market failure. When the compulsory licenses were first enacted, the cable

and satellite industries were in their embryonic stages. Today, however, it is estimated that over 90 percent of American households subscribe to a pay TV service. So there are a myriad of issues that may be relevant for consideration.

For example, are these licenses still necessary to foster competition or should they be phased out as the Copyright Office and others have recommended? How many consumers truly benefit from these licenses?

On the other hand, is the current overlapping web of communications and copyright policy functioning in a way that meets the goals of national media policy? It cannot be denied or disregarded that marketplace incumbents, including broadcasters, cable, and satellite providers and content creators, have entrenched interests and investments in a complex framework created by law. Would an abrupt dismantling of this structure be unfair to those industries and harmful to consumers? Can current law keep pace with new technologies that seek to exploit ambiguities in the legal framework, for example, what constitutes a public performance for retransmission consent purposes?

Recently the CBS/Time Warner Cable retransmission consent dispute resulted in a temporary blackout for some consumers. Is that dispute evidence of a broken system or does it reflect a robust free market?

Also, how should we address or should we address the nascent online video distribution models that in the future may very well displace the traditional distribution methods altogether? Are these Internet-based video distribution models the new kids on the block entitled to comparable statutory imposed rights, obligations, and prohibitions? Or is the time for Government intervention over?

These are only a few of the broad policy questions that I think are relevant in this space. I believe that we must determine whether the current regime is working to ensure that content providers and distributors, old and new, are appropriately compensated and incentivized in a way that provides a competitive environment for American consumers.

We have an impressive and diverse group of expert witnesses today with very different views on how the marketplace works and how it has developed since STELA and most probably what the rules of the road should be moving forward. I look forward to the testimony today and to continuing this dialogue in the future.

And, Mr. Chairman, I yield back and thank you for the time.

Mr. COBLE. I thank the gentleman for his opening statement.

The Chair now recognizes the distinguished gentleman from Virginia, Mr. Bob Goodlatte, the Chairman of the Committee on the Judiciary, for his opening statement.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. I appreciate your holding this hearing. I look forward to the testimony of the witnesses.

For decades, the vast majority of Americans have relied upon satellite and cable services for access to a wide variety of video content ranging from nighttime entertainment for their families, educational shows for their children, local and national news with information that informs them, and public access channels that em-

power Americans to see their local, State, and Federal representatives in action.

As the number of channels and sources of video content continue to increase, a growing number of Americans now subscribe to additional services such as Redbox, Amazon, and Hulu, some of which create their own content. Americans are embracing these additional services to such a degree that society has coined two new terms, "cord shavers" and "cord cutters," for those who are reducing or eliminating traditional video subscriptions. According to the FCC's latest competition report, in addition to free over-the-air broadcast content, 100 percent of Americans have access to two satellite services. 98 percent have access to these two satellite services and one local alternative, and 35 percent have access to two satellite services and two local alternatives.

Marketplace competition has grown significantly since the last major Committee activity in this area in 2010 when Congress enacted the Satellite Television Extension and Localism Act. There are three compulsory licenses in Title 17 impacting this industry, one of which expires at the end of 2014. This Committee will consider, over the next year, whether a reauthorization of this compulsory license is warranted.

However, as the written testimony submitted for this hearing demonstrates, some interested parties are advocating for Congress to undertake more than a simple reauthorization and look at other matters surrounding the video marketplace and competition policies that appear to have become more prominent recently.

One core factor that this Committee will weigh, as we consider these important issues, is ensuring that copyright owners maintain the right to distribute their intellectual property as they choose. This Committee has traditionally disfavored compulsory licenses, although there are three in effect today in this marketplace.

Another core factor we will weigh is ensuring competition in the marketplace. Consumers and intermediaries benefit where there is robust competition. As the Committee of jurisdiction for competition policy, efforts that involve competition issues deserve this Committee's oversight and ongoing attention.

The written testimony of the witnesses here this morning highlights the importance of both issues to the video marketplace. As this Committee continues its oversight and legislative activities in this area, I look forward to hearing from all interested parties about their perspectives and concerns.

And I thank the Chairman and yield back.

Mr. COBLE. I thank you, Chairman Goodlatte.

The Chair now recognizes the distinguished gentleman from Michigan, Mr. John Conyers, the Ranking Member of the Committee on the Judiciary, for his opening statement.

Mr. CONYERS. Thank you, Chairman.

The Satellite Television Extension and Localism Act is full of options that we have witnesses to distinguish.

I want to thank the Chairman for keeping the witness list down to seven. I understand we ran out of tables and we were not able to put on any more people than are here.

I want to consider these options, and I look forward to the witnesses' testimony.

Two considerations, one about copyright owners and the other about consumers. We must protect copyright owners because it is their property that forms the basis of the entire scheme. Compulsory licenses are generally not favored because they distort the marketplace and result in below-market rates being paid to content owners.

Second, we must enact policies that protect consumers and safeguard competition. Consumers benefit from increased competition because more competition usually produces lower prices. And copyright owners do not benefit financially from retransmission consent agreements, which is at the heart of these disputes, despite the fact that the signal only has worth because of the programming contained on the signal.

And so I think we must focus on principles of localism. People who subscribe to cable or satellite television have so many options. There is never a shortage of something to watch. But even with all these choices, people still highly value their local news, their local sports, and need local channels to deliver community service and emergency information. Localism and the traditional network affiliate relationship also benefits copyright owners by allowing their programming to be publicly performed in every market across the country.

Now, I conclude by observing that there will be circumstances in which these principles will conflict. I look forward to working to ensure that the public interest can best be served through satellite carriage of broadcast television signals.

And I thank the Chairman for allowing me to make these few brief remarks.

Mr. COBLE. Thank you, Mr. Conyers. I appreciate that.

As indicated before, we have a very distinguished panel before us today, and I will begin by swearing in the witnesses. Gentlemen, if you would please rise.

[Witnesses sworn.]

Mr. COBLE. Let the record show that all witnesses concur with that.

And I will now introduce our panel. We appreciate everyone's attendance at this very important hearing.

Our first witness today is Mr. Paul Donato, Executive Vice President and Chief Research Officer of the Nielsen Company. Mr. Donato is responsible for overseeing the development and evaluation of research while also serving as Nielsen's liaison to his clients and industry associations. He received his B.A. in psychology and sociology from the State University of New York at Stony Brook.

Our second witness is Mr. Stanton Dodge, Executive Vice President, General Counsel, and Secretary for DISH Network. Mr. Dodge is responsible for all legal and government affairs for DISH-added subsidiaries. He received his B.S. in accounting from the University of Vermont.

Our third witness is Mr. Gerard Waldron, partner at Covington and Burling, testifying today on behalf of the National Association of Broadcasters. With more than 25 years experience in law and public policy, his practice focuses on communication and technology. Mr. Waldron received his B.A. degree from the University of Virginia.

Chairman Goodlatte has now asked permission to introduce our next witness.

Mr. GOODLATTE. Thank you, Mr. Chairman. It is my pleasure to welcome our fourth witness and my constituent, Mr. Earle MacKenzie, the Executive Vice President and Chief Operating Officer of Shentel Cable, testifying on behalf of the American Cable Association. With 35 years of telecom experience, Mr. MacKenzie is responsible for Shentel's daily operations of its many subsidiaries. He received his B.A. in accounting from the College of William and Mary. Earle, welcome. We are delighted to have your testimony today as well.

Mr. COBLE. I thank the Chairman.

Our next witness is our fifth witness today, Mr. James Campbell, Vice President for Public Policy at CenturyLink. Mr. Campbell is responsible for the company's regulatory and legislative affairs and received his bachelor's degree from Santa Clara University.

Our sixth witness is Mr. Robert Garrett, partner at Arnold & Porter, who is testifying today on behalf of Major League Baseball. Mr. Garrett joined Arnold & Porter in 1977 and has served as outside counsel to Major League Baseball on copyright and telecom issues for more than 35 years. Mr. Garrett attended the Northwestern University.

Our seventh and final witness is Mr. Preston Padden, who is testifying on his own behalf today. With an extensive career in the media business, he served as former President of the ABC Television Network and former Executive Vice President of the Walt Disney Company. He received his B.A. from the University of Maryland.

We welcome you all and we will start, Mr. Donato, with you. You will be the lead-off hitter today.

Gentlemen, as is obvious to all, we have seven witnesses. This could take a long time. We try to apply the 5-minute rule. There is a timer before you. When that green light turns to amber, that is your signal that the time is running. The clock is running out. You have a minute to go. So at that point, we would appreciate if you would sort of wrap it up.

We are trying to apply the 5-minute rule to us as well. So if you will respond tersely to our questions, that would be helpful as well.

So, Mr. Donato, why don't you start us off?

TESTIMONY OF PAUL DONATO, EXECUTIVE VICE PRESIDENT AND CHIEF RESEARCH OFFICER, THE NIELSEN COMPANY

Mr. DONATO. Good morning, Chairman Coble, Ranking Member Watt, and Members of the Subcommittee. My name is Paul Donato and I am the Executive Vice President and Chief Research Officer for Nielsen. I thank you for the opportunity to join today's panel to discuss Nielsen's designated market area, commonly known as DMAs, and their role in satellite transmission statutes such as STELA.

Nielsen is a global media and marketing research company that measures what people watch and buy in 100 countries worldwide. In the United States, we are widely known for our television audience measurement service, the Nielsen television ratings, which

provide estimates of audiences for broadcast, cable, and satellite programs.

Over the years, Nielsen has developed innovative technologies, allowing us to expand our measurement services to include computers, tablets, and smart phones. Through these technologies and our volunteer opt-in panelists, Nielsen has the capability to measure consumer Internet purchase habits, listening trends on terrestrial, Internet, and satellite radio, and how consumers utilize social media. Our audience measurement reports are relied on by a range of public and private sector stakeholders to facilitate business transactions and gauge consumer trends. Nielsen's DMAs are also used by the Federal Government to define markets in satellite television retransmission statutes.

Most discussions of STELA and its predecessors begin with a conversation about Nielsen's DMAs, and that will be the focus of my testimony today.

The designated market area is a collection of counties which share a predominance of viewing to broadcast stations licensed to operate within a given standard metropolitan statistical area as defined by the OMB. Predominance or dominance of viewing is defined here to indicate that "for a particular county, homes may view broadcast stations licensed to operate from different but generally nearby metro areas. The DMA with the predominant viewing is that metro area whose broadcast stations have the highest share of audience for that county."

So we start with a metro area, such as New York or Los Angeles, and continue on through the 210 DMA markets in the United States.

Each March, using tuning data collected from Nielsen homes over the last year, existing DMA regions are tested in order to verify that the dominant share of viewing from each DMA county continues to be from broadcast stations licensed to operate from within that same home metro. All assignments are based on share of household tuning between 6 a.m. and 2 a.m. Sunday through Saturday. While this is the basic premise behind the DMA, there are rules which Nielsen exercises when it appears that the predominance of viewing may be shifting. These rules try to balance the need for stability in television markets, but at the same time, they need to ensure that counties are assigned to the DMAs from where the highest share of broadcast viewing occurs.

For example, if a larger share of viewing from a county shifts from its current DMA assignment to broadcast stations from another DMA, that shift must be statistically significant and occur for 2 consecutive years.

Nielsen instituted the DMA system in the mid-1960's to measure the number of viewers in a particular area and, more specifically, to connect sellers and buyers of advertising.

The DMA allowed for the creation of a market where buyers and sellers of local television advertising could do business with each other based on impartial information provided by a third party. Advertisers need to know that their ads are directed at audiences they want to serve. The TV Advertising Bureau estimates that in Q1 of this year, ad spending in the U.S. was almost $18 billion, with an estimate of $72 billion for the entire year. That is a market

that fuels the great entertainment and news programs that this country produces and watches.

With the emergence of cable and satellite television in the late 1980's and early 1990's, the landscape of the industry changed. The new technology allowed companies that carried television programming to expand their boundaries. Specifically, television stations were previously limited to being viewed within a local DMA and could not be seen outside of those boundaries. And while new technologies open up new horizons, they also create new problems for the television industry.

The industry needed rules to determine which local stations could be carried in which local markets, and it turned to the Federal Government for help. In 1992, Congress and the FCC established rules governing which local television stations could be carried in which local markets. As part of that process, Nielsen's designated market areas were adopted as the guideline for determining which local stations could be carried. It should be noted that Nielsen did not recommend the use of the DMAs for this purpose nor were we asked for technical assistance on the use of the DMAs. It was a decision that was made entirely by Congress.

Finally, as you work to learn more about the future trends in video use, we would be happy to assist you in any way we can. Thank you again for the opportunity to appear before you, and I look forward to your questions.

[The prepared statement of Mr. Donato follows:]

Prepared Statement of Paul Donato, Executive Vice President and Chief Research Officer, Nielsen

Good morning Chairman Coble, Ranking Member Watt and members of the Subcommittee. My name is Paul Donato, and I am the Executive Vice President and Chief Research Officer for Nielsen. I thank you for the opportunity to join today's panel to discuss Nielsen's Designated Market Areas, commonly referred to as "DMAs," and their role in satellite transmission statues such as the Satellite Television Extension and Localism Act (STELA).

Nielsen is a global media and marketing research company that measures what people watch and buy in 100 countries worldwide. In the United States, we are widely known for our Television Audience Measurement Service, the Nielsen Television Ratings, which provide estimates of the audiences for broadcast cable and satellite programs. Over the years Nielsen has developed innovative technologies allowing us to expand our measurement services to include computers, tablets, and smartphones. Through these technologies and our volunteer panelists, Nielsen has the capability to measure consumers' Internet purchasing habits, listening trends on terrestrial, Internet and satellite radio, and also how consumers utilize social media. Our audience measurement reports are relied upon by a range of public and private sector stakeholders to facilitate business transactions and gauge consumer trends. Nielsen's DMAs are also used by the federal government to define markets in satellite television retransmission statutes.

NIELSEN DMAS & SATELLITE RETRANSMISSION STATUTES

Most discussions of STELA and its predecessors begin with a conversation about Nielsen's DMAs, and that will be the focus of my testimony today.

The Designated Market Area

The Designated Market Area is a collection of counties each of which shares a predominance of viewing to broadcast stations licensed to operate in a given Standard Metropolitan Statistical Area (SMSA) as defined by the Office of Management and

Budget (OMB). Predominance or dominance of viewing is defined here to indicate that:

> *for a particular county, homes may view broadcast stations licensed to operate from different but generally nearby Metro areas. The DMA with the predominant viewing is that Metro area whose broadcast stations have the highest share of audience for that county.*

So we start with a Metro area such as the New York or Los Angeles SMSA and continue throughout the 210 DMA markets in the US.

Each March, using tuning data collected from Nielsen homes over the last year, existing DMA regions are tested in order to verify that the dominant share of viewing from each DMA county continues to be from broadcast stations licensed to operate from within that same home Metro (SMSA). All assignments are based on share of household tuning between 6 AM and 2 AM Sunday through Saturday. While this is the basic premise behind the DMA, there are rules which Nielsen exercises when it appears that the predominance of viewing may be shifting. These rules try to balance the need for stability in television market definitions and the need to ensure that counties are assigned to the DMAs from where the highest share of broadcast viewing occurs.

For example, if the larger share of viewing from a county shifts from its current DMA assignment to broadcast stations from another DMA, that shift must be "statistically significant" and occur for two consecutive years.

Nielsen instituted the DMA system in the mid-1960s to measure the number of viewers in a particular area and, more specifically, to connect the sellers and buyers of advertising.

The DMA system allowed for the creation of a market where the buyers and sellers of local television advertising could do business with each other based on impartial information provided by a third party. Advertisers need to know that their ads are directed at the audience they want to serve. The Television Advertising Bureau estimates that Q1 2013 ad spending in the US was almost $18 billion, for an annual spending estimate of almost $72 billion for all TV, a market that fuels the great entertainment and news programs that this country produces and America watches.

With the emergence of cable and satellite television in the late 1980s and early 1990s, the landscape of the industry changed. The new technology allowed companies that carried television programming to expand their boundaries. Specifically, television stations that were previously limited to being viewed within a local DMA could be seen outside of those boundaries. And, while the new technologies open new horizons, they also created new problems for the television industry.

The DMA and Satellite Statutes

The industry needed rules to determine which local stations could be carried in which local markets and it turned to the federal government for help. In 1992, the Congress and the Federal Communications Commission established rules governing which local television station could be carried in which local markets. As part of that process, Nielsen's Designated Market Areas were adopted as the guideline for determining which local stations could be carried in which local markets. It should be noted that Nielsen did not recommend the use of DMAs for this purpose, nor were we asked for technical assistance on the use of DMAs. This was a decision that was made by the Congress.

CONCLUSION

As you work to learn more about the future trends in video use, we would be happy to assist you in any way we can. Thank you again for the opportunity to appear before you and I look forward to your questions.

Mr. COBLE. Thank you, Mr. Donato. Congratulations. You beat the illumination of the red light. Pressure on you, Mr. Dodge.

Needless to say, gentlemen, your entire statements will be made part of the record.

Mr. Dodge?

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

Mr. DODGE. Thank you. Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, Ranking Member Watt, and Members of the Subcommittee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the General Counsel of DISH Network. DISH is the Nation's third largest pay TV provider with more than 14 million subscribers and over 25,000 employees. We are the only provider for local television service in all 210 local DMAs.

DISH's award-winning innovations include the Hopper DVR and TV Everywhere features that consumers can use to have greater choice and control over their viewing experience. DISH pays billions of dollars a year for the right to distribute programming to our subscribers and fully supports fair compensation to copyright holders.

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

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

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

First, we believe Congress should protect consumers against the growing problem of blackouts caused by retransmission consent disputes. The proof is in the numbers. In 2010, there were 12 blackouts. In 2011, there were 51. In 2012, the number soared to almost 100, and the pace has yet to level off. So far in 2013, we have had 84 blackouts which puts us on track for a record-setting year of 120.

Making matters worse, the length of the blackouts and the number of consumers impacted are increasing. The consumers are the real victims of these one-sided negotiations. Their programming gets pulled by the broadcasters and their monthly bills go up. Of increasing concern, some broadcasters are coordinating their negotiations with each other and colluding rates that they demand from video distributors like DISH.

The American Television Alliance, a coalition whose membership encompasses cable, satellite, and telco providers, independent programmers and public interest groups, and of which DISH is a member, is unified in calling for changes to the outdated retransmission consent rules as part of the STELA reauthorization. We and many others in the industry propose, among other things, that when a local network station is pulled from a consumer due to a

retransmission consent dispute, the video distributor should be able to provide another market's network signal. The broadcaster whose signal is imported would be compensated under the established distant signal royalty rate. And this reform will at least allow consumers to keep their network programming while negotiations continue. If the broadcaster's local content is as valuable as they assert, then the imported distant network signal is a poor substitute, and both parties will continue to have every incentive to reach an agreement. Importing a distant signal during a blackout simply fills the void for network programming.

Second, Americans living in remote, underserved areas have especially benefited from STELA and its predecessors. Among other things, STELA allows Americans residing in predominantly rural areas to receive distant network signals for any missing Big 4 stations in their market. The distant signal license sunsets at the end of 2014, and without reauthorization, 1.5 million American households will be disenfranchised.

Third, in the 3 years since the last reauthorization, the video industry has not been sitting still. Consumers can and increasingly want to watch news, sports, and entertainment on the go using increasingly high resolution screens available on their smart phones and tablets. Over the years, DISH has done much to respond to changing consumer preferences, and today DISH stands ready to make a significant investment in the wireless market to satiate consumers' growing demand for increased mobility and flexibility in consuming video.

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

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

[The prepared statement of Mr. Dodge follows:]

Testimony of

R. Stanton Dodge

Executive Vice President and General Counsel of DISH Network L.L.C.

on

"Satellite Television Laws in Title 17"

before the

House of Representatives

Committee on the Judiciary

Subcommittee on Courts, Intellectual Property and the Internet

September 10, 2013

Chairman Goodlatte, Ranking Member Conyers, Chairman Coble, Ranking Member Watt, and Members of the Subcommittee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the General Counsel of DISH Network, the nation's third largest pay-TV provider and the only provider of local television service in all 210 of this nation's local TV markets.

The Satellite Television Extension and Localism Act of 2010 ("STELA") and its predecessors have been good for consumers. These statutes provide a framework to curb market inefficiencies and allow the free market to work smoothly. They helped to usher in new choices for consumers and better service to historically underserved populations. To make transmissions under the distant signal copyright license, DISH compensates the broadcasters, the sports leagues, the Motion Picture Association of America ("MPAA") members, and all other copyright owners at a privately negotiated rate.

It is clear that STELA should be renewed. The distant signal license sunsets at the end of 2014, and without reauthorization, over 1.5 million American households will be left without access to a full complement of network channels. But Congress should do more than simply reauthorize the distant signal license.

In particular, the broken retransmission consent regime is in dire need of comprehensive reform. Every year we see more blackouts during contractual disputes between broadcasters and their distributors, lasting longer than in the past, and impacting millions more subscribers. The headlines about the CBS service interruption during its dispute with Time Warner Cable are a stark reminder. The retransmission consent problem has reached a crescendo, the most severe crisis since Congress decided to give broadcasters a retransmission consent right in the 1992 Cable Act. This is the most destructive and outdated remnant of the 1992 Act and does not

match up with the vibrant, ever-changing, competitive landscape in the modern video marketplace.

The American Television Alliance ("ATVA"), whose membership encompasses cable and satellite providers, independent programmers, and public interest groups, and of which DISH is a member, is unified in calling for targeted fixes of these outdated retransmission consent rules as part of the STELA re-authorization.

We along with many other members of ATVA have voiced support for proposals like interim carriage authority, which would temporarily permit a distant signal to be imported during a retransmission consent dispute. That measure would alleviate the problem of subscriber disruptions and prevent the use of consumers as pawns. And, the broadcaster whose signal is imported will be compensated under the already established distant signal royalty rate. If the broadcaster's local content is as valuable as they believe it is, then the imported distant network is a poor substitute, and both parties would continue to have every incentive to reach an agreement. The imported distant signal simply fills the void for the network programming.

Others in ATVA have expressed interest in a discussion of standalone broadcast station offerings, which would give consumers the choice of whether to pay separately to receive a particular local broadcast station. And some in ATVA support the deregulatory concepts embodied in Rep. Scalise's legislation from the 112th Congress. These are merely a few of the ways to address this issue, which will not be disruptive to the STELA re-authorization, and are gaining support. Without immediate action by Congress, however, it seems likely that millions more screens will go dark every year, and consumers will pay more and more for their cable and satellite service. The time to act is now.

So this morning, I want to highlight the successes of STELA and its predecessors and why STELA should be renewed. I also want to review the origins and purpose of the retransmission consent system, and outline some measures that could be implemented to avoid consumer disenfranchisement and abuses of the 1992 retransmission consent right.

But first, let me say a few words about DISH. DISH employs over 25,000 people across the country and is a leader in innovation, having rolled out advanced place shifting and DVR functionality that provides our customers with the ability to view their content where, when, and how they want it. To stay relevant, we must continue to adapt to our customers' evolving preferences, and we believe that the only way to do that is to embrace innovation and change as a company. And our laws, which set the framework for a competitive video marketplace, must do the same.

The Satellite Home Viewer Act and the Distant Signal License – Creating a Marketplace Framework that Works

The Satellite Home Viewer Act, passed in 1988 and renewed in 1994, gave the nascent satellite television industry the right, for the first time, to retransmit the signals of network stations to "unserved" households through the use of a statutory copyright license. "Unserved" households are households that cannot pick up the relevant network station using a traditional, over-the-air antenna. Before the Act, if a satellite carrier wanted to retransmit a broadcast channel, it couldn't just negotiate with a single copyright holder, because the broadcasters have always maintained that they do not have sublicensing rights to all the programs they broadcast. This meant that satellite carriers would have to negotiate separately with, and procure licenses from, each individual owner of a copyright in the broadcast. A day's broadcast could contain

content owned by literally hundreds of copyright owners, and this list of entities could change every day as the programming changed.

The inefficiency in the process made it next to impossible to clear all copyrights for all broadcasts. Congress recognized this market inefficiency and addressed it in the cable context in 1976 when it created a statutory copyright license that allowed cable providers to comply with the Federal Communications Commission's must-carry rules and pay a single license fee that was then allocated among all relevant copyright holders in the broadcast. In 1988, Congress saw the sense in applying the same compulsory copyright policy in the satellite context, too, and created the distant signal license for satellite TV providers. It was not, contrary to certain assertions, meant to subsidize a particular industry. Rather, the license, like the cable license that preceded it, was addressed to a structural inefficiency in the market. It also enabled the introduction of multichannel video to rural and underserved households that never had access to cable service. The net result is a market framework that remains a win-win-win for distributors, consumers, and content owners alike.

