

REAUTHORIZATION OF THE SATELLITE TELEVISION EXTENSION AND LOCALISM ACT

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED THIRTEENTH CONGRESS FIRST SESSION

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**REAUTHORIZATION OF THE SATELLITE
TELEVISION EXTENSION AND LOCALISM ACT**
WEDNESDAY, MARCH 26, 2014

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Klobuchar, Franken, Grassley, Hatch, and Flake.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Good morning, everybody. The Senate is just opening, and I understand that the visiting chaplain today is from Iowa, so obviously Senator Grassley is there on the floor and will join us in a while. But my good friend, Senator Hatch, is here, the most senior Member of the Republican Party, and my friend, Amy Klobuchar.

You know, it does not seem possible, except for those of you in the industry, but five years ago, television broadcasters turned off their analog signals. They went to digital. It is a different type of business and thus a dramatic improvement. But even then, we did not even start to imagine how the video market has changed. With online platforms like Netflix and Amazon and others, you can watch entire seasons of television shows on demand. They have also been doing a lot of original programming.

We have had very rapid innovation like this over the years, from the cable industry in the 1970s to the satellite industry in the 1980s. New challenges, new opportunities, but it has been almost 30 years since we passed the *Satellite Home Viewer Act* to address the challenges of it. Now we have the most recent iteration of that law: the *Satellite Television Extension and Localism Act*, or *STELA*.

STELA grants the satellite industry a compulsory copyright license to retransmit distant broadcast television content to consumers who are unable to receive a signal over the air. I am not telling you anything you do not know, but I am doing this because we stream these online and those who are following us online. And this license is going to expire at the end of the year. Actually, it was, for many years, the only way the satellite industry could provide broadcast television content to consumers. But broadcast television is most valuable when it is appropriately tailored to local markets and provides local news, weather, and sports that consumers want to see. We worked in 1999 to create a new, perma-

ment license to allow for the retransmission of local content by satellite carriers into local markets. And I think that has helped to strengthen the local focus of American broadcasting, having this local television content and satellites.

It has put two major, nationwide distribution platforms on an equal footing with the cable industry. DISH Network and DIRECTV give people more choice, particularly in rural areas like Vermont where cable is not always available. Even though I live seven miles from our State capital, from the Statehouse itself, I am on a dirt road where my nearest neighbor is half a mile away. So that gives you some idea of why there is no cable television there. And because it is on the side of a mountain, there is very little over-the-air television.

But when I am home, I like to be able to see the local news and know what is going on throughout the State of Vermont. That is why I have worked to ensure that every single satellite subscriber in the State has access to local news and weather, as I do as a satellite subscriber.

In 2010, we extended *STELA*'s distant signal license for another five years. We updated all three of the compulsory copyright licenses for the digital era. We made changes to reduce reliance on the distant signal license.

Now, I recognize that not everyone sees a need for us to reauthorize this license. Compulsory copyright licenses inherently restrict the rights of content holders to negotiate on market-based terms. And retransmissions of out-of-market broadcast stations dilute the value of local stations. And I share some of these concerns. I look forward to a time when we can let this license lapse because virtually all consumers are being served by local stations.

From what I hear around the country, we are not at that moment yet. I will move forward with bipartisan legislation to reauthorize *STELA*, but that is why we are having input here today. And I will work closely with Senator Grassley and Chairman Rockefeller and our counterparts in the House.

I have had the chance to work both as Chairman and as Ranking Member with Senator Hatch, Senator Sessions, and Senator Specter on satellite reauthorizations. And as I see Senator Grassley arriving, I will hush up and turn it over to him. Otherwise, I will just put his statement in the record.

**OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S.
SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. I had already decided I was going to put it in the record, so I think we will go ahead, if that is okay with you.

Chairman LEAHY. Okay. It will be in the record.

Senator GRASSLEY. Thank you very much.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Okay. We will start with Alison Minea, the director and senior counsel of regulatory affairs at DISH Network. She is responsible for the company's advocacy before the FCC on spectrum, media, and satellite issues. She joined DISH in February 2010. She received her bachelor's degree from Bryn Mawr College

and then went out to Colorado and got her law degree from the University of Colorado.

Please go ahead.

STATEMENT OF ALISON A. MINEA, DIRECTOR AND SENIOR COUNSEL OF REGULATORY AFFAIRS, DISH NETWORK L.L.C., WASHINGTON, DC

Ms. MINEA. Good morning. Chairman Leahy, Ranking Member Grassley, and Members of the Committee, I appreciate the opportunity to testify today. My name is Alison Minea. I am the director and senior counsel of regulatory affairs for DISH Network, the Nation's third largest pay-TV provider.

Should *STELA* be reauthorized? Yes, of course. If not, over 1.5 million customers, mostly in rural areas, will lose one or more of the Big Four network channels. But just extending the Act for another five years is not enough. A so-called clean reauthorization of the satellite home viewer law would ignore the satellite home viewer's number one problem: the increasing threat of blackouts.

The last few times that Congress took up *STELA*, it was more than a clean reauthorization. In 2009, to benefit consumers, it confronted the challenge of how to get local broadcast stations carried by satellite in all 210 markets. I am proud to say that, as a result, DISH Network is the only provider of local television service in all 210 markets.

With this year's *STELA* reauthorization, there is once again a challenge to be met. We believe that Congress should take this opportunity to fix the escalating problem of local channel blackouts during retransmission consent disputes. There were 12 blackouts in 2010, and more than 10 times as many in 2013, a record-breaking 127.

We suggest two possible legislative solutions to end blackouts and ensure that consumers have continuous access to network programming from the pay-TV provider of their choice.

First, during a retransmission consent impasse, a mandatory standstill should be in place to ensure that the broadcast signal stays up. If the parties are unable to agree upon terms, they should proceed to so-called baseball arbitration, where a neutral arbitrator chosen by the parties evaluates each party's best offer and selects the one that most accurately reflects a fair market price. In all cases, the final rate would apply retroactively, ensuring that the broadcaster is fairly compensated. Most important, the consumer would remain unharmed.

Second, a more limited solution would allow pay-TV providers to import a distant network station when the local network affiliate withholds its signal during a retransmission consent dispute. This solution would still leave consumers without access to certain local programming, like local news, sports, and weather, but it would at least provide network programming content.

The thing is that the television landscape has changed dramatically since the *Cable Act of 1992* established the current system of retransmission consent. In those early days, the broadcaster negotiated with a single cable company that was likely the only pay-TV provider in the same market. Today cable operators no longer enjoy local monopolies, and broadcasters can now pit pay-TV com-

petitors against one another, all to the consumers' detriment. This is not a free market.

Meanwhile, mom-and-pop local broadcasters continue to disappear, as broadcaster conglomeration accelerates. 2013 alone saw three large broadcaster mergers. The remaining separately owned broadcasters increasingly use sidecar agreements that further solidify their monopoly power. As a result, pay-TV providers are frequently dealing with one entity coordinating retransmission negotiations for many separate broadcasters in the same local market.

Not surprisingly, these market developments have led to a dramatic increase in blackouts as the broadcasters leverage the market imbalance into higher prices. Fortunately Congress can do something about it.

On behalf of DISH's 22,000 employees and more than 14 million subscribers across the Nation, I strongly encourage the Committee to seize this opportunity and update the law to reflect marketplace realities and better protect consumers.

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

[The prepared statement of Ms. Minea appears as a submission for the record.]

Chairman LEAHY. Thank you. And also thank you for being so clear on the position you are in on this.

Ms. Burdick, it is nice to see you again.

Marci Burdick is senior vice president for Schurz Communications, supervises three cable companies, eight television stations, and 13 radio stations. She has been in her current role since 2003. She is president of the Television Board of the National Association of Broadcasters, serves on the South Bend Rotary Club, and, of course, the Museum Studebaker, which is most appropriate in South Bend. And, of course, you are no stranger to Capitol Hill, so good to have you here.

STATEMENT OF MARCI BURDICK, SENIOR VICE PRESIDENT OF BROADCASTING, SCHURZ COMMUNICATIONS, INC., MISHAWAKA, INDIANA, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Ms. BURDICK. Thank you, Chairman Leahy, Ranking Member Grassley, and Members of the Committee. Good morning. I am Marci Burdick. I am senior vice president of the Electronic Division for Schurz Communications, a mom-and-pop broadcaster. We own eight television stations in six States. We have operating partnerships with two others. And we own three cable companies and 13 radio stations. I am testifying today on behalf of the National Association of Broadcasters, where I am the TV Board Chair, and our more than 1,300 free, local, over-the-air television station members.

NAB's position on the *STELA* reauthorization is simple: We ask that the Committee take a hard look at whether the distant signal license continues to benefit consumers. The distant signal license exists for the benefit of satellite companies, and it was enacted in a time where technology did not exist for satellite to offer local broadcast TV stations to its subscribers. If you conclude that the reauthorization of this satellite bill is warranted, NAB will support that effort. But any reauthorization should be narrow and not a ve-

hicle for additional reforms that expand the scope of the license or undermine broadcasters' ability to serve our local communities.

In 1988, 26 years ago, CDs outsold vinyl records for the first time, "Rain Man" was at the top of the U.S. box office, and the Dow Jones Industrial Average was trading at just over 2,000 points. Also, 26 years ago, Congress enacted the first satellite television authorization, the *Satellite Home Viewer Act*, as a means to help spur competition for home video delivery against incumbent cable monopolies. Now, two and a half decades later, it is clear that this Committee's work was a resounding success as the satellite companies have evolved into the country's second and third largest pay-TV providers. How times have changed.

The original 1988 *Satellite Home Viewer Act* enabled satellite carriers to retransmit the signals of distant television network stations to satellite owners. This is commonly referred to as "the Section 119 license," and it is the expiring provision of *STELA* that is before the Committee today.

At the time it was enacted, the distant signal license was needed to provide certain unserved households with network programming because satellite companies were unable to provide local broadcasters. The distant signal license served an important purpose in 1988, when the back-yard satellite industry was just getting started, and it served its purpose again when DISH and DIRECTV first launched their small-receiver services in the 1990s. But in 2014, when DISH and DIRECTV have achieved a size and scope that makes them dominant market leaders, the distant signal license has become a vestige of a bygone era, a time before fiber optics, compression technology, and digital.

Congress anticipated that satellite technology would evolve, which is why each of the satellite laws has included a five-year sunset. Today over 98 percent of all U.S. TV households can view their local network affiliates by satellite. Further, as DISH has demonstrated, there are no longer technical reasons preventing any market from receiving their local TV stations. And no public policy justifies treating a satellite subscriber in a local-into-local market as an unserved household eligible to receive distant network signals.

Let us be clear. Any viewer served by a distant signal is deprived of the benefits of locally focused service. A viewer in Vermont or Iowa does not benefit from service from a Denver ABC affiliate instead of his or her local WVNY or KCRG.

Local TV stations deliver high-quality local news, weather, and emergency updates to all Americans. This is exactly as Congress intended. This local service is one that our viewers, your constituents, continue to rely on and one we take great pride in continuing to improve every day. Broadcasters are continuously looking for ways to enhance newscasts, upgrade weather and emergency services, and provide accurate, efficient, and speedy coverage of breaking news events and their aftermath. No other medium provides the depth of coverage we do for locally focused events paired with the most watched entertainment programming on prime-time TV.

In conclusion, if this Committee decides to once again reauthorize the distant signal license, NAB will support that effort. But with that support, we ask you to take a hard look at whether this

license continues to serve consumers and urge you to reject calls from satellite providers to expand the scope of the compulsory Section 119 license in order to give them a leg up in market-based retransmission consent negotiations. Moreover, we ask that you reject any attempt to add wholly unrelated or controversial provisions to a *STELA* bill.

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

[The prepared statement of Ms. Burdick appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much, Ms. Burdick, and it is nice to see you again.

Ms. BURDICK. Thank you.

Chairman LEAHY. Our next witness is Ellen Stutzman. She is the director of research and public policy for the Writers Guild of America, West. In her role with the Writers Guild, she coordinates the development of its public policy agenda. She received her bachelor's from Cornell and then crossed the country to get her MBA from the University of California in Los Angeles.

Ms. Stutzman, we are glad to have you here. Please go ahead.

**STATEMENT OF ELLEN STUTZMAN, DIRECTOR OF RESEARCH
AND PUBLIC POLICY, WRITERS GUILD OF AMERICA, WEST,
INC., LOS ANGELES, CALIFORNIA**

Ms. STUTZMAN. Thank you. Good morning, Chairman Leahy, Senator Grassley, and Members of the Committee. My name is Ellen Stutzman. I am the director of research and public policy for the Writers Guild of America, West. Thank you for the opportunity to testify.

The Guild is a labor organization representing more than 8,000 professional writers of feature film, TV series, local news, and original video programming now available through services like Netflix and Amazon. We support reauthorizing *STELA* because we want broadcast content to be as widely available as possible. A clean reauthorization will preserve access for subscribers while still protecting localism.

Because there has been much discussion about using this process to weaken retransmission in favor of MVPDs, I will focus my comments on why we support the existing rules.

We do so because we want broadcast television to remain a healthy source. Broadcasters also air the most original and highest-rated content. Last season, 96 of the top 100 most-watched programs were on broadcast television. As such, the broadcast networks are responsible for a great deal of the must-have programming that makes an MVPD service attractive. And of key interest to our members and other entertainment workers, broadcast employment standards are the best in the industry.

Broadcasters continue to produce content in a time of increased competition from cable networks and online video providers. Retransmission allows broadcasters to diversify revenue and adapt to a media landscape where they no longer account for all of television viewing.

The existing rules are necessary because four MVPDs control two-thirds of the market. DIRECTV and DISH are the second and

third largest distributors and account for one-third of all MVPD customers. And the proposed Comcast-Time Warner merger, which we oppose, would combine the first and fourth largest MVPDs. Concentration can be even greater at a local level, where a single distributor can account for the majority of subscribers. Retransmission rules help balance the power between broadcasters and MVPDs.

The Guild is concerned with the rising costs of cable, but we cannot deny that television today offers so much more than even a few years ago. We have transitioned from a world where networks controlled the schedule to where content is available whenever and wherever consumers want. Retransmission negotiations include the on-demand rights that make this possible—rights that provide tremendous value to MVPDs.

It is appropriate that broadcasters be fairly compensated for this contribution. Retransmission fees are a small portion of the cable bill, and we do not think weakening the rules is the answer to rising prices.

Many of the proposed changes would simply give more power to distributors. Mandatory interim carriage in the event of a dispute would significantly reduce an MVPD's incentive to engage in good-faith negotiations. Similarly, allowing distant-signal importation during a dispute would sacrifice localism in favor of enhancing MVPD power.

It is unfortunate when viewers lose access to the content our members create because of a blackout, but we recognize that such action is sometimes necessary. The loss of viewers and revenue presented by a signal interruption remains a sufficient incentive for a broadcaster to make a fair deal.

In sum, this is not the appropriate vehicle to begin making selective changes to industry regulations. The Guild would, however, welcome a broader review of the video marketplace. We think changes that include requiring networks to air independent content, expanding the definition of an MVPD to promote more virtual competitors, and changing content bundling practices would do more to produce a vibrant, competitive market.

Simply put, there are better ways to increase competition and address rising costs to consumers than unfairly and asymmetrically gutting the negotiating rights of broadcasters.

Thank you for your attention, and I look forward to your questions.

[The prepared statement of Ms. Stutzman was not available at the time of publication.]

Chairman LEAHY. Well, thank you very much.

And our last witness is John Bergmayer, senior staff attorney at the Washington, DC-based Public Knowledge. He specializes in telecommunications and intellectual property issues. He is a member of the DC and Colorado Bar Associations, received his bachelor's degree from Colorado State University, and his law degree from the University of Colorado Law School.

Mr. Bergmayer, please go ahead, sir.

**STATEMENT OF JOHN BERGMAYER, SENIOR STAFF
ATTORNEY, PUBLIC KNOWLEDGE, WASHINGTON, DC**

Mr. BERGMAYER. Chairman Leahy, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to appear here today.

First, I have a few remarks on issues specific to *STELA*, and then I will present a few broader ideas that will make the video marketplace more competitive and affordable.

Congress must reauthorize *STELA*. This law ensures that satellite television companies can continue to retransmit broadcast stations to their customers, and it is an important building block of video competition. The success of satellite should be a lesson for policymakers about the importance of fostering new models of video competition. Congress should not put the video competition we have already achieved at risk by failing to ensure that satellite viewers can continue to access popular programming without interruption.

Given the importance of *STELA* to maintaining competition in the video marketplace, Congress should reauthorize *STELA* indefinitely and without sunset. There is no reason for Congress to create artificial crises every few years. However, if Congress does choose to reauthorize *STELA* for only a few years, it should tie its expiration to the expiration of other video marketplace rules, such as distant signal rules, basic tier buy-through, and similar provisions. This would ensure that it is not just the satellite industry that has to come to Congress hat in hand on such a regular basis.

STELA reauthorization also presents the opportunity to give customers more reliable and relevant programming with two simple reforms. First, Congress can protect consumers from the increased rate of programming blackouts due to retransmission consent negotiations. Retransmission consent negotiations have been compared to a fight between two elephants where the consumers are the grass. Ideally a gradual phase-out of the retransmission consent regime, coupled with the elimination of compulsory copyright licenses, would simplify the system and eliminate statutory middlemen. If Congress maintains the current system of retransmission consent, it should act to prevent consumers from being trampled by the elephants.

It should direct the FCC to adopt rules prohibiting conduct deemed to violate the good-faith negotiation provision and clarifying existing FCC statutory authority to mandate arbitration and interim carriage. The consumer benefit from these reforms is two-fold:

First, they would prevent blackouts, ensuring that TV viewers are not held hostage as a negotiating tactic between media companies.

Second, they would slow down the rate of increases in carriage fees paid by multichannel video programming distributors, or MVPDs, to broadcasters, in turn slowing the rate at which consumer pay-TV bills increase.

A second simple reform that can be tied to *STELA* would be to allow the FCC to modify designated market areas for broadcast TV carriage on satellite, as it already can with cable. In previous authorizations, Congress has commissioned studies of this so-called

orphan county issue. This time, Congress should empower the FCC to make these corrections.

The success of satellite TV points to the best long-term approach for improving the video marketplace: promoting competition from new providers. Technology has dramatically changed the possibilities for how the public can watch television, and yet many Americans are locked into a television business model that limits competition and choice. Most of the most popular programming is not available except through traditional bundled subscription TV services, and these grow more expensive year after year.

An outdated regulatory structure and a trend toward industry consolidation, such as the Comcast-Time Warner Cable merger, which we likewise oppose, allows incumbents to protect themselves and fend off new competition. It is time to revamp that structure. A video marketplace that served the public interest would align the interests of viewers, creators, and distributors and not set one against the other.

Online video can provide much needed competition in the video marketplace. Congress and the FCC can help it in three easy ways:

First, they can clear away some of the outdated rules that hold back competition and keep prices high. I have mentioned one example in the dysfunctional retransmission consent system. The basic tier buy-through rule that prohibits broadcast stations from being offered a la carte by cable companies is another. The Congress should be cautious not to weaken parts of the statute that benefit consumers, such as Section 629 of the *Communications Act*, which promotes video device competition.

Second, Congress and the FCC can extend the successful policies such as program access to online providers. These policies are designed to mitigate market power by large video providers. They should not be repealed until effective competition develops.

Third, Congress and the FCC can protect online openness. Online video needs an open Internet to thrive. In addition to supporting the FCC and protecting the open interest, Congress should encourage the FCC to examine whether discriminatory data caps hold back online video competition and whether large ISPs are using network interconnection agreements, sometimes called “peering agreements,” anticompetitively. This will increase competition, meaning lower prices, better services, and more control for consumers.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Bergmayer appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much. Let me start off with just a couple questions. Then we will go back and forth here. And maybe, Ms. Stutzman, this is best for you.

Whenever we are considering satellite reauthorization, we talk about the importance of competition in the video marketplace. The original Satellite Home Viewer Act, I think we can all agree, the satellite industry was in its infancy. Now the industry has grown into a legitimate competitor to cable.

How important is a competitive video market to writers and creators of content?

Ms. STUTZMAN. Thank you for your question. It is incredibly important. We currently do not think that the MVPD market is competitive enough. In most markets, consumers can choose between a cable provider and two satellite providers, and we would like to see more competition. But what this amounts to is these companies are powerful gatekeepers, and they can decide what content reaches consumers, and that has a negative impact on the stories that are told, on diverse and independent content, and ultimately, you know, what our members do. So a competitive marketplace is incredibly important.

Chairman LEAHY. Ms. Burdick, I want to talk about rural areas and what might happen in smaller areas, and I know you are aware of that. I am not being parochial, but to use an example, a State like Vermont could easily be dominated by major television markets like New York. How does the system put in place by STELA actually help us to have local content?

Ms. BURDICK. Well, I think—and you will remember this better than I because you were here—the Section 122 license, which requires and preserves localism, has been a wholesale success. DISH is now in every local market in the country. Direct could be. There is no technological barrier. So localism was definitely encouraged and preserved under the Section 122 license, which is now permanent.

Our concern is with the distant signal, and as you rightly point out, when a Los Angeles or a New York television station is imported into Vermont, that localism is undermined when local television stations are not seen. And when local television stations are not seen, their advertisers are not seen. Ninety percent of our revenue comes from advertising, so it diminishes our economics.

Chairman LEAHY. Thank you. And, Ms. Minea, we have heard in other hearings that there are between 1 and 1.5 million customers relying on the distant signal license for broadcast television programming. DISH's testimony today is that it numbers over 1.5 million. Do you know what the exact number or as exact as you can get?

Ms. MINEA. Thank you for your question, Chairman Leahy. I believe the number is approximately 1.56. DISH and DIRECTV, in an effort to answer this question, confidentially submitted some subscriber numbers to the Satellite Industry Association, which then compiled them together to arrive at that number.

Chairman LEAHY. But the number of subscribers served with distant signals is lower than when we enacted the local license in 1999. Is that correct?

Ms. MINEA. Over time, DISH, as you know, has been expanding its local-into-local service so that the need for the distant signal license has diminished, and I could not agree with Ms. Burdick more that localism is important and, wherever possible, you know, we want to provide people with their local broadcast stations.

Nonetheless, the Section 119 distant signal license still serves a very important role for those approximately 1.5 million consumers for, among other things, short markets, which are markets that are typically smaller and rural markets that do not have a local network affiliate. And the distant signal license allows DISH to import

a replacement network station to fill out a complement of Big Four stations for those consumers.

Chairman LEAHY. Some of them are RVs and trucks and things like that. Is that correct?

Ms. MINEA. Yes, Chairman Leahy, the distant signal license also allows a satellite carrier to provide distant network stations to subscribers in recreational vehicles and commercial trucks, subject to some paperwork and verification requirements.

Chairman LEAHY. We are talking about what we are going to do and what House Energy and what Commerce is going to do. Let me ask you this: Would DISH oppose a reauthorization of *STELA* that does not address broader issues related to the video market, such as retransmission consent?

Ms. MINEA. Thanks for your question, and it is an important one. We absolutely want the Section 119 license reauthorized, but we believe that more must be done and can be done. As I noted in my testimony, blackouts of local network station signals during disputes are increasing. There were 12 in 2010 and 127 in 2013. And consumers cannot wait. Blackouts need to be dealt with now, and we believe that the *STELA* reauthorization is extremely the right opportunity to address this issue.

Chairman LEAHY. Thank you. I am sure there are going to be some more questions on this to all of you. As you know, it is going to be a major part of the debate.

Senator Grassley.

Senator GRASSLEY. I am going to ask each of you three questions, and I would like a short answer because, quite frankly, the idea is to summarize some things you have already said in your statement.

The Copyright Office has suggested in their recommendations of Section 302 report phasing out three statutory licenses of Title 17. Now, I have already heard from you about Section 119, so the question of the other three: In your view, is the Section 119 statutory license still necessary in today's marketplace? We will start with you, Ms. Burdick.

Ms. BURDICK. Is Section 119 still—

Senator GRASSLEY. Yes.

Ms. BURDICK. We question whether Section 119 is still necessary when local broadcasters can be seen in all television markets of the country.

Senator GRASSLEY. Ms. Stutzman.

Ms. STUTZMAN. At this point, we are in favor of reauthorizing it because we want the content to be available where it is not.

Senator GRASSLEY. Okay.

Mr. BERGMAYER. Senator, in general, we are in favor of phasing out compulsory licenses. It just has to be done very cautiously, according to a timetable, and we need to avoid the situation where an MVPD might be double paying because it does not have a compulsory license for the copyright and yet still has to negotiate for retransmission consent. And that applies to all the cable and satellite compulsory licenses.

Senator GRASSLEY. Okay. Then for all of you, starting with Alison, if Congress were not to reauthorize *STELA*, how would this affect consumers? What sort of disruptions, if any, are likely to

occur if the three statutory licenses were repealed? And if that happened, what are the benefits or harms with respect to letting the law expire?

Ms. MINEA. That is a great question. If I could just clarify, are you asking specifically with regard to Section 119 or with respect to other copyright—

Senator GRASSLEY. Now it is more general. So if I misinterpreted your answer to Senator Leahy and you want to answer what I previously had asked, I would like to hear your view on the question of whether or not Section 119 is still necessary in today's marketplace.

Ms. MINEA. Thank you, and I share your concern for making sure that consumers are not disrupted as laws are updated.

We do believe that the Section 119 license continues to play an important role, and statutory licensing in general, such as the 122 license, I think continues to be necessary to ensure that consumers get local broadcast stations.

There may be possibilities for overhauling the entire system and taking away the statutory licenses, but that would be a very complex process. There is a thicket of government regulations that govern the system, so we would definitely urge caution in looking at whether or not the statutory licenses could be eliminated.

Senator GRASSLEY. Ms. Burdick, on my second question.

Ms. BURDICK. I would agree with both ends of the table that eliminating all copyright would be exceptionally complex. I worry as a local broadcaster—I try to envision a day where I would have to go out and negotiate all of those rights as a local broadcaster. But since Section 119 is the only provision that is sunseting and the distant signal importation, I would say that in terms of the need for that, only DISH and Direct know, of that 1.5 million number that we have all heard, how many of those customers are grandfathered and actually could be receiving local-into-local. So we really do not know. Only they know.

Senator GRASSLEY. So disruption would be the answer, the effect on the consumer that I was kind of concentrating my question on.

Ms. BURDICK. I think the disruptions would be minimal and maybe even less than the 1.5 million.

Senator GRASSLEY. Okay. Ms. Stutzman.

Ms. STUTZMAN. Thank you. We think the statutory licenses could be retired, and there might possibly be a marketplace solution to negotiating the copyright. And we are not asking for that at this time, but certainly if retransmission consent rule changes were contemplated, we think that might be an appropriate consideration. Thank you.

Senator GRASSLEY. Mr. Bergmayer, do you have something to add?

Mr. BERGMAYER. Sure. Even if you accept the premise that the number of customers that would be disrupted is relatively small, I would just look to where those customers are located. They would be predominantly rural and perhaps low-income customers that I think Congress should take extra care to protect.

Senator GRASSLEY. This will have to be my last question. Time is running out. Do you have a position on the length of *STELA* reauthorization if Congress decides to extend it?

Ms. MINEA. Senator Grassley, ideally we think that the Section 119 license should be reauthorized permanently. Failing that, we would like it reauthorized for as long as possible.

Senator GRASSLEY. Ms. Burdick.

Ms. BURDICK. We would absolutely disagree that a distant signal law should be made permanent, and there is less of a need every single day. If this Committee thinks it needs to be reauthorized for five years, we would support that.

Chairman LEAHY. Okay.

Ms. STUTZMAN. We would also support a five-year reauthorization.

Senator GRASSLEY. Mr. Bergmayer.

Mr. BERGMAYER. I think one approach that Congress could take is tie its expiration to expiration of provisions from around the industry so different people's oxes get gored.

Senator GRASSLEY. I am done with my presentation today, but I will have questions for each of you, and quite a few questions for DISH, if you would be willing to answer them in writing.

Ms. MINEA. Certainly. Thank you.

[The questions of Senator Grassley appear as submissions for the record.]

Senator GRASSLEY. Thank you.

Chairman LEAHY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I always like to follow a statement about goring oxes when I am going to ask questions.

[Laughter.]

Senator KLOBUCHAR. Thank you for holding this important hearing. Satellite service is really important, especially in the rural part of Senator Franken's and my State. It is the only way that many of the 650,000 satellite subscribers in our State can get access to video services.

I think we have seen subsequent updates to this law that give an additional boost to competition by ensuring satellite competitors could offer local broadcast channels to their customers. I can tell you that local broadcasting is an important part of life in America. In our State it is the way that many people actually get updates on floods, problems that occur in the local areas, tornadoes. It has been actually not just key for our local programming and bringing people together; it has also been key for some of our emergencies that we have had in our State over the years.

So I want to start here with you, Ms. Minea. Is reauthorization of this Act—I think you have made the case—still necessary? And what changes would you like to see?

Ms. MINEA. Thanks for your question, Senator Klobuchar. So, yes, the Section 119 license continues to be necessary. Minnesota actually has a short market. Mankato, Minnesota, which does not have an ABC or an NBC affiliate, so one example of something that would go away if 119 were not reauthorized is our inability to import an ABC and an NBC from the Twin Cities market into Mankato.

More broadly, as I said, we believe that the reauthorization of *STELA* is an important opportunity to fix the problem of blackouts. Consumers cannot wait for reforms that may come in the future.

This is now the time to stop this now. So as I said in my testimony, we propose a standstill and baseball-style arbitration as our first choice to deal with the problem of blackouts now.

Senator KLOBUCHAR. Okay. Ms. Burdick, one of our goals here was to promote localism. Do you think that it has done its job? And what more can be done to get at Congress' intent to promote localism?

Ms. BURDICK. I think anything you can do to incentivize all providers to be in all local markets would be a positive thing. As DISH has demonstrated, they are, in fact, in all 210 markets. If that can be incentivized some other way, that would be a good thing, providing choice for consumers and competition.