With the license, millions of consumers get access to network programming, network shows reach audiences that are otherwise unavailable to them, and copyright owners receive a fair royalty for the additional viewers. Without the statutory license, is it very likely that the administrative costs of clearing individual copyrights alone would mean that these signals would not be carried. Since 2004, the satellite royalty is set by either private negotiations between the content owners and the distributors; or, if the parties cannot reach agreement, by an administrative proceeding. But this has not been necessary, either after the 2004 or 2010 reauthorizations. Following each of the last two reauthorizations, representatives from the content and distribution industries, including DISH, the broadcasters, and the MPAA, came to

the table and agreed to market rates for those retransmissions, including cost-of-living adjustments. We submitted those rates to the Copyright Office, and the Copyright Office adopted the agreed rates as the licensing rates under the statute. I am confident this will happen after the current reauthorization, too. In many respects, the Satellite Home Viewer Act created a market framework that works. We should keep what works.

Satellite TV Expands Rapidly, and Congress Responds by Creating the Local-into-Local License

Consumers recognized the value of satellite TV by adopting it rapidly. By the end of 1999, more than 9 million consumers subscribed to satellite TV. And we looked for ways to be even more competitive. We wanted to retransmit local broadcasts to our customers in the broadcasters' market. This would allow our subscribers to receive their local broadcasts and other programming through a single source. New spot beam technology, which allows satellites to reuse the same frequencies in multiple, smaller beams on the same satellite, would allow us to provide these broadcasts on a market-by-market basis.

Congress responded to the needs of consumers and the potential offered by this new technology by enacting the Satellite Home Viewer Improvement Act ("SHVIA") in 1999. SHVIA created the so-called "local-into-local" statutory license, which allows satellite carriers to retransmit the signals of network stations to subscribers within the broadcaster's market. These are consumers that these broadcasters are already obligated to serve by virtue of their broadcast license from the FCC. The local-into-local license merely allowed these consumers to receive these signals over their satellite carrier's service instead of over-the-air. This was a big step in leveling the playing field between satellite carriers and cable providers, who had long enjoyed the right to carry local network broadcast programming on their systems, ushering in a new era of competition in the pay-TV industry.

Consistent with its goal of fair competition, Congress also took the rules created for cable in the 1992 Cable Act and applied them to satellite companies: a system in which local broadcasters may elect either to negotiate for retransmission by the satellite carrier on commercial terms, or choose mandatory carriage—"must carry"— for a 3 year term. Unlike cable, however, satellite was given a choice: either don't carry any local broadcast signals in a market, or if you do, carry all of them. Our response to Congress' action was immediate. We invested hundreds of millions of dollars in spot-beam satellites, and once those satellites were in orbit, began providing broadcast signals to subscribers in those markets. Since then, satellite providers have emerged as a key competitive force in the pay-TV industry, requiring cable companies to compete on price, programming, quality, and service.

Congress Uses the Reauthorization of the Distant Signal License as an Opportunity to Accommodate the Changing Video Marketplace

Since SHVIA, the distant signal license has been reauthorized two more times. Each time, Congress took the opportunity to also update the law to reflect the some of the changing realities of the video marketplace. In 2004, Congress passed the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), which, among other things, made further efforts to level the playing field between cable and satellite by allowing satellite providers to retransmit "significantly viewed" stations in counties outside their local market where they are broadly viewed, a right the cable industry had long enjoyed. In 2010, STELA not only reauthorized the distant signal license, but also gave DISH an opportunity to earn back the right to use this license. As some of you are aware, DISH was enjoined from providing distant network signals to its subscribers in 2006. STELA presented DISH with a challenge and an opportunity: provide local service to all television markets in the United States, and you can get

your distant signal license back. DISH accepted that challenge enthusiastically. The result: today 29 new markets have access to a full complement of network programming, and DISH is now the only multi-channel distributor, whether satellite or cable, to offer local broadcast stations to consumers in all of the nation's local markets. This makes us the biggest distributor of public and commercial local broadcast stations in the United States. The process set forth in STELA worked precisely as envisioned, and it stands as an example of how a targeted legislative solution can work to everyone's benefit.

The Broken Retransmission Consent Regime Leaves Consumers in the Dark – Literally

In 1992, Your Regional Cable Operator Was the Only Game in Town. The broadcasters' retransmission consent right was not always with us. Congress created it and gave it to the broadcasters in the 1992 Cable Act. Before that time, distributors could simply retransmit local stations under the cable statutory license of Section 111.

Back then, we lived in a different world. Most markets were served by only a single cable company. Satellite wasn't an option, unless you wanted to install a 3-meter dish in your backyard. We likely had never heard of the Internet, as it was in its infancy. If we had a mobile device, it was probably the size of a brick. All these years of progress later, with increased competitive forces now at play in the video marketplace, it is difficult to look at the laws on the books and tell that much has changed. Except for its extension to the satellite arena, the retransmission consent system remains largely the same two-plus decades later.

Today, Networks Leverage Their Monopolies to Play Distributors Against Each Other. In most places today, multiple distributors using a traditional distribution model (the cable company, two satellite providers, and often a telco) compete for customers. This is not to mention over-the-top providers such as Netflix, Amazon, and Hulu, which are potential or

present competitors, too. The multiplicity of distributors has a significant implication under the current retransmission consent regime. Network stations play providers against one another. Instead of a broadcaster and a single regional cable operator engaging in a relatively fair fight and coming to terms on a reasonable retransmission fee, networks threaten to pull their programming, effectively (and sometimes affirmatively) pushing consumers onto other providers' systems – providers that may have given in to the same unreasonable demands of the broadcaster. In contrast to the cable and satellite providers, each broadcaster effectively owns a monopoly in its given market. No other station in the market can offer the same network programming by virtue of the network system of exclusive franchises. Consequently, the broadcasters have the luxury of threatening to withhold their programming altogether in order to extract higher and higher retransmission consent fees. The result: broadcasters leverage their government-protected exclusive network franchises by means of their government-created retransmission consent right.

The problem is exacerbated by the increasing consolidation we have seen in the broadcasting industry. In the last four months alone, acquisitions have preoccupied the industry, with the Sinclair Group seeking to increase its holdings from just over 100 stations to almost 150; Gannett proposing to acquire Belo Corporation to bring Gannett's holdings of local broadcast stations to 43; Tribune acquiring Local TV Holdings to bring its total station ownership to 42; and Media General and New Young Broadcasting announcing their intention to merge and combine ownership of their 30 broadcast station affiliates. This consolidation further imbalances the market, as multiple markets are presented to carriers with take-it-or-leave-it propositions for extraordinary rates. We are seeing increased fee demands of between three and

six hundred percent when compared to just three years ago, when Congress last acted and passed STELA.

We also urge this Committee to consider the serious antitrust issues that arise when broadcasters enter into arrangements to jointly negotiate retransmission consent deals. For example, in 2012, DISH was forced to black out three Big-4 stations in Casper, Wyoming and two Big-4 stations in Cheyenne, Wyoming. Although the five stations were ostensibly owned by three different entities, DISH was required to negotiate with a single appointed representative for all five stations. After negotiations broke down, the blackout lasted for 4 months. The consolidation of so much must-have local broadcast programming under one negotiator gives the broadcasters inordinate additional leverage, precipitating and prolonging the blackouts for DISH subscribers.

Consumers Are Getting Left in the Dark. The result: consumers are being left in the dark—literally. To gain leverage during retransmission consent negotiations, broadcasters increasingly pull their signals, resulting in blackouts of major television networks. Cable, satellite, and telco subscribers who paid for their service are deprived of key network programming, along with important local safety, emergency, weather, and news information, precisely what the broadcasters claim is their public interest charge. And the problem is worse than ever.

These blackouts are affecting more consumers in more markets than ever before. The proof is in the numbers. In 2010, there were 12 instances where a broadcast signal was blacked out in a local TV market. In 2011, there were 51. In 2012, the number soared to almost 100 blackouts affecting millions consumers. And the pace has yet to level off. In 2013, we're on track for 120 blackouts. Like most snowballing crises, individual incidents are increasing in

severity. In this case, the blackouts are increasing in length. The longest blackout lasted only 24 days in 2010. In 2011, there were 16 blackouts lasting over 24 days. Last year, there were 30 blackouts that lasted over 24 days, two of which lasted 121 days. And the CBS blackout lasted over four weeks, affecting more than 3 million consumers in some of the nation's largest markets. During the blackouts, CBS even barred Time Warner Cable's Internet customers from accessing full episodes of CBS programming on the Internet. Like many blackouts, the dispute coincided with a marquee event—in this instance, the anticipated start of the NFL season.

In the past, subscribers' access to the World Series and the Oscars has been threatened by broadcasters' brinksmanship. Ultimately, the losers in these one-sided contests are the consumers who get their programming pulled from them by the broadcasters and then see their bills on the rise as a result of outrageous broadcaster price demands. Some broadcasters have floated the idea of becoming a cable channel, thus stopping the broadcast of their channels over the air. If the broadcasters choose to do that, they should give back all of their free government-granted broadcast spectrum, must carry rights, and other public subsidies.

Congress Can Fix the Problem. Congress can restore balance to the negotiating table by temporarily allowing cable and satellite carriers to substitute a distant network signal from a non-local market during an impasse in retransmission consent negotiations with a local market affiliate of that same network. This approach has broad support from across the industry and public interest groups.

Here is how the proposal would work: If a broadcaster blacks out, for example, the local Denver FOX station, the cable or satellite provider would be able to temporarily offer subscribers an out-of-market station, such as the Cheyenne FOX station. The replacement station will not be a perfect substitute for the blacked-out local station, since consumers won't

have their local content, but at least people will be able to receive network programming. And, the broadcaster whose signal is imported will be compensated under the already established distant signal royalty rate.

Additionally, this solution will introduce some competition into the marketplace—just as pay-TV providers face competition from one another that mitigates against dropping broadcast programming. Here the broadcaster would face some degree of competition from a network affiliate in another market. The local broadcaster might think twice before pulling its signal from cable or satellite subscribers. Consumers will benefit.

Today's Laws Should Reflect Today's Marketplace, A Marketplace in which DISH is Prepared to Compete

The video industry is a place where the marvels of yesterday have become commonplace today. The needs and desires of consumers are evolving to keep pace with the options that new technology makes available to them. Our laws should also evolve to create a framework that facilitates the functions of the free market. This framework would help providers to give American consumers what they want: the content that they want, when they want it, and how they want it. Consumers want to watch their programming of choice on their television sets, on their phones, and on their tablets—no matter where they are. They also want to surf the web or make a phone call—again, no matter where they are. When we look at the marketplace for video, we need to be able to provide all of those options to every one of our customers, and we need to do it anywhere, anytime, on any device.

Our company is moving to meet this need. By rolling out technological innovations like the Hopper with Sling, our customers can use a smartphone or tablet from any location in a controlled and private manner to enjoy the video content for which they have already paid. Our new PrimeTime Anytime and AutoHop functionality take the DVR to a new level. Consumers

can, at their option, enable these features to gain the ability to more easily view their preferred programming when they want, while skipping what they don't want to see.

These are some of the ways in which we have responded to our customers' changing needs. But we have further to go. In the past, we haven't shrunk from "betting the company," so to speak, in order to stay competitive. We went from selling big dishes to launching our own small-dish DBS business. To give customers what they want, including mobile video, voice, and data, we are taking a risk again. Recognizing the evolution in video, DISH is on its way to becoming a wireless service provider. We acquired satellite spectrum and, after almost two years, secured FCC approval to use that spectrum for terrestrial mobile broadband services. We now want to compete against the established players by offering video, voice, and data inside and outside the home, from a single platform.

DISH is driven to provide consumers with all that they want, including the choice in services and providers that they seek. If we are successful, we will fuel billions of dollars in investment and create tens of thousands of new jobs throughout the United States. But just as businesses must foster change in a rapidly evolving video marketplace to keep pace with what consumers want, government should work to ensure its regulations mirror today's competitive realities, consumer expectations, and advances in technology.

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

Mr. COBLE. Thank you, Mr. Dodge.

Mr. Waldron?

I commend you as well for beating the illuminating light, Mr. Dodge. Thank you. Pressure on you, Mr. Waldron.

TESTIMONY OF GERARD J. WALDRON, PARTNER, COVINGTON AND BURLING LLP, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. WALDRON. Good morning, Chairman Coble, Ranking Member Watt, Chairman Goodlatte, and Ranking Member Conyers, and Members of the Subcommittee. My name is Gerry Waldron. I am a partner with the law firm of Covington and Burling, and I am testifying here today on behalf of the more than 1,000 free, local, over-the-air television members of the National Association of Broadcasters.

As the Committee begins its review of STELA, your broadcast constituents urge you to keep in mind two principles. First, free, locally focused broadcast television should remain available to American households. Second, your review of STELA should not be used to create new exceptions to copyright law that undermine those contractual relationships between broadcasters and satellite or cable companies that enable broadcasting's local focus.

Why is localism so important? For broadcasters, localism is coverage of local news, severe weather and emergency alerts, school closings, high school sports, local elections, and public affairs. Localism is support for charities, civic organizations, and events that help create a sense of community. Our broadcast stations are also the way that local businesses educate and inform the public about the goods and services and, in turn, create jobs and support your economies.

There is no doubt that viewers, your constituents, continue to rely on our service. Broadcast television remains unique because it is free, it is local, and it is always on even when other forms of communications may fail.

As a threshold matter, the Subcommittee should ask whether the expiring section 119 distant signal license continues to promote localism and whether it is in the public interest. It could be argued that the distant signal license served its purpose in 1988 when the backyard satellite industry was just getting started and that it served its purpose again when DISH and DirecTV first launched their small receiver services in the mid-1990's. But in 2013, when DISH and DirecTV are two of the largest three pay TV providers in the country, the distant signal license is a vestige of a bygone era.

Today over 98 percent of all U.S. television households can view their local network affiliates by satellite, and that number is growing all the time. No public policy justifies treating satellite subscribers in local markets as unserved, which would deprive viewers of the benefits of locally focused service. As DISH has demonstrated, there are no technical reasons for failing to serve all markets.

Accordingly, the Subcommittee should continue to encourage localism and consider whether the section 119 license should expire.

In reexamining STELA, you are likely to hear from those seeking enactment of new exceptions to the copyright laws that would undermine broadcasters' retransmission consent rights. Let me be clear. Arguments that broadcasters have too much leverage in the retransmission consent process or that retransmission fees are directly responsible for rising cable bills are wrong. Local broadcasters and pay TV providers both have an incentive to complete retransmission consent negotiations. And for that simple reason, they always do before any disruption to viewers occurs. There are exceptions but they are rare, and in fact, carriage disruptions from retransmission consent impasses represent 1 one-hundredth of 1 percent of all annual U.S. television viewing hours. Put that another way, consumers are 20 times more likely to lose television programming service because of a power outage than because of a retransmission consent impasse.

Furthermore, in the small number of instances where these negotiations have resulted in disruptions to consumers, there is one distinct pattern: the involvement of Time Warner Cable, DirecTV, and DISH. Since 2012, these three companies alone have been party to 89 percent of all the disruptions nationwide.

In contrast to what some suggest, NAB has demonstrated across numerous economic studies that retransmission consent payments are not responsible for high and rising pay TV prices. Just 2 cents of every cable bill dollar goes to broadcast retransmission fees, and that is true in spite of the fact that during the 2011 season, 96 of the top 100 most watched prime time programs were on broadcast television.

Lastly, the Committee should understand that retransmission consent negotiations are about more than just fees. Increasingly, these negotiations include hard discussions about how we can distribute our content across a variety of new platforms such as Hulu that promote competition.

In conclusion, your local broadcast constituents urge you to rebuff calls from the pay TV industry to expand the narrow examination of STELA solely to give them an unfair leverage in market-based negotiations.

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

[The prepared statement of Mr. Waldron follows:]

Hearing on
"Satellite Television Laws In Title 17"

United States House of Representatives
Committee on Judiciary

Subcommittee on Courts,
Intellectual Property and the Internet

September 10, 2013

Statement of Gerard J. Waldron

On behalf of the
National Association of Broadcasters

INTRODUCTION AND SUMMARY

Good morning, Chairman Coble, Ranking Member Watt, and members of the Subcommittee. My name is Gerry Waldron. I am a Partner at the law firm of Covington and Burling, and am testifying here today on behalf of the thousands of broadcasters – both those affiliated with the ABC, CBS, FOX, NBC and Univision networks as well as independent broadcasters – who serve their communities with free, local, over-the-air television and are members of the National Association of Broadcasters (NAB).

Thank you for the opportunity to discuss the reauthorization of the Satellite Television Extension and Localism Act of 2010 (STELA), and specifically certain provisions which are set to expire at the end of 2014. NAB looks forward to working with this Subcommittee as we again consider how the public interest can best be served through satellite carriage of broadcast television signals.

Today I will discuss the bedrock principle of localism that underpins STELA and its predecessors; provide a background on the copyright and communications laws that govern the satellite industry; and examine whether the distant signal license is still needed. Additionally, I will focus on one issue that, while not in any way relevant to STELA reauthorization, has been raised by others – retransmission consent.

The Subcommittee should start with a basic question, one that no doubt is asked about every bill that comes before this panel: Is legislation needed? Should the distant signal be reauthorized? At NAB, we ask that question in earnest, because Congress intended the distant signal to be *temporary* in nature. Yet, here we are 25 years later debating whether to extend it for the fifth time. Given that we're now in the fourth decade of a "temporary" provision, we think the satellite industry needs to prove to

members of the Subcommittee why this "temporary" exception to the norms of copyright law should not sunset. In the event that the Subcommittee does deem reauthorization of the distant signal license, in some form, necessary, Congress should limit any action to those narrow issues relevant to today's environment in which local-into-local service is now provided in all markets. Any efforts to address unrelated issues would only prolong and complicate this reauthorization process.

I. Localism: The Core Principle Underpinning the Satellite Laws

The starting point for considering any reauthorization must be localism – the bedrock principle rooted in the Communications Act of 1934 that has guided both communications and related copyright policy in this area for decades. In crafting the Satellite Home Viewer Act of 1988 ("SHVA") and its progeny, Congress strived to promote this local model by adhering to two interrelated policy objectives: (1) enabling the wide availability of free, locally-focused, over-the-air television programming in American television households, while (2) ensuring that the satellite retransmission of television broadcast stations did not discourage broadcasters from continuing to offer this free television service.[1] These objectives should continue to guide your review of legislation today.

What does localism mean for the public served by local television broadcasters, your constituents? Localism is coverage of matters of importance for local communities, such as local news, severe weather and emergency alerts, school closings, high school sports, local elections and public affairs. Localism is support for

[1] S. Rep. No. 92, 102 Cong., 1st Sess. 36 (1991).

local charities, civic organizations and events that help create a sense of community. Locally based broadcast stations are also the means through which local businesses educate and inform the public about their goods and services and, in turn, create jobs and support local economies. Local broadcasters address the needs of the public, based on a familiarity with and commitment to the cities and towns where they do business.

I could recount numerous examples of NAB stations excelling in all of these locally-focused capacities, but there is no better example of the benefits of broadcasters' local focus than the role that broadcasters performed in their coverage of the tornados in Oklahoma earlier this year. Before, during, and after the tragic tornado in Moore touched down on May 20, local broadcast television stations served Oklahomans with up-to-the-minute, life-saving information.[2] Whether it was warning viewers to seek shelter based on Doppler radar reports, providing aerial footage of the storm and its destruction from a helicopter or helping emergency personnel communicate rescue and recovery information to residents, broadcasters were there in Moore, Oklahoma as *first informers.* At 5:30 pm local time, shortly after the worst of the storm, over 475,000 television viewers in the Oklahoma City market were watching local news coverage on broadcast television. To put that in perspective, 375,000 viewers in this market watched last year's Super Bowl.

Local broadcast television remains unique because it is free, it is local and it is *always on* – even when other forms of communication may fail. As local broadcasters

[2] During the week of May 20-26, which saw a tornado strike the area on May 20, 99 of the top 100 rated programs were found on broadcast television. The top 20 shows for the week were all storm-related coverage, in particular special news coverage of tornado and its aftermath. http://www.tvb.org/measurement/PRR_Week35

continue to reach more people and touch more lives than any other communications medium, the Subcommittee and your constituents would be well served by once again focusing on localism in any reauthorization effort.

II. Legal Background

It is important to appreciate that three distinct statutory licenses in the Copyright Act govern the retransmission of *distant* and *local* over-the-air broadcast station signals:

- Section 119 permits a satellite carrier to retransmit *distant* television signals to subscribers for private home viewing and to commercial establishments for a per subscriber fee.
- Section 122 permits a satellite carrier to retransmit the signals of each *local* television station into the station's local market and also outside the station's market where the station is "significantly viewed," on a royalty-free basis.
- Section 111 permits a cable operator to retransmit both local and distant radio and television signals to subscribers.

I want to emphasize that only the Section 119 license sunsets at the end of 2014 and is the subject of this hearing. The Section 111 and 122 licenses are permanent. Of course, all of these licenses are contingent upon the users complying with certain conditions imposed by the Communications Act, including rules, regulations, and authorizations established by the Federal Communications Commission (FCC) governing the carriage of television broadcast signals, but that is the focus of another Committee.

A. The Section 119 License

In 1988, Congress responded to concerns of companies using large satellite dishes, mostly in rural areas, to deliver multichannel service to consumers far away from a TV station, by adopting the Satellite Home Viewer Act (SHVA). That law, adopted years before DISH or DirecTV were even launched, created the Section 119 statutory license enabling satellite carriers to retransmit the signals of *distant* television network stations and superstations to satellite dish owners for their private home viewing. The Section 119 license enabled satellite carriers to provide *distant* network programming to households unable to receive adequate over-the-air signals from their local network affiliates.

In adopting Section 119, Congress carefully wrote in a number of conditions to promote fundamental policies. Respecting the principle of localism, only those subscribers who live in unserved households are eligible to receive distant network station signals. SHVA defined an "unserved household" as a household that cannot receive, through the use of a "conventional, outdoor rooftop receiving antenna," an over-the-air signal of a network station of Grade B intensity. The purpose of this provision was to protect the local viewing public's ability to receive locally oriented news, information and other programming by preserving the exclusivity local television stations have in their network and syndicated programs. That territorial exclusivity, which is common in many industries, enables stations to generate revenue needed to provide local service.

The law was originally set to expire at the end of 1994; however Congress reauthorized Section 119 in 1994, 1999, 2004, and again in 2010 for additional five year periods.

B. The Section 122 License

The 1999 renewal, called the Satellite Home Viewer Improvement Act of 1999 (SHVIA), also created a new royalty-free Section 122 license that allowed, but did not require, satellite carriers to retransmit *local* television signals into their own markets. The Section 122 license was intended, in part, to make the satellite industry more competitive with cable. In that it was wildly successful. The number of satellite subscribers sky-rocketed. Satellite carriers have increasingly relied upon the Section 122 license to provide *local* television signals to their subscribers. Currently, DISH provides local-into-local service in all television markets (referred to as Designated Market Areas (DMAs)), and DirecTV reportedly offers local-into-local service to all but 15 DMAs.

The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) reauthorized Section 119 once again, but also set rules to further limit importation of distant network station signals into local television markets. For example, SHVERA required the satellite carriers to phase out retransmission of distant signals in markets where they offered local-into-local service. Generally, a satellite carrier was required to terminate distant station service to any subscriber who elected to receive local-into-local service, and was precluded from providing distant network station signals to new subscribers in markets where local-into-local service was available.

SHVERA additionally permitted satellite carriers to deliver television station signals from adjacent markets that were determined by the FCC to be "significantly viewed" in the local market so long as the satellite carrier provided local-into-local service to those subscribers. SHVERA also expanded the copyright license to make express provision for digital signals.

C. STELA: Part Copyright Law, Part Communications Act

Sections 119 and 122 discussed above are part of the Copyright Act. These copyright sections work in tandem with certain provisions in the Communications Act. For example, Section 325 of the Communications Act requires satellite carriers to obtain retransmission consent for the carriage of local stations, but exempts carriers from obtaining such consent to retransmit *distant* network signals to unserved households.

Section 338 of the Communications Act contains provisions governing the carriage of local stations. These provisions include the "carry one, carry all" requirement under which a satellite carrier offering carriage of one local station in a market must offer carriage to all stations in the market.

Section 339 of the Communications Act governs the carriage of distant signals. Its provisions include: provisions relating to replacing distant signals with local signals; carriage of distant digital signals; digital signal strength prediction testing; and program exclusivity rules for satellite. Lastly, Section 340 has provisions relating to the carriage of significantly viewed signals.

While none of the Communications Act sections are scheduled to sunset, certain provisions within the key sections do sunset in 2014. Specifically, the following provisions related to retransmission consent are set to expire: (1) the exemption satellite

carriers enjoy from having to obtain retransmission consent from stations whose signals they provide to unserved households; (2) the prohibition against stations entering into an exclusive carriage agreement with only one cable or satellite provider; and (3) the requirement to negotiate retransmission agreements in good faith.

III. Does the Section 119 License Continue To Promote Localism?

Given the narrow scope of the Section 119 license, we invite the Subcommittee to consider whether the time has come for this "temporary" *distant* signal license to sunset. While the distant signal license may have served its purpose in 1988, when the back-yard satellite industry was just getting started; and again when DISH and DirecTV first launched their small-receiver services in the mid-1990s; today, in 2013, the distant signal license is a vestige of a bygone era, a time before fiber optics, compression technology, digitalization, and the ability they have brought to provide local stations to nearly all subscribers. While the satellite companies are in the best position to precisely identify the number of their subscribers currently receiving distant signals, four years ago, the last time Congress looked at this issue, only some two percent (2%) of households continued to receive a distant signal package, and that number was steadily declining.

Experience has shown that the Section 122 local-into-local compulsory license is the right way to address delivery of over-the-air television stations to satellite subscribers. NAB strongly supported the Section 122 license when it was adopted and continues to believe that it is mutually beneficial to stations, to carriers and, most importantly, to consumers. Local-into-local has provided a boon for the satellite industry

and greatly enhanced its ability to compete with cable. The *local* license also has promoted localism, since viewers truly realize the benefits of the local broadcast model where they receive a local signal. Thus, Congress's focus at this time should be to further these trends and promote local-into-local service in all markets.

To a great extent, Section 119 has outlived its usefulness. Unlike the local-into-local compulsory license, the distant-signal compulsory license as applied to distant network signals threatens the statutory goal of localism.[3] As a result, the only defensible justification for this exception is as a "hardship" exception—to make network programming available to the small number of households that otherwise have no access to it. The 1999 SHVIA Conference Report states that principle eloquently: "the specific goal of the 119 license . . . is to allow for *a life-line network television service to those homes beyond the reach of their local television stations.*" SHVIA Conference Report, 145 Cong. Rec. at H11792-793 (emphasis added).[4]

Today, over 98 percent of all U.S. television viewers can view their *local* network affiliates *by satellite*—and that number is growing all the time. In practical terms, with few exceptions, *there are no unserved viewers* in areas in which local-into-local satellite transmissions are available, because it is no more difficult for subscribers to obtain local stations from their satellite carriers than to obtain distant stations from those same carriers. Accordingly, no public policy justifies treating satellite subscribers in local-into-

[3] The portion of Section 119 enabling retransmission of "superstations" does not pose such a threat to localism.

[4] *See, e.g.*, Satellite Home Viewer Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship."); *id.* at 26 ("The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely."); *id.* at 14 (1988) ("Moreover, the bill respects the network/affiliate relationship and promotes localism.").

local markets as "unserved" and therefore eligible to receive distant network stations. Quite the contrary, there is every reason to close this loophole.

IV. Retransmission Consent

The retransmission consent right is contained within the Communications Act, and was established by Congress in 1992 and upheld by the Supreme Court in 1997. Retransmission consent recognizes local broadcasters' property interest in their over-the-air signal, permitting them to seek compensation from cable operators and other multichannel video programming distributors (MVPDs) for carriage of their signals.

In the course of the Subcommittee's reexamination of STELA, it is likely to hear from interests seeking enactment of new exceptions to the copyright laws that would undermine broadcasters retransmission consent right. Broadcasters across the country urge the Subcommittee to resist these overtures, since they would pose significant harm to the locally-focused broadcast model that has served the viewing public so well for decades.

Specifically, a change in law that would permit a satellite carrier to import a distant signal – not based on need, but to gain unfair market leverage in a retransmission consent dispute – would be contrary to decades of Congressional policy aimed to promote localism. Such a proposal would undermine the locally-oriented contractual exclusivity of the network/affiliate relationship by delivering to viewers in *served* households—*i.e.*, those who can already watch their own local ABC, CBS, Fox, and NBC stations—network programming from another distant market. This importation of duplicative distant network programming jeopardizes the viability of the local network-

affiliated stations that offer the local news, weather and emergency information that viewers value.

When Congress adopted the retransmission consent right, it sought to implement a *market-based* system of property rights and private contracts to address "a distortion in the video marketplace."[5] Congress acted to address the distortion caused by the ability of cable operators to retransmit and resell a local broadcast station's signal without its permission. Thus, Congress acted to rebalance the distortion caused by the compulsory statutory license which cable companies enjoyed. The fundamental factual, equitable and competition policy considerations before Congress in 1992 remain true and valid today.

In 1992, Congress found that "[b]roadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems."[6] Based on these facts, Congress reasoned that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals," and because "cable operators pay for the cable programming services [such as Comedy Central or Animal Planet] they offer to their customers ... that programming services on a broadcast channel should not be treated differently."[7] Finally, looking at the presence of competing channels owned by cable operators through a competitive lens, Congress did "not believe that public policy support[ed] a

[5] S. Rep. No. 92, 102 Cong., 1st Sess. at 35.
[6] *Id.*
[7] *Id.*

system under which broadcasters in effect subsidize the establishment of their chief competitors."[8] All of these findings remain as relevant today as they were in 1992.

Both local broadcasters and pay television providers have an incentive to complete retransmission negotiations in the marketplace before any disruption to the viewer occurs, and for that very simple reason almost all negotiations are completed on time and with no drama. NAB studies show that over a recent five-year period, service interruptions from retransmission consent impasses represented approximately one one-hundredth of one percent (0.01%) of annual U.S. television viewing hours.[9] That means consumers are more than 20 times more likely to lose access to television programming due to a power outage than a retransmission negotiation impasse.[10] Further, in the handful of instances where retransmission consent negotiations do result in temporary service disruptions, there is one distinct pattern – the involvement of Time Warner Cable, DirecTV and DISH. Since 2012, these three companies have been party to **89 percent of broadcast television service disruptions nationwide**.[11] Moreover, broadcasters have never been found by the FCC to be in violation of their obligation to negotiate in good faith.

Opponents of retransmission consent cite rising retail cable and satellite bills as justification to "reform" retransmission consent. However, broadcast costs are not responsible for the steep increase in cable bills. The truth is that MVPDs are seeking to limit one of their operating costs - in this case, broadcast programming - and asking for

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[8] *Id.*

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

[10] *Id.*

[11] *Publicized Broadcast Signal Blackouts* SNL Kagan.

Congress's help; not to lower cable bills, but to increase their own profit. The rise in cable rates outpaced inflation long before a penny of retransmission consent was paid to broadcasters.[12]

NAB has demonstrated across numerous economic studies that retransmission consent payments are not responsible for the high and rising consumer prices charged by MVPDs.[13] Additionally, a recent independent analysis reveals a stark contrast in the weight of costs of cable programming: it estimated that while only *two cents* of every dollar of cable video revenue goes to retransmission consent, nearly 20 cents goes to cable programming fees.[14] This disparity exists despite the fact that broadcast programming remains the most compelling, most watched programming available. That's not our opinion; that is what the ratings show. During the 2011-2012 television season, *96 of the top 100* most watched prime time programs were aired by broadcast stations.

The fact that new competitors in the MVPD space have emerged in recent years does not weaken the justification for retransmission consent. Certainly both the marketplace and much of the underlying technology have undergone changes over the past two decades. However, the variety of MVPDs in a marketplace does not necessarily mean that the MVPD marketplace is more competitive. Rather, MVPD concentration and market power is actually *increasing* in local markets. Indeed, just last

[12] FCC Cable Industry Price Reports; Bureau of Labor Statistics.

[13] *Id.* at 11-24 ("data simply do not support the claim that increases in MVPD prices are caused" by retransmission consent fees, as these fees represent a tiny fraction of MVPD costs); *see also* Eisenach & Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010), Appendix A to the Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 13-17, 21-22 (demonstrating that even a "flawed analysis" conducted for MVPD interests "shows little effect of retransmission consent fees on consumers," and that retransmission fees make up a small fraction of MVPD programming costs and an even smaller percentage of MVPD revenues).

[14] *Where Your Cable Dollar Goes*, Multichannel News (Mar. 28, 2011) at 10-11.

week the Second Circuit Court of Appeals found that "[c]able operators may not be as dominant as they were in 1992 when Congress enacted the Cable Act [but] [n]evertheless, cable operators continue to hold more than 55% of the national MVPD market and to enjoy still higher shares in a number of local MVPD markets."[15] Accordingly, these changes in the marketplace do not erode Congress's original rationale that broadcasters should be compensated for their signal as a matter of fairness and sound competition policy, but rather speaks to the wisdom of the property-based framework that it established in the first place. Retransmission consent merely vests in local broadcasters the right to negotiate for the retransmission of their signal—it does not guarantee carriage on an operator's system nor does it dictate the terms or outcome of that negotiation.

CONCLUSION

With the perspective gained from 25 years of experience with STELA and its predecessors, the Subcommittee should be guided by the same underlying principle it has consistently applied when examining the satellite laws: localism. When viewed through that lens, the distant signal license, which dates back to the inception of an infant satellite industry in the 1980s, has outlived its usefulness and can no longer be justified. This Subcommittee should promote the principle of localism by encouraging local-into-local satellite service for all Americans in each of the 210 television markets.

This Subcommittee should also resist calls to create exceptions to the copyright laws that weaken local television stations' retransmission consent rights. Instead,

[15] *Time Warner Cable, Inc. v. FCC*, No. 11-4138 at 43 (slip op.) (2d Cir. Sept. 4, 2013).

Congress should continue to rebuff the efforts of the satellite and cable industries to intervene in free-market retransmission negotiations, which the FCC has expressly found benefit cable/satellite operators, broadcasters and, "[m]ost importantly, consumers."[16]

[16] FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (Sept. 2005)* at ¶ 44.

Mr. COBLE. Thank you, Mr. Waldron.
Mr. MacKenzie?

TESTIMONY OF EARLE A. MacKENZIE, EXECUTIVE VICE PRESIDENT AND CHIEF OPERATING OFFICER, SHENTEL CABLE, ON BEHALF OF THE AMERICAN CABLE ASSOCIATION

Mr. MACKENZIE. Good morning.

Shentel offers wireline and wireless services to residential and business customers in smaller markets in rural areas in the mid-Atlantic region. As a smaller, rural provider, our costs per subscriber are greater. However, despite the higher costs, firms like Shentel still provide our customers with the same service enjoyed by urban customers.

It is a challenge that is not made any easier by certain laws and rules that govern our business. For example, one of the simplest issues I would raise for the Committee today is the competitive disparity that stems from the fact that certain laws governing the satellite TV industry are reauthorized every 5 years. The cable industry does not benefit from such a periodic review. In fact, Congress has not made a broad legislative change to the cable rules since the 1990's.

If Congress wants to conduct such a review, one set of rules that has worked and should not be changed is the cable copyright license. It continues to serve its goal in compensating copyright holders for the retransmission of their work. Many stakeholders agree no significant change to the license is necessary.

If Congress were to repeal the license, it would be very burdensome for the cable firms to anticipate all the copyrighted works that would need to be cleared before they are aired on broadcast stations. Moreover, the repeal would create uncertainty in the marketplace for us and our customers.

Should Congress reach a different conclusion, any change to the existing license must coincide with reform to the broadcast carriage rules such as retransmission consent because they are legally intertwined.

There are a number of specific problems related to the outdated rules and regulations governing the cable industry, particularly retransmission consent, that are covered in my written testimony. But with limited time, I will focus on just two that are of direct relevance to the Judiciary Committee.

This Committee should be aware that there are dozens of instances where separately owned Big 4 broadcasters in the same market are colluding against the cable operator in their negotiation of retransmission consent. Typically this means that two broadcast stations with exclusive market rights that are protected by the Government use the same negotiator to conduct the negotiations. Available evidence shows this anticompetitive conduct by broadcasters raises fees between 22 and 160 percent. In the end, these costs are passed on to the consumer.

The practice of coordinating retransmission consent negotiations is widespread, occurring in at least 20 percent of the TV station markets, and it is increasing. This year, there has been a number of broadcast station mergers and acquisitions that could result in even more coordination of retransmission consent negotiations.

If you share my concerns, please inform the Department of Justice.

Another area we would like the Committee to consider are skyrocketing sport programming fees. It is amazing in the past few years sports leagues have extracted more than $110 billion from broadcast and cable TV networks, and there is no end in sight. These networks bid extraordinary amounts because they can pass those costs on to the pay TV providers and our customers. Not surprisingly, ESPN, regional sports networks, and the Big 4 broadcasters are aggressively hiking their fees. In the end, the consumer shoulders these costs.

One part of the sports programming problem is rooted in a 50-year-old Federal law giving an antitrust exemption to professional sports leagues when they are negotiating their TV programming deals. However, like retransmission consent, the sports programming market has changed significantly since JFK was President, but the rules have not. It may have made sense to give professional sports leagues a pass from the antitrust rules in 1961. Their dominant market power no longer justifies this exemption.

Mr. Chairman, it is clear that there is a host of issues that need attention. Given the significant changes in the marketplace, I hope the issues I have raised here will be taken into consideration as part of the Committee's reauthorization of the satellite TV license.

Thank you for the opportunity to testify.

[The prepared statement of Mr. MacKenzie follows:]

Statement of
Earle A. MacKenzie
Executive Vice President and Chief Operating Officer at Shenandoah Telecommunications Company
Board Member of the American Cable Association

Before the
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives

Hearing on
"Satellite Television Laws in Title 17"
September 10, 2013

My name is Earle A. MacKenzie, and I am the Executive Vice President and Chief Operating Officer of Shenandoah Telecommunications Company, better known by our brand name, Shentel. The company was started in 1902 by a group of farmers who wanted to bring telephone service to Shenandoah County, Virginia. Today, we offer a broad range of advanced broadband, digital video, wireline and wireless services to residential and business customers in western and southern Virginia, West Virginia, western Maryland and southern Pennsylvania. We are a publicly traded company (SHEN) headquartered in Edinburg, Virginia, a town of 1,100 residents, which is typical of many communities we serve. Our company has over 500,000 customers served by 700 employees. Our cable operations, with 75,000 customers in Virginia, West Virginia and Maryland, pass 185,000 homes and businesses in 31 counties with 110 communities.

The cable markets we serve vary from small towns to rural areas. We, like other members of the American Cable Association, differ from large urban providers in that we pass fewer homes per mile with outside plant. This increases the cost to construct and upgrade our systems and to operate them on an ongoing basis. However, despite the disproportionate costs, smaller operators still believe in providing smaller markets with the same service as large ones. Shentel is a good example. Our company invests to ensure that the rural communities we serve will have access to the same level of services as those found anywhere in the US. For example, since 2009, the shareholders of Shentel have invested over $370 million dollars in our wireless and wireline networks. $112 million has been spent upgrading cable networks we purchased in 2008 and 2010. This investment of over $650 per home passed has allowed us to bring high definition television, digital voice and up to 50 Mbps of high speed Internet to communities that previously had only dial up. Another example of our commitment to rural communities is our decision to rebuild the cable network to 10,000 homes in McDowell County, located in southern West Virginia using fiber-to-the-home technology, similar to Verizon FIOS.

It's been nearly five years since Congress and this Committee had to consider whether to reauthorize the satellite TV compulsory license, and as part of that process, took an in depth look at the video marketplace in which DISH Network and DIRECTV operate. It was after conducting this evaluation that Congress passed the Satellite Television Extension and Localism Act of 2010, which extended the statutory copyright license until 2014, and made some changes to the rules governing the satellite TV industry to reflect the marketplace of 2009. As you probably know, even without the benefit of this hearing or my testimony, a lot has changed. So the fact that Congress and this Committee are now once again evaluating the video marketplace as part of its consideration of whether to renew the satellite TV

license for another five years is very appropriate, and your decisions stand to benefit consumers and competitive markets.

It's actually been even longer since Congress or this Committee has conducted a serious examination of the rules governing the cable TV industry. Hearings on cable industry pricing used to be an annual affair, but more recently they occur only sporadically. While there have been some hearings on the video marketplace with respect to mergers, like Comcast-NBCU, members of Congress are not forced to make periodic decisions about whether certain cable rules should be extended or eliminated because the majority of rules that apply to the cable industry do not sunset in the same way as the satellite TV copyright license. In fact, the last time Congress made broad legislative changes to the rules governing the cable industry was in the 1990s. So if you think a lot has changed in the last five years, then you undoubtedly recognize there have been even more dramatic changes in the marketplace in the last 20 years. I'll highlight some of these changes later on in my testimony, and leave you with my conclusion that the video market is no longer the same one that Congress sought to fix two decades ago.

Not surprisingly, while some of the laws passed by Congress continue to serve their purpose, others now fail to properly govern the video marketplace as it exists. In what follows, I will discuss in more detail rules that continue to work and serve their intended purpose and need no change except for a tweak here and there, such as the cable copyright license and the program access rules. I will also discuss a few rules that have grown noticeably stale and are ripe for updating, such as the retransmission consent rules and the Sports Broadcasting Act of 1961. To start, I'm going to discuss a rule that works, and has stood the test of time.

Section 111 Cable Statutory License

Copyright holders and cable operators have been operating under the Section 111 statutory license since 1976, and throughout that time, it has served its goal in compensating copyright holders for the retransmission of their work in a way that is minimally burdensome.

The Section 111 license arose from a compromise reached among the stakeholders in the 1970s. Copyright holders whose content airs on the signals of broadcast stations felt that they should be compensated by cable operators who retransmit these signals. One of the issues cable operators were concerned about was whether they would be able to efficiently clear rights from potentially thousands of copyright holders in advance of their content airing on the broadcast stations. Though less than perfect, the Section 111 license nevertheless addressed the concerns of both groups, and has proven to be an efficient and effective means of clearing copyrights to this day. In fact, in 1999, Congress provided the satellite industry a similar license.

If Congress were to repeal Section 111 and 119, clearing the rights to all of the programming on retransmitted broadcast stations would present very difficult burdens, both logistically and financially. Cable operators and other multichannel video programming distributors ("MVPDs") would be unable to anticipate all the copyrighted works that a broadcast station would air. Faced with potential copyright liability, operators may have to drop stations, where able, but face an unsolvable problem with respect to must carry stations that cannot be dropped. Without an efficient licensing scheme, it is likely that pay TV customers would lose access to programming from broadcast stations that they have historically received. Moreover, these customers may end up paying more money for the same content due to the transaction costs of clearing copyright that does apply today. For some smaller MVPDs and broadcasters, the harms

would threaten their viability. For rural consumers, the proposals could result in fewer choices and higher costs. Maintaining the status quo avoids these consequences.

Under these circumstances, it is not at all surprising that a wide range of stakeholders – including representatives of broadcast stations, copyright users and even some copyright owners – agrees that it is appropriate for the statutory license to remain unchanged.

Powerful rights holders argue that the license should be eliminated because they are underpaid. Ironically, these rights holders might actually be overcompensated for their works today. Outdated retransmission consent rules that distort the market allow broadcasters to extract soaring retransmission consent fees from MVPDs. A significant portion of this revenue is not kept by broadcasters, but returned to the rights holders of the programming that runs on the broadcast stations, who predominately are the broadcast networks and sports leagues. Therefore, retransmission consent fees end up being additional indirect payments from MVPDs to copyright owners that supplement the royalties that these rights holders get through the statutory license. Taking these supplemental payments into account, rights holders claim that they are undercompensated doesn't add up.

Should Congress reach a different conclusion about the need to maintain the copyright license, changes to the compulsory license cannot be done in isolation. As the Copyright Office and the Federal Communications Commission ("FCC") have long recognized, the license is intertwined with key broadcast regulations, such as retransmission consent, must carry, and the FCC's exclusivity rules. Changes to the license must coincide with reform of these broadcast signal carriage rules. It is also essential that two policies that are essential to smaller and rural MVPDs be preserved:

- Clear access to distribute "distant" signals; and
- Special considerations for smaller MVPD systems.

First, for over 35 years, Section 111 has cleared copyright for cable carriage of what are considered "distant" broadcast signals because they are transmitted from another designated market area (DMA). In adopting this license, Congress recognized that many cable systems in rural areas, especially those on the outskirts of DMAs, offered "distant" signals because "local" signals were unavailable or limited. Rural consumers benefitted then, and still do today.

For some consumers, "local" stations are actually located out-of-state, and the importation of "distant" stations provides them with in-state news, sports, and political coverage. For others, "distant" signals provide vital weather warnings that come prior to, rather than during or after, the event.

For these reasons and others, any changes to the compulsory license must also include a provision that smaller and rural MVPDs can continue to be permitted to provide "distant signals."

Second, the special consideration that smaller MVPDs have historically received through the Section 111 license must also continue. Since 1976, Congress has allowed smaller MVPDs to pay lower copyright license fees. This policy recognized that smaller MVPDs provided needed services, and operate under economic constraints that are vastly different from those affecting larger operators. This remains true today. Congress has maintained the small system provisions throughout every amendment to the license, validating their importance.

Elimination of the license would undoubtedly expose smaller MVPDs to rampant price discrimination, leading these operators to pay higher copyright license fees than larger MVPDs. ACA has documented to Congress and the FCC that many broadcasters and programmers routinely charge smaller operators substantially higher programming fees. It is easy to understand. A copyright holder has a financial incentive to enter into a deal with a large cable operator that provides service to tens of millions of subscribers because not reaching an agreement means losing out on receiving a big payout. Therefore, the price agreed upon in a negotiation involving a large cable operator is far more likely to be closer to the fair market value of the content than the price reached in a negotiation with a small cable operator. A copyright holder doesn't have the same incentive to reach individual deals with hundreds of small cable operators who each serve only a few thousand subscribers. The cost of conducting all of these transactions is far greater, and the amount of money that would be lost as a result of not entering each deal is significantly lower. In fact, for many larger copyright holders the amount of money paid by a single small cable operator is materially insignificant. Not surprisingly, in these instances, the copyright holder would set the price much higher than the price it charges large cable operator, and tell the small cable operator, "take-it-or-leave-it," knowing the cable operator needs the rights to its programming more than it needs to be paid by the cable operator. This type of price discrimination has no basis in cost; rather, the basis is unmatchable market power.

The Section 111 license protects smaller MVPDs from this sort of price discrimination by establishing uniform license fees based on gross revenues and other variables. With no compulsory license, powerful rights holders would "stick it to the small guy" – conduct that would threaten smaller operators and their customers who rely on their service. Accordingly, any change to the compulsory license must include ensure smaller operators not pay more per customer than larger operators.

While there are some parties that suggest that the copyright licenses can be eliminated, and propose alternative market oriented solutions to take its place. We urge the Committee to take into account the success of the copyright license regime, and the potential impact that changes to the license would have on smaller cable operators and their customers. In sum, we believe that the public continues to remain best served by maintaining the license.

But there are issues and dynamics that merit review and action by this Committee. In the following, I will discuss the rules that govern both the retransmission consent and sports programming marketplace, and how these rules are either creating problems in the market today or not sufficiently addressing market failures. Moreover, I will talk about how a law passed by Congress to protect buying groups, typically used by small cable operators, from being discriminated against by vertically integrated programmers, is no longer offering such protection. Finally, I will also discuss how a statute intended to create a competitive marketplace for the sale of cable set top boxes has failed, and at the same time put a significant burden on smaller operators.

Retransmission Consent

The recent retransmission consent impasse between Time Warner Cable ("TWC") and CBS Corp. ("CBS") is the latest and most visible sign of serious flaws in the rules governing the retransmission consent market. The main problem is that Congress passed a law based on marketplace conditions that no longer exist.

In the last twenty years, we've seen satellite TV and telephone companies successfully launch multichannel video services that compete with cable. Today, cable faces robust competition. In our case,

the satellite TV providers have over 60% of the video market in the areas we serve. Moreover, there are other types of video distributors in the market. Over-the-top video distributors, like Netflix, Amazon, and Hulu have entered the market, and have obtained 30 million customers. In addition, the programming market has largely consolidated into five media conglomerates that control the big 4 television networks (ABC, NBC, CBS, and FOX) and dozens of the most popular cable channels. This is not the marketplace of 1992.

As a result of the outdated rules and regulations, consumers are being harmed. In the following, I will describe three retransmission consent-related issues that require Congress' attention. First, broadcasters are flouting current rules, including antitrust laws, by colluding in their sale of retransmission consent. Second, existing rules and regulations are failing to protect consumers from broadcasters that pull their signals during retransmission consent negotiating impasses. Finally, current rules require consumers who subscribe to cable service to also subscribe to the broadcast stations that elect retransmission consent, even if they don't want to receive those broadcast stations via their subscription service. Each of these issues can be addressed through narrowly-tailored fixes, and I encourage the Committee to consider addressing them as part of the reauthorization of the satellite copyright license.