Senator KLOBUCHAR. As you all know, this Committee is soon going to be holding a hearing on the merger between Comcast and Time Warner Cable. This combination has the potential for profound impact on the competitive landscape.

Ms. Minea, what is DISH's view on the merger? And are there any concerns from your standpoint that the Committee should be aware of as we consider the impact the merger will have?

Ms. MINEA. Senator Klobuchar, we have read those news reports, and as far as we know, there are not any applications before the FCC. At this point we just have not had an opportunity to develop a position, so I am not able to comment on it.

Senator KLOBUCHAR. Okay. Does anyone else want to comment on it? I just thought you would. I do not know why I thought you would.

[Laughter.]

Senator KLOBUCHAR. You want to gore another ox, Mr. Bergmayer, please.

Mr. BERGMAYER. Yes, I believe that the Comcast-Time Warner merger would be disastrous for programmers, for independent creators, and for TV viewers. It would raise prices. It would create a single gatekeeper for programming in broadband of almost unprecedented power, in addition to the vertical integration harms which just happened due to Comcast's unfortunate acquisition of NBCUniversal. So in that hearing, we are looking forward to hearing your views on the dangers of this merger.

Senator KLOBUCHAR. Back to some satellite. Minnesota, as we know—I see the satellite dishes all over our State, especially in the rural areas. There is certainly a higher percentage of rural homes that have satellite. Would that be true, Ms. Minea?

Ms. MINEA. Senator Klobuchar, I want to make sure I understand your question. Are you asking specifically about rural customers in Minnesota relative to other States?

Senator KLOBUCHAR. Yes—no, no. I am asking about rural areas having more of them than in urban areas.

Ms. MINEA. Of course. Yes, rural customers disproportionately depend upon satellite. That was true in the early days of satellite, and it continues to be true today. Indeed, that is why the expiration of the Section 119 license would have a disproportionately larger effect on rural subscribers to DISH and DIRECTV, because in many cases, it is rural subscribers who live in short markets and rural subscribers who live outside of the over-the-air footprint of broadcasters.

Senator KLOBUCHAR. Ms. Burdick, during the last *STELA* reauthorization—I feel that I have been here for not that long, but I was here for that, and I am also on the Commerce Committee, so I live and breathe *STELA*—there were concerns about the way that DMAs were defined for local broadcasters and the issue of orphan counties. This is an issue I spoke about during the Judiciary markup and in the Commerce Committee consideration of *STELA* five years ago.

Can you talk about how DMAs are still important to local advertising and the economies and what the status is of that?

Ms. BURDICK. As I mentioned earlier, 90 percent of our revenue comes from advertising, and the fact is that the DMAs were determined where the major population centers were concentrated. And so that is still extremely important to us.

But as it relates to orphan counties, there are provisions currently available to solve many of those issues. We have been involved with several of them. And as an example, I live—my front yard is in Michigan. My back yard is in Indiana. So while I vote in Congressman Upton's district, I am served by South Bend television. The MVPD in my area reserves a channel for unduplicated local programming, so the Michigan broadcaster with its local news and information can be on the air while the South Bend CBS affiliate is protected with its syndicated and network exclusive programming. So there are solutions currently available to solve many of those issues.

Senator KLOBUCHAR. Okay. Thank you very much, and I will put some questions on the record for you, Ms. Stutzman. Thank you.

[The questions of Senator Klobuchar appear as submissions for the record.]

Chairman LEAHY. Thank you very much.

Senator HATCH.

Senator HATCH. Well, I want to thank you all for coming today. Thank you, Mr. Chairman. My thanks to all of you for coming here today to help us learn about some of these outstanding issues, both those that are directly before us in deciding whether to reauthorize the *Satellite and Television Extension and Localism Act of 2010*, or *STELA*, as well as some of the broader reforms that have been proposed.

Now, let me just ask you this, Ms. Burdick—and we welcome you especially. I understand that studios own the content and should be able to control how it is being used, but we have to be realistic about trends toward streaming television online.

During a dispute between a cable or satellite provider and a broadcaster, can online viewers who specifically choose not to have satellite or cable, can they also be affected?

Ms. BURDICK. So there are many ways in which content is provided online, and as a local broadcaster, I can control my content online in a different way than I can offer network or syndicated programming online. You know, I think you are probably speaking of the CBS issue with Time Warner recently, and I think what was lost in all of that is that those agreements went back to 2008, before the Internet was ubiquitous. And the outcome of that was that a holistic agreement was reached in which Internet and video

rights were resolved. And so the retransmission consent discussion is far more robust than just video rights.

Senator HATCH. All right. Ms. Minea, let me ask you this question: As you know, blackouts are related to the issue of retransmission consent, and I am trying to understand whether there is a need for reform here or not. On the one hand, a DIRECTV executive testified in June that, "Between 2010 and 2015, DIRECTV's retransmission consent costs will increase 600 percent per subscriber."

On the other hand, Ms. Burdick has testified that, "While only two cents of every dollar of cable video revenue goes to retransmission consent, nearly 20 cents goes to cable programming fees."

Now, Ms. Minea, I realize that I quoted a figure from DIRECTV, but assuming that DISH is facing similar increases, when we talk about a number like 600 percent, what are we talking about in dollars and cents? And how much money per subscriber are we talking about here?

Ms. MINEA. Thanks for your question, Senator Hatch. The particular breakdown of the numbers is not something that we have released for confidentiality reasons. What I can tell you is that satellite TV is part of a very competitive market for pay-TV providers. We have telephone companies, we have cable companies, we have DIRECTV against whom we compete, so we have to fight like crazy to keep our costs down. Programming costs generally are our biggest cost center, and when we see broadcast stations who are asking for 400-percent increases for our contract renewal, it really hurts. And at some point we have to start passing along some of those costs to our subscribers. We do not believe it is sustainable, and that is why we think that reform is needed.

Senator HATCH. Ms. Burdick, could you comment on some of these increases?

Ms. BURDICK. Thank you. Math was never my strong suit, but when you start at zero, it is pretty easy to get to 400 percent pretty darn quickly.

I am negotiating against a company represented by Ms. Minea to my right that said to me at the outset of the negotiation, "I do not care if you are dark because I churn more customers in a year than your company represents." And you know what? That is the truth.

Broadcasters are never off. We always are on the air, local television broadcasters. We may have a contractual dispute from time to time with DISH or DIRECTV, but the only thing preventing a customer from moving to another provider is their late fee and termination requirements that one customer told me—because I take all those calls from customers. He said, "It will cost me \$429 to switch." The local broadcasters are always on.

Senator HATCH. Well, let me just ask you this: While retransmission consent may be beyond the scope of our reauthorization of *STELA*, I would like to focus on a proposal regarding joint sales agreements. Could you tell us how joint sales agreements are helpful for broadcasters?

Ms. BURDICK. Sure. Let me speak from our own experience. We have three. We have one in Wichita, Kansas, where we own the dominant CBS station, and we helped Entravision enter the mar-

ket faster with a shared service and a joint sales arrangement. The net effect of that is we are providing the only local news broadcasting in Spanish in the State of Kansas, something they could not afford on their own. We helped them lower their costs.

The other side of the equation is in Augusta, Georgia, where I had an NBC affiliate, the only one that our company owned that was not a leader in its market, and for 12 years we—after launching local news, we sustained losses every year for 12 years. And when the recession hit and the remainder of our company could not prop it up, we had two choices: Go out of the local news business because that is where the bulk of our expense is, or enter into an agreement where we could share costs with other broadcasters. And we did that with Media General, preserving a local broadcaster in the market.

Senator HATCH. Well, thank you. My time is up, but let me just give you a chance, Ms. Minea, to respond. Why do cable and satellite producers see them as being anticompetitive?

Ms. MINEA. Thanks so much for your question, Senator Hatch, and if you would indulge me, I just want to respond briefly to what Ms. Burdick said.

The way that we see it is that blackouts are 100 percent the fault of the broadcaster. We never, ever want to take the signal down. That is why we are asking for a standstill. Yes, it may take time for us to hammer out the deal, but consumers should never lose their signal. And in some cases, the signal may be free over the air, but consumers should not have to be put in the position of choosing which provider to switch to. They may have chosen DISH because we have the lowest price and the best technology. They should not even have to be in a position where they have to switch. Blackouts should never happen.

And as to your other question, Senator Hatch, in terms of these joint sales agreements, there are lots of different sorts of sidecar agreements. An instance where two broadcasters need to share a news helicopter to save costs, we are not concerned about that. We can absolutely see why that might make sense.

Our concern is really just focused on those agreements under which separately owned broadcasters get together and negotiate jointly for retransmission consent. And, again, this all ties back to blackouts. Three stations negotiate jointly. That means if we cannot reach a deal by the deadline, that is three stations that are blacked out rather than just one. So, again, it is an even greater impact to the customer than if we were negotiating with just one at a time. Thank you.

Senator HATCH. Thanks, Mr. Chairman.

Chairman LEAHY. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, for calling this hearing, and thank you all for being here. This hearing marks the beginning of a process that will result in more competition for consumers, I hope. Congress has passing satellite TV laws since the 1980s, but the cable industry remains the dominant force in the marketplace. I believe that the cable industry could become even more powerful if Comcast is allowed to acquire Time Warner Cable. I strongly oppose this acquisition, and it is a good reminder that consumers need more competition from satellite TV.

I know that the satellite companies, the cable industry, and the broadcasters all have their priorities in this bill, but one thing is clear: that the best interests of the consumers must guide this process. If Congress does not act before this law expires, many people could wake up on January 1st without access to local stations that they rely on for news and programming. And Senator Klobuchar is absolutely right. They are very useful in emergencies, and we have had a lot of school closings this winter.

As I said, consumers have to be our focus, and that is why I am so concerned about this Comcast-Time Warner Cable acquisition. I believe it is a terrible deal for consumers.

Ms. Stutzman, I am a member of the Writers Guild, so I am very sympathetic to anything you say.

[Laughter.]

Senator FRANKEN. You recently submitted a filing urging the FCC to reject this deal. Can you explain why you did this and what the acquisition could mean for both satellite and cable customers?

Ms. STUTZMAN. Thank you for your question, Senator. We share your concern and appreciate how vocal you have been about the merger.

We think the FCC should reject the deal because it is not in the public interest, it is anticompetitive, and that is a bad deal for content creators as well as consumers.

Comcast is already the largest cable and Internet service provider, and allowing them to get bigger by acquiring eight or 10 million customers will make them too powerful of a content gatekeeper.

On the cable side, they can use this to cut affiliate fees paid to broadcast and cable networks, which reduces the money available to invest in content, which harms viewers. The company will also control at least one-third of the broadband Internet market, and this is where all of the new video competition is coming from. And we fear that they will use their power in that market to steer the direction away from new providers like Amazon and Netflix to favor their own content, which obviously limits what consumers will be able to see.

And the Internet, you know, the broadband Internet market is even less competitive than the cable market. Most people really have a choice of one or two Internet providers when you are talking about high-speed Internet that could be used to watch video.

And so we just think this will limit choice. It will probably increase prices, and it will harm the content that consumers can see.

Senator FRANKEN. And, Mr. Bergmayer, you talked about peering agreements, and I think when we talk about an open Internet, we want to be talking about that.

This is about blackouts again. There is a basic dispute here, I guess, and so I will—Ms. Minea, you have your position, and, Ms. Stutzman, you have yours. And anybody can weigh in on this. Can anybody here get to the nub of the difference? And how can we avoid blackouts for consumers? But what is the disagreement here? Go ahead.

Mr. BERGMAYER. Senator, I think everyone at this table agrees that broadcasters ought to be paid a fair value for their content. I think the disagreement is about whether basically pulling the sig-

nal during the course of a contract dispute is a legitimate negotiating tactic or not. I happen to think that it is not, especially because the way that TV works, you have these must-see events that happen periodically, and I do not think it is a coincidence that very often these disputes are timed to happen near those events, which I think leads to an unfair situation. But ultimately I am not saying that I think that cable or satellite ought to get access to this content for free.

Senator FRANKEN. I know that Ms. Minea talked about a baseball sort of arbitration, a way of resolving this. Ms. Stutzman, Ms. Burdick, do you have opinions on that?

Ms. BURDICK. Yes, arbitration will not resolve blackouts any more quickly. It will lengthen the process, and it will add expense to local broadcasters like me. I do not have a phalanx of attorneys who negotiate these deals 24/7, like the bigger MVPDs.

I would like to correct one thing John said. Both parties in a contract negotiation determine its length of time. So to suggest that broadcasters are somehow pulling a signal before a must-see event is not correct. Both parties agree to the length of terms, and they both know what that is.

Ms. MINEA. May I briefly respond?

Senator FRANKEN. I would say yes.

[Laughter.]

Chairman LEAHY. I will say yes, too, but votes have started, and we are going to have to wrap up all of this in seven minutes.

Senator FRANKEN. Really?

Chairman LEAHY. But go ahead.

Senator FRANKEN. Okay. Well, I actually—

Chairman LEAHY. And we have to have Senator Flake have a chance, but go ahead and respond.

Ms. MINEA. I will be very brief. We do not want blackouts, and the reason we have proposed baseball-style arbitration in conjunction with the standstill is there will be no blackout. Consumers will not be impacted. They will not lose their programming, and the arbitration will produce a fair market prices, because both sides will have an incentive to submit their best offer, and the arbitrator can choose. But in the meantime, consumers are not harmed.

Ms. STUTZMAN. But content continues to be available over the air, and I really think that needs to be promoted to consumers because most households can receive broadcast programming using a digital antenna. And so it remains there rather than giving more power to an MVPD in a negotiation.

Chairman LEAHY. Thank you.

Senator FRANKEN. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Flake.

Senator FLAKE. Thank you. I apologize if I am plowing old ground here, and I apologize for not being here. But if you can just tell me—and let us start with Ms. Minea—the structure that we have, the retransmission structure, started in 1992 with the goal of maintaining or enhancing local content, do you feel that it has achieved that goal, the structure that we have?

Ms. MINEA. Thanks for the question, Senator Flake. Yes, in the sense that local broadcast stations are more available now on DISH Network than they ever have been before. We offer local broadcast

stations in all 210 markets. So the current statutory framework has allowed us to do that, and all I would say is that, unfortunately, because of the increased competition among pay-TV providers, meanwhile there is only one NBC affiliate, for example, per market, it is not a level playing field. That is what is causing the blackouts.

So we believe in localism, we believe it is working, and we just think that *STELA* could do more to protect consumers.

Senator FLAKE. Okay. Ms. Burdick.

Ms. BURDICK. So it was 1992 that broadcasters were allowed to negotiate for their signal. It was really not until 2006 that any broadcaster was paid, and that really was a benefit of satellite increasing its presence in each of the markets so there was a competitor.

Retransmission consent is working, although while broadcast television accounts for about 40 percent of the viewing, we get about six to seven percent of the revenue. So we still have a ways to go in trying to negotiate a fair value for the product we bring, investing back into local communities with local news, weather, and sports.

Senator FLAKE. All right. Ms. Stutzman.

Ms. STUTZMAN. I think retransmission consent negotiations are very important because broadcast stations operate in a television landscape where there are hundreds of cable channels that consumers can choose from, and those cable networks have a dual revenue stream. And so this is really broadcast adapting to that model, diversifying their revenue sources, and keeping broadcast healthy. So we think it is very important.