Coordinated Retransmission Consent Negotiations

This committee should be concerned that separately owned, same-market broadcasters are colluding in the sale of retransmission consent to pay-TV providers in at least 43 television markets by coordinating their negotiations. Available evidence submitted by large and small cable operators to the FCC shows that when broadcasters engage in this anticompetitive conduct, they can extract at least 22% higher fees than if they negotiate separately. One cable operator presented evidence showing that its rates were more than 160% higher. To put this price increase in perspective, antitrust authorities are generally concerned whenever horizontal consolidation results in price increases greater than 5%. These price increases are passed along to consumers, who end up paying for them in higher costs.

The practice of separately owned, same market broadcast stations coordinating their retransmission consent negotiations is widespread and increasing. This year, we have seen a rash of broadcaster deals that could result in broadcasters entering into coordination agreements that would likely include the coordination of retransmission consent negotiations.

ACA has brought this issue to the attention of the FCC as part of its retransmission consent rulemaking and quadrennial media ownership review. The two rulemakings remain pending at the agency. Also at the request of Senator Rockefeller, the Government Accountability Office ("GAO") is preparing a report on the impact of this practice on competition and consumers. However, this issue is not solely under consideration by the FCC and GAO. The US Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") also have authority to review this practice under the antitrust statutes. In fact, in 1996, the DOJ brought a case against three separately owned broadcasters in Texas who were coordinating their negotiations. Currently, the DOJ and FTC are reviewing a number of broadcaster transactions where the purchasers of the stations will enter into agreements to coordinate the activities. We are hopeful that the DOJ and FTC will consider the impact of these deals on competition and consumers with regard to the coordination of retransmission consent, and prohibit such arrangements in the deals under review, thereby setting a marker for other broadcasters to see that collusion in retransmission consent negotiations is not permitted.

Blackouts

The recent retransmission consent dispute between Time Warner Cable and CBS highlighted how existing rules lack a reliable safety net for consumers when broadcasters and MVPDs cannot reach mutual agreement. For 32 days in August and September, more than three million TWC and Bright House Networks ("BHN") subscribers were without access to CBS network programming, and local news and weather from their local CBS stations, through their cable operator because of a dispute over prices, terms and conditions of retransmission consent in the eight large television markets where CBS owns and operates broadcast stations. An even larger number of TWC and BHN broadband Internet subscribers were been denied access to the online video content found on CBS.com and available to all other Internet users, regardless of whether their local CBS station has been blacked out. This latest blackout was not an isolated incident. In 2012, millions of Americans went without access to their local broadcast signals after station owners cut off programming 91 times. This was a 78% increase over 2011, and even more over 2010.

Existing law prevents a cable operator from dropping a broadcast station during the sweeps period if its retransmission consent agreement expires during "sweeps." Such periods are the quarterly national four-week ratings periods – generally including February, May, July and November. While cable operators are prohibited from pulling broadcast signals during periods of time financially important to broadcasters, there is no constraint on broadcasters' pulling signals from cable operators.

Congress should prevent broadcasters from pulling signals from cable operators if retransmission consent agreements expire before new agreements have been signed. ACA has proposed adoption of a rule mandating that broadcasters and MVPDs continue to offer a broadcast station's signal to consumers after an existing retransmission consent agreement expires and while the terms of a new agreement are pending resolution of a negotiating dispute. Under this approach, the parties' existing retransmission consent agreement would automatically be extended past its expiration date, and an MVPD would continue to pay the broadcaster for retransmission consent rights per such contract. At the time that the dispute is resolved and a new agreement is signed, the prices and terms of the new agreement would retroactively apply to begin immediately after the previous agreement's expiration date and any required true-up of prices would be applied. This proposal does not call for Congress to side with a broadcaster or MVPD on the appropriate prices, terms, and conditions of carriage for the broadcaster's signal. It also does not give MVPDs the right to carry the broadcaster's signal indefinitely. In the event that various forms of voluntary mediation fail, binding commercial baseball style arbitration would provide final resolution. This proposal focuses on the narrow need to ensure consumers have continued access to broadcast stations while parties continue to negotiate. The FCC has adopted this type of standstill relief on numerous occasions, and it has worked.

Congress should adopt this type of standstill relief now to make sure that the blackout that affected millions of Time Warner Cable and Bright House Network subscribers is the last of its kind.

Retransmission Consent Must-Buy Obligotion

Cable operators are required by regulation to have a basic service tier that includes all local broadcast television stations offered by the cable operator. Moreover, all subscribers to cable operators must purchase the basic service tier in order to receive additional video programming. This means cable operators must include both stations that seek carriage for no compensation, like must-carry stations and

PEG channels, and stations that elect retransmission consent and demand payment for carriage in a tier that every subscriber must purchase.

These rules create two problems. First, consumers who wish to subscribe to a cable operator must pay for the broadcast stations that elect retransmission consent whether they want these channels or not. Consumers who do not want these broadcast stations from their cable operator either may not want them at all, or may wish to receive them through an alternative source, such as using an over-the-air antenna that allows them to get the channels for free. Current law prevents cable operators from putting the retransmission consent stations on a separate tier, and allowing its customers to choose whether they want to pay to receive this broadcast tier or not.

Second, tier placement and subscriber penetration levels are critical terms of negotiation between cable operators and non-broadcast programmers. Non-broadcast programmers highly value lower tier placement and higher subscriber penetration, and cable operators who provide lower tier placement and higher subscriber penetration pay lower carriage fees. By providing broadcasters that elect retransmission consent an automatic right to appear on the basic service tier and obtain 100% cable subscriber penetration, Congress has taken off the table a critical term of negotiation that cable operators could leverage with broadcasters to obtain lower rates.

Congress should not require inclusion of broadcast stations that elect retransmission consent on the cable basic service tier. Moreover, Congress should ensure that consumers who wish to receive cable television service without subscribing to the retransmission consent stations may do so. Such a modification to existing rules would impact only how broadcast stations that elect retransmission consent are sold. It would not affect the right of broadcast stations that elect must carry and other channels, such as PEG channels, to be on the basic service tier and included with the purchase of any other cable television service.

The Sports Programming Market

Today's sports programming market is known for rapidly escalating sports fees. Professional sports leagues benefit from national sports networks and big 4 broadcast networks that aggressively bid against one another (as do regional sports networks) for the rights to air their sporting events. The sports leagues have commanded more than $110 billion from broadcast and cable TV networks for the rights to televise their sporting events well into the next decade. The NFL alone will receive $28 billion from three broadcast networks starting after the 2013 season for the rights to their programming for nine years. These networks bid extraordinary amounts knowing they can pass on their costs to pay-TV providers. Not surprisingly ESPN is the most expensive cable network at $5.54 per subscriber per month according to SNL Kagan, with smaller MVPDs paying even higher prices. The fee is expected to grow to $6.95 by 2016. Also predictably, the broadcast stations affiliated with the big 4 broadcast networks and the ones electing retransmission consent, and demanding significant increases in their fees.

A key part of the sports programming market problem stems directly from a decision Congress made more than 50 years ago to create a legislative antitrust exemption for professional sports leagues in the Sports Broadcasting Act. Similar to the problems with the retransmission consent marketplace, the sports programming market has experienced dramatic change over the past five decades. For instance, in 1961 when the Act was adopted, there were far fewer sports teams per league, and some of the professional sports leagues faced same-sport competition from new leagues. For instance, there were two competing professional football leagues, the National Football League ("NFL") and the American

Football League ("AFL"). While it might have made some sense to give the professional sports leagues a pass from the antitrust rules at the time to ensure that they could effectively negotiate sports programming deals, a lot has changed since then. Today, each of the professional sports leagues has dozens of teams in dozens of markets, and there is no significant same-sport rival to the NFL, Major League Baseball, the National Basketball Association, or the National Hockey League. These leagues, the NFL in particular, are dominant in the video programming market, commanding billions of dollars for its sports programming rights. Unlike in the 1960s, when the leagues could only sell their rights to the broadcast stations, these leagues now sell to national cable networks and they have their own national networks that carry their content as well. Further, there are new networks coming to market interested in acquiring sports rights, like FOX Sports 1 and NBCSports. So, while the downstream programming marketplace has gotten more competitive, the sports leagues have grown and consolidated, and yet they maintain their antitrust exemption.

Another part of the problem is the leverage that the programmers who acquire these sports programming rights can exert onto pay-TV providers and their customers. Networks like ESPN and regional sports channels demand that pay-TV providers sell their networks on basic tiers. With the programming on basic tiers rather than in a separate Sports package, the cost for this programming is thrust upon all the subscribers of all pay-TV providers, whether they want the programming or not.

The problems with the sports programming market are extensive, but as a first step, Congress should eliminate an exemption from the antitrust rules that should never have been granted in the first place.

The Program Access Rules

Congress sought to ensure that smaller operators were protected from discriminatory and unfair behavior by vertically integrated programmers by extending "program access" protections to their programming buying groups. However, the regulations adopted by the FCC in 1993, particularly its definition of a "buying group," prevent the nation's largest programming buying group, the National Cable Television Cooperative ("NCTC") from availing itself of the protections Congress intended. This means that the 900+ cable operators, including Shentel, who obtain most of their national programming through this organization, are effectively denied the protection of the program access rules. The FCC is now considering the adoption of new rules that would allow a buying group, like the NCTC, to file program access complaints and also contain safeguards to prevent programmers from evading the protections of the rules. It is vital that the FCC act now by updating its definition of a buying group, make clear that programmers must treat buying groups comparably to other MVPDs, and do not arbitrarily exclude certain buying group members from joining a master agreement signed by the buying group.

The Set-Top Box Integration Ban

As discussed, in many aspects the video marketplace has changed, and rules and regulations have not been updated to reflect the current marketplace. This isn't just true with regard to the programming market, but also in the market for set top boxes. In 1996, Congress believed that consumers had no other option other than to lease set top boxes from their cable operator, and so passed legislation to give the FCC authority to adopt rules that would promote the development of a retail set-top box marketplace. In response, the FCC adopted an "integration ban" which required that the security functions of a set-top box be separated from its other functions with the purpose of creating "common reliance" by cable operators and consumers on non-integrated set-top boxes. The "integration ban" was put into place in

2007, and the rules applied to all cable operators regardless of the number of subscribers served by the operator.

The ban has only increased the cost of leased boxes for cable operators and their consumers. The ban resulted in significantly higher costs to operators to purchase non-integrated set-top boxes that provided no greater consumer functionality than was available before the ban. Some estimates indicate that more than $1 billion in costs were added to the price of set-top boxes leased to subscribers since the date the ban went into effect.

Making matters worse, the ban imposed costs on cable operators but not on their competitors. DBS providers, and non-cable IPTV providers, like AT&T, who compete against cable operators, are permitted to offer integrated set-top boxes to their subscribers for lease, giving them a regulatory advantage.

The increased cost of cable set-top boxes as a result of the integration ban slowed down the plans of many cable operators to transition from analog to more efficient and innovative digital service. Accordingly, consumers of these cable systems have not benefited from the advanced services that operators otherwise would have been able to provide.

The impact of the integration ban has had a disproportionate impact on small cable operators, and remains a burden for nearly all of them. In spite of this fact, the FCC has provided no exemption for smaller cable operators despite the fact that small operators do not drive equipment development and subjecting them to the ban would provide no material benefit to the development of a competitive retail set-top box market.

Today, the marketplace is vastly different from 1996. The marketplace has responded to consumer interest in getting content on different types of devices, such as Internet connected TVs, streaming to tablets, mobile telephones and other "smart" video devices. Given the changes in the marketplace and the burden that the integration has caused on the industry, particularly on smaller operators, and their customers, the time has come for elimination of the integration ban. Such an action need not eliminate the obligation on cable operators to support set-top boxes manufactured by a third-party such as TiVo so that consumers can continue using these devices they purchased at retail outlets for use with their cable service, as well as acquire new devices brought to market. Congress can eliminate the "integration ban" and still require cable operators to support these third-party devices.

Closing

Because of the 5-year term of the Sec. 119 satellite license, the Judiciary Committee regularly reviews the laws governing the satellite TV industry, and makes changes to ensure that the rules do not fall too far behind the marketplace. It essence, the Committee gives the satellite TV industry a physical. Because the rules governing the cable industry do not expire in the same way, Congress has never conducted a similar type of physical in decades. Mr. Chairman, in past meetings, we've discussed the idea of giving the cable industry a similar type of physical. Given the significant changes in the marketplace, we believe the time has come for Congress to conduct such a review, and we hope that some of the issues addressed above would be under consideration for reform. Thanks again for the opportunity to testify.

		Station #1			Station #2		
DMA	DMA Rank	Owner (also Controlling Entity)	Call Letters	Affil.	Owner	Call Letters	Affil.
Columbus, OH	32	Sinclair Broadcast Group	WSYX	ABC	Cunningham Broadcasting	WTTE	FOX
Jacksonville	50	Newport Television	WAWS	FOX	High Plains Broadcasting	WTEV	CBS
Providence-New Bedford	53	LIN TV	WPRI	CBS	Super Towers	WNAC	FOX
Wilkes Barre-Scranton-Hztn	54	Nexstar Broadcasting Group	WBRE	NBC	Mission Broadcasting	WYOU	CBS
Dayton	63	Sinclair Broadcast Group	WKEF	ABC	Cunningham Broadcasting	WRGT	FOX
Charleston-Huntington	65	Sinclair Broadcast Group	WCHS	ABC	Cunningham Broadcasting	WVAH	FOX
Springfield, MO	75	Schurz Communications	KYTV	NBC	Perkin Media	KSPR	ABC
Cedar Rapids-Wtrlo-IWC&Dub	89	Sinclair Broadcast Group	KGAN	CBS	Second Generation of Iowa	KFXA	FOX
Savannah	92	New Vision Television	WJCL	ABC	Parkin Broadcasting	WTGS	FOX
Baton Rouge	94	Communication Corp of America	WGMB	FOX	White Knight Broadcasting	WVLA	NBC
Burlington-Plattsburgh	95	Smith Media	WFFF	FOX	Lambert Broadcasting	WVNY	ABC
Greenville-N. Bern-Washngtn	99	Bonten Media Group	WCTI	ABC	Esteem Broadcasting	WFXI	FOX
Johnstown-Altoona-St Colge	102	Peak Media	WWCP	FOX	Palm Television	WATM	ABC
Lincoln & Hastings-Krny	105	Pappas Telecasting	KHGI	ABC	Omaha World-Herald	KFXL	FOX
Tyler-Longview(Lfkn&Ncgd)	107	Communication Corp of America	KETK	NBC	White Knight Broadcasting	KFXK	FOX
Fort Wayne	109	Granite Broadcasting	WISE	NBC	Malara Broadcasting Group	WPTA	ABC
Youngstown	110	New Vision Television	WKBN	CBS	Parkin Broadcasting	WYTV	ABC
Augusta-Aiken	111	Media General	WJBF	ABC	Schurz Communications	WAGT	NBC
Peoria-Bloomington	116	Granite Broadcasting Corp.	WEEK	NBC	Barrington Broadcasting	WHOI	ABC
Peoria-Bloomington	116	Nexstar Broadcasting Group	WMBD	CBS	Sinclair Broadcast Group	WYZZ	FOX
Fargo-Valley City	117	Hoak Media	KVLY	NBC	Parker Broadcasting	KXJB	CBS
Traverse City-Cadillac	120	Heritage Broadcasting Group	WWTV	CBS	Cadillac Telecasting	WFQX	FOX
Columbus, GA (Opelika, AL)	127	Raycom Media	WTVM	ABC	Southeastern Media Holdings	WXTX	FOX
Amarillo	130	Nexstar Broadcasting Group	KAMR	NBC	Mission Broadcasting	KCIT	FOX
Chico-Redding	131	Catamount Holdings	KHSL	CBS	Evans Broadcasting	KNVN	NBC
Wilmington	132	Raycom Media	WECT	NBC	Southeastern Media Holdings	WSFX	FOX
Columbus-Tupelo-W Pnt-Hstn	133	WTVA, Inc.	WTVA	NBC	Southern Broadcasting	WKDH	ABC
					Lingard Broadcasting	WLOV	FOX
Rockford	134	Nexstar Broadcasting Group	KQRF	FOX	Mission Broadcasting	WTVO	ABC
Topeka	136	New Vision Television	KTKA	ABC	Parkin Broadcasting	KSNT	NBC
Monroe, LA-El Dorado	137	Hoak Media	KNOE	CBS	Parker Broadcasting	KAQY	ABC
Monroe, LA-El Dorado	137	Nexstar Broadcasting Group	KARD	FOX	Mission Broadcasting	KTVE	NBC
Duluth-Superior	139	Granite Broadcasting	KBJR	NBC	Malara Broadcast Group	KDLH	CBS
Wichita Falls & Lawton	142	Nexstar Broadcasting Group	KFDX	NBC	Mission Broadcasting	KJTL	FOX
Wichita Falls & Lawton	142	Drewry Broadcast Group	KSWO	ABC	Hoak Media	KAUZ	CBS
Lubbock	143	Nexstar Broadcasting Group	KLBK	CBS	Mission Broadcasting	KAMC	ABC

		Station #1			Station #2		
DMA	DMA Rank	Owner (also Controlling Entity)	Call Letters	Affil.	Owner	Call Letters	Affil.
Erie	146	Nexstar Broadcasting Group	WJET	ABC	Mission Broadcasting	WFXP	FOX
Erie	146	SJL of Pennsylvania	WICU	NBC	Lilly Broadcasting	WSEE	CBS
Sioux City	147	Titan TV Broadcast Group	KPTH	FOX	Waitt Broadcasting	KMEG	CBS
Anchorage	148	Coastal Television Broadcasting	KTBY	Fox	Vision Alaska	KYUR	ABC
Joplin-Pittsburg	149	Nexstar Broadcasting Group	KSNF	NBC	Mission Broadcasting	KODE	ABC
Joplin-Pittsburg	149	Saga Communications	KOAM	CBS	Surtsey Media	KFJX	FOX
Rochestr-Mason City-Austin	153	Quincy Newspapers	KTTC	NBC	SagamoreHill Broadcasting	KXLT	FOX
Terre Haute	154	Nexstar Broadcasting Group	WTWO	NBC	Mission Broadcasting	WFXW	FOX
Gainesville	163	CP Media	WGFL	CBS	MPS Media	WNBW	NBC
Abilene-Sweetwater	164	Nexstar Broadcasting Group	KTAB	CBS	Mission Broadcasting	KRBC	NBC
Billings	168	Nexstar Broadcasting Group	KSVI	ABC	Mission Broadcasting	KHMT	FOX
Casper-Riverton	196	Mark III Media	KGWC	CBS	Silverton Broadcasting	KTWO	ABC
					Wyomedia	KFNB	FOX
San Angelo	197	Nexstar Broadcasting Group	KLST	CBS	Mission Broadcasting	KSAN	NBC

Mr. COBLE. Thank you, Mr. MacKenzie.
Mr. Campbell?

TESTIMONY OF JAMES CAMPBELL, REGIONAL VICE PRESIDENT, PUBLIC POLICY, CENTURYLINK, INC.

Mr. CAMPBELL. Thank you, Mr. Chairman, Ranking Member Watt, Chairman Goodlatte, and Ranking Member Conyers. I appreciate you giving CenturyLink the opportunity to testify before this Subcommittee as a relatively new entrant into the video marketplace.

And I would echo Mr. Dodge's testimony that CenturyLink is certainly not seeking to avoid paying reasonable costs for acquisition of broadcast content. Rather, we seek a fair set of rules by which it cannot be unfairly leveraged against both consumers and new entrants like us.

To give you a little background, CenturyLink is the third largest telecommunications company in the United States offering voice, video, and data at over 14 million homes in 37 States and businesses in all 50 States and select international markets. We offer cybersecurity solutions to the Federal Government and multiple State and local governments, and as a result of our recent acquisition of Savvis, we are actually one of the largest cloud computing and hosting companies in the world.

Only recently over the past 5 years have we gotten involved in the competitive video market, launching a fully digital IPTV product in multiple markets, including Orlando, Las Vegas, Phoenix, and central North Carolina. And I will tell you consumers benefit from robust competition in the form of better service quality, in the form of more innovation, more investment, and ultimately lower rates. But, unfortunately, the cost of obtaining broadcast content has threatened consumers' ability to get any of these benefits.

The current regulatory regime was created in an environment where the Federal lawmakers were concerned about market abuse from monopoly incumbent cable operators. As a result, over the years lawmakers have kind of skewed the regulatory advantages toward broadcasters vis-a-vis their relationship with pay TV providers in multiple ways.

For example, one, a local broadcaster, because of tie-down arrangements, can force feed unwanted content to providers regardless of consumer demand.

Two, a provider has no other alternative to obtain this content in most of these markets.

And third, the FCC's application and interpretation of the good faith standard has rendered really meaningless, giving de facto power to the broadcasters in retransmission consent negotiations.

In addition, the regulatory regime, as has been stated, did not contemplate the explosion of video competition from a myriad of industries. Incumbent cable operators no longer have a monopoly in the market.

While the current rules create problems for the larger companies, they impose additional burdens on new entrants like CenturyLink. Every customer we get had a relationship with another provider before they come to us. We have to win every single customer we sign up. That is capital intensive. It is tough sledding. And for that

reason, we cannot simply just take whatever the broadcasters' demands are. In the case of a blackout—and I know that broadcasters have used this more frequently—there is little harm to the broadcasters if the signal is lost, but a tremendous amount of harm to a company like CenturyLink as we try and provide competitive service.

And unfortunately, the retransmission consent fees are providing a windfall not to the local stations but to national networks. The original intent of these rules was to provide a safety net for true local stations. It is not the case anymore. SNL Kagan projects that retransmission fees will increase to $6.1 billion in 2018, up from $2.4 billion in 2012. That is a 250 percent increase, and that is all at the expense of consumers.

Congress has an opportunity as part of the STELA reauthorization to reform and rebalance the negotiation process regarding the retransmission consent marketplace. The reasons Congress conferred significant regulatory advantage to the broadcasters no longer exist. CenturyLink favors a deregulatory approach where our consumers could receive national content from adjacent or alternate markets during the pendency of negotiations, should they break down. This is good for two reasons. One, it rebalances the negotiation process where both parties have a little bit more leverage at the table, and two and most importantly, it does not punish consumers for two providers' failure to reach an agreement.

At the end of the day, it is not about winners and losers. It is about protecting consumers who bear the biggest brunt of this regulatory problem and ensuring the future of a competitive marketplace in the video marketplace.

Again, I thank you again for the opportunity testify. We look forward to working with the Committee and try and enact and enable consumer-oriented legislative reform. Thank you.

[The prepared statement of Mr. Campbell follows:]

Testimony of

James Campbell
Regional Vice President, Public Policy
CenturyLink

before the
Subcommittee on Courts, Intellectual Property and the Internet,
Committee on the Judiciary
United States House of Representatives

September 10, 2013

Mr. Chairman, Ranking Member Watt, and members of the Subcommittee, thank you for the opportunity to testify this morning before the Subcommittee regarding the *Satellite Television Laws in Title 17.* My name is Jim Campbell, Regional Vice President Public Policy for CenturyLink. As a relatively new entrant in the video arena, CenturyLink hopes to bring a unique, consumer-focused perspective to the Subcommittee on the fast evolving video market in which today's Satellite Television Extension and Localism Act (STELA) operates. I will address its context in the larger pay TV market, and the importance of enacting reauthorization legislation that addresses the disparities between today's video market and a Cable Act that was enacted under far different market and technological conditions.

On the issue of access to content, which for many who are following this proceeding today is a key topic, CenturyLink like others, does not seek to avoid paying reasonable rates for its broadcast content, but we do seek fair retransmission consent rules that will not be leveraged against consumers and competitive new entrants. This can be achieved by modernizing the existing regulatory structure to permit us to carry national programming from an alternative market during negotiation breakdowns.

CenturyLink background and entry into the video market

By way of background, CenturyLink is the third largest telecommunications company in the United States, offering advanced communications services to over 14 million homes; federal state and local governments; as well as businesses in all 50 states and select international markets. Services include voice, broadband, video entertainment and data services. In addition, we provide fiber backhaul and managed cybersercurity solutions. We offer cloud computing on

and hosting companies in the world. Today we are a global communications company that has evolved from a long and successful history of providing telephone service, which provides a variety of services including our more recent entry into the video services market.

Over the past five years, CenturyLink has significantly ramped up its entry into the competitive video market, launching its fully digital IPTV service in twelve markets, including Las Vegas, Phoenix, Orlando, Colorado Springs, Omaha, Tallahassee and central North Carolina. The service delivers high-quality video content, a broad range of on-demand content, and advanced technology and interactive features over a managed two-way IP network, bringing an additional competitive video option to over 1.5 million homes. In fact, we are generally the only facilities-based competitor to the local cable provider in markets we enter. Our company's unique and expansive network footprint provides great potential for our video product to reach a variety of rural and urban markets of all sizes.

Consumers benefit from robust competition. Better service, investment, innovation, and lower prices always result when one or more providers compete for customers. That is true in the video market as well. Unfortunately, while we have seen some slowdown in cable price increases from the incumbent operator in the markets where CenturyLink has launched our competitive service, true competitive pricing has not yet been realized.