Senator FLAKE. All right.

Mr. BERGMAYER. And I think a lot of aspects of the 1992 *Cable Act* were successful. However, I think that the general approach that Congress took in 1976 of first creating the cable compulsory license and then, fast-forward, creating a new right that is sort of layered on top of that, so we have the simultaneous existence of copyrights and then a broadcaster has a signal right and that is where the negotiation takes place, is just a little too complicated. That is why we have advocated simplifying the system.

Senator FLAKE. Thank you, Mr. Chairman.

Chairman LEAHY. If there are no further questions, then I would thank you all. But I know that some will have questions for the record, and I would ask you to return them as quickly as you can.

Thank you all very much for being here.

[Whereupon, at 11:06 a.m., the Committee was adjourned.]

A P P E N D I X

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary

On

“Reauthorization of the Satellite Television Extension and Localism Act”

Wednesday, March 26, 2014
Dirksen Senate Office Building, Room 226
10:00 a.m.

Alison Minea
Director and Senior Counsel of Regulatory Affairs
DISH Network
Washington, DC

Marci Burdick
Senior Vice President of Broadcasting
Schurz Communications, Inc.
Mishawaka, IN

Ellen Stutzman
Director of Research and Public Policy
Writers Guild of America, West
Los Angeles, CA

John Bergmayer
Senior Staff Attorney
Public Knowledge
Washington, DC

PREPARED STATEMENT OF CHAIRMAN PATRICK LEAHY

**Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing on “Reauthorization of the Satellite Television Extension and Localism Act”
March 26, 2014**

Nearly five years ago, television broadcasters turned off their analog signals and transitioned to digital, heralding a new era of television for the 21st Century. Since that time, we have seen the video market change in exciting ways. Online platforms like Netflix and Amazon allow consumers to watch entire seasons of television shows on demand, and are even becoming destinations for original programming.

We have seen rapid innovation like this over the years, from the birth of the cable industry in the 1970s to the evolution of the satellite industry in the 1980s. These new technologies brought with them new challenges and opportunities for content creators and consumers alike. It has been almost 30 years since Congress passed the Satellite Home Viewer Act to address the important challenge of how to marry these new platforms with broadcast television. Today, we consider the most recent iteration of that law – the Satellite Television Extension and Localism Act – or “STELA.”

STELA grants the satellite industry a compulsory copyright license to retransmit distant broadcast television content to consumers who are unable to receive a signal over-the-air. This license, which is set to expire at the end of the year, was for many years the only way the satellite industry could provide broadcast television content to consumers. Broadcast television is most valuable, however, when it is appropriately tailored to local markets and provides local news, weather, and sports that consumers want to see. That is why we worked in 1999 to create a new, permanent license to allow for the retransmission of local content by satellite carriers into local markets.

The resulting combination of local television content and satellite has helped to strengthen the local focus of American broadcasting. It has also helped put two major, nationwide distribution platforms on an equal footing with the cable industry. DISH Network and DirecTV help to give consumers more choice, particularly in rural areas like Vermont where cable is not always available. Local content means a lot to Vermonters, which is why I have worked to ensure that every single satellite subscriber in the state has access to local news and weather.

In 2010, Congress made the decision to once again extend STELA’s distant signal license for another five years. In doing so, we updated all three of the compulsory copyright licenses for the digital era. We also made some changes to further reduce reliance on the distant signal license, which has been an important goal of these reauthorizations since the local-into-local license was established.

I recognize that not everyone sees a need for us to reauthorize this license. Compulsory copyright licenses inherently restrict the rights of content holders to negotiate on market-based terms. And retransmissions of out-of-market broadcast stations dilute the value of local stations. I share some of these concerns, and I look forward to a time when Congress can let this license lapse because virtually all consumers are being served by local stations. I do not think we have reached that moment yet, however, and I intend to move forward with bipartisan legislation this year to reauthorize STELA. The input from stakeholders at this hearing today is an important first step in that process.

As we move forward, I plan on working closely with Senator Grassley, as well as Chairman Rockefeller and our counterparts in the House. A STELA reauthorization should not be partisan or controversial – it should be a moment for the Senate to come together. In the past, I have worked as both Chairman and Ranking Member with Senator Hatch, Senator Sessions, and Senator Specter on satellite reauthorizations. That is the spirit in which I will be approaching our work this year.

I thank the witnesses for appearing today and I look forward to hearing your testimony.

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PREPARED STATEMENT OF RANKING MEMBER CHUCK GRASSLEY

*Insert for
Chuck Grassley*

**SENATOR GRASSLEY'S OPENING STATEMENT, SENATE
JUDICIARY COMMITTEE HEARING "REAUTHORIZATION OF
THE SATELLITE TELEVISION EXTENSION AND LOCALISM
ACT," MARCH 26, 2014**

Thank you, Mr. Chairman. I appreciate your holding this hearing, and I also thank the witnesses for their testimony today.

The Satellite Television Extension and Localism Act, also known as STELA, is an important piece of legislation. Among other things, STELA provides satellite operators with a compulsory copyright license to retransmit distant over-the-air television signals to American families who otherwise wouldn't have access to their current television programming. Given the fact that this license is set to expire in December, if Congress doesn't act to reauthorize STELA, as many as 1.5 million unserved American households could be deprived of the news they rely on and the television programming they presently enjoy.

The Satellite Home Viewer Act first established the distant signal license in 1998. This law was intended, with the Cable Act, to foster competition and protect consumers. Since then, we've always come together to enact satellite reauthorization legislation that both Democrats and Republicans could agree on.

I know that there are a number of other issues being discussed, many dealing with statutory provisions governing the broadcast industry that lie primarily within the jurisdiction of the Commerce Committee. I believe that all these issues warrant careful study and consideration, and I'm glad that we're beginning our discussion of them.

There has been a tremendous amount of innovation and technological advancement in the communications industry. Markets have evolved and the communications landscape has changed dramatically since these laws first were enacted. So, it may be more productive to look into these issues within the context of a broader review of the nation's communications laws and our effort to update



those laws to bring them in line with the ever-transforming and vibrant communications marketplace.

In Iowa, we face both urban and rural communications issues. In rural Iowa, some of my constituents are faced with the challenge of not being able to receive over-the-air broadcast signals. Broadband access also can be a challenge in these rural areas. It's important that the challenges facing rural America aren't left out of these broader discussions.

My hope is that we'll be able to continue in the tradition of bipartisanship by coming together to pass a consensus STELA reauthorization bill before time runs out at the end of the year. I look forward to working with the Chairman on this legislative effort.

PREPARED STATEMENT OF ALISON A. MINEA



Testimony of

Alison A. Minea
Director and Senior Counsel of Regulatory Affairs
DISH Network L.L.C.

on

**“Reauthorization of the Satellite Television
Extension and Localism Act”**

before the

United States Senate Committee on the Judiciary

March 26, 2014

Chairman Leahy, Ranking Member Grassley and Members of the Committee, I appreciate the opportunity to testify today. My name is Alison Minea, and I am the Director and Senior Counsel of Regulatory Affairs for DISH Network, the nation's third largest pay-TV provider and the only provider of local television service in all 210 markets.

In addition to reauthorizing STELA, we believe that Congress should take this opportunity to fix an escalating problem that negatively impacts consumers across the United States: local channel blackouts during retransmission consent disputes. Failing to end blackouts as part of STELA will only harm consumers, and this problem is on the rise: there were 12 blackouts in 2010 and a record-setting 127 blackouts in 2013.

We suggest two possible solutions to end blackouts and ensure that consumers have continuous access to network programming from the pay-TV provider of their choice.

First – during a retransmission consent impasse, a mandatory “standstill” should be in place to ensure that the broadcast signal stays up. If the parties are unable to agree upon carriage terms, they should proceed to so-called “baseball” arbitration, where a neutral arbitrator chosen by the parties evaluates each party's best offer and selects the one that most accurately reflects a fair market price. In all cases, the final agreed-upon rate would apply retroactively, ensuring that the

broadcaster is fairly compensated. Most important: the consumer would remain unharmed.

Second – a more limited solution would allow pay-TV providers to import a distant network station when the local network affiliate withholds its signal during a retransmission consent dispute. This solution would still leave consumers without access to certain local programming, including local news, sports and weather information, but it would at least provide network programming content.

For more details on these proposed solutions, as well as other input on today's video marketplace, please find attached as Appendix A our March 17, 2014 response to the Senate Committee on Commerce, Science and Transportation's February 24, 2014 letter regarding STELA reauthorization.

The television landscape has changed dramatically since the Cable Act of 1992 was enacted, establishing the current system of retransmission consent. In those early days, the playing field was closer to level. The broadcaster negotiated with a single cable company that was likely the only pay-TV provider in the same market. Not reaching a retransmission consent agreement was mutually assured destruction for both sides of the negotiating table. Today, by contrast, cable operators no longer enjoy local monopolies. Unlike 1992, broadcasters can now pit potential suitors against one another, all to the detriment of consumers. This is *not* a free market.

Meanwhile, “mom and pop” local broadcasters continue to disappear, as broadcaster conglomeration grows more common. The last few months of 2013 alone saw Gannett’s acquisition of Belo, Tribune’s acquisition of Local TV, and Sinclair Broadcasting’s emergence as the nation’s largest local broadcaster, with 167 broadcast stations under its empire. And just last week, Media General announced that it would acquire LIN Media, creating the second largest local television broadcasting company and further consolidating the industry. The remaining separately-owned broadcasters increasingly use “sidecar” agreements under which they jointly negotiate retransmission consent. Pay-TV providers are frequently dealing with a single entity coordinating retransmission consent negotiations for multiple separately-owned broadcasters in the *same* local market.

Not surprisingly, these market developments have coincided with the exponential increase in blackouts as the broadcasters attempt to leverage this market imbalance into higher retransmission consent fees. In the words of industry analyst Craig Moffett, retransmission consent disputes, “... pit what is essentially a government-sanctioned monopoly content provider against a distributor for which there are readily identifiable substitutes. Of course the broadcaster will eventually win.”

Should STELA be reauthorized? Of course. If not, over 1.5 million customers, mostly in rural areas, will lose one or more of the Big 4 network

channels. But merely extending the Act for another five years is not enough. A so-called “clean” reauthorization of the satellite home viewer law would ignore the satellite home viewer’s number one problem – the increasing threat of blackouts. The draft legislation developed by Chairmen Upton and Walden in the House is an excellent start. But more is necessary to accomplish the fundamental goal of ensuring that broadcast programming fulfills its public interest mandate and always stays up for consumers.

On behalf of DISH’s 22,000 employees and more than 14 million subscribers across the nation, I strongly encourage the Committee to seize this opportunity and update the law to reflect marketplace realities and better protect the consumer.

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

APPENDIX A



March 17, 2014

United States Senate
Committee on Commerce, Science, and Transportation
Washington, DC 20510-6125

Delivered by email to: STELA_Comments@commerce.senate.gov

Dear Chairman Rockefeller, Ranking Member Thune, Chairman Pryor, and Ranking Member Wicker:

On behalf of our two companies, attached please find responses to the Committee's questions concerning STELA reauthorization. Should you have any questions concerning this document, please do not hesitate to contact us.

Respectfully Submitted,

/s/
Andrew Reinsdorf
Senior Vice President
Government Affairs
DIRECTV, LLC

/s/
Jeffrey Blum
Senior Vice President and
Deputy General Counsel
DISH NETWORK L.L.C.

INTRODUCTION AND SUMMARY

DIRECTV, LLC (“DIRECTV”) and DISH Network L.L.C. (“DISH”) respectfully submit these joint responses to the Committee’s written questions. We applaud the Committee’s bipartisan efforts to establish a broad and thoughtful discussion of pro-competition, pro-consumer reforms in concert with the reauthorization of the Satellite Television Extension and Localism Act of 2010 (“STELA”).

Together, our two companies serve over 34 million pay-TV subscribers and are the second and third-largest pay-TV companies in the U.S. We also are the only respondents that: (1) serve every community in the United States, including those in the most rural areas; (2) in the case of DISH, carry every single eligible local broadcaster in all 210 designated market areas (“DMAs”); and (3) rely directly on STELA to provide service to our subscribers.

In our answers to the Committee’s questions, we call upon Congress to:

- Stop local programming blackouts;
- Put an end to drastic retransmission consent rate hikes; and
- Ensure that the most rural households in the U.S. have access to the same network programming as urban and suburban households.

In support of these principles, we advocate specific measures to amend current law, including:

- Authorizing the FCC to impose baseball-style arbitration and a standstill so the programming stays up while the parties arbitrate their dispute; or, alternatively, permitting the importation of distant signals during retransmission consent disputes.
- Stipulating specific, anti-consumer actions that would fail the “good faith” requirement.
- Prohibiting joint sales agreements and other collusive methods used by broadcasters.
- Updating the definition of “unserved household” to reflect how Americans actually receive over-the-air broadcast signals today, as opposed to how they did decades ago.
- Prohibiting broadcaster blocking of online content to the broadband subscribers of a multichannel video programming distributor (“MVPD”) during a dispute with that MVPD.
- Encouraging the unbundling of broadcast programming from other programming, both at the wholesale and retail levels.
- Permanently reauthorizing STELA.

The time for action is now. The current system of retransmission consent, established by Congress over 20 years ago in the 1992 Cable Act, gives each “Big Four” broadcast station a monopoly in its local market. While it may have been a fair negotiation when it was one cable company against one broadcaster, today the local broadcaster holds all of the cards and plays multiple MVPDs off of each other in any given market. Ultimately, it is the American consumer who suffers.

Broadcasters abuse their retransmission consent rights during negotiations, using brinksmanship tactics and blackouts to extract ever-greater fees from MVPDs, with no end in sight. Blackouts happen when companies like DIRECTV and DISH try to fight back and reject broadcasters’ unreasonable price demands, which often involve rate increases of several hundred percent. Retransmission consent fees raised \$758 million for broadcasters in 2009. They hit \$3.3 billion in 2013. They are expected to reach \$7.6 billion in 2019.

In 2013, there were 127 broadcaster blackouts, compared with 96 blackouts in 2012, 51 blackouts in 2011, and 12 blackouts in 2010. Thus, the number of blackouts increased over *one thousand percent* since Congress passed STELA. These numbers do not even include all of the near-misses, which are equally disruptive to the consumer experience. Compounding the injury, the timing of many blackouts coincides with marquee events like the World Series or the Oscars.

It is time for Congress to act, and STELA reauthorization presents the perfect vehicle. Every five years Congress updates the law to account for changes in the marketplace, technology, and consumer demand. It should continue to make updates and improvements to the law that will benefit consumers.

I. STELA-Specific Issues:

(1) Should Congress reauthorize STELA? If so, for how long?

Yes, permanently.

More than 1.5 million satellite subscribers—many of them in the most rural areas of the country—depend on these provisions in order to receive distant signals. Were Congress not to reauthorize STELA, these subscribers would lose access to TV service that most Americans take for granted.