Additionally, federal and state policymakers recognize that broadband deployment and cable competition are related and that broadband speeds and adoption increase significantly when it is offered along with video services, which is a benefit to consumers. Ninety percent of our new TV customers also purchase high speed Internet, which resonates well for those who

least 50 percent of our new IPTV customers are new customers to CenturyLink.

In our IPTV markets, CenturyLink offers broadband speeds ranging from 25 to 40 megabits per second, and in Omaha, where we have launched full gigabit service, those customers are enjoying our video product using incredible speeds over our gigabit network.

The 1992 Cable Act, retransmission consent and changed circumstances

The underlying federal rules that govern cable, satellite and IPTV providers' efforts to obtain broadcast content were largely motivated by Congress' concern in 1992 that local broadcasting was at risk from potential market power abuses by incumbent cable companies who dominated the marketplace at that time. As a result, federal policymakers have deliberately enhanced the broadcasters' position vis-à-vis pay television providers with several key provisions:

- Under the must-carry rules, any local broadcaster can demand that its local feed be featured in the cable television provider's line-up, even if there is minimal demand from viewers.
- Under the FCC rules, a pay television provider that seeks to provide its customers with the content found on local broadcast stations (and that has not already been compelled to carry those stations under the must-carry rules) effectively has no other option for obtaining such content.
- Congress added a requirement that retransmission consent negotiations be conducted in good faith as part of prior revisions to the satellite compulsory license act.

rendered it meaningless, adding significant *de facto* power to the broadcaster position under the rules, even as consumers have been subjected to signal blackouts with increasing frequency in recent years.

- Ironically, although threatening blackouts on the eve of marquee events like the Super Bowl or the Oscars is a standard tactic for broadcasters, it is actually unlawful under FCC rules for pay television providers to deny viewers access to a signal during "sweeps week," when the pressure is greatest on broadcasters to show good ratings to their advertising clients.

These provisions were added to the considerable benefit of no-cost spectrum granted by the federal government decades ago to broadcasters, and continually renewed to this day. Unfortunately, the changes made by the 1992 Act did not anticipate the explosion of video competition with traditional cable providers from Direct Broadcast Satellite, other MVPDs, and over the top video providers. DirecTV, DISH, Verizon FiOS, AT&T U-Verse, CenturyLink PRISM™ TV, and more recently, Netflix, Google and Amazon are now all entering markets with the goal of providing consumers alternatives to large incumbent providers.

Twenty-one years later, incumbent cable companies no longer have a monopoly in the video market. Reconciliation of present rules with market realities is needed immediately. While CenturyLink believes that content owners should be reasonably compensated for their content, under the current law, retransmission consent fees are providing windfall profits for the major broadcast networks and owners of multiple broadcast stations rather than a safety net for local stations. These excessive fees eventually hit the wallets of consumers in your districts.

Customers of new entrants become victims of competitive choice

While customers of larger cable and satellite companies are subject to blackouts with increasing frequency, tied carriage and non-negotiable rates create additional competitive hurdles for alternative providers. On the one hand, because we are a relatively new video option in most of the markets we serve, we can ill-afford even a small number of subscriber defections should we lose the right to carry a local station. Yet, given the massive capital investments we have made in order to provide consumers with a competitive alternative, we also cannot simply give in to whatever the broadcasters demand – including not only exorbitant rates but also the tied carriage of additional broadcast and non-broadcast services that are of limited interest to our customers.

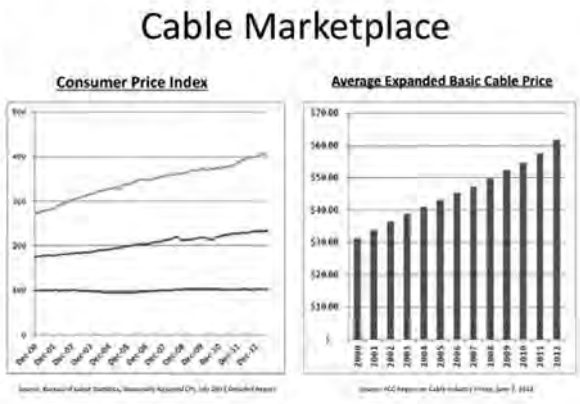
While the loss of a signal will severely harm a new entrant and its customers, it will pose little risk to the broadcaster given its ability to continue to make its programming available to other video programming distributors as well as to transmit it for free over the air and the Internet. And the harm does not end there. Broadcasters often take further advantage of their leverage over new entrants by imposing even more onerous terms than those demanded of incumbent providers.

In addition to the direct adverse impact that outdated retransmission consent rules have on the consumers who end up bearing the cost of the broadcasters' demands, they also threaten the consumer benefits of local facilities-based video provider choice such as innovative service and product offerings, differentiated programming, pricing options, and broader deployment of high speed broadband.

The recent retransmission consent dispute between Time Warner Cable and CBS has brought into sharp focus the fact that the current retransmission consent regime leaves consumers vulnerable to service disruptions and offers no protection against escalating prices.

And, in fact, it is well established that the cost to MVPDs of obtaining broadcast programming has been and continues to increase exponentially and consumers are feeling the impact through increased prices. SNL Kagan projects retransmission fees paid to broadcasters by video providers could reach a total of $6.1 billion by 2018, up from the $2.4 billion estimated in 2012. During its last round of retransmission negotiations, as mentioned above, CenturyLink experienced this sharp increase in the cost for broadcast content.

In turn, these high content costs have resulted in higher video service prices. For instance, according to the FCC report on Cable Industry Prices released on June 7, 2013, the average monthly price of



ending January 1, 2012, to $61.63, compared to an annual increase of 2.9% in the Consumer Price Index (CPI). Further, the price of expanded basic service has increased at a compound average annual growth rate of 6.1% over the same period while the CPI compound annual growth rate over the same period was only 2.4%. These increases are simply not sustainable for MVPDs or consumers.

The solution: Modernize the Cable Act to restore a level-negotiating table during retransmission consent negotiations

Congress has an opportunity, as part of the reauthorization of the Satellite Television Extension and Reauthorization Act of 2010, to restore balance to the retransmission consent marketplace.

The significant regulatory advantages that Congress has conferred on the broadcast industry for various reasons, and under various circumstances that no longer exist are not benefitting consumers. The current model clearly needs to be modified. The issue of negotiations and related timing should be addressed immediately. Under the existing legislative regime, local broadcast stations have the right to pull the plug on any video provider when retransmission negotiations hit a standstill, blacking out all nationally distributed programming (CBS, ABC, NBC, FOX,). Moreover, they are bolstered by a regulatory regime that erects barriers that effectively prevent providers from obtaining that programming from a station in another media market. Congress needs to amend the current legislative framework to restore a more level negotiating table.

[1] The average monthly price of expanded basic service is the combined price of basic service and the most subscribed cable programming service tier excluding taxes, fees and equipment charges.

amended to allow providers the right to carry national programming from an adjacent or alternate market during a broadcast retransmission consent negotiation breakdown. Consumers should not be punished as a result of provider negotiations.

Final thoughts

At the end of the day, this is not about winners and losers. It is about consumers and the future of a truly competitive marketplace. At the current rate of change, the real harm is occurring now for consumers who are required to pay for increases in real dollars. At some point, the model breaks. Local broadcasters are effectively using outdated rules to inhibit consumers from receiving the benefits of program choice and a truly viable, competitive marketplace. Congress can play a significant pro-consumer role by modernizing current retransmission statutes and establishing meaningful guidelines for negotiations and access to adjacent content to prevent blackouts.

Thank you for the opportunity to testify today. We look forward to working with members of the Committee to accomplish legislative reform in the evolving video marketplace. We are confident that rapid and meaningful reform will encourage new entrants like CenturyLink to continue to expand our investments in broadband and digital video services and allow us to provide American consumers with the benefits of innovation and competition.

Mr. COBLE. Thank you, Mr. Campbell.
Mr. Garrett?

TESTIMONY OF ROBERT ALAN GARRETT, PARTNER, ARNOLD & PORTER LLP, ON BEHALF OF MAJOR LEAGUE BASEBALL

Mr. GARRETT. Thank you, Chairman Coble, Ranking Member Watt. Thanks for the opportunity to testify on behalf of Major League Baseball this morning.

Let me summarize that testimony with three brief points.

First, baseball has a major stake in any revision of the copyright laws that affect television programming, including cable and satellite compulsory licenses. Baseball and its member clubs are copyright owners of a substantial amount of very entertaining, very valuable television programming. They now offer their fans access to approximately 5,000 copyrighted telecasts of Major League Baseball games each year. They do not believe that there is any single copyright owner that provides the American public with more television programming than Major League Baseball.

Second, the vast, overwhelming majority of baseball's telecasts are provided to cable and satellite subscribers pursuant to licenses negotiated in a free marketplace and not pursuant to compulsory licensing. There is simply no reason that satellite carriers or cable systems or anyone else require a compulsory license to provide Major League Baseball telecasts or any other broadcast television programming. Satellite carriers and cable systems negotiate every day in the free marketplace to offer hundreds of channels, tens of thousands of hours of non-broadcast television programming. We believe that they can do the same to offer broadcast programming, including telecasts of baseball games.

Third and finally, if Congress, nevertheless, chooses to reauthorize the section 119 compulsory license, baseball has one simple request, and that is adopt a mechanism to ensure that satellite carriers and cable systems at the very least pay fair market value for their compulsory licenses. According to the FCC, cable systems derive more than $67 billion in revenues by selling access to video programming. Compulsory licensing royalties amount to less than one-half of 1 percent of those revenues, one-half of 1 percent for what is undoubtedly the most valuable, the most watched of all the programming cable systems offer. Satellite carriers also pay less than one-half of 1 percent of their revenues for their compulsory license. Their video revenues amount to approximately $36 billion. Their compulsory licensing royalties in 2012 amounted to approximately $87 million or about $10 million less than when Congress last renewed the section 119 license. The current satellite royalty rate is, in fact, the same as the rate that an independent panel of arbitrators determined to be fair market value in 1997, 16 years ago.

There is simply no justification for requiring copyright owners to subsidize with below-market royalty rates the major corporate entities that dominate the cable and satellite industries. Baseball believes that Congress should authorize the Copyright Board to set rates for the carriage of all broadcast programming under the cable and satellite compulsory licenses and that the Copyright Royalty Board also should be authorized to adjust those rates periodically

so that they continue to provide fair market compensation to copyright owners.

Thank you, Mr. Chairman, and baseball also looks forward to working with you and your Subcommittee on this important matter.

[The prepared statement of Mr. Garrett follows:]

Prepared Statement of Robert Alan Garrett, Arnold & Porter LLP, Washington, DC, on Behalf of Major League Baseball

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify, on behalf of Major League Baseball, concerning the Section 119 satellite compulsory license that is scheduled to expire at the end of next year. I have been Major League Baseball's outside counsel on copyright and telecommunications matters for more than thirty-five years. During that same period, I also have served as lead counsel in satellite and cable compulsory licensing proceedings for the Joint Sports Claimants, which consists of Baseball, the National Football League, National Basketball Association, National Hockey League and National Collegiate Athletic Association. While I am presenting this testimony solely on behalf of Baseball, all JSC members share a common interest in ensuring strong and effective copyright protection, and fair market compensation, for the telecasts of their games.

BASEBALL'S COPYRIGHTED TELECASTS

When Congress comprehensively revised the copyright laws in 1976, and adopted the Section 111 cable compulsory license, the average sports fan had access to approximately 100 telecasts of Major League Baseball games each season. Much the same was true in 1988 when Congress enacted the satellite compulsory license by adding a new Section 119 to the Copyright Act. Today, however, the situation is very different.

Baseball and its member clubs now offer their fans the ability to view virtually every one of the approximately 5,000 MLB game telecasts each year. Telecasts of MLB games are available on the FOX national broadcast television network; three national cable networks (ESPN, TBS, MLB Network); over-the-air broadcast stations throughout the country (*e.g.,* WUSA–TV in Washington DC and "superstation" WGN–TV in Chicago); and more than two dozen regional sports networks (*e.g.,* MASN, FOX Sports Net). In addition, Baseball's "out-of-market" satellite and cable package, MLB Extra Innings, provides each subscriber with virtually all Major League Baseball games not otherwise available from other licensed telecasters. Fans in Washington DC, for example, can view game telecasts of the Yankees, Red Sox, Cardinals, Pirates, Giants and a score of other teams. More than 67 million cable and satellite subscribers in the United States currently have access to MLB Extra Innings.

The comparable out-of-market package for Internet-connected devices, MLB.TV, is available to subscribers through more than 350 such devices—including personal computers, smartphones (Apple, Blackberry and Android), tablets (iPad, Kindle Fire and Android) and a variety of consoles (Xbox360, Sony Playstation 3, Apple TV, Roku). In addition to receiving access to out-of-market games, MLB.TV subscribers can choose whether to listen to the radio or TV broadcast of the home or visiting club. MLB.TV also offers access to HD quality broadcasts of the games and provides DVR capabilities that allow fans to pause or rewind live telecasts. And those who utilize the MLB.com At Bat app to view games can take advantage of several additional features, including real-time statistical updates and analyses, video archive and a "pitch-by-pitch widget" that tracks the location, type, and speed of every pitch (including whether a pitch is a curve ball, slider, or knuckle-curve). The At Bat app has been downloaded more than 22 million times since its debut five years ago.

All of the MLB game telecasts, whether they are accessible over-the-air or via cable, satellite or Internet-connected devices, are copyrighted works. In the 1976 Copyright Act, Congress—at the urging of Baseball and other sports interests—clarified that telecasts of live sports events receive copyright protection, like any

other audiovisual work, as long as they are recorded ("fixed") simultaneously with their transmission. When entering into licensing agreements with its various rightsholders, Major League Baseball and its member clubs contractually ensure that the resulting telecasts are recorded and that either Baseball or one of its clubs will own the copyright in those telecasts. With approximately 5,000 MLB game telecasts each year, Major League Baseball is a major copyright owner and source of television programming. Baseball relies heavily upon the copyright laws to protect its substantial investment in (and incentive to create) that highly entertaining and valuable programming.

COMPULSORY LICENSING

The satellite compulsory license in Section 119 of the Copyright Act permits satellite carriers to retransmit to their paying subscribers, without the consent of copyright owners, out-of-market broadcast television programming. The retransmitted programming includes the telecasts of games that Major League Baseball and its clubs license to broadcast stations and the FOX broadcast network. A similar compulsory license, which applies to cable systems, exists in Section 111 of the Copyright Act. The effect of these licenses is to divest Baseball (as well as other copyright owners) of any ability to negotiate with satellite carriers and cable systems over the terms on which those services commercially exploit broadcasts of MLB games.

These licenses are impediments to the operation of the free marketplace. They unfairly deprive all copyright owners, including Baseball, of the ability to control the distribution of their copyrighted works—as well as the right to receive fair market compensation and other license terms typically included in marketplace agreements. They also impose significant administrative costs upon Baseball and other copyright owners and substantially delay the receipt of compensation for the use of their programming. Baseball routinely negotiates in the marketplace with the cable and satellite industry concerning the carriage of Baseball telecasts; the vast majority of programming that cable systems and satellite carriers offer are the product of marketplace negotiations. There is no reason that similar negotiations should not be allowed to occur over the broadcast programming now covered by the compulsory licenses.

FAIR MARKET COMPENSATION

Some parties have taken the position that elimination of the compulsory licenses could be disruptive to the marketplace, because the licenses reflect the settled expectations of the licensees and at least some licensors. Baseball respectfully disagrees with that view. An inequitable and unjustifiable regulatory regime that supplants marketplace negotiations should not be perpetuated simply because some parties have become accustomed to it. However, Baseball understands the practical difficulties associated with elimination of the cable and satellite compulsory licenses.

If the compulsory licenses are retained, Baseball urges Congress to ensure that both cable operators and satellite carriers pay fair market value for all programming they choose to carry pursuant to the compulsory licenses. Baseball believes the relevant evidence demonstrates that neither cable operators nor satellite carriers are paying fair market value under their compulsory licenses. Indeed, satellite carriers are currently paying a Section 119 royalty that is less than the royalty that three independent arbitrators considered to be fair market value in *1997*—sixteen years ago. Moreover, the total Section 119 royalties have declined by approximately $10 million per year since Congress last reauthorized the Section 119 license. The Section 111 royalty paid by cable operators is comparably below fair market value. Indeed, when Congress adopted the Section 111 royalty rates nearly forty years ago, it explicitly noted that those rates would produce only a "minimal" royalty that had no economic basis. Cable operators pay less than one-half of one percent of their $66 billion in video revenues (according to the FCC) for the Section 111 compulsory license that allows them to offer some of their most valuable television programming.

There is no justification for requiring copyright owners to subsidize, with below-market royalty rates, the major corporate entities that dominate the cable and satellite industries. Baseball believes Congress should, at the very least, authorize the

Copyright Royalty Board to set market rates for the carriage of all programming under the cable and satellite compulsory licenses. The CRB also should be authorized periodically to adjust those rates so that they continue to provide fair market compensation to copyright owners.

While Section 119(c) of the Copyright Act directs the Copyright Royalty Board to adopt fair market value rates for the satellite carrier license, that provision sets a series of procedural dates that focus upon 2010, when Congress last renewed the Section 119 license. Section 119(c) must be amended to permit the adjustment of royalty rates for whatever period, if any, Congress decides to continue the Section 119 compulsory license. Congress also should adopt a similar rate adjustment mechanism for the compulsory license of cable systems, which compete with satellite carriers in the delivery of broadcast television programming. Currently, the law allows adjustments in the cable royalty rates to account for inflation only.

* * * * *

Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to express Baseball's views on the satellite compulsory license in Section 119 of the Copyright Act and the related cable compulsory license in Section 111 of the Act. Baseball looks forward to working with you and your Subcommittee to help ensure strong and effective copyright protection, including fair market compensation, for all copyrighted works.

Mr. COBLE. Thank you, Mr. Garrett.

Mr. Padden?

TESTIMONY OF PRESTON PADDEN, FORMER PRESIDENT, ABC TELEVISION NETWORK, FORMER EXECUTIVE VICE PRESIDENT, THE WALT DISNEY COMPANY, TESTIFYING ON HIS OWN BEHALF

Mr. PADDEN. Chairman Coble, Ranking Member Watt, Chairman Goodlatte, and Ranking Member Conyers, my name is Preston Padden. I appear today on my own behalf and sadly no one is paying me to be here. [Laughter.]

I am so old that I am one of the few living souls who has been around for the entire history of this issue, and I am here today to implore you not to just kick the can down the road again. It is long past time to repeal the satellite and cable compulsory licenses and the Rube Goldberg-like statutory and regulatory system that surrounds them.

As the former President of the ABC Television Network, I know how TV program rights are negotiated. I promise you that the earth will continue to spin, consumers will continue to have access to TV, and all TV industry sectors will continue to thrive without the compulsory licenses, without the associated FCC rules, and without retransmission consent.

In 1976 when the cable TV industry was in its infancy, Congress granted cable an extraordinary exception to normal copyright principles: a compulsory copyright license to distribute the programs on broadcast TV channels. The FCC adopted rules, including network non-duplication and syndicated exclusivity, to limit the market disruption caused by the new compulsory license.

In 1988, the compulsory license was extended to satellite.

Then in 1992, Congress enacted retransmission consent requiring a marketplace negotiation between broadcast TV stations and cable and satellite distributors, a negotiation that is the functional equiv-

alent of a negotiation that would have been required if the compulsory licenses had never been enacted in the first place.

When others argue that the compulsory licenses are essential, please consider this. Every day hundreds of non-broadcast TV channels, channels like Discovery, History Channel, USA Network, Bravo, and HBO, get distributed to nearly every man, woman, and child in America without any compulsory license and without retransmission consent. They get distributed because the channel owner and the cable and satellite systems have an old-fashioned, simple copyright negotiation. There is absolutely no reason why the broadcast channels cannot be distributed in exactly the same way.

When the satellite license was adopted in 1988, you provided a sunset and expressed the expectation that the license would temporary and would be replaced by market negotiations. Instead, the license has been renewed four times.

When you renewed it in 2004, you directed the Register of Copyrights to study the continued need for compulsory licensing. In 2008, the Register released that study, calling the cable and satellite compulsory licenses—and I quote—arcane, antiquated, complicated, and dysfunctional. Not exactly a ringing endorsement.

When you renewed the satellite license again in 2010, you directed the Register of Copyrights to prepare a more specific report to Congress, proposing mechanisms and methods for the phase-out and eventual repeal of the cable and satellite compulsory licenses. And you asked the Register to propose marketplace alternatives. The Register issued that report in 2011, concluding that the compulsory licenses are—and I quote again—an artificial construct created in an earlier era. The Register further recommended that Congress set a date-specific trigger to phase out and ultimately repeal the licenses.

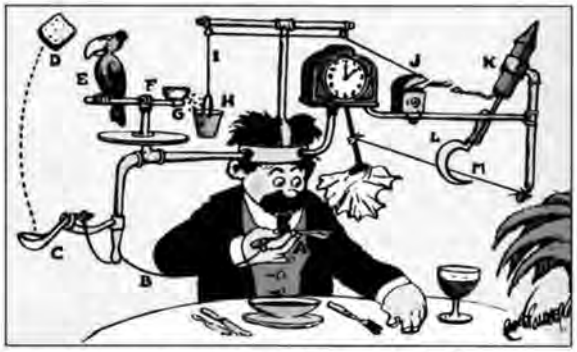
I want to close with what I think are three simple truths. First, compulsory licensing is just not necessary in these markets. Second, broadcast channels like non-broadcast channels absolutely deserve to be paid by the cable and satellite distributors who want to sell their programming to consumers. And lastly, local broadcast channels are no more a monopoly than are the non-broadcast channels like AMC, Time Warner Cable SportsNet, Bravo, and Discovery.

Thank you very much.

[The prepared statement of Mr. Padden follows:]

Self-Operating Napkin

Rube Goldberg's idea for self-operating napkin. As you raise spoon of soup **(A)** to your mouth it pulls string **(B)**, thereby jerking ladle **(C)** which throws cracker past parrot **(E)**. Parrot jumps after cracker and perch **(F)** tilts, upsetting seeds **(G)** into pail **(H)**. Extra weight in pail pulls cord **(I)** which opens and lights automatic cigar lighter **(J)**, setting off sky-rocket **(K)** which causes sickle **(L)** to cut string **(M)** and allow pendulum to swing back and forth thereby wiping off your chin. After the meal, substitute a harmonica for the napkin and you'll be able to entertain the guests with a little music.



Compulsory License, FCC Regulations And Retransmission Consent - Rube Goldberg Would Be Proud!

Testimony of Preston Padden
Former President, ABC Television Network,
Former Executive Vice President, The Walt Disney Company

Before The Subcommittee on Courts, IP and the Internet
Committee On The Judiciary
United States House of Representatives
September 10, 2013

THE CURRENT "RUBE GOLDBERG" STATUTORY/REGULATORY SCHEME

1. **Congress grants cable and satellite distributors a free compulsory copyright license to commercially exploit all the programs on local TV broadcast stations.**

2. **The FCC imposes regulations – e.g. network non-duplication, syndicated exclusivity, etc. – to limit the scope of the free compulsory licenses for programs on broadcast TV stations.**

3. **Then Congress enacts retransmission consent that requires essentially the same negotiation between broadcast TV stations and cable/satellite distributors that would have been required if the compulsory licenses had never been adopted in the first instance.**

4. **In contrast to the "give with one hand, take with the other" statutory/regulatory mess described above, more than 500 non-broadcast TV channels – channels not subject to compulsory copyright licenses – get distributed by cable and satellite systems nationwide every day through normal marketplace copyright negotiations with no muss or fuss.**

5. **Crazy? - You decide! Items 1 – 3 above are the equivalent of Rube's "Self Operating Napkin". Item 4 is equivalent to the manual napkins each of uses every day.**

Introduction

Chairman Coble, Ranking Member Watt and Members of the Subcommittee, my name is Preston Padden. 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, satellite television and content production including serving as President of The ABC Television Network. After my retirement I taught Communications Law for three years at The University Of Colorado.

I appear here today on my own behalf. I am not speaking for any company, industry or institution. I paid my own way to this hearing, I wrote a check to license Rube Goldberg's cartoon and I am receiving no compensation for my testimony. The views I express today are my own. I am strongly pro-broadcaster, pro-cable/satellite operator, pro-online video distributor and pro-content creator. I am anti-no one. Most importantly I am passionate about advocating a common sense reform of the convoluted statutes and regulations that presently govern cable and satellite distribution of broadcast television programs.

The question before you today is whether to yet again extend what was supposed to be a temporary compulsory copyright license for satellite television distributors. Instead of simply "kicking the can down the road" once again, I urge you, in conjunction with the

Committee on Energy and Commerce, to consider fundamental reform of the copyright and communications law provisions that govern cable and satellite distribution of broadcast television programs. The current copyright and communications law framework is so convoluted and nonsensical that Rube Goldberg would be proud.

Webster's New World Dictionary describes a Rube Goldberg device as "a comically involved, complicated invention, laboriously contrived to perform a simple operation". Rube would have loved our system of compulsory licenses, FCC regulatory provisions and retransmission consent. In 1976 Congress granted the then nascent cable television industry a free compulsory copyright license to commercially exploit all of the programs on local TV broadcast stations. This extraordinary abrogation of free market copyright principles [permissible under International Copyright Treaties only in cases of market failure] was accompanied by a set of FCC regulations designed to ameliorate the impact of compulsory licensing including network non-duplication, syndicated exclusivity and sports blackout rules. Later both compulsory licensing and the associated FCC rules were expanded to include satellite television distributors. Then, in 1992 Congress enacted retransmission consent to require free market negotiations between a local TV broadcast station and a cable or satellite distributor wishing to retransmit the station – effectively abrogating the compulsory licenses and creating a complex and convoluted equivalent of a free market system of negotiated licenses.

By contrast, the programs on more than 500 non-broadcast channels – channels like Discovery, History Channel, ESPN, and HBO – are NOT subject to compulsory licensing, retransmission consent and associated FCC regulations. The programs on these non-broadcast channels are distributed successfully nationwide to nearly every man, woman and child in America through free market negotiations. When licensing programs for its channel, the non-broadcast channel owner simply secures from the program owner the right to sublicense the program to the cable and satellite distributors that carry the channel. It is clear that broadcast channels could do exactly the same. The only reason for the different copyright treatment of programs on broadcast and non-broadcast channels is that the broadcast regime was established in the early 1970's before the advent of non-broadcast channels.

In my opinion, it is long past time to undo this statutory and regulatory mess. Subject to a brief transition period, Congress should repeal the cable and satellite compulsory licenses in 17 U.S.C. Sections 111, 119 and 122. At the same time Congress should repeal the retransmission consent provision in 47 U.S.C. Section 325 (b)(1)(A) and legislatively repeal the FCC's regulations governing network non-duplication, syndicated exclusivity and sports blackouts. The end result of these reforms would be to put cable and satellite distribution of broadcast television programs under the same legal regime as the distribution of non-broadcast programs – namely, simple free market copyright negotiations.

Compulsory Licenses and Retransmission Consent

The cable compulsory copyright license (17 U.S.C Section 111) was enacted in 1976 when television in America consisted almost entirely of just ABC, CBS and NBC. 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 born.

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 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 of communications regulations designed to ameliorate the effects of the cable compulsory license. These regulations do <u>not</u> 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 cable/satellite distributors and then offer those distributors 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 cable and satellite 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 cable and satellite distributors.

In 1988 Congress extended the Compulsory Copyright License to satellite systems. Satellite Home Viewer Act of 1988, Title II, Pub. L. No. 100-667. But, the satellite license was to be temporary. "The 1988 Act was designed as a transitional measure to facilitate competition and the marketplace's ability to meet the needs and demands of home satellite dish owners." See S. Rep. No. 42, 106 th Congress, 1 st Sess., at 5 (1999). This Committee was clear that it intended the satellite license to be a temporary stop-gap measure, enabling "the home satellite market [to] grow and develop so that marketplace forces will satisfy the programming needs and demands of home satellite antenna owners in the years to come, eliminating any further need for government intervention." H.R. Rep. No. 887, 100thCong., 2d Sess., pt. 2, at 15 (1988).

Cable and satellite distributors sell their subscribers the programming on a combination of broadcast and non-broadcast channels. By the early 1990's, Congress concluded that it was wrong for cable and satellite 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 requires cable and satellite distributors to secure the permission of a broadcast station before retransmitting

the programs on it's 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 cable/satellite distributors 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 cable and satellite distributors 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% 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 cable and satellite distributors 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 cable and satellite distributors. The need to legislatively override this ancient ratings data enshrined in the FCC Rules is why this Committee, and the Committee On Energy and Commerce, 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 cable and satellite distributors sense an opportunity to satisfy consumer demand. Repeal of the compulsory licenses would enable program owners, broadcasters and cable/satellite distributors similarly to deliver to consumers the broadcast 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 and satellite, 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 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 my broadcast friends want to maintain the status quo. My cable operator friends want to repeal or modify retransmission consent and my copyright owner friends would like to be in charge of when, to whom and how their programming is distributed. The common sense course of action for this Committee, and for the Committee On Energy and Commerce, is to repeal the compulsory copyright licenses and all of the associated regulations designed to ameliorate the market-disrupting impact of those licenses, including retransmission consent.

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 rights as they, and program owners, 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 the Regional Sports Networks owned by Time Warner Cable and that is Time Warner Cable. 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 these disputes involve both broadcast and non-broadcast channels. 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, because of the competitive pressures on both program owners and distributors, any channel disruptions will be temporary. In the meantime, there are many substitute channels available.

Some of my broadcast friends 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 cable/satellite distributors and consumers are seeking their signal rather than their 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 cable and satellite distributors to retransmit its programs would cease to be a potential customer for program creators. Similarly, a broadcast station that could not authorize cable and satellite distributors 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 be assured of a strong second revenue stream than is retransmission consent.

Finally, I would like to say a word about must carry regulation. I take no position on whether Congress and/or the FCC should continue the must-carry rules. I simply note that must-carry rules easily can continue in the absence of compulsory licensing. Before invoking must-carry, stations simply would need to certify that they had secured the right to sublicense to cable/satellite retransmitters all of the programs that they broadcast.

Conclusion

In my opinion, it is long past time to undo this Statutory and Regulatory mess. Congress should repeal the cable and satellite compulsory licenses in 17 U.S.C. Sections 111, 119 and 122. At the same time Congress should repeal the Retransmission Consent provision in 47 U.S.C. Section 325 (b)(1)(A) and legislatively repeal the FCC's Regulations governing network non-duplication, syndicated exclusivity and sports blackouts. The end result of these reforms would be to put cable, satellite and online distribution of broadcast television programs under the same legal regime as the distribution of non-broadcast programs.

Mr. COBLE. Thank you, Mr. Padden.

I want to thank the witnesses for your timely testimony, staying within the 5-minute rule. We try to apply the 5-minute rule to ourselves as well. So if you can be terse in your answers, we would be appreciative of that.

Mr. Garrett, how is Major League Baseball working to make its content available to Americans in new ways with advanced technology?

Mr. GARRETT. Mr. Chairman, as I indicated in my testimony, Major League Baseball currently offers approximately 5,000 telecasts of its games to consumers each season. That is virtually every single game that is played during the course of a season is made available to Major League Baseball's fans.

They do it in a variety of ways. They have done it over national broadcast television networks such as Fox. They do it over a myriad of local broadcast stations and regional sports networks throughout the country. They do it over several cable networks, including ESPN, TBS, the Major League Baseball network. They make some of these programs available via their out-of-market packages that are carried by cable systems and satellite carriers to almost 67 million households across the United States. And finally, they also make it available via their very successful, award-winning MLB.TV app which makes all of these telecasts available to anyone with an Internet-connected device, over 350 different devices.

Mr. COBLE. Thank you, sir.

Mr. Dodge, for our constituents what issues should they be asking the Congress to place its focus upon?

Mr. DODGE. If there is one issue that is top of mine for DISH is that the retransmission consent system today is broken. It is not a free market. In every local market around the country, in the old days when cable was in its infancy, you had one broadcaster who would negotiate with one cable company and there was somewhat a symbiotic relationship or mutual assured destruction, depending on how you looked at it, and today that one broadcaster plays three or four distributors off against each other and ultimately it is consumers who are caught in the crosshairs and are hurt by losing their signals and have their prices go up year after year.

Mr. COBLE. Thank you, sir.

Mr. Padden, I think you have touched on this. In your opinion, what would be the result if the section 119 license simply expires, which I think is December of next year.

Mr. PADDEN. My recommendation is that Congress provide a short transition period to allow the broadcast industry to get its rights in order and then repeal all of these licenses. And all that would happen is the broadcast programming would get distributed exactly the same way the non-broadcast programming is distributed today, through a simple negotiation between the cable and satellite companies on the one hand and the local station on the other hand, with the station acting as a rights aggregator just as the non-broadcast channels do today.

Mr. COBLE. I still have time. Anybody else want to weigh in on that?

Mr. DODGE. Sure. I think what Mr. Padden suggests is very similar to a bill that has been proposed by Representative Scalise over at the Energy and Commerce Committee, and it is certainly one potential option very worthy of debate. We are just thrilled at DISH that there does appear to be a recognition that there is a problem and that there should be such a debate.

Mr. WALDRON. If I may add. I think the section 119 license expiring—this Committee could advance the debate by actually getting a number as to how many people would be affected. So I would suggest that the Committee ask the satellite carriers to submit a certified number as to how many people today are getting distant signal. In the past, we have heard 1 million. But we do not know what the number is. And I think if the Committee would get that information, then we could have a serious debate about is this distant signal license worthwhile to extend for this small number of people. There may be some hardship cases. There may be special circumstances which justify it. But right now we are all in a blind alley.

Mr. COBLE. Time for one more comment.

Mr. DODGE. Well, in response to that, I would say that it is true that there are less and less folks who are actually availing themselves of the distant signal license today, but it is a very important group of rural and underserved Americans, for example, in short markets like Glendive, Montana that does not have an ABC or Fox affiliate, and what the distant signal license allows us to do is import those stations, the network programming, to those folks who otherwise would have no access to that.

Mr. WALDRON. And we would be happy to have a conversation about short markets and areas where there is a spot beam problem. But we just do not know what the nature of it is. And that would actually be a helpful step in promoting legislation.

Mr. COBLE. How many people use it, Mr. Dodge?

Mr. DODGE. The estimates I have heard are 1 million to 1.5 million consumers.

Mr. COBLE. I see my amber light appears. So I now recognize the distinguished gentleman from North Carolina, Mr. Watt, for his questioning.

Mr. WATT. Thank you, Mr. Chairman. As has become my policy, I have decided to defer until the end of the process. So I will defer to Mr. Conyers and go last in the chain.

Mr. CONYERS. Thank you very much.

Could I begin our discussion that I thank you for the variety of views presented? But do you believe, Mr. Dodge and Mr. Padden, that Congress should do more than simply reauthorize the distant signal license? Either one can start off.

Mr. PADDEN. I am happy to go first.

As I have said, I think this is one Government program that you can retire. These licenses were enacted before there were any nonbroadcast channels. They only apply to the programming on the broadcast channels, and you now have hundreds of other channels distributed nationwide with no muss, no fuss through normal copyright negotiations, and I think that proves that you do not need these licenses anymore for the broadcast programming.

Mr. DODGE. To address that specific point, I believe there is a difference between cable channels and the local broadcasters, the chief difference being the local broadcasters received at least initially billions of dollars of spectrum for free under the promise that they would be stewards of that spectrum and use it for the public good. And they are further propped up by rules such as must-carry, syndicated exclusivity, and network non-duplication that the cables do not have the benefit of.

And to your specific question, Ranking Member Conyers, we think that the satellite act should be reauthorized so that the current beneficiaries are not disenfranchised.

And further, we think there are two reasonable zones of expansion that should be considered, one of which is fixing the broken retransmission consent system as it stands today, and the other is fixing the orphan county that, at least in my case, every time around this year, the folks in two southwest counties in Colorado start asking the question of why they cannot watch the Broncos. And the reason is because they are in the Albuquerque DMA.

Mr. CONYERS. Well, Mr. Dodge and Mr. Padden, do I sense that there is a little space between both your responses? [Laughter.]

Mr. DODGE. Yes, although we are good friends.

Mr. CONYERS. We are all friends here.

Mr. PADDEN. Ranking Member Conyers, this Committee asked the expert agency, the Register of Copyrights, to study these licenses, and their report said—and again I will quote—that they are arcane, antiquated, complicated, and dysfunctional. I cannot imagine why you would want to continue such a program.

Mr. CONYERS. Now, I am going to give you another chance, Mr. Dodge. What are the targeted fixes that the American Television Alliance, ATVA, is calling for to the retransmission consent rules as part of the STELA reauthorization?

Mr. DODGE. Principally there are two, the first of which is one that we favor, which is allowing video providers to import a distant signal on an interim basis during the pendency of retransmission disputes when the broadcaster takes down the programming. The other would be some form of standstill where the programming stays up and then the parties would enter binding baseball-style arbitration to reach a fair rate. But in each of those cases, the consumers would still have access to the programming and theoretically the broadcasters in the first instance would still have an incentive to negotiate, as would the TV provider because the distant signal is an imperfect solution.

Mr. CONYERS. Would you add to that, Mr. Waldron?

Mr. WALDRON. Absolutely. Thank you, sir.

In terms of it, I think it is clear that there are thousands of cable systems in America. There are thousands of broadcasters in America. And the vast majority of time, the system works. There is a marketplace settlement. There are marketplace negotiations.

The fact is, as I mentioned in my testimony, there has been an increase in disruptions, and they all involve three companies, DirecTV, DISH, and Time Warner. We see this, frankly, as a manufactured crisis. They are deliberately going and playing the game and, frankly, in order to get this Committee to pay attention to these issues.

So we actually think in the vast majority of cases the system is working.

And with respect to the suggestion of a standstill, well, there is another way of putting that. They get to take my copyright without my permission. That is what a standstill is. I do not want to give them my retransmission consent, but yet they get to take it because they were taking it before. And I do not want to give it to them anymore. That seems rather contrary to our copyright law tradition. So we think that actually would be not something that the Congress should endorse.

Mr. PADDEN. Could I add one thing?

Mr. CONYERS. Yes.

Mr. PADDEN. In evaluating the request being made by the cable and satellite industry for a standstill provision, I think you should consider the fact that the cable industry just went to court and successfully defeated a standstill agreement in program access disputes. So they went to court and got rid of the standstill when they did not want to continue to carry something, and now they are back here asking you to enact a standstill against the broadcasters.

Mr. CONYERS. Mr. Campbell, the last comment.

Mr. CAMPBELL. Thank you, Ranking Member Conyers.

The companies that Mr. Waldron mentioned are very large. And we are a new entrant into the market. I would suggest that often these larger companies play the negotiations against smaller companies like CenturyLink trying to compete and win customers over. And without any leverage at all, we are the ones that are getting kind of swallowed up in this thing, and that is going to stifle competition, investment, and innovation.

The other thing I would point out is while the broadcasters often threaten to black out, it is unlawful for any provider to not carry the signals during "sweeps week," which is the week that broadcasters get their ratings and make their advertising money. That is the 1 week we cannot put it off.

Mr. CONYERS. Mr. Chairman, could I get 30 seconds more?

Mr. COBLE. 30 seconds will be granted.

Mr. DODGE. Thank you. I just wanted to address one point made by Mr. Waldron, which is that 90 percent of the blackouts are caused by three entities, my company included. And I guess that is a bit in the eye of the beholder because we would, of course, take the view that 100 percent the blackouts are caused by four companies, ABC, NBC, CBS, and Fox and their affiliates. [Laughter.]

But putting that aside for the moment, if you look at the facts, it is not surprising the DISH, DirecTV, and Time Warner Cable represent, as they assert, 90 percent of the blackouts because, one, we represent 50 percent of the marketplace for pay TV today. The other 25 percent is Comcast, which owns NBC, arguably is conflicted. And the remaining 25 percent is folks like Mr. Campbell. So in many ways, DISH, DirecTV, and Time Warner are the only folks who are actually able to negotiate effectively with the broadcasters, and thank goodness we are out there fighting for consumers to lower prices.

Mr. CONYERS. Thank you, Chairman Coble.

Mr. COBLE. You are welcome, Mr. Conyers.

The distinguished from Virginia, Mr. Goodlatte, is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Donato, I want to ask you a question on behalf of my constituents. I have a number of them that I hear from who live usually in a rural area, a good distance from the market that they are in and a lot closer to another market that they would prefer to receive the broadcast signal from or the retransmission of that. And I wonder if you might just elaborate on that. These are lots of people but living in rural areas who are 75 miles from the D.C. market but 25 miles from the small Harrisonburg market and would rather have the Harrisonburg market.

Mr. DONATO. Generally each year there are a few markets in which that kind of a situation happens. The DMA is what it is. It was created to reflect the viewing of people in that county. So the particular counties that you are talking about, as I said in my testimony, the predominance of viewing is actually to the home market that it is currently in.

Again, it was developed as a mechanism to define the geography in which television signals are viewed and therefore local advertisers would be able to use local television and support local television.

Mr. GOODLATTE. Should those lines be adjusted?

Mr. DONATO. We have an analysis process. Every year we go through and we evaluate the viewing for each county within the DMA. It is perhaps a little bit conservative in that you have got to have a statistically significant change 2 years in a row before we move the county over. But the reason for that is the need for stability in the marketplace overall in the advertisers' behalf.

There are always better ways of doing things. We generally treat these situations on a case-by-case basis. We often meet with Congressmen when in their district there is an issue and we describe what the numbers are. So it is a system upon which almost $40 billion worth of advertising has been very successful for the last 50 years.

Mr. GOODLATTE. Let me interrupt you, and I want to ask a couple other questions that are of a broader nature.

But before I do that, I want to ask Mr. Garrett if he wants to respond to Mr. MacKenzie's suggestion that the sports broadcast antitrust exemption should be eliminated.

Mr. GARRETT. Mr. Chairman, actually I do not have a response. There is nobody who comes to me and asks for advice on antitrust laws. My focus is on copyright law and what is good copyright policy.

Mr. GOODLATTE. Well, in light of that, I will cut you short then and ask if you work with and represent people who might have an opinion on that subject.

Mr. GARRETT. Absolutely.

Mr. GOODLATTE. And if they would submit that to the Chairman of the Committee in writing, I would be pleased if the Chairman would share that answer with me when it arrives.

Mr. GARRETT. Absolutely.

Mr. GOODLATTE. Let me ask all of the members of the panel what is the proper role for Congress in responding to marketplace

disputes. In order to resolve disputes, should Congress set general guidelines for the marketplace to follow, or should it set detailed requirements that all participants must follow? And then as an adjunct to that, are there ways for business disputes to occur and be resolved without disrupting the consumers who rely upon satellite and cable services for access to video content?

Mr. Donato I gave you a shot. I will start with Mr. Dodge and we will work our way down. If we have time, we will get back to you.

Mr. DODGE. I will take your second question first, and I would say the ways to avoid consumers being disrupted are the two ways I said earlier, which is, one, allow us to import a distant signal during the pendency of these disputes or some mechanism for a standstill. I have to say I am not all that familiar with the niceties of what standstills have and have not been struck down over the time, but the fact of the matter is if the broadcasters are going to sit here and wrap themselves in localism as a justification for about 99 percent of what they are saying, why do they want to take the signal down and disenfranchise consumers at these times? Leave the signal up. We are not saying we are not going to pay during those periods. We gladly will. But do not disenfranchise the consumer.

Mr. GOODLATTE. We have just got to keep moving because of limited time.

Mr. WALDRON. Two points. One is that Congress actually, I think, wisely decided in 1992 to essentially have the marketplace settle these issues.

And secondly, where there are problems, frankly, consumers should have more choice. So it is sometimes difficult to change your provider. There were news reports that people wanted to change from Time Warner, but nobody was answering the phone. And there are cancellation penalties and the like. So that actually would enhance the marketplace competition.

Mr. GOODLATTE. Mr. MacKenzie?

Mr. MACKENZIE. I think our position is general guidelines would be better than specific guidelines. Mr. Dodge has come up with two ideas, the distant signal and also kind of preventing the blackouts. A distant signal really does not work for the cable industry because we do not already have that content. The satellite industry already has that content and can quickly move it. For us, it would be building fiber and trying to get it off air, which would be impossible. So from our standpoint, preventing the blackout by leaving the signal on while we negotiate would be preferable.

Mr. GOODLATTE. Mr. Campbell?

Mr. CAMPBELL. Not to repeat what has been said, I agree with Mr. Dodge and Mr. MacKenzie.

But to return the negotiations to actual free market negotiations, we hear a lot about the thumb on the scale in favor of one party over the other. We do not seek to have the thumb put on the scale in our favor. We would just rather have it removed from the other side so that the negotiations do become, once again, free market negotiations because the world has changed a lot since 1992.

Mr. GOODLATTE. Thank you.

Mr. Garrett?

Mr. GARRETT. From Major League Baseball's standpoint, they license a great deal of programming that they want their consumers—they want their fans to see. And they are as frustrated as anyone either here in Congress or the fans themselves when that programming is not made available.

Having said that, we also recognize that broadcasters have property rights in those signals, and we believe the best way to determine the value of those property rights is through free marketplace negotiations. And that is the objective that we in baseball have, is to have free marketplace negotiations or, at the very least, fair market value compensation for the programming that is being utilized.

Mr. GOODLATTE. Thank you.

Mr. Padden?

Mr. COBLE. The gentleman's time has expired.

Mr. Padden, you may respond.

Mr. PADDEN. If I could, I would like to respond briefly to your question to Nielsen about the DMA. This is an example of the dysfunction that is built into the compulsory license and the associated FCC rules. In the free market, if you have constituents who want to see station A and station A would like constituents to see it and there is a distributor between them that would like to make money distributing it, they can figure it out. All the non-broadcast channels get distributed anywhere someone wants to see them.

The problem is the compulsory license and the associated FCC rules actually enshrine Nielsen's rating data from 1972 as the basis for what signals can go where. They are still sitting in the FCC rules, 1972 ratings data. And if you would just get a big broom and sweep all of this stuff away, the free market could better serve your constituents.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. COBLE. Thank you. The gentlelady from California, Ms. Chu, is recognized for 5 minutes.

Ms. CHU. Thank you, Mr. Chair.

Mr. Dodge, I understand that—well, in fact, you said earlier that 1 million to 1.5 million households in the United States currently get their access to broadcast stations through the distant signal service. But it is clear that the number of households that are dependent on the distant signal decreases every time Congress looks into reauthorizing section 119.

Can you tell us who these remaining 1 million to 1.5 million households are and where they are located? Are they mostly located in rural areas, or are they concentrated in certain parts of the country?

Mr. DODGE. Generally located in rural and underserved areas. And there is really four categories, if you will, of consumers: folks in short markets such as Glendive, Montana that is missing a Fox and an ABC where we are allowed those network affiliates into those markets; outside the spot beam of our satellites. So if you think of Utah, for example, which is a rectangle—our spot beams are generally round. The law allows us to provide distant signals to the folks that are not covered by our spot beams. Commercial trucks and RVs are covered by the distant signal license, and then DirecTV.

We are an alternate in 10 markets so we do not actually make use of the, quote, traditional unserved household exception allowing a distant signal, but DirecTV does because I believe there are still 15 markets where they do not provide local service. And then they have some grandfathered subscribers as well I believe.

Ms. CHU. And do we have that technology now to close the gap to them?

Mr. DODGE. For example, the short market issue is just purely the fact that there are no affiliates of a particular network in those markets. And with respect to outside of the spot beam, it depends on whether or not the satellite beam is large enough to actually cover an entire DMA, which it is not in all cases, but it is very, very limited when it is not.

Ms. CHU. Mr. Waldron, I am aware that today consumers have several options for how they will view video content. They can access the content through pay TV carriers or other options now through the Internet. There is no doubt that the online model will continue to grow in the coming years. To what extent should we consider these newer platforms as we are reauthorizing satellite TV laws? Should we consider them at all?

Mr. WALDRON. Well, I think they can inform the debate because they show how the TV market is evolving.

And let me also say that, you know, we have talked earlier about the conflict between CBS and Time Warner Cable. A significant part of that dispute was about the ability for CBS to offer its programming to a competitor to Time Warner Cable. Now, I understand why Time Warner Cable does not want CBS to make its programming available to a Hulu or a Netflix or an Amazon Instant Video. But CBS actually is interested in doing that to give consumers choice. So you should be aware that that is actually increasingly a matter of the negotiations. It is not necessarily the fee which news reports said was a deal that was cut relatively early in the process, but in fact, enabling broadcasters to actually have—giving consumers choice across these different platforms.

Ms. CHU. Well, in fact, the digital rights of content are playing a more important role in these retransmission negotiations. How do you think the issue of digital rights will impact future negotiations, and does Congress have a role in protecting consumers in this regard?

Mr. WALDRON. Well, I think Congress should actually say, as it has, that the copyright holders should be able to negotiate an agreement across all of their content. As I said, I think the CBS example is telling in that CBS wants to actually promote competition. So that is why they actually went about those negotiations. And we think that actually is a way that consumers can give choices.

I do want to come back to a statement that Mr. Dodge said. We do not dispute that there are some hard cases out there such as the short market situation or the corners of spot beams. But what we do not know is how many there are. And Mr. Dodge is one of two. So he said earlier he has heard the 1.5 million. Well, he has half of the information that is needed and DirecTV has the other half. So it is not like you have to survey a thousand companies in order to get this data. And what we would like to do is to get what

is the number and what is the context. How many are RVs, how many are in short markets, how many are spot beams problems. And as DISH has proven, there is now technology so that there should not be an unserved household. So DISH is in 100 percent of all the markets.