Some have suggested that private licensing could take the place of STELA. That may be true under the comprehensive deregulatory approach championed in the Senate last Congress by then-Senator Jim DeMint (R-SC) and Rep. Scalise (R-LA), which would eliminate nearly all regulation of broadcast television, including the enormous regulatory benefits enjoyed by broadcasters. But nobody seriously contends that, if Congress were to eliminate STELA’s *distant signal*

provisions only, private licensing would replace them. Even NAB, which has opposed these provisions for decades, does not believe this.¹

The distant signal provisions must be renewed by Congress in order for a largely rural segment of the American population to receive the same broadcast network programming as the rest of the American populace. In other words, were Congress not to renew STELA, distant signals would disappear, depriving rural Americans of a lifeline to broadcast network programming and eliminating any chance of watching a network station in “short” markets, which do not have a station affiliated with that network.

A permanent reauthorization would establish parity between satellite and cable, since the cable statutory license does not expire. We see no reason why satellite subscribers should live with the threat of losing their service when cable subscribers do not. Barring permanent reauthorization, however, Congress should extend STELA for as long as possible.

(2) Members of the Committee have heard from constituents who are unable to watch in-state broadcast TV programming. Under Section 614(h) of the Communications Act, the Federal Communications Commission (FCC) has the power to modify Designated Market Areas (DMAs) for broadcast TV carriage on cable systems. Should the FCC have a similar power with respect to satellite pay TV providers to address DMA issues? Are there other ways to address these issues?

Congress should consider this solution along with others.

Satellite subscribers tell DIRECTV and DISH the same things they tell Members of Congress. They do not want to be told which “local” stations they must watch. They want choices. They also want to be able to watch news and sports that originate from within their own states.

Congress could address this issue in many ways. One legislative approach would be to permit satellite carriers to provide in-state stations to so-called “orphan

¹ United States Copyright Office, “Section 302” Report at 71-72 (2011), available at <http://www.copyright.gov/reports/section302-report.pdf> (“NAB concluded that given the overwhelming economic importance to the station of appealing to viewers in its own market as opposed to cable or satellite subscribers in some distant market, there is little likelihood that stations would adjust their existing licensing models for broadcast programming specifically to accommodate the programming preferences of a distant cable operator or satellite carrier. NAB also stated that there is no incentive for a broadcaster to undertake the additional cost and administrative burden of negotiating for additional rights in order to be able to sublicense all of its station’s programs to cable operators or satellite carriers serving subscribers in distant markets.”) (internal citations omitted).

counties,” which are counties that receive no in-state broadcasting. Permitting the FCC to modify DMAs holds some promise as well.

Broadcasters occasionally suggest that they can “solve” the in-state local news problem by offering private copyright licenses for local news. This, however, results in a product that consumers do not want—a “channel” that offers a blank screen for as many as 23 hours a day. We know this because DIRECTV offers such a product in Arkansas. Very few people watch it. People want to watch channels with around-the-clock programming, not blank screens.

That said, we must present two notes of caution. First, DIRECTV and DISH have each spent hundreds of millions of dollars on spot-beam satellites and ground equipment based on the Nielsen DMA boundaries. We may not be able to adjust our channel offerings to implement changes that Congress or the FCC might enact, and some of this costly capacity might have to fall into disuse.

Second, for this reason, DIRECTV and DISH urge Congress to avoid single market “fixes,” as it did when it passed STELA five years ago. We can comply more easily with systematic changes than with one-off changes to individual local markets.

A general remedy proposed by DIRECTV and DISH would give subscribers the option to purchase station signals from an in-state DMA if they first receive local service. We would compensate the in-state broadcaster pursuant to the Section 119 distant signal license. To the claims from broadcasters that this would reduce local station viewership, we would note that (a) a subscriber’s local stations still would be on the channel lineup, and (b) if local programming is as important and compelling as local broadcasters claim, then no material decrease in viewership should result.

(3) One of the expiring provisions in STELA is the obligation under Section 325(b) of the Communications Act for broadcast television stations and multichannel video programming distributors (MVPDs) to negotiate retransmission consent agreements “in good faith.” Should the Congress modify this obligation or otherwise clarify what it means to negotiate retransmission consent in good faith? If so, how?

Yes. Congress should clarify and expand the “good faith” rules.

Congress has already instructed the FCC to adopt and enforce rules that “prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith.”² Such rules are supposed to provide that a broadcaster violates its good faith duty when its demands include terms or conditions not

² 47 U.S.C. § 325(b)(3)(C)(ii).

based on competitive marketplace considerations.³ In implementing this mandate, the FCC has created a two-prong standard: a list of specific acts and practices that are *per se* a violation of good faith, and a totality of the circumstances test.⁴ While the second prong—the totality of the circumstances—gives the agency some flexibility to consider broader types of anti-competitive conduct that we have observed, to date it has not been used in this way. Moreover, the FCC has interpreted the law as not contemplating an “intrusive role” for the agency.⁵ As a result, the FCC has never found a violation of the good faith requirement.

Broadcasters plainly do not consider the good faith rules an impediment to their behavior. In such circumstances, it should surprise no one that broadcaster blackouts are accelerating and retransmission consent fees are increasing at an alarming rate, driving up consumer prices.

Congress should thus clarify and expand the good faith requirement. At a minimum, the requirement should prohibit the following:

- Brinkmanship tactics, such as threatening programming blackouts designed to exploit a network-affiliated broadcast station’s already substantial market power. (We discuss ideas for “blackout relief” below in response to Question II.1.b.i.)
- Withholding of retransmission consent from an MVPD without granting that provider relief to permit importation of same-network distant signals throughout the market until a carriage agreement has been reached.⁶ (This also falls within our discussion of “blackout relief.”)
- Giving a network the right to negotiate or approve a station’s retransmission consent agreements or any major term in such agreements. (We discuss joint retransmission consent negotiation in more detail below in response to Question II.1.b.ii.)
- Granting another non-commonly owned station or station group the right to negotiate or approve a station’s retransmission consent agreements. (We

³ *Id.*

⁴ 47 C.F.R. § 76.65(b)(1)-(2).

⁵ *Amendment of the Commission’s Rules Related to Retransmission Consent*, 26 FCC Rcd. 2718, ¶ 20 (2011).

⁶ For satellite carriers, such relief would take the form of waivers to the “no-distant-where-local” and “unserved household” rules. 47 U.S.C. §§ 339(a)(2)(E), (c)(2). For cable operators, such relief would take the form of waivers of the network nonduplication and syndicated exclusivity rules. 47 C.F.R. § 76.92 *et seq.*

discuss joint retransmission consent negotiation in more detail below in response to Question II.1.b.ii.).

- Demanding that an MVPD not carry legally available out-of-market stations (*e.g.*, distant signals or significantly viewed signals), or substantially burdening such carriage, as a condition of retransmission consent.
- Deauthorizing carriage immediately prior to or during marquee events, such as the Super Bowl, World Series, or Academy Awards. (We discuss the so-called “sweeps provisions” in more detail below in response to Question II.1.b.v.)
- Refusing to give a stand-alone offer for retransmission consent when requested by an MVPD, or giving a stand-alone offer so high as to not constitute a *bona fide* offer. (We discuss stand-alone offers in more detail below in response to Question II.1.b.vi.)
- Imposing a blackout in any DMA where the broadcaster has failed to provide an adequate over-the-air signal to a materially large number of subscribers.

None of these activities ought to be considered consistent with “competitive marketplace considerations.” None should be permitted under the good faith standard.

(4) As part of STELA, Congress changed the statutory standard by which households are determined to be “unserved” by broadcast TV signals. Does Congress or the FCC need to take further action to implement this previous legislative amendment?

Yes, further action is necessary. For years, the law specified that households would be considered “served” (and thus ineligible for distant signals) if tested or predicted to receive signals of a specified strength using a “conventional, stationary, outdoor rooftop receiving antenna.”⁷ (Since the antenna is supposed to be pointed at each station tested, this really means a “rotating” antenna, not a “stationary” one.) But most Americans do not have rooftop antennas and have not for many decades. People today use indoor antennas. We have consistently argued that the relevant standard should reflect the kinds of equipment actually deployed in the marketplace.⁸

⁷ 17 U.S.C. § 119(d)(10)(A) (2004).

⁸ See, *e.g.*, Letter from DIRECTV, Inc. and DISH Network, L.L.C., FCC EB Docket No. 06-94, (filed Nov. 4, 2010) (providing CEA figures related to antenna purchases as part of technical submission); *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home*

Moreover, just before the digital transition, the FCC ruled that broadcasters did not have to replicate their analog “Grade B” signal coverage areas with the new, digital broadcast signal contours, increasing the number of households that cannot receive an over-the-air signal using a typical indoor digital antenna.

In response, Congress changed the relevant statutory criteria to refer simply to an “antenna.”⁹ Congress removed all prior specifications—“conventional,” “stationary,” “outdoor,” and “rooftop.”

We believe that Congress intended to permit use of indoor antennas as part of the standard. This certainly was our understanding at the time, based on our conversations with Members of Congress and Congressional staff.

The FCC, however, did not construe the deletions in that manner, and decided to leave the “outdoor rooftop” criteria unchanged in its rules.¹⁰ Thus, the predictive model and test still assume use of equipment that almost nobody uses.

This means that satellite subscribers in rural areas often can be left without access to broadcast network programming. If, for whatever reason, a satellite carrier does not offer a local station, the subscriber often can get no network service at all. She cannot receive local signals because she is too far from the transmitter. And we cannot give her distant signals because the FCC test thinks she can receive local signals.

This occurs far more often than one might think. Last summer, DIRECTV conducted nearly 1,800 signal tests in three local markets, and compared those

Viewer Act, 14 FCC Rcd. 2654, ¶ 52 (1999) (citing comments of satellite providers urging an indoor antenna standard, but citing to then-current statutory language specifying the use of outdoor rooftop antennas).

⁹ 17 U.S.C. § 119(d)(10)(A).

¹⁰ *Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension & Reauthorization Act of 2004*, 25 FCC Rcd. 16471 (2010) (“*2010 Measurement Order*”). The FCC reasoned: “the change in statutory language simply affords that Commission latitude to consider all types of antennas.” *Id.*, ¶ 12. It concluded that an outdoor antenna was the more appropriate standard because (1) it “has always assumed” that people who could not receive a signal using an indoor antenna would employ an outdoor one; (2) the stations’ service contours themselves were developed assuming the use of outdoor antennas; and (3) it believed that no reliable method for indoor testing had then been developed. *Id.*, ¶ 12-14. We are aware of no evidence to support the FCC’s first “assumption.” The FCC’s latter two arguments have nothing to do with whether subscribers actually use outdoor antennas or not. Indeed, the FCC itself noted: “[W]e remain aware and concerned that using the outdoor measurement procedures may result in instances where a consumer who either cannot use an outdoor antenna or cannot receive service using an outdoor antenna and is not able to receive a station’s service with an indoor antenna will be found ineligible for satellite delivery of a distant network signal.” *Id.*, ¶ 21.

results to the FCC's predictive model that is intended to predict whether people can receive local signals. As many as *two-thirds* of those predicted to receive local signals could not actually receive a viewable picture—and this was using a rooftop antenna. If it had been able to conduct indoor antenna tests, the figures would undoubtedly have been much worse still.

We thus believe that Congress should mandate a change to the standard and give the FCC more unequivocal direction than was issued in STELA.

(5) Are there other technical issues in STELA that have arisen since its passage in 2010 that should be addressed in the current reauthorization?

No.

II. General Video Policy Issues:

(1) Some have suggested that Congress adopt structural changes to the retransmission consent system established under Section 325 of the Communications Act (Act). Others have indicated that the retransmission consent system is working as Congress intended when it was developed as part of the Cable Television Consumer Protection and Competition Act of 1992.

(a) Should Congress adopt reforms to retransmission consent? If so, what specific reforms could best protect consumers? If not, why not?

Yes. The retransmission consent rules date from 1992—the same year *Wayne's World* was released, AT&T introduced the first video phone (for \$1,500), and the Washington Redskins won their last Super Bowl.

The video marketplace has changed beyond recognition since then. But regulation of the retransmission consent regime has not.

In particular, when Congress created the retransmission consent regime in 1992, it sought to balance the market power of monopoly cable operators against the monopoly power of broadcast network affiliates with exclusive territories. In the ensuing two decades, however, the video programming distribution industry has undergone profound changes. While cable operators still have market power, they are not monopolies in the markets for video distribution. Most consumers can now choose from among three or more distributors—not to mention online video providers. But *broadcasters'* exclusive territories and the Commission's retransmission consent regime have remained largely unchanged.

Moreover, broadcasters have increasingly engaged in conduct designed to enhance their bargaining power even beyond what they possessed in 1992. This includes collusion in the negotiation of retransmission consent (we describe this in more detail below in response to Question II.1.b.ii, regarding joint retransmission consent negotiation) and prohibiting the use of their programming as a distant network or significantly viewed station, even though the law allows it.

Broadcasters have exploited this situation by abusing their retransmission consent rights during negotiations, using the tactics of brinksmanship and blackouts to extract ever-greater fees from MVPDs—this is an escalating problem with no end in sight. SNL Kagan estimates that MVPDs paid \$3.3 billion in retransmission consent fees in 2013, and that this figure will soar to a staggering \$7.6 billion by 2019.

When MVPDs decline to meet broadcaster's demands, they face the loss of programming for their subscribers. In 2013, there were 127 broadcaster blackouts, compared with 96 blackouts in 2012, 51 blackouts in 2011, and 12 blackouts in 2010.

The result? Consumers are harmed no matter what the MVPD chooses. Either the MVPD acquiesces, in which case subscribers pay higher prices for programming. Or the MVPD resists, in which case the subscriber loses key programming. Consumers also may be forced by blackouts to switch from their first choice provider. This, in turn, can cause the loss of their chosen package, pricing, and DVR recording history, not to mention the hassle of transferring billing, equipment and set up to their second (or third) choice provider. Broadcaster blackouts, moreover, affect all MVPDs. Thus, a consumer who switches MVPDs in order to obtain broadcast programming may find herself needing to do so again within a short time.

As DISH has noted previously, rural households suffer disproportionately from broadcaster blackouts.¹¹ Moreover, broadcasters in many cases simply have failed to provide an adequate over-the-air signal to reach many rural communities. As discussed above in more detail below in response to Question I.4, DIRECTV has found that as many as two-thirds of those predicted to receive local signals could not actually receive a viewable picture.

¹¹ See Comments of DISH Network, MB Dkt. No. 10-71 at 11-14 (filed May 27, 2011). These comments, along with the Comments of DIRECTV, LLC, MB Dkt. No. 10-71 (filed May 27, 2011) ("DIRECTV Retransmission Consent Comments") are attached hereto as Exhibit B.

Examples of Communities Underserved by Big Four Broadcast Station Signal¹²

| DMA | Community Affected | "Big Four" Digital Broadcast Signals Received | Missing "Big Four" Networks |
|---------------------------|-----------------------|---|-----------------------------|
| Denver, CO | Steamboat Springs, CO | None | ABC, CBS, FOX, NBC |
| Fargo-Valley City, ND | Cavalier, ND | WDAZ-TV (ABC); KNRR (FOX) | CBS, NBC |
| Medford-Klamath Falls, OR | Lakeview, OR | KOTI (NBC) | ABC, CBS, FOX |
| New York, NY | Ellenville, NY | WRGB (CBS) | ABC, FOX, NBC |
| Phoenix, AZ | Globe, AZ | KPNX (NBC); KPHO-TV (CBS) | ABC, FOX |
| Spokane, WA | Lewiston, ID | KLEW-TV (CBS); KHQ-TV (NBC) | ABC, FOX |

Clearly, then, Congress should act.

We discuss the six proposals cited by the Committee, along with several others, immediately below. (Please note that we discussed some of these reforms in the context of the FCC's "good faith negotiation" rules above in response to Question I.3.)

(b) Please comment on the following possible reforms that have been suggested by various parties:

(i) Providing the FCC authority to order interim carriage of a broadcast signal or particular programming carried on such signal (and the circumstances under which that might occur).

We strongly support this proposal. We think of this idea as one form of "blackout relief" for subscribers. It strikes us as the single most important thing Congress could do in the STELA reauthorization.

One can agree with the MVPD in a particular retransmission consent fight. Or one can agree with the broadcaster. But we should all be able to agree that the *subscriber* should not be put in the middle. Subscribers have done nothing wrong. All they want is to watch television from the MVPD that they have chosen.

¹² *Id.* at 13.

Blackout relief would let them do just that. It would require the FCC to order interim carriage during all blackouts. And it would provide that subsequent agreements will govern carriage back to the date of the blackout, so neither party is advantaged by the interim carriage.

Better yet would be to combine interim carriage with baseball-style arbitration. This would keep the programming up so consumers do not suffer, and ensure that the broadcasters are fairly compensated through a formal arbitration process.

Blackout relief works best if it is mandatory and applies automatically. Asking the FCC to order interim carriage during *some* blackouts would be costly and time consuming, and would inappropriately put the focus on the behavior of MVPDs and broadcasters, when the focus should be on the harm caused to the consumer.

Blackout relief could also take the form of changes to the distant signal rules. Congress should permit (or direct the FCC to permit) pay TV providers to deliver distant signals during blackouts. While less perfect than full interim carriage, this distant signal fix would allow us to provide subscribers with an imperfect substitute during a local broadcaster's blackout, thereby softening the blow to consumers. Subscribers in such circumstances would continue to have access to a network affiliate but would not have local news, weather and sports.

For example, if a broadcaster were to black out the local Charleston-Huntington, West Virginia FOX station, DIRECTV and DISH would be able to temporarily bring in an out-of-market station, such as the Lexington, Kentucky FOX station (with the MVPD paying the compulsory copyright fee for each subscriber). The replacement station would not be a perfect substitute for the blacked-out local station, since consumers would not have their local content, but at least some measure of protection would be extended to affected consumers by providing access to network programming. Additionally, this fix would level the playing field a bit in the negotiating process and make it more likely that the broadcaster would not pull its signal in the first place. Broadcasters would be introduced to some of the same competitive pressures that satellite carriers and cable operators face every day, and consumers would benefit as a result.

These forms of blackout relief would not "interfere" with the "free market," as broadcasters have argued, for the simple reason that

the market is not free; it is skewed by the legal monopolies and regulatory benefits enjoyed by the four networks. The retransmission consent “marketplace” is one littered with invasive government rules that favor broadcasters and disfavor MVPD subscribers. A list of these appears as Exhibit A. Every single one of these rules gives special privileges to broadcasters. These privileges do not apply to pay-TV networks (such as CNN or ESPN), Internet programming, or any other kind of video product other than broadcasting.

In today’s highly regulated market, however, broadcasters cannot reasonably object to protecting subscribers through blackout relief.

If Congress truly believes that broadcasters are special, and that there should be a “social contract between the government and broadcasters to serve the ‘public interest’ (e.g., provide ‘local’ programming and a ‘diversity of voices’ to as many Americans as possible),”¹³ it should ensure that consumers do not lose the benefit of this bargain.

(ii) Prohibiting joint retransmission consent negotiations for multiple TV stations at the same time.

Of all the reforms presented to Congress, this should be the easiest to implement.

Broadcasters should not be able to evade FCC rules through legal tricks. Yet this is exactly what broadcasters are doing today.

The FCC’s media ownership rules generally prohibit one entity from owning more than one “big four” network affiliate in a market.¹⁴ And they generally prohibit excessive concentration of broadcast ownership across markets.¹⁵ Thus, collusive joint retransmission consent negotiation should already be prohibited.

Broadcasters, however, increasingly evade these rules through “sidecar” arrangements such as JSAs, SSAs, and similar endeavors. DIRECTV’s own internal records show that in nearly

¹³ Phoenix Center, “*An Economic Framework for Retransmission Consent*,” Policy Paper No. 47 at 1 (Dec. 2013).

¹⁴ 47 C.F.R. § 73.3555(b).

¹⁵ *Id.* § 73.3555(e).

half of the markets in which it carries local signals, it must negotiate with a party controlling multiple affiliates of the “Big Four” networks. This does not even count the increasing practice of networks insisting on negotiating or approving retransmission consent on behalf of their allegedly independent affiliates.

Nobody carries more broadcasters than DIRECTV and DISH. We can assure you that these sidecar arrangements harm viewers. They lead to higher prices (as much as 161 percent higher, according to one estimate¹⁶). And they by definition cause greater harm when blackouts occur.

This is why the Department of Justice recently submitted a filing at the FCC that highlighted the harms of these tactics and urged the FCC to require the broadcast ownership rules to treat any two stations participating in such an arrangement as being under common ownership.¹⁷ DOJ found that, “[g]iven the extensive control over pricing decisions inherent” in such arrangements, they should be attributable under the FCC’s ownership rules.¹⁸ And it stated that “failure to treat JSAs and similar arrangements as attributable interests could provide opportunities for parties to circumvent any competitive purposes of the multiple ownership limits.”¹⁹

The FCC Chairman recently proposed to generally prohibit joint retransmission consent negotiations between non-commonly owned stations. The House Commerce Committee’s discussion STELA reauthorization draft contains a similar approach.

We support both of these proposals. Some broadcasters point to instances in which SSAs and JSAs have led to more local news, or joint ownership of a news helicopter, or other public goods. We do not object to such arrangements. Our primary concern is when

¹⁶ William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market* (May 27, 2011), filed as an attachment to the Comments of American Cable Association, MB Docket No. 10-71 (filed May 27, 2011); William P. Rogerson, *Joint Control or Ownership of Multiple Big Four Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees*, MB Docket No. 10-71 (May 18, 2010), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

¹⁷ *Ex Parte* Submission of the United States Department of Justice, MB Docket Nos. 09-182, 07-294, and 04-256 (filed Feb. 20, 2014).

¹⁸ *Id.* at 15-16.

¹⁹ *Id.* at 16 (internal citations omitted).

broadcasters collude on *external* functions—particularly retransmission consent.

Other broadcasters say that they need to negotiate retransmission consent on behalf of more stations in order to ensure their continued ability to offer local news and information. If they really believe this, they should make the case to Congress and the FCC to relax the ownership limits. Unless and until they do so, they should not be allowed to rely on legal tricks to evade the Commission's rules and harm consumers.

Finally, although the Committee does not ask this question directly, the retransmission consent problems reflect a larger pattern of network dominance over affiliates in the broadcast markets. DIRECTV, for example, has argued that network “rights of refusal” or even outright negotiation on behalf of “independent” affiliates should be considered attributable under the FCC’s ownership rules and violations of its good faith rules.²⁰

As part of STELA reauthorization, Members of the Committee might ask their local broadcasters:

- Do you think your network has demanded too much control over retransmission consent negotiations and programming time?
- Do you think too much of your station’s retransmission consent fees are sent back to network headquarters rather than to your local station to support local news, weather, sports, and public affairs programming?

We believe that candid answers to these questions would stand in contrast to NAB’s claim that the current retransmission consent system does not require reform.

(iii) Mandating refunds for consumers in the case of a programming blackout (and apportioning the ultimate responsibility for the cost of such refunds).

Mandatory refunds would not be pro-consumer as they might result in the elimination of current consumer benefits and flexibility.

²⁰ DIRECTV Retransmission Consent Comments at 19.

The proposal stems from broadcast claims that subscribers cannot switch providers during blackouts because long-term satellite service agreements impose “early termination fees.” This, however, is only half of the story.

To begin with, DIRECTV and DISH subscribers are never required to enter into a service agreement. They can *choose* to do so if they would like to lower the up-front cost of equipment and installation. Alternatively, they can pay the full cost of equipment and installation when they commence service and enter into no service commitment.

We offer service agreements because we invest as much as \$1,000 to provide service to a new residential subscriber. This includes the full-price of installation and equipment. Subscribers choose service agreements because it makes more sense for them to pay these costs over the long term than all at once.

And every service agreement clearly states that programming and channel lineups are subject to change and are not cause for either party to end the agreement.

Were Congress to mandate refunds during blackouts, we would find ourselves less able to offer long-term service agreements. This, in turn, would force subscribers to pay the full price of equipment and installation up front.

Such a measure would only serve to increase broadcaster leverage in retransmission disputes, when the scales are already so tipped in their favor. This would make such disputes more common. And it would lead broadcasters to demand even higher prices.

Perhaps broadcasters would agree to amending the law so that any broadcaster that blacks out its signal during a retransmission consent dispute must credit all impacted subscribers with the amount of retransmission consent fees paid retroactively to the broadcaster during that period. This might: deter the broadcaster from blacking out its programming in the first place; incent the broadcaster to reach an agreement quickly when it does black out a signal; and offer some financial compensation subscribers who lose service through no fault of their own. DIRECTV and DISH would gladly credit the full amount of such restitution to subscribers upon receipt from the broadcaster.

(iv) Prohibiting a broadcast television station from blocking access to its online content, that is otherwise freely available to other Internet users, for an MVPD's subscribers while it is engaged in a retransmission consent negotiation with that MVPD.

This, too, is a wise reform, as illustrated by the fact that CBS recently blocked access to online content by Time Warner Cable's broadband subscribers nationwide during the retransmission dispute between the two. Such blocking harms MVPD video subscribers in the same way that blackouts harm them more generally. But it also harms others. Some people have no MVPD video service and rely on the broadband connection to get video content. Others get video from one provider and broadband from another. Yet they can be caught up in a dispute and denied Internet content even though they actually are still paying for a video service that includes the broadcaster's signal.

Congress should prohibit such conduct outright. At a minimum, it should clarify that website blocking against such viewers constitutes a *per se* violation of the good faith rules.

(v) Eliminating the "sweeps" exception that prevents MVPDs from removing broadcast TV channels during a sweeps period, or alternatively extending that exception to prevent broadcasters from withholding their signals or certain programming carried on such signals under certain circumstances.

To begin with, neither DIRECTV nor DISH has ever blacked out broadcast TV channels. Broadcasters black out channels by withholding consent.

This fix constitutes a matter of fairness and creates parity between MVPDs and broadcasters. One could imagine a fair set of retransmission consent rules containing no restrictions on the timing of disputes. (The DeMint/Scalise approach does this, as does the House Energy and Commerce Committee discussion draft.)

Even better from a consumer perspective would be a prohibition on blackouts both during sweeps weeks (which are important to broadcasters) and prior to and during marquee events such as the Super Bowl, World Series, or Academy Awards (all of which are important to viewers and have been used at one time or another by broadcasters as leverage to receive higher fees). Such a rule could

be formulated both by referencing a limited number of specific events or in terms of ratings or some other parallel metric.

Under the existing formulation, however, the government protects only one side's economic interests—the broadcasters'. This ultimately harms consumers, and certainly has no place in allegedly "free market" negotiations.

(vi) Prohibiting retransmission consent agreements that are conditioned on the carriage by an MVPD of non-broadcast programming or non-broadcast channels of programming affiliated with the broadcast license holder.

Congress should prohibit the *forced* tying (whether explicit or *de facto*) of affiliated content as a condition of gaining access to a station's signal. It should not prohibit all *offers* of bundled programming.

Forced tying most often arises in negotiations with the large station groups affiliated with national networks, which use their "must have" broadcast programming as negotiating leverage to gain carriage for new and/or unpopular cable channels affiliated with the corporate parent.

Refusal to even discuss carriage of the station's Big Four network signal separately from carriage of other tied programming introduces an additional element of cost and complexity to the negotiation, and thereby increases the risk that the parties will reach an impasse. Such an outcome does not serve the public interest.

To be clear, we are not saying that Congress should prohibit all offers that bundle retransmission consent with carriage of additional content. Indeed, in many cases, we have found the terms and conditions of a bundled offer attractive. If, however, an MVPD requests an offer for retransmission consent on a stand-alone basis, there is no reason why the broadcaster should refuse to honor that request.

In order to be effective, such a rule would have to distinguish between *bona fide* and sham offers for stand-alone programming. We do not think this would be difficult to police in practice. A demand for significant price increases over the prior agreement if the distributor purchases retransmission on a stand-alone basis would be an example of a sham offer.

The FCC has a similar remedy with respect to stand-alone broadband offerings by Comcast in connection with the Comcast/NBCU merger. There, the FCC required Comcast to offer stand-alone broadband service “at reasonable market-based prices” and “on equivalent terms and conditions” to the most comparable bundled offering.²¹

(2) Should Congress maintain the rule that cable subscribers must buy the broadcast channels in their local market as part of any cable package? If the rule is eliminated, should an exception be made for non-commercial stations?

We are not cable operators and are not subject to this requirement.

(3) Should Congress maintain the rule that cable systems include retransmission consent stations on their basic service tiers?

We are not cable operators and are not subject to this requirement.

(4) Section 623 of the Act allows rate regulation of cable systems unless the FCC makes an affirmative finding of “effective competition.” Should Congress maintain, modify, or eliminate these provisions?

We are not cable operators and are not subject to this requirement.

(5) Should Congress repeal the set-top box integration ban? If Congress repeals the integration ban, should Congress take other steps to ensure competition in the set-top box marketplace both today and in the future?

We are not cable operators and are not subject to this requirement.

(6) Should Congress limit the use of shared services agreements (SSAs) and joint sales agreements (JSAs) by broadcast television ownership groups, and if so, under what circumstances?

Please see our response to question II.b.ii, in which we discuss such arrangements in the context of joint retransmission consent negotiations.

²¹ *Comcast Corp., General Electric Co., and NBC Universal, Inc.* 26 FCC Rcd. 4238, app. A, § IV.D (2011).

(7) Should Congress act in response to concerns that the increasing cost of video programming is the main cause behind the consistent rise in pay TV rates and that programming contracts contribute to the lack of consumer choice over programming packages? If so, what actions can it take?

From our perspective, this question sets forth the very impetus for retransmission consent reform—skyrocketing broadcaster price increases resulting in more and more disputes and blackouts and higher rates for our subscribers. As described in our response to Question II.2.b.vi, moreover, we believe that the very worst instances of tying involve broadcast programming.

Programming costs are the single largest input cost for both DIRECTV and DISH. They cost even more than the satellites we use to provide our services. As such, they have a direct impact on what subscribers pay for service.

Of course, we are concerned about price increases and tying for *all* programming, not just broadcast programming. But, as described above, broadcast prices have increased much faster than those for any other type of programming—even sports programming.

We think broadcast programming has become the most problematic kind of programming because only broadcast programming is subject to a thicket of government rules that favor one side over the other. Moreover, STELA itself relates to broadcast programming. While we welcome Congressional efforts to control runaway programming prices more broadly, it makes sense to focus on the most acute problems in the video marketplace as part of STELA reauthorization.

(8) With consumers increasingly watching video content online, should Congress extend existing competitive protections for the traditional television marketplace to the online video marketplace? If so, what types of protections?

We are still analyzing whether Congress should extend existing competitive protections for the traditional television marketplace to the online video marketplace, and have not yet formulated an opinion on this.

(9) The Consumer Choice in Online Video Act, S. 1680, is one approach to fostering a consumer-centric online video marketplace. Are there elements of that bill that should be considered in conjunction with the STELA reauthorization?

S. 1680 contains several provisions helpful to consumers. In particular, provisions prohibiting Internet blocking during retransmission consent disputes

could be beneficial. So would the provisions encouraging broadcasters and upstream copyright holders to provide copyright licensing for online delivery.

On the other hand, several provisions appear to impose additional, unwarranted regulation on MVPDs. One such provision would prohibit many exclusive arrangements—even those between distributors without market power and unaffiliated programmers. Such arrangements have enabled both of our companies to compete against cable operators that still maintain dominant market share in most of America.

(10) Would additional competition for broadband and consumer video services be facilitated by extending current pole attachment rights to broadband service providers that are not also traditional telecommunications or cable providers?

Our two companies do not use pole attachments at this time but, as stated above, we generally support regulatory parity.

(11) Would additional competition for broadband and consumer video services be facilitated by extending a broadcaster's carriage rights for a period of time if they relinquish their spectrum license as part of the FCC's upcoming incentive auction?

We generally support efforts to facilitate the most spectrum possible made available in the incentive auctions. That said, we think that broadcast carriage rights should not be *expanded* as part of any incentive auction.

(12) Are there other video policy issues that the Congress should take up as part of its discussions about the STELA reauthorization?

We are unaware of any such issues at this time, other than as noted above.

PREPARED STATEMENT OF MARCI BURDICK



**Hearing on
“Reauthorization of the Satellite Television
Extension and Localism Act”**

**United States Senate
Committee on the Judiciary**

March 26, 2014

**Statement of Marci Burdick
Schurz Communications, Inc.
On behalf of the National Association of Broadcasters**

Introduction and Summary

Good morning, Chairman Leahy, Ranking Member Grassley and members of the Committee. My name is Marci Burdick and I am the Senior Vice President of the Electronic Division for Schurz Communications. Schurz owns eight television stations and has operating partnerships with two others. In addition, we own three cable companies and 13 radio stations. I am testifying on behalf of the National Association of Broadcasters (NAB), where I am the Television Board Chair.

Thank you for the opportunity to discuss the Satellite Television Extension and Localism Act of 2010 (STELA), and specifically the section 119 distant signal license, which is set to expire at the end of 2014. NAB looks forward to working with this Committee as we again consider how consumers can best be served through satellite carriage of broadcast television signals.

I am proud to testify today on behalf of NAB's thousands of free, local, over-the-air television stations across the nation as well as our television broadcast network (ABC, CBS, FOX, NBC, and Univision) members. Broadcasters serve an indispensable role in the dissemination of valuable entertainment and local news, weather, emergency, and public affairs programming – a concept known as “localism” that I will discuss in further detail below. But local broadcasting also has an unmatched legacy as an engine for economic development and growth in our communities, with local broadcast television supporting over 188,000 jobs and over \$32 billion in annual GDP through local stations, advertising, and programming.

NAB's position on this reauthorization is simple: This Committee should take a hard look at whether the “temporary” Section 119 distant signal license, crafted in the 1980s to grow a nascent satellite industry and now largely supplanted by the Section

122 local license, continues to benefit consumers. This reauthorization is, at its core, a satellite bill, and every household served by this license is deprived the benefits of locally-focused programming. If, however, this Committee determines that an extension of the distant signal license is warranted, we ask that any reauthorization not serve as a vehicle to reopen well-established copyright and retransmission consent provisions that are outside the scope of this Act and enable free local broadcast television. It is important to emphasize at the outset that NAB prefers no bill over a harmful bill.

To assist the Committee's review, this testimony 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 continues to promote localism. Additionally, I will focus on one issue that, while far afield from the core questions of a STELA reauthorization, has been raised by others – the concept of retransmission consent which compensates local television stations for their broadcast signal and enables those stations to continue investing in community-based, locally-focused programming.

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 locally-focused, over-the-air television programming in American

television households, while (2) ensuring that the satellite retransmission of television broadcast signals did not discourage broadcasters from continuing to offer this television service for free over-the-air.¹ These noble objectives should continue to guide your review of legislation today.

Why is broadcast localism so important? Localism is coverage of matters of significance 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 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. This free local service is our focus, and it differentiates American broadcast television both from our peers around the world, as well as every other medium here at home.

There is no doubt that our viewers – your constituents – continue to rely on our locally-focused service. The most striking example was provided in the wake of the tragic tornados in Moore, Oklahoma last year where more viewers tuned into local broadcast news coverage in that market than watched last year's Super Bowl. 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

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

personnel communicate rescue and recovery information to residents, broadcasters served as Moore's *first informers*.²

Simply put, 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.

II. Legal Background

Two distinct statutory licenses in the Copyright Act govern the retransmission of *distant* and *local* over-the-air broadcast station signals by satellite carriers:

- 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.

Only the Section 119 license sunsets at the end of 2014 and is the subject of this reauthorization. The Section 122 license is permanent, as is the Section 111 license, which permits a cable operator to retransmit broadcast television signals.

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)

² During the week of May 20-26, 2013, 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 the tornado and its aftermath. http://www.tvb.org/measurement/PRR_Week35

governing the carriage of television broadcast signals. Three of those provisions also expire this year and fall under the jurisdiction of the Commerce 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 localism priorities. Respecting the principle of localism, only those subscribers who live in "unserved households" are eligible to receive distant network station signals. 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. With the addition of popular local television channels to their subscriptions, the number of satellite subscribers skyrocketed. 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.

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

As a threshold matter, this Committee must consider whether the expiring Section 119 distant signal license continues to promote localism, and is in the public interest. It could be argued that the *distant* signal license served its purpose in 1988, when the back-yard satellite industry was just getting started; served its purpose again when DISH and DIRECTV first launched their small-receiver services in the mid-1990s; but in 2014, where DISH and DIRECTV have achieved a size and scope that allows them to fiercely compete with the most successful cable companies, the distant signal license is a vestige of a bygone era, a time before fiber optics, compression technology, and digitalization.

Experience has shown that the Section 122 local-into-local 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 when they receive the local signal. Thus, Congress's focus at this time should be to further these trends and promote local-into-local service in all markets.

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. With few exceptions,³ *there are not unserved viewers* in areas in which local-into-local satellite transmissions are available, and no public policy justifies treating satellite subscribers in markets that can be served with a local signal as “unserved” and therefore eligible to receive distant network stations. Further, there are no technical or engineering reasons preventing any market from remaining unserved, which DISH has demonstrated by expanding its local-into-local service in all 210 markets.

This Committee should continue to encourage localism, and take a hard look at whether the Section 119 license should expire. An important first step is identifying the precise number and nature of households that the section 119 license continues to serve, and whether those households could be more effectively served by the local license.

More importantly, this Committee should resist attempts by the satellite industry to expand the scope of the section 119 license, which deprives viewers locally-focused broadcast services and runs contrary to the trend of recent reauthorizations. Requests that this Committee consider changes to the antenna standard employed to determine “unserved households” in 17 U.S.C. § 119(d)(10) are a naked attempt by the satellite industry to expand the number of households eligible to receive a distant signal under the license, and serves no public interest benefit. Such a change would deprive those households the benefits of locally-focused broadcast television where there is no technological impediment. The sole beneficiaries would be satellite providers who could

³ SHVIA Conference Report, 145 Cong. Rec. at H11792-793 (“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.”) (emphasis added).

then serve those households without compensating obtaining broadcasters' retransmission consent. This proposal re-litigates a settled policy question that the FCC addressed at Congress's instruction in the 2010 STELA bill⁴ – the satellite carriers simply were not satisfied with the outcome.

IV. Retransmission Consent

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

In the course of the Committee'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 rights.

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, Univision and NBC stations – network programming from another distant market. This importation of duplicative distant network programming jeopardizes the viability of the

⁴ *Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations*, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 16426, ¶¶ 7-15 (2010).

local network-affiliated stations that offer the local news, weather and emergency information that viewers value. Additionally, it undermines the rights of content owners, who invest significant money to produce popular programming, to control the distribution of their product.

Both local broadcasters and pay television providers have an incentive to complete retransmission consent negotiations in the marketplace before any disruption to viewers occurs, and for that simple reason they almost always do. As a result, service disruptions from retransmission consent impasses represent only one-hundredth of one percent (0.01%) of annual U.S. television viewing hours.⁵ That means consumers are more than 20 times more likely to lose access to television programming from a power outage than 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, over 90 percent of broadcast television service disruptions nationwide are attributable to just these three companies.

Opponents of retransmission consent cite rising retail cable and satellite bills as justification to “reform” retransmission consent. However, retransmission consent fees are not possibly responsible for the steep increase in cable bills and NAB has demonstrated this across numerous economic studies.⁶ Moreover, broadcast carriage fees represent only a fraction of total programming costs. It is estimated that only two

⁵ 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).

⁶ 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).

cents of every cable bill dollar goes to broadcast retransmission consent. This is in spite of the fact that in 2013, 97 of the top 100 most watched prime time programs were aired by broadcast TV stations.⁷

The truth is that cable and satellite operators are seeking to limit one of their operating costs – in this case, broadcast programming – and asking for 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, and continues to do so today.

Local television stations across the country urge the Committee to resist the overtures of a few bad actors in the pay-TV marketplace whose intent is to create an artificial crisis requiring Congress to "fix it". Doing so would pose significant harm to the locally-focused broadcast model that has served the viewing public so well for decades and, as part of a STELA reauthorization, inject unnecessary controversy and risk of delay.

Conclusion

At the core of STELA and its predecessors is the fundamental concept and enduring value to every community in this nation of broadcast localism. This Committee should take a hard look at whether the "temporary" Section 119 distant signal license should be allowed to expire as scheduled and as originally intended by its creators. If, however, this Committee determines that an extension of the distant signal license is warranted, we ask that any reauthorization not serve as a vehicle for new laws that

⁷ The Nielsen Company-NTI, HH Live and SD Estimates, September 24, 2012 - May 22, 2013, compiled by Television Bureau of Advertising.

undermine the future of our free, locally-focused broadcasting system. 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 a leg up in market-based negotiations. I thank you for your efforts and am happy to answer your questions.

PREPARED STATEMENT OF JOHN BERGMAYER



Testimony of John Bergmayer
Senior Staff Attorney
Public Knowledge

Before the
U.S. Senate
Committee on the Judiciary

Hearing On:
Reauthorization of the Satellite Television Extension and Localism Act

Washington, DC
March 26, 2014

Testimony of John Bergmayer
Senior Staff Attorney
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Before the
U.S. Senate
Committee on the Judiciary
Hearing on "Reauthorization of the Satellite Television Extension and Localism Act"
March 26, 2014

Good morning Chairman Leahy, Ranking Member Grassley, and members of the Committee. I am John Bergmayer, Senior Staff Attorney at Public Knowledge, a public interest nonprofit dedicated to the openness of the Internet and open access for consumers to lawful content and innovative technology. I am pleased to have the opportunity to appear before you to discuss the reauthorization of the Satellite Television Extension and Localism Act, also known as STELA, and the opportunity before Congress to make a positive impact on the video marketplace through its policies. Today, I'm going to talk about two things. First, I have a few remarks on issues specific to STELA. Then I will present a few broader ideas that will make the video marketplace more competitive and affordable.

Congress must reauthorize STELA by the end of 2014. This law ensures that satellite television companies can continue to retransmit local broadcast stations to their customers, and it is an important building block of video competition. Congress may choose to consider various video reform proposals, but it must not let these proposals keep STELA from being reauthorized. Satellite has been a success story, where action by Congress and the Federal Communications Commission (FCC) ensured that a new distribution technology could access content and reach viewers. It should be a lesson for

policymakers about the importance of fostering new modes of video competition. Congress should not put the video competition we have already achieved at risk by failing to ensure that satellite viewers can continue to access popular programming without interruption.

Given the importance of STELA to maintaining competition on the video marketplace, Congress should reauthorize STELA indefinitely, without sunset. There is no reason for Congress to create artificial crises every few years to ensure that satellite remains a competitor. A “clean” or noncontroversial reauthorization of STELA indefinitely would not prevent Congress from revisiting the provision at a later date, perhaps along with other video reforms. If Congress does choose to reauthorize STELA for only a few years, it should work to tie its expiration to the expiration of other video marketplace protections, such as distant signal rules, basic tier buy-through, and similar provisions tying the protection of other competitor distribution models to the satellite industry.

STELA reauthorization also presents the opportunity to give consumers more reliable and relevant programming with two simple reforms. First, Congress can protect consumers from the increased rate of programming blackouts due to retransmission consent negotiations by revising Section 325 of the Communications Act. The simplest reform would be to eliminate retransmission consent altogether, eliminating the statutory middleman in content negotiations. Retransmission consent negotiations have been compared to a fight between two elephants where the consumers are the grass. However, a broad reform like this would require a gradual phase-in, coupled with the elimination of compulsory copyright licenses. This would take time. In the short term, if Congress

maintains the current system of retransmission consent, it should act to prevent consumers from being trampled.

Directing the FCC to adopt rules proscribing conduct during negotiations that would be deemed in violation of the “good faith” provision would force the FCC to use its current power to protect consumers from harms unrelated to negotiations, such as the removal of online content during negotiations. Additionally, when retransmission negotiations are at an impasse, Congress should clarify that the FCC has existing statutory authority to mandate arbitration and interim carriage, and direct it to enact rules to that effect. The consumer benefit from these reforms is twofold. First, they would prevent blackouts ensuring that TV viewers are not held hostage as a negotiating tactic between media companies. Second, they would slow down the rate of increases in carriage fees paid by Multichannel Video Programming Distributors (MVPDs) to broadcasters, in turn slowing the rate at which consumer pay TV bills increase.

A second simple reform to STELA would be to update the Communications Act to allow the FCC to modify Designated Market Areas (DMAs) for broadcast TV carriage on satellite, as is already allowed with cable. For too long, satellite customers in so-called orphan counties have found that they are not able to receive broadcasts of local content due to DMAs drawn without local community interests taken into account. After years of study, Congress should empower the FCC to make these corrections.

The success of the satellite TV industry and the legislation that enables it, such as STELA, points to the best long-term approach for improving the video marketplace. That is to promote competition from new providers. Technology has dramatically changed the possibilities for how the public can watch television. But despite all of the great programming and groundbreaking devices, many Americans are locked into a television business model that limits competition and choice: the expensive bundle of channels. Most of the most popular programming is not available except through traditional subscription TV services, and these grow more expensive year after year. Two years ago, the monthly fee for cable TV (*not* including broadband) hit \$86 per month, and is projected to rise to \$200 per month by 2020—that is, unless Congress does something about it.¹ By contrast an online video-on-demand service like Netflix or Amazon Instant Video costs less than \$10 per month.

The ongoing dominance of the MVPD model is made possible largely by an outdated regulatory structure created by broadcast, MVPD, and content incumbents to gain competitive advantages and to cement their place in the video ecosystem. Moreover, people get their broadband through Internet service providers that are also video distributors, and who have the motivation and the means to discriminate against online video services. It is time for Congress and the FCC to revamp the rules of the video industry to promote the public interest. A video marketplace that served the public interest would give viewers more choice of providers and the ability to watch any programming whenever

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

they want on the device of their choosing. At the same time, it would ensure that creators and distributors could continue to get paid a fair price. A video marketplace that served the public interest would align the interests of viewers, creators, and distributors, not set one against the other.

Online video is a success story that can provide much needed competition to the video marketplace. At the moment it is not driving down cable prices because outdated rules and anti-competitive practices have forced online video to serve as a supplement to cable and satellite, not a replacement. Congress and the FCC can help online video develop into a full competitor in a three easy ways. First, they can clear away some of the outdated rules that slow down the evolution of the video marketplace. I've already discussed one example in the dysfunctional retransmission consent system, but it would also include protectionist policies like the sports blackout rule and prohibition on distant signal importation. Congress should be cautious not to eliminate parts of statute that promote competition and choice. For example, section 629 of the Communications Act allows for the FCC to enforce rules that create innovation in set-top boxes and competition against high priced cable boxes. Congress and the FCC should continue to enforce the current CableCARD implementation of that statute while moving to a more modern implementation that fixes some of CableCARD's shortcomings. The current proposal in the House to eliminate the "integration ban" would be counter to this end.

Second, they can extend the successful policies that protect providers from anticompetitive conduct to certain online providers. For example, if a large cable system is

prohibited by law from acting anti-competitively towards a satellite provider, there is no reason why it should be able to take the same actions against an online video provider. Measures such as program access and program carriage rules are designed to mitigate this form of market power by certain large video providers. These rules should be extended to online video and should not be repealed until effective competition develops.

Third, they can protect Internet openness and prevent discriminatory billing practices that hold back online video. In addition to supporting the FCC in preserving Open Internet rules, Congress should encourage the FCC to examine whether discriminatory data caps hold back online video competition. This will increase competition, meaning lower prices, better services, and more flexibility and control for consumers.

Thank you, again, for inviting me to speak and I look forward to your questions.

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR ALISON A. MINEA

**SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR SENATE JUDICIARY
COMMITTEE HEARING "REAUTHORIZATION OF THE SATELLITE TELEVISION
EXTENSION AND LOCALISM ACT," MARCH 26, 2014**

Questions for Alison Minea (DISH Network)

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

It's been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

Do you believe that the Section 119 license will ever become obsolete? If so, when? If not, why not?

How many households are currently served by the distant signal license? Has the number of unserved households increased or decreased since STELA was passed in 2010?

Do you foresee a time in the near or distant future when satellite television providers are able to provide all of their customers with local channels, as opposed to importing distant signals?

What are the current impediments to DISH Network being able to provide local signals to all households that are currently deemed "unserved"?

Do you believe that receiving local news, weather and emergency alerts from video subscription services is still valued by your consumers and in the best interest of the American public?

In Northwest Iowa, many of my constituents are either in the Sioux City, Iowa DMA or the Sioux Falls, South Dakota DMA. Should cable or satellite providers be allowed to bring in a neighboring broadcaster's signal to better reflect the market demands of that area? Why or why not? Some argue that the marketplace would be better served if consumers had more choice as to which broadcast signal they could receive – do you agree?

In Iowa, many consumers aren't able to receive the broadcaster's digital signal because the consumer lives outside of the broadcaster's digital contour. So, if not for a cable TV provider, a satellite provider or the consumer installing a 30 foot antenna outside their home, the consumer wouldn't be able to receive "free" over the air broadcast news. Should all broadcasters be mandated to serve their entire DMA footprint with a digital signal? In areas where it's technically not feasible, should cable TV companies and satellite companies be required to pay for the signal through the retransmission consent regime?

How often has DISH Network utilized the "significantly viewed" option that Congress has provided in previous satellite authorizations to provide local, non-duplicative content from adjoining DMAs to their consumers?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR MARCI BURDICK

**SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR SENATE JUDICIARY
COMMITTEE HEARING "REAUTHORIZATION OF THE SATELLITE TELEVISION
EXTENSION AND LOCALISM ACT," MARCH 26, 2014**

Questions for Marci Burdick (NAB)

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

It's been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

How valuable is local programming to your consumers? What steps, if any, should Congress take to ensure that consumers receive their local programming?

In Northwest Iowa, many of my constituents are either in the Sioux City, Iowa DMA or the Sioux Falls, South Dakota DMA. Should cable or satellite providers be allowed to bring in a neighboring broadcaster's signal to better reflect the market demands of that area? Why or why not? Some argue that the marketplace would be better served if consumers had more choice as to which broadcast signal they could receive – do you agree?

In Iowa, many consumers aren't able to receive the broadcaster's digital signal because the consumer lives outside of the broadcaster's digital contour. So, if not for a cable TV provider, a satellite provider or the consumer installing a 30 foot antenna outside their home, the consumer wouldn't be able to receive "free" over the air broadcast news. Should all broadcasters be mandated to serve their entire DMA footprint with a digital signal? In areas where it's technically not feasible, should cable TV companies and satellite companies be required to pay for the signal through the retransmission consent regime?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR ELLEN STUTZMAN

**SENATOR GRASSLEY’S WRITTEN QUESTIONS FOR SENATE JUDICIARY
COMMITTEE HEARING “REAUTHORIZATION OF THE SATELLITE TELEVISION
EXTENSION AND LOCALISM ACT,” MARCH 26, 2014**

Questions for Ellen Stutzman (Writers Guild)

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

It’s been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

How should we address the nascent online video distribution models which may displace the traditional distribution methods altogether? Should internet-based video distribution models receive statutorily-imposed rights, obligations, and prohibitions like their satellite and cable company counterparts? Or should the government let the free market work?

QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR FOR ELLEN STUTZMAN

Senator Klobuchar's Question for the Record*For Ms. Stutzman, Writer's Guild West*

Independent programing that is not affiliated with a major studio or network is an important part of the video ecosystem. Over the past decade, we've seen an increase in consolidation among large programmers and cable companies. With this consolidation, we have heard increasing concerns from independent programmers about the challenges that they face in the market. The Writer's Guild represents writers who work for all programmers, large and small, affiliated and independent. Can you tell us about challenges that independent programmers and their writers in particular face? How would any changes to STELA reauthorization impact those challenges?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR JOHN BERGMAYER

**SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR SENATE JUDICIARY
COMMITTEE HEARING "REAUTHORIZATION OF THE SATELLITE TELEVISION
EXTENSION AND LOCALISM ACT," MARCH 26, 2014**

Questions for John Bergmayer (Public Knowledge)

Do you see any of the Title 17 statutory licenses as necessary to foster competition in the video market? Why or why not?

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

It's been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

RESPONSES OF ALISON A. MINEA TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

**SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR SENATE JUDICIARY
COMMITTEE HEARING "REAUTHORIZATION OF THE SATELLITE TELEVISION
EXTENSION AND LOCALISM ACT," MARCH 26, 2014**

Questions for Alison Minea (DISH Network)***1. What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?***

Among other things, the current system of retransmission consent, established by Congress over 20 years ago in the 1992 Cable Act, gives each "Big Four" broadcast station a monopoly in its local market. While it may have been a fair negotiation when it was one cable company against one broadcaster, today the local broadcaster holds all of the cards and plays multiple MVPDs off of each other in any given market. Ultimately, it is the American consumer who suffers.

Broadcasters abuse their retransmission consent rights during negotiations, using brinkmanship tactics and blackouts to extract ever-greater fees from MVPDs, with no end in sight. Blackouts happen when companies like DISH try to fight back and reject broadcasters' unreasonable price demands, which often involve rate increases of several hundred percent. Retransmission consent fees cost MVPDs \$758 million in 2009. They rose to \$3.3 billion in 2013. They are expected to reach \$7.6 billion in 2019.

In 2013, there were 127 broadcaster blackouts, compared with 96 blackouts in 2012, 51 blackouts in 2011, and 12 blackouts in 2010. Thus, the number of blackouts increased over *one thousand percent* since Congress passed STELA. These numbers do not even include all of the near-misses, which are equally disruptive to the consumer experience. Compounding the injury, the timing of many blackouts coincides with marquee events like the World Series or the Oscars.

2. What is the proper role for Congress in responding to marketplace disputes in the communications industry?

Among other things, it is time for Congress to act to fix the broken retransmission consent system, and STELA reauthorization presents the perfect vehicle. Every five years Congress updates the law to account for changes in the marketplace, technology, and consumer demand. It should continue to make updates and improvements to the law that will benefit consumers. Specifically, we advocate specific measures to amend current communications law, including:

- Authorizing the FCC to impose baseball-style arbitration and a standstill so the programming stays up while the parties arbitrate their dispute; or, alternatively, permitting the importation of distant signals during retransmission consent disputes.
- Stipulating specific, anti-consumer actions that would fail the "good faith" requirement.
- Prohibiting joint sales agreements and other collusive methods used by

broadcasters.

- Updating the definition of “unserved household” to reflect how Americans actually receive over-the-air broadcast signals today, as opposed to how they did decades ago.
- Prohibiting broadcaster blocking of online content to the broadband subscribers of a multichannel video programming distributor (“MVPD”) during a dispute with that MVPD.
- Encouraging the unbundling of broadcast programming from other programming, both at the wholesale and retail levels.
- Permanently reauthorizing STELA.

3. It's been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

It is evidence of a system that is broken.

The retransmission consent rules date from 1992—the same year Wayne’s World was released, AT&T introduced the first video phone (for \$1,500), and the Washington Redskins won their last Super Bowl. The video marketplace has changed beyond recognition since then. But regulation of the retransmission consent regime has not.

In particular, when Congress created the retransmission consent regime in 1992, it sought to balance the market power of monopoly cable operators against the monopoly power of broadcast network affiliates with exclusive territories. In the ensuing two decades, however, the video programming distribution industry has undergone profound changes. While cable operators still have market power, they are not monopolies in the markets for video distribution. Most consumers can now choose from among three or more distributors—not to mention online video providers, among others. But broadcasters’ exclusive territories and the Commission’s retransmission consent regime have remained largely unchanged.

Moreover, broadcasters have increasingly engaged in conduct designed to enhance their bargaining power even beyond what they possessed in 1992. This includes collusion in the negotiation of retransmission consent and prohibiting the use of their programming as a distant network or significantly viewed station, even though the law allows it.

Broadcasters have exploited this situation by abusing their retransmission consent rights during negotiations, using the tactics of brinksmanship and blackouts to extract ever-greater fees from MVPDs—this is an escalating problem with no end in sight. SNL Kagan estimates that MVPDs paid \$3.3 billion in retransmission consent fees in 2013, and that this figure will soar to a staggering \$7.6 billion by 2019.

When MVPDs decline to meet broadcaster's demands, they face the loss of programming for their subscribers. The result? Consumers are harmed no matter what the MVPD chooses. Either the MVPD acquiesces, in which case subscribers pay higher prices for programming. Or the MVPD resists, in which case the subscriber loses key programming. Consumers also may be forced by blackouts to switch from their first choice provider. This, in turn, can cause the loss of their chosen package, pricing, and DVR recording history, not to mention the inconvenience of transferring billing, equipment and set up to their second (or third) choice provider. Broadcaster blackouts, moreover, affect all MVPDs. Thus, a consumer who switches MVPDs in order to obtain broadcast programming may find herself needing to do so again within a short time.

As DISH has noted previously, rural households suffer disproportionately from broadcaster blackouts. Moreover, broadcasters in many cases simply have failed to provide an adequate over-the-air signal to reach many rural communities.

4. If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

Given a broadcaster's monopoly in each local market, among other things, we disagree that a "free market" exists for the negotiation of retransmission consent and refer to our response to Question #3 above.

5. Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

Yes, and refer to our response to Questions # 2 & 3 above.

6. Do you believe that the Section 119 license will ever become obsolete? If so, when? If not, why not?

It is difficult to predict whether Section 119 will ever become obsolete, but Section 119 today serves an important role that should be retained.

More than 1.5 million satellite subscribers—many of them in the most rural areas of the country—depend on Section 119 in order to receive distant signals. Were Congress not to reauthorize STELA, these subscribers would lose access to TV service that most Americans take for granted.

Some have suggested that private licensing could take the place of STELA. That may be true under the comprehensive deregulatory approach championed in the Senate last Congress by then-Senator Jim DeMint (R-SC) and Rep. Scalise (R- LA), which would eliminate nearly all regulation of broadcast television, including the enormous regulatory benefits enjoyed by broadcasters. But nobody seriously contends that, if Congress were to eliminate STELA's *distant signal* provisions only, private licensing would replace them. Even NAB, which has opposed these provisions for decades, does not believe this.

The distant signal provisions must be renewed by Congress in order for a largely rural segment of the American population to receive the same broadcast network programming as the rest of the American populace. In other words, were Congress not to renew STELA, distant signals would disappear, depriving rural Americans of a lifeline to broadcast network programming and eliminating any chance of watching a network station in “short” markets, which do not have a station affiliated with that network.

7. *How many households are currently served by the distant signal license? Has the number of unserved households increased or decreased since STELA was passed in 2010?*

See response to Question #6 above.

8. *Do you foresee a time in the near or distant future when satellite television providers are able to provide all of their customers with local channels, as opposed to importing distant signals?*

That is entirely up to the broadcasters who fail to provide local service in all 210 DMAs, thus necessitating the use of the distant signal license to, among other things, fill in “short” markets.

9. *What are the current impediments to DISH Network being able to provide local signals to all households that are currently deemed “unserved”?*

For years, the law specified that households would be considered “served” (and thus ineligible for distant signals) if tested or predicted to receive signals of a specified strength using a “conventional, stationary, outdoor rooftop receiving antenna.” (Since the antenna is supposed to be pointed at each station tested, this really means a “rotating” antenna, not a “stationary” one.) But most Americans do not have rooftop antennas and have not for many decades. People today use indoor antennas. We have consistently argued that the relevant standard should reflect the kinds of equipment actually deployed in the marketplace.

Moreover, just before the digital transition, the FCC ruled that broadcasters did not have to replicate their analog “Grade B” signal coverage areas with the new, digital broadcast signal contours, increasing the number of households that cannot receive an over-the-air signal using a typical indoor digital antenna.

In response, Congress changed the relevant statutory criteria to refer simply to an “antenna.” Congress removed all prior specifications—“conventional,” “stationary,” “outdoor,” and “rooftop.”

We believe that Congress intended to permit use of indoor antennas as part of the standard. This certainly was our understanding at the time, based on our conversations with Members of Congress and Congressional staff.

The FCC, however, did not construe the deletions in that manner, and decided to leave