Ms. CHU. And can you address the issue of localism, the principle that is embedded in our Nation's communications laws? Can you tell us how the law developed to focus on localism and some of the benefits of holding onto that principle?

Mr. WALDRON. So just quickly. So localism goes back to the original broadcast licenses. It is embedded in the Communications Act of 1934, and it is the notion that broadcasters should meet the needs of their local community. That makes American broadcasting unique around the world. There are national broadcast systems in Europe and in Asia. We have a locally focused broadcast system.

The reason why we have concerns with the distant signal—it undermines that localism. That local broadcaster who is bringing the local car dealership, who is talking about the local high school sports or the tornado—if you are getting a signal in from New York or LA, you are not going to be aware in Moore, Oklahoma about the tornado that is coming. So localism is the heart of the broadcast and it also is at the heart of the satellite laws. And we think that that actually is a strong argument why the Committee should be skeptical that a distant signal license is still needed.

Ms. CHU. Thank you. I yield back.

Mr. COBLE. I thank the gentlelady.

The gentleman from Texas.

Mr. FARENTHOLD. Thank you very much.

Having grown up as a broadcaster working in radio since I was 15 years old, I kind of grew up with the public interest, convenience, and necessity standard. And I certainly have a great deal of sympathy for the local broadcasters.

I want to ask Mr. Dodge and maybe Mr. MacKenzie. If we take away or limit the local TV station's leverage with respect to negotiating a programming license by allowing distant signals, what leverage are they going to have in the negotiations?

Mr. DODGE. Well, if you believe what they say and localism is as important as it is, then the distant signal is an imperfect solution. All it will do is ensure that folks continue to be able to watch American Idol, but they will not be getting their local news.

Mr. FARENTHOLD. I do think that that is important. And, Mr. Waldron, maybe you can tell me some of the benefits that we are getting. I cannot believe Jim Cantore is going to give me better hurricane information than the weathercaster we call "Dead Wrong Dale" affectionately in Corpus Christi.

Mr. WALDRON. Actually that is exactly right. And look, we understand the market. We understand that people actually are tuning in on a daily basis for their American Idol or for their CBS or NBC hit show. But when the tornado comes, suddenly there will be an outcry. And I do not think you want to say where is that local station the day after the tornado hits. So that is the point, that localism is about being there and serving the community all the time. And yes, much of the viewing is tuning in for——

Mr. FARENTHOLD. Okay. I have got limited time.

So, Mr. MacKenzie, can you tell me—go ahead. Did you want to answer this?

Mr. MACKENZIE. I would. The American Cable Association are primarily very small cable providers. Oftentimes we are at the edge of a DMA. So I will use my system as an example. We are in Shenandoah County, which is in the Washington, D.C. DMA. You cannot get off air in our area. We have to have that brought in by fiber to do so. So I can tell you there are no local sports. There are no local—but I can get that from a distant station which is only 30 miles away.

Mr. FARENTHOLD. All right. So let us talk about section 119. And if we do away with the requirements—or the incentives for local stations to get on or the requirements, do we end up with network affiliate super stations where it is the station in New York or Chicago or LA that everyone gets? And then how does the local car dealer advertise or whatever business there is in the local community or a candidate for Congress?

Mr. WALDRON. Our view is that is absolutely what would happen, that the easiest thing for the carriers to do would be to make an arrangement with New York and Chicago and LA. So then we would have a national broadcast system, which is how some other countries are doing it. That is not the American system and it is not the case that actually would give a platform for the car dealers or the movie theaters——

Mr. FARENTHOLD. I am sorry. I have got limited time.

Mr. Dodge——

Mr. DODGE. Can I just say——

Mr. FARENTHOLD. Sure.

Mr. DODGE. Why should consumers not be able to choose in that case? It sounds like Mr. Waldron is proving the point that perhaps localism is not that important. If a consumer is going to be satisfied with New York, shouldn't they make that——

Mr. FARENTHOLD. But isn't it much cheaper for you and uses less bandwidth and less resources for you on your satellite just to have one national? You do away with all the spot beams and all of that and you just have one station. And it is actually cheaper for you to broadcast one affiliate rather than several hundred?

Mr. DODGE. It certainly would be, but the fact of the matter is today we broadcast locals in all 210 markets. We have made the decision that we want to be in there, and all we are saying is to protect consumers from takedowns, allow us to temporarily import a distant signal. That is not the end game.

Mr. FARENTHOLD. Would another option to the ones you suggested might be, all right, you stay up and you go under whatever agreement is eventually reached?

Mr. DODGE. Of course.

Mr. FARENTHOLD. All right.

Mr. Donato, we talk about these million or so——

Mr. DONATO. Designated market areas.

Mr. FARENTHOLD. Yes. Well, we talk about the million or so people who are not served by anybody. Is there a way we set it up where—and even with the DMAs, we set it up to the one that is most rationally close to them? Isn't there just a way to start over and do away with the 1972 stuff? If I had my choice of local affili-

ates in Washington, D.C. on DirecTV, I would pick the Corpus Christi local affiliate.

Mr. DONATO. So the 1972 stuff is—that is what existed at the time the law was written, and that is why it is in the appendix and no one has gone back to update it. We would be delighted to supply the Committee with updated information on it.

Just so you understand what the implications are, pay penetration in 1972 was obviously less than 5 percent or the amount of viewing that went to pay was less than 5 percent. And right now the amount of viewing that goes to cable stations is about 60-65 percent. So there has been a shift.

Typically the counties in which it feels like it is irrational because you cannot get the Broncos game are really large rural counties, and most of those people in those counties do, in fact, watch to the home market station. We do have split counties. We had split counties in the past.

Mr. FARENTHOLD. My time is up. I have now got to go research whether or not watching my Corpus Christi stations on my Slingbox is illegal. I am really concerned now.

I yield back.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Florida, Mr. Deutch, is recognized for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Padden, you have made an argument, a very compelling argument, that the current retransmission system that is in place is incredibly complex, comically complex I am sure you would say. But your solution is to walk away—for us to walk away from that process altogether, which would bring all of the broadcast stations into the free market, if I understand your proposal. And I appreciate your desire to take Congress out of this. And the full Committee's Chairman I think touched on this before. If you take Congress out of these business-to-business dealings, Congress is still going to be tipping the scales in favor of one party or the other either by keeping compulsory licenses or by striking them. Why is walking away altogether a fair solution?

Mr. PADDEN. I think the best way to explain it is like this. First you gave cable—I will say cable and satellite a compulsory license for the programs on broadcast stations. Then as part of that deal, the FCC adopted rules that restrict cable and satellite's use of that compulsory license. And then in 1992, Congress enacted retransmission consent which requires a marketplace negotiation between the station and the cable and satellite people. So you ended up at the same place you would be, namely in marketplace negotiation, if you had done nothing except you have got a bunch of regulatory warts that you developed along the way like the fact that the 1972 rules are still in the FCC's rules.

All I am saying is it is a Rube Goldberg system. It is a complex way to do something simple, and it really is a chance for once to say here is a Government program that each little step made sense when we did it but the end result is nonsensical, so we are going to back out of it.

Mr. DEUTCH. Mr. Dodge, let's talk about regulatory warts for a second. I assume that you would be in some disagreement with

that proposal. But I am hoping you could walk us through the process that DISH undertakes to negotiate with local broadcasters. What makes that more difficult from your company's perspective than negotiating with the non-broadcast stations that Mr. Padden holds up as the model as to exactly how this should now work? As he points out, those negotiations all take place without any congressional interference at all. Why is there a difference? Is it more difficult and, if so, why?

Mr. DODGE. It is more difficult because you have 210 small monopoly territories, if you will, where this one local broadcaster who, as Mr. Waldron asserts, has this valuable local content that is irreplaceable that no one else can recreate, and that one broadcaster gets to play three if not four distributors off each other. And oftentimes you get to a point in a negotiation where they are asking for 300-400 percent increase, and they say, okay, I guess we are not going to get there. I am just going to take the signal down. I am going to call up your competitors and tell my consumers to go switch to them. And the problem is while the broadcaster might lose an eyeball for 30 days, DISH has lost a customer for eternity after the consumer goes through the headache of switching.

Mr. DEUTCH. Mr. Dodge, can you just go through that in a little more detail, though? When you say they are playing several off of one another, can you give me some examples? How does that actually work? What is it that you would see happen?

Mr. DODGE. So in some cases, the broadcasters literally start running advertisements in the paper saying—you know, putting into their signal that you are about to lose your signal from DISH network. Please call DirecTV or Comcast, whomever. They run advertisements in the local papers. And, you know, as Mr. Waldron says, maybe it is a smaller amount of these things that actually go to a takedown. What he does not account for is there are numbers of these where you do actually get to an 11th hour negotiation, but the consumers have been bombarded for weeks if not a month with all these advertisements and messages across the bottom of the screen saying the sky is falling, you better switch now. So there is a huge disenfranchisement of consumers even in cases where it does not actually go to a takedown.

Mr. DEUTCH. Mr. Waldron?

Mr. WALDRON. Let's take Mr. Dodge's statement, read it back, and swap out the word HBO for broadcaster. HBO does not want to reach a deal with the local cable company. HBO is going to pull back its programming. HBO is going to run an advertising to say that, "Oh, you want to watch HBO, you want to watch your favorite show? Go to DirecTV because DISH does not have HBO." What is so remarkable about this? These are marketplace negotiations. To your point, Congressman, what you started out with, what is different about this, as Mr. Padden said, with every other sort of broadcaster? And the answer is Congress depends on HBO and DISH and DirecTV to have serious negotiations and to deal with the marketplace. That is the same exact thing that is going on here.

Mr. DODGE. And if I may.

Mr. DEUTCH. Can I have 15 seconds just to hear the difference? Mr. Dodge?

Mr. DODGE. So with respect to HBO, are there other movie channels out there? Yes, there are. Is there potential substitute programming? Yes, there is.

Now let's substitute in what Mr. Waldron said. I guess localism is not that important. We should be able to import New York because it is just not that important what is actually going on in Denver. He cannot talk about of both sides of his mouth.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from Florida?

Mr. DESANTIS. Mr. MacKenzie, if you wanted to chime in, go ahead.

Mr. MACKENZIE. I would. I think the big difference between DirecTV and DISH and members of the American Cable Association are relative size. We are very small providers, normally with, on average, less than 5,000 subscribers. When we start our retransmission discussions with the broadcasters, it is after they have already negotiated with the big company that is in the DMA. When we try to make a negotiation—and on numerous occasions I have asked, "Could we have a most favored nations clause in our contract to make sure that we are being treated fairly compared to the others in the marketplace?" And I have never been able to get that in. So I think there is a huge difference between the negotiations between a DirecTV and DISH and the broadcasters and the small cable operators and the broadcasters.

Mr. DESANTIS. Great. I just wanted to give you a chance.

This is my first time going around with this. I am a freshman, but it is really interesting to see. I was listening to the Major League Baseball testimony, and I am one of the youngest Members of Congress, but yet I remember watching 100 games about. We had TBS in Florida, TBS for the Braves, WGN for the Cubs, a little bit of White Sox. Then we did get WOR, so there were Mets games. So those were the people that I followed. When ESPN started covering cable, you started to get more, and then with the Internet—I remember when MLB.TV came out. You could actually watch games at work. And now you can do it on your devices. I mean, it is just unbelievable. And I think the technology is great. I wonder about the lost productivity in the American workforce, but I guess that is just a discussion for another time.

So as someone who is new to this, I would just like you all to say—you know, we are here. A lot of people say, you know, Congress—they got to solve the problems of the American public, all that. And that is nice to say but it obscures the fact that we actually create a lot of problems here through the years. And I have seen it in other areas.

And so as somebody who is new looking at this, what would you say as kind of something that Congress has created a problem with this that we should look to rectify? I probably know where Mr. Padden is going but can you start and then just give me a quick——

Mr. PADDEN. Sure. One perfect example is the compulsory license that you enacted gives cable systems the right to carry stations that are deemed significantly viewed in their county based on a list of ratings from 1972 that is enshrined in the FCC rules. And if a station wants to get carried somewhere else and the constituents

there want to see it, the station has to petition the FCC to amend the list of significantly viewed stations so they can be carried there. It is crazy. I mean, if you simply rely on the free market and there are people who want to see the station and the station wants to be seen, they will figure out how to get it done.

Mr. DESANTIS. Mr. Garrett?

Mr. GARRETT. Well, Congressman DeSantis, there are probably several answers I could give. The one I would focus on for Major League Baseball here is the fact that entities like Major League Baseball and other content owners are forced to subsidize essentially a $100 billion industry by providing them with below-market programming pursuant to the compulsory license.

You mentioned the great variety, the wealth of programming, baseball programming that you can see now. The vast bulk of that programming is made available through negotiated licenses, through marketplace negotiations. And we think that the same can be true of the program that is now available during compulsory licensing, but if compulsory licenses continue, at the very least, we should have fair market value paid for that programming.

Mr. DESANTIS. You mentioned the industry. But what is the dollar loss to Major League Baseball? Have you looked——

Mr. GARRETT. I do not know the answer to that. It is not a question of harm here. It is a question of talking about what is fair and reasonable and that marketplace compensations, marketplace value is what we all live with in this industry.

Mr. DESANTIS. Thank you.

Mr. Campbell?

Mr. CAMPBELL. Congressman DeSantis, thank you.

Conceptually I think that the biggest problem is that the rules that are currently in place do not recognize what the marketplace looks like today and it is ever-changing and ever-evolving. I think the biggest thing that Congress could do would make sure that rules are in place that encourage innovation and investment and competition because we are dealing with companies that have been there forever, and I think consumers benefit the most by having companies like CenturyLink go into a major market, invest the capital, and compete. And I think the rules in place would tend to stifle that. So I think conceptually that is what Congress should take a look at.

Mr. DESANTIS. Good.

Mr. MacKenzie?

Mr. MACKENZIE. Small rural carriers are the ones who are bringing broadband to America which is, I know, a priority for everyone. But oftentimes the rules and regulations are one size fits all. And so I think one of the things we should look at is some changes in the rules or when the rules are being looked at, how it impacts the small providers.

Mr. DESANTIS. I am out of time, but if the rest of you gentlemen would like to submit something, I would certainly love to hear your views as well.

So thank you for coming.

Mr. COBLE. I thank the gentleman from Florida.

The distinguished lady from California.

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

And our witnesses today—I appreciate your time. It has been helpful to me coming from Los Angeles and having just experienced the blackout which, again, I thought was specific to our area and did not really realize how widespread this was or why this happens.

So I just had a couple of questions for you, one of which is do you worry that pulling consumers into these escalating negotiations between cable or satellite and broadcasters means that more people are going to opt out of pay TV and whether or not you think this would have a harmful effect on content creators whose shows are distributed on cable and satellite? And that is for anybody.

Mr. WALDRON. Can I make one point?

Ms. BASS. Sure.

Mr. WALDRON. I want to emphasize that a broadcaster is a free over-the-air service. So during the so-called blackout, the service was available 100 percent of the time. I realize that some people might not have antennas or some people might have reception problems. But I do want to emphasize——

Ms. BASS. I could have seen CBS?

Mr. WALDRON. I am sorry?

Ms. BASS. I could have seen CBS if I had rabbit ears?

Mr. WALDRON. Yes, absolutely. It was available over the air during the entire time, and indeed, there were reports at least in the New York market that there was a run on antennas at Radio Shack. So I do want to emphasize that the signal is always on and always up. It may not be available on the cable system, and we realize that, but it was available during this whole time.

Mr. DODGE. Well, I would take a bit of an issue with that as I do not think the broadcasters actually build out terrestrial signal to their entire DMA, certainly not in every DMA. So I think it depends where you lived in Los Angeles as to whether you could get an off-air signal.

Ms. BASS. I see. I do not think people knew that, and I doubt whether there was a run on rabbit ears in LA.

Mr. DODGE. Shame on broadcasters for not building out their entire DMAs.

Ms. BASS. Okay.

Mr. CAMPBELL. And from a pay provider perspective, it is not free.

Ms. BASS. Okay.

The second question is many local broadcast stations play an important role in providing local news, weather and emergency information particular to the communities they serve. And I know that we all agree that viewers should not be deprived of local information, especially during emergencies. So specifically I wanted to ask what steps can Congress take to ensure that our constituents do not get caught in the middle of these commercial disputes, particularly when weather or other emergency information is at stake.

Mr. WALDRON. Well, one approach that we would have is that if there is a dispute, the consumers should be able to change providers. So there should not be a cancellation fee, and frankly there should be a rebate if they are denied service.

Ms. BASS. That is not that easy to do.

Mr. WALDRON. I am sorry. Excuse me?

Ms. BASS. That is not that easy to do. I mean, if you just want to cancel right in the middle of the dispute?

Mr. WALDRON. I understand it is not easy to do, but that is a choice that consumers can have in addition to getting the signal over the air. And by the way, it is free to anyone who has antennas. You can also pay for pay TV, but it is free to anyone who has an antenna.

Ms. BASS. Okay, representing the antenna companies.

Mr. DODGE. Could I address just the point about refunds and cancellation fees? I think, as is clear, our view of the world is today it is an unfair fight as it stands. You have got one broadcaster who plays all the distributors off against each other. With all due respect, Mr. Waldron is trying to actually make it even worse by saying now let's give another hammer to the broadcaster by saying you have to do refunds and waive termination fees in all these cases when, quite frankly, the fact that there are blackouts are the exact reason why our disclosures to our consumers in our contracts are crystal clear that programming is subject to change because we cannot ever guarantee that we are going to be able to provide any local broadcaster's signal because there is this constant threat of takedowns.

Ms. BASS. Thank you.

Would anybody else like to respond?

Mr. MACKENZIE. Yes. I think the proposal that we put forward that during these disputes the signal remains up while the negotiations are going on, therefore the consumer is not going to be harmed, and once the negotiations are completed, then the fees are paid retroactive. So no one really is disturbed or harmed by that, and it allows the consumer to continue to have service during that period of time.

Ms. BASS. Anyone else? All right. Thank you. Oh, I am sorry.

Mr. PADDEN. I would just repeat that Mr. MacKenzie's industry just went to court to defeat a standstill agreement in the context of the program access rules, and for them to now come in and say they would like it in this instance I think is unusually duplicitous even by Washington standards.

Ms. BASS. Would you like to respond to that, Mr. MacKenzie?

Mr. MACKENZIE. My company and the companies of the ACA were not involved in that suit. The large cable operators maybe, but not the small cable operators.

Ms. BASS. Okay, thank you.

Mr. COBLE. I thank the gentlelady.

The distinguished gentleman from Louisiana.

Mr. RICHMOND. Thank you, Mr. Chairman. I want to thank you for having the Committee meeting today.

Let me just start with—I guess I will show a little favoritism and start with Mr. Campbell from CenturyLink. I guess my question to you would be looking at most of your new subscribers and the fact that they are probably new to the Internet and looking at the area where you all are located which, if you go right down the street toward Monroe Lake Providence, you are talking about one of the poorest places in the country. That has consistently been that way. The fact that your new customers and coming in and taking video

along with Internet access, what kind of effect is that having in the area?

Mr. CAMPBELL. Congressman, thank you for the question. It has had a great effect not only for our subscribers that take the video product but for those who choose not to. As we upgrade the networks in these markets that we enter, we are offering broadband speeds that range from 25 to 40 megabits. So even those folks we cannot sign up to the video product that may not want it, everyone else is getting enhanced broadband speed. So really the benefit from the video perspective is great because it allows us to compete with the incumbent cable operator and offer a video product. But even from a broadband perspective, the effect is even greater.

Mr. RICHMOND. From a price point, how are you all with the traditional video providers and cable providers?

Mr. CAMPBELL. Traditionally in the markets where we have entered, we obviously enter lower than they do. What we have seen is some slowdown in price increases from the incumbent cable operator although that has not—they slow down the increases. They still increase their prices and the content acquisition is still a problem, but generally our price point is lower.

Mr. RICHMOND. Let me just say that many local broadcast stations play an important role in providing local news, weather, and emergency information to the communities they serve. However, nearly 90 percent of households today watch their local broadcaster through a pay TV subscription and therefore are dependent on cable, satellite, or other video provider to offer this program. And as we mark the anniversary of 9/11, I believe that we all agree that the U.S. should not be deprived of local information during emergencies regardless of how retransmission consent negotiation is proceeding. And I mentioned 9/11 but, of course, in Louisiana and in our area, we have to worry about hurricanes and tornados and other things.

So I would be interested whether the panelists would comment on their views as to whether it is a fair negotiating tactic to threaten blackouts given viewers are then at the risk of missing emergency information. What steps can we take to ensure that our constituents do not get caught in the middle of that fight, particularly when weather and other disasters may play a part? And anyone can start.

Mr. DODGE. Of course, we do not think it is fair for consumers to be put in that position, especially given that the broadcasters received at least initially billions of dollars of spectrum for free under the premise that they would be stewards of that spectrum for the public good.

And with all due respect to Mr. Waldron, I do not think saying to folks, "Hey, just go use an off-air antenna" is a 100 percent satisfactory solution because the broadcasters do not cover their entire DMAs with the free broadcast signal.

Mr. WALDRON. The vast majority—I do want to emphasize the vast majority of the thousands of broadcasters and the thousands of cable companies reach deals. So for your constituents and the vast majority of constituents, as I said in my opening statement, 1 one-hundredth of 1 percent of all viewing hours were lost to disruptions last year. You are 20 times more likely to lose your service

because of a power outage than you are because of retransmission consent impasse. So broadcasters have every commitment to reach the deals in the marketplace, and in the vast majority of times, those deals are reached and constituents continue to get their service.

Mr. CAMPBELL. Congressman, as you know, our company is steeped in a rich history of being a local rural communications provider, and we absolutely embrace localism. The issue from a video perspective is—I think Mr. Dodge mentioned this—negotiations are not quite as local as they used to be. If we were dealing with a local station in the Colorado Springs market, then it might be a better negotiation process. We are dealing with syndicates that own 30, 40, 50 markets who play them against each other, who push these negotiations up to the national level and tie in all of this nonlocal content into the agreement and say take it or else. And so that is kind of the issue from the video perspective.

In utopia, if they were local and it worked the way that Mr. Waldron said, I do not disagree, but it does not work that way.

Mr. RICHMOND. I see that my time has expired, and Mr. Chairman, I yield back.

Mr. COBLE. The gentleman's time has expired. I thank the gentleman.

The distinguished gentleman from Georgia.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate the opportunity to be here.

This is one of those issues that my staff and others have said this is just a terribly complicated issue. And I began reading about this last week, and I felt like I was back in law school and, as I call, seminary "cemetery" and reading a paragraph and having to reread it four or five times and saying what exactly is being said here. Mr. Padden, you made a great point about that. This is just chaotic.

And then I have been listening today, and what I come back to is—having the great joy of serving Georgia's 9th congressional district, which is northeast Georgia, the mountains, the start of the Appalachian Trail, very rural but also very urban in certain areas. Is what I hear lost here? The people who are not in this room paid to be here and that is my constituents back home who could really frankly care less about the complexity of it. They are wanting to be able to get their news, to watch new ideas and to watch new TV and to watch new programming. And sometimes the complacency of what I have seen here today is more fighting for our battles and our market share than ending up—the bottom line is the person that we actually serve. And this is some of the questions that I want to take up first.

Mr. Donato, you answered a few minutes ago, and I am going to assume that it was sort of off the cuff. But you said, well, the DMA is what it is, almost implying like Nielsen—where we are because we are in a statute doing what we do. But you do not always have to be there. We can change that. I mean, there can be other ways to look at DMAs and going very conservatively and this kind of thing.

So I would like for you to explain the process in which Nielsen decides current DMA boundaries and tell me whether or not northeast Georgia is under current consideration.

Mr. DONATO. Currently the process is annually. We go in and we evaluate the share of tuning to stations from the home market, and the market for a particular county which has the majority of the viewing or the larger share—it is to that home market that a county is assigned. In some cases very large or rural or counties which are on the sort of outskirts of the DMA, we will actually split counties and put one part of the county in one market and one part of the county in the other market.

Mr. COLLINS. Does safety ever become an issue? I mean, you seem to talk about viewership, but I mean, we are talking about safety here. We talked about hurricanes, tornados. Does safety ever enter into what you are thinking about? Because by splitting a county—Elbert County is one of mine that is split. I was watching just a few months ago when we had an issue with ice. I did not even see four of my counties on the Atlanta area—which I am in Gainesville—even listed there. I mean, is there safety that ever comes into account of what you are talking about?

Mr. DONATO. The DMA is entirely based on viewing.

Mr. COLLINS. Okay, and I appreciate that because we have something I want to cover here.

So these gentlemen have talked about safety and localism and these kind of things, but yet, when we do the DMA, safety is not a consideration being taken into account. So the argument is really interesting here. We get them talking about localism and safety. We get you saying, well, we do not even take it into account for DMAs.

Mr. DONATO. I guess I would respond in this way. So the DMA is basically set up as a commercial entity so that buyers and sellers of advertising understand the geography associated with viewing audiences. It is the basis for literally hundreds of billions of dollars of commercial activity, and it really is the thing that has supported local television all along. It is objective. It is based on viewer preferences. It is not based on any rules. We frequently talk to Congressmen and women when there are issues that arise in terms of someone not seeing a signal and they go to their Congressman or woman.

Mr. COLLINS. We are going to talk about that in just a second.

Mr. DONATO. Yes. We basically handle them one at a time and try to demonstrate why they are where they are. And we listen to them and sometimes this is the reason why we begin to split a county if it does appear as if a county really goes—part of a county goes to one market, part of a county goes to another market in terms of the viewer preferences.

Mr. COLLINS. In one of my counties in particular, I think that is just a false distinction.

But really I think what is happening here is we are talking on two different levels when we deal with this DMA issue. In one part, we are dealing with localism and the safety aspects and why we need local broadcasting and why the satellite and cable providers get in this market. And on your angle, you are not even discussing really what some of the arguments that are being made here. So

that is a concern. I may submit more questions for the record for you at a later time.

Mr. Waldron, how specifically are broadcasters willing to facilitate the availability? As I said before, I have four counties that are orphan counties. I would like a commitment from you to work with my office, and I know that they have already been working there to make sure that we get this question addressed because it came up in my town hall meetings. They understand this. They get it because we are really in a different dynamic in those four counties and really split between two smaller markets in the predominant Atlanta market in which most of them are participating. Can I get a commitment out of you continuing to work with me on those orphan counties that I have?

Mr. WALDRON. Absolutely.

Mr. COLLINS. The other question here and this is sort of an overall question. I will leave this one open. It is not one that I had prepared but it came to me as I was listening to you. I am out of time, I believe, Mr. Chairman? So I guess I will have to submit it for the record. Can I have 30 seconds, Mr. Chairman?

Mr. COBLE. 30 seconds will be granted.

Mr. COLLINS. Thank you, Mr. Chairman.

I read the New York Times. I read the Washington Post. I read the Wall Street Journal. I read the Atlanta Journal. I read the Gainesville Times. I even read the Fannin News Observer. I get information from all over. Why couldn't I have my local broadcasting and the Los Angeles affiliate if I wanted to? And I am not setting myself up. So anybody in the audience says, "Oh, he is for one side or the other." No. I am just asking an honest question with the way things are developed. Shouldn't the question be "either/or"—not be "either/or" and be "and?"

Mr. WALDRON. If I may answer.

Mr. COBLE. Your time has expired.

You may answer.

Mr. WALDRON. I mean, I think the argument is that exclusive territories are very common in business, let's say a beer distributorship or a car dealership. Well, that is what a local broadcaster is. They are the CBS outlet, if you will, for a CBS affiliate in Gainesville or Atlanta. They are that outlet. If you are bringing in another CBS station, then you actually have defeated the exclusivity that the broadcaster negotiated for.

Mr. COLLINS. We will talk about it.

Mr. COBLE. The gentleman's time has expired. I thank the gentleman.

The gentlelady from Washington.

Ms. DELBENE. Thank you, Mr. Chair, and I just want to thank all of you for being here today and continuing as we have more questions.

I wanted to start with Mr. Padden. You have not talked about localism at all and with your proposal how that would impact access to local information.

Mr. PADDEN. Again, I am just suggesting to you that marketplace forces would be a better servant of consumers' interests. If there is programming they are interested in, whether it is local programming or something from somewhere else, and you leave it to the

market and there is money to be made providing that program to them, they will get it. The overwhelming majority of the viewing is to local broadcast stations because of the overwhelming interest in the local news and weather and sports, and in a free market system, that would continue. There would be absolutely no diminution in that at all.

Why you would want to continue a system that is based on the Nielsen ratings from 1972 to decide who gets to watch what I do not understand.

Ms. DELBENE. You know, with the new technology today, the Internet, people are getting a lot of local information even when they are not at home. Many of us when we are here are still staying connected at home and getting local information in other ways because we have people traveling around a lot and they are not always in their local area but they still want news that is happening from home.

So given the development of new technologies and the different consumer behavior in terms of access to content and making sure that we—given that we have legislation from 1988 and Nielsen ratings from earlier, how do we make sure that we put together a policy that does not inhibit innovation or change going forward as we look at what we should do here in the next step? And so that is kind of a broad question for everyone, but we want to make sure that whatever we do addresses issues that consumers have today but also does not block innovative new entrants that may also want to compete in this space.

Mr. Donato?

Mr. DONATO. Yes, I would like to answer that actually.

So we measure viewing of television online. We have made an announcement. It is a very complicated technical problem of measuring it through tablets. We have made an announcement that we have solved the technology, and starting the end of next year, viewership on tablets will also be included in the ratings.

I suppose my point is we have got measurement solutions. The business relationships are very, very complicated, and I would not comment on them. I would leave it to my fellow panelists to comment on them. But we do have the measurement solutions worked out.

Mr. DODGE. If I could comment on the 1972 Nielsen data point, I think one thing that is missing from the record is that although theoretically DMAs can change based on viewership and viewership is what is measured, if there is only one signal that is available in a DMA, when you check the viewership, you are going to get the same local affiliate over and over and over again. And in southwest Colorado, for example, which I mentioned is in the Albuquerque DMA, we have proposed to provide both Albuquerque and Denver to the folks in those two counties and let the consumers decide. So when Mr. Donato's firm calls them up, they can say I am watching Albuquerque and, lo and behold, maybe the broadcasters are right. People down there prefer to buy their Chevrolets from Albuquerque, but some people might say I am watching Denver. And ultimately it is a vote of the people to decide where those two counties should be.

Mr. DONATO. I said it before, but I do not understand the 1972 comment. Every year we evaluate viewership and that is the basis on which DMAs are constructed.

Ms. DELBENE. So I was not just focused on 1972. I am kind of focused on the speed of legislation and the way people are viewing, the way the industry work changes more quickly sometimes than legislation does. So how do we make sure we put together legislation that does not inhibit that innovation?

Mr. WALDRON. If I could come back to your original question about technology, technology is very exciting for broadcasters because, as you are probably well aware, with Slingbox and other technologies, watchabc.com, you can actually use the Internet technologies to keep up with your local broadcaster even when you are in Washington, D.C. And with the CBS issue with Time Warner, an important part of that was the online digital rights so that CBS can make that programming available to Hulu or Netflix or Amazon Instant Video. So the technology is actually expanding opportunities to access your local broadcaster.

Ms. DELBENE. Yes, Mr. Padden.

Mr. PADDEN. If I could respond just briefly. You are right. New technology is creating all kinds of wonderful opportunities. Unfortunately, the compulsory license that you have given to the cable industry and the satellite industry you have not given to the online industry. So, for example, you give the rights to broadcast programming, to Comcast and to DirecTV, but you do not give it to Netflix. I do not understand why. I am not advocating that you give it to Netflix. What I am advocating is you undo the license you have given to cable and satellite that currently puts online distributors at a disadvantage. The United States is a party to a number of international treaties that prohibit compulsory licensing of television programming to online providers. So the only way you can level the playing field is by repealing the license for cable and satellite.

Ms. DELBENE. My time has expired. So thank you, Mr. Chair. I yield back.

Mr. COBLE. I thank the gentlelady.

The distinguished gentleman from Texas, Mr. Lamar Smith.

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman.

First of all, let me apologize for being tardy as well as for having to leave early. This is one of those days where all of the three Committees on which I serve are meeting concurrently. So I am having to shift around.

Also, I may be covering some subjects that have already been covered, and I apologize for that. But I would like to address a couple of questions to our panelists today.

My first question I think would go to Mr. Dodge, Mr. Waldron, and Mr. MacKenzie, and it is this. The compulsory license has been extended innumerable times by Congress, and my question is how well is it working for television viewers? And do you feel that it ought to be reauthorized for another 5 years? Mr. Dodge?

Mr. DODGE. I would say it is working wonderfully. As a result of the last reauthorization, DISH is now providing local channels in all 210 DMAs.

Mr. SMITH OF TEXAS. Okay. Thank you.

Mr. Waldron?

Mr. WALDRON. With respect to the local channels, I might surprise you. I agree completely with Mr. Dodge. We think the local compulsory licenses actually do work. I disagree with my friend, Preston Padden, on that one. Broadcasters think the system is working.

Mr. SMITH OF TEXAS. And Mr. MacKenzie?

Mr. MACKENZIE. We are going to go three in a row. I would agree.

Mr. SMITH OF TEXAS. Okay. Thank you.

The next question is for Mr. Garrett and Mr. Padden and Mr. Dodge, and it is this. What alternatives exist to the compulsory license? And would those alternatives adequately protect the rights of copyright holders? Mr. Garrett?

Mr. GARRETT. The Copyright Office addressed that very question in a report that they prepared for Congress here, and they talked about the different types of licensing, direct licensing, sub-licensing, and collective licensing. And the report lays it out in excellent detail here.

The one thing I would mention is just the actual history here of what has happened with WTBS, for example. I have had the privilege of being present, I think, at every one of the hearings this Subcommittee has held on this issue since the late 1970's. And when I go back, I think about the years when people would debate about making WTBS available and it could only be done via compulsory licensing. And in fact, what happened in 1990 is WTBS converted to a cable network, and today it is available to virtually every cable subscriber, not pursuant to compulsory licensing, but pursuant to free marketplace negotiated agreements, including agreements that Major League Baseball has and has kept a package of programming on TBS for several years and will through the year 2021.

Mr. SMITH OF TEXAS. Mr. Padden?

Mr. PADDEN. There are plenty of marketplace alternatives that would be far more appropriate and fair to copyright owners than a Government system where Government boards set the rates.

Mr. SMITH OF TEXAS. Thank you.

And finally, Mr. Dodge.

Mr. DODGE. We believe that the compulsory licenses do still continue to have utility, and part of the reason is what Mr. Padden noted in his written testimony, which is to this day the broadcasters still have not cleared copyrights through to the viewer in all instances. And that is the magic of a compulsory license actually.

Mr. SMITH OF TEXAS. Thank you all for your testimony.

Thank you, Mr. Chairman. I yield back.

Mr. COBLE. I thank the gentleman from Texas.

The distinguished gentleman from New York.

Mr. JEFFRIES. Thank you, Mr. Chairman, and I thank the distinguished Ranking Member as well.

It seems to me that many of the disputes over the last several years that have, in some instances unfortunately, resulted in a temporary blackout and ability for consumers, some of whom I represent back home in Brooklyn and parts of Queens, to get content all seem to occur in and around significant sporting events. So

most recently in the run-up to the start of the football season, there was a conflict that was resolved on the eve of the football season starting, thankfully. In the past back at home, there was a conflict that prevented some consumers from seeing part of the early Yankees run through a particular playoff season that wound up resolving itself. And there was a conflict at home that centered around the ability for some people to see MSG which broadcast cast the Knicks. The Knicks were off to a terrible start, so nobody cared. [Laughter.]

And then Jeremy Lin came on the scene and it became a big problem. And it ultimately resolved itself.

But there is a lot of conflicts, not all exclusively, but a lot that just seem to have interesting timing as it relates to major sporting events.

And so I was very interested in Mr. MacKenzie's observations as it relates to sports licensing fees. I believe you testified that sort of these transmission fees have been skyrocketing in recent times. Is that correct?

Mr. MACKENZIE. True.

Mr. JEFFRIES. And I think you also indicated that as a result, consumers are hurt as a result of the increase in the sports transmission fees. Is that right?

Mr. MACKENZIE. That is our opinion, yes.

Mr. JEFFRIES. Now, could you elaborate on that opinion in terms of how exactly you think the consumers are hurt by an increase in licensing fees connected to ESPN or some of the other sports content?

Mr. MACKENZIE. Well, for instance, ESPN, as reported by SNL Kagan—the cost of that channel alone is $5.50, and that is a channel that is required to be carried at the basic tier. So whether you are a sports fan or not, you are having to pay for ESPN. So when you look at the sports programming that is on the cable channels and on the broadcast channels, the amount of the programming costs that can be attributed to sports—and I do not have an exact number, but the estimate is a third of the expense——

Mr. JEFFRIES. Now, who requires ESPN to be carried at the basic tier?

Mr. MACKENZIE. That is part of the negotiations that you have with Disney. When you are negotiating with them, they will only allow you to carry ESPN if you put it on the lowest tier.

Mr. JEFFRIES. Okay.

You also mentioned in your testimony that you thought that the antitrust exemption that exists perhaps should be revisited because of the dominant market share that exists with the major sports leagues. Is that correct?

Mr. MACKENZIE. Yes.

Mr. JEFFRIES. Now, in 1922, I believe there was an antitrust exemption granted blanket to Major League Baseball, and then you referenced legislation that this Congress passed in 1961. But if we were to revisit the antitrust exemption and adjustments were to be made, recognizing that there is a difference between baseball and the other major sports leagues, how do you think that that could impact the landscape in a manner that was favorable to our consumers?

Mr. MACKENZIE. Well, I think that what you have, rather than one entity negotiating on behalf of the entire league, you would have individual teams negotiating in their local market. I think that that would allow for more competition and probably lower costs.

Mr. JEFFRIES. Could you comment on that, Mr. Garrett?

Mr. GARRETT. Congressman, as I indicated earlier, very few people want to hear what I have to say about antitrust policies and antitrust laws. My focus is on the copyright side.

But what I will say is that with the Sports Broadcasting Act, it is, among other things, responsible for why you and the American public will be able to see the World Series on Fox this year. It is that law which gives the Commissioner of Baseball, gives the NFL and other leagues the ability to pull together rights and make available to the American public the kind of programming that is now made available. I think the law has worked well. It has not been abused, and it is one of the reasons why today I can come here and say to you that every one of the approximately 5,000 games played in Major League Baseball—I am sorry—5,000 telecasts of games in Major League Baseball is available in one fashion or another to your constituents and to all consumers.

Mr. JEFFRIES. Thank you.

Mr. COBLE. Thank you. I thank the gentleman.

The distinguished lady from Texas is recognized.

Ms. JACKSON LEE. Mr. Chairman, thank you. I think all of us are expressing our appreciation to our Chairman and to the Ranking Member and indicating that our calendars caused us to be delayed. In one instance, the Homeland Security Committee was discussing Syria, and I might add that the combination of gentlemen that are before us, content and the various providers, have helped to contribute to America's education and discourse on this very important issue. So we are here for more than just a separation of powers as to who has what, who is to be regulated, but to be able to thank you for how you contribute to the public discourse on some very vital issues.

We are engaged in this regulatory discussion because Congress, in its wisdom, saw fit to regulate both the content and the providers in order to create more robust competition, which I think is vital, and particularly the responsibilities of the Judiciary Committee are on the issue of competition. And I might add that there is merit in everyone's position, as I have been able to glean, as I have sat here.

And certainly to the National Association of Broadcasters, I want to just be historic in my reflection on the old days of the black and white television with that antenna where you did provide content of joy to those communities that could get a television. And all they had to do was to plug it into the socket. So we have come to a new posture that for many was a very difficult change because they had to now pay for something that they had been able to plug in and receive some form of content. But in the wisdom of the Congress and the innovativeness of technology, we have all come to live together with the new access that consumers have.

In the course of that, I want to raise a number of questions. All of us I think or many Members have expressed certainly the con-

cern of the issue of blackout and how it impacts not so much the two entities that are having a disagreement. I heard someone say that that is only a minute percentage that occurred, but if it occurs at all, it is a difficult challenge for many of us who deal with our constituents.

With all due respect and reflection, the customer will be calling the satellite company or they will be calling the cable company, and they will not be calling the entity that has the content. And we have to find a balance with that because there are concerns that this would be a growing problem.

So I am going to be posing a generic question to start out with, and I would appreciate those who would answer it could do so. And I might have missed. So this is just a plain, simple question. Do we expect to have these content conflicts coming up over and over again? And is there a way that the industry will look to solve those kinds of concerns? We know what the issues are. The issues I have, content. You are a provider. You want to get my content. You have to pay. But are there ways to handle that in a preferable way than to skew what Congress tried to regulate and balance to protect the content, rightly so, and also to give competition. That is one question.

The other question is should the upcoming reauthorization include a discussion of other issues related to satellite, cable, and the Big 4 broadcasters? And what do you think they should be or do you think—and again, to those who would want to answer that—it should be simply a clean reauthorization? The Judiciary Committee has its jurisdiction and others have theirs.

Specifically to Mr. Dodge on the DISH Network, are the cord cutters or cord shavers, those who do not subscribe to multi-channel video programming distributor, reduce the scope of the MVP's ability—are they of concern to the DISH Network? And if Congress did not reauthorize section 119 compulsory license, how expensive or burdensome would that be for you? Now, that is specifically to you.

Can you answer the other questions about getting a resolution on how you debate this question going forward and then the reauthorization question?

Mr. DODGE. Sure.

Ms. JACKSON LEE. And this is for everyone, Mr. Dodge. Why don't you wait on the question I specifically asked you?

Others on the comment please.

Mr. CAMPBELL. Yes, I think something can be done to resolve this. What we need to do is look at the rules that are currently in place that are slanted in favor of the broadcasters that were created at a time when the broadcasters were facing issues with the incumbent operators, and now the shield has turned into a sword. And so if some of those issues were removed, such as network nonduplication and syndicated exclusivity, then I think you would see a much more balanced negotiation process. We have incentive to get local channels, the local news channels to our consumers, and I think the broadcasters have the incentive as well. But the problem is that so much of a national content is tied to it. If we were able to carry that content, I think the negotiations would be more balanced.

Ms. JACKSON LEE. Mr. Dodge, on your question.

Mr. DODGE. Oh, sure. I would say to answer your first question, is this problem going away, for lack of a better term, the proof is in the numbers. In 2010, there were 10 local blackouts. In 2011, there were roughly 50. Last year, there were roughly 100, and now we are on track to set a record with 120, which is not a record I think any of us will be happy to hit.

With respect to your question on whether cord cutters were a concern for DISH, the answer is no. We welcome the competition, and we need to find a way ourselves to actually evolve and participate in that.

Ms. JACKSON LEE. Thank you.

Anyone else?

Mr. WALDRON. If I may,

Mr. COBLE. The gentlelady's time has expired. I will give you 1 more minute.

Mr. WALDRON. I was just going to say broadcasters support a clean reauthorization of STELA, and the vast majority of deals do get done.

And with your opening comment, still today you can get a TV and an antenna and plug it in and you get TV for free.

Ms. JACKSON LEE. Thank you, Mr. Chairman, for your indulgence. And thank you. I look forward to talking with you all individually. Thank you very much.

Mr. COBLE. I thank the gentlelady.

The distinguished gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. And I want to thank the Chair for convening this hearing and all of the witnesses for participating. It has been a delightful, free-flowing discussion. It has been great to see Mr. Dodge and Mr. Waldron seated next to each other going toe to toe.

I will always benefit, since I have started going last in the series of questioning on our side, from what has taken place because there is always one comment that kind of pops up in the whole discussion that hits my mind. And that comment today came from Mr. Dodge when he looked at Mr. Waldron and said you cannot talk out of both sides of your mouth. My thought was that most of us—in all of the industries is my experience—have talked out of both sides of their mouths depending on what is beneficial to their particular industry.

But I did note that it was particularly applicable to the broadcasters because I have been a strong advocate for people being paid for their intellectual property, and for that reason, I have been a strong advocate of your ability to negotiate for payment for your products. I think that is very important.

What I have not been able to reconcile, however, is how you apply a different standard to the people who provide copyrighted material on radio, the performers. And I just do not understand that dichotomy. And so I am hopeful that you all will maybe come around on the radio side to the same position that you hold on the—when you own the protected material, understand that there are performers out there that own the protected material that they produce, and they deserve to be paid also.

So I am not going to belabor that, although I would note that it seems to me to be unfair for you all to take the position that there

is some kind of performance tax when the Government gets no part of the performance rights revenue. Yet, there is no performance tax when you get paid for what you have the copyright to. So I hope you all will help me reconcile that. I will not do it here in public. But it is a concern that I have.

I think these are inordinately difficult issues. I kind of come down closer probably to where Mr. Padden does than most people. We would probably be better off to get the Government out of the way not only in this context but in the performance rights context too.

So it will not be a surprise to anybody because I announced it at a hearing right before the break that I was introducing a bill to do away with the compulsory license of music, but to make sure that if you play a performer's music that you compensate them and go and work out a deal with them if that is what you want to do. I am kind of free market on a lot of this stuff, Mr. Padden, and I was particularly appreciative that your testimony was the last testimony.

So I thank all of you for being here. I will not necessarily ask a question unless Mr. Waldron wants to respond to what I did not intend to be a personal attack on NAB because I started out by saying we all are self-serving and talk out of both sides of our mouths. I think that is characteristic of all of us at one time or another. I just used your industry as an example, as Mr. Dodge did. I thought his comment was appropriate.

Mr. WALDRON. I was just going to say we look forward to further conversations with you. It probably is best in private. We do not accept all that you said, but we can continue those conversations.

Mr. WATT. Well, we have continued those conversations on a local and national level, and they have always been cordial and congenial. So as you all said, you and Mr. Dodge and Mr. Waldron are good friends, and Mr. Dodge and Mr. Padden are good friends. All of us are good friends. We do not always agree on every issue.

Mr. Chairman, before you close the record, the Motion Picture Association of America has requested that we submit this infographic illustrating the continued rapid growth of online viewing options for audiences for the record. So I would ask unanimous consent that we make this a part of the record. I am not even sure what it is. [Laughter.]

But I am in complete agreement that anything that will help us make good decisions ought to be part of the record. I ask unanimous consent to submit it.

Mr. COBLE. Without objection. Now, if it ignites in my hands, Mr. Watt, I will not hold you harmless for that. But we will accept that without objection.

[The information referred to follows:]

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Proposed Addition to the Record
Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on
"Satellite Television Laws in Title 17"
September 10, 2013

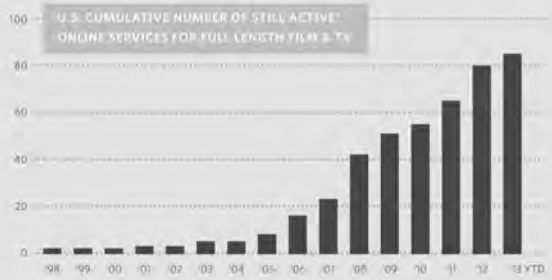
Today, consumers have numerous options for how they can find and watch their favorite TV shows and movies. In addition to connecting audiences at the theater and on TV, consumers have the ability to watch their content on a multitude of devices ranging from computers, smartphones, and tablets. There are now over 400 unique online services around the world delivering full length films and TV shows, 95 of which are available in the United States.

We respectfully submit the attached infographic, which illustrates the continued rapid growth of online viewing options for audiences, for the record.

THE RISE OF HIGH-QUALITY ONLINE SERVICES FOR FULL-LENGTH FILM AND TELEVISION

Today's connected consumers demand content everywhere: at the theater, on TV, and using computers, tablets, and mobile devices. The film and television community is constantly innovating to deliver the world's best content where and how our audience wants it-- thanks in part to copyright laws that incentivize the development of high-quality viewing platforms.

There are now over 400 unique online services around the world delivering full length films and TV shows, 95 of which are available in the United States. MPAA's WheretoWatch.Org provides a listing of these platforms, and makes it easy to access content online.



KEY DEVELOPMENTS IN ONLINE SERVICES FROM THE LAST QUARTER

Bell Media launches TV Everywhere service with **BravoGo**, which will allow audiences to live stream current and past seasons of several of Canada's most popular television shows.

Access Digital Entertainment announced the launch of **WowHD.TV** later this year, which will serve as the United Kingdom's first online retailer to offer Ultraviolet enabled digital content.

Tech company Fanhattan announced **Fan.TV**, a search-tool website that presents audiences in the United States with the multitude of options for watching a particular movie or television program.

Viki, a video streaming website that offers on-demand TV and film from around the world, expanded its offerings in Latin America and presence in China.

Access Digital Entertainment announced the May 2013 launch of **Ezyflix.TV**, Australia's first streaming service to offer Ultraviolet functionality.

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Mr. COBLE. I thank the gentleman.

I want to thank those of you who have been in attendance for the entire hearing. Obviously, your interest is more than just casual. And I particularly want to thank the witnesses. You have contributed significantly to a very complex and a very important issue. And we may meet again. But it has been a pleasure having you all with us.

The hearing is now concluded.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing stands adjourned.

[Whereupon, at 12:25 p.m., the Subcommittee was adjourned.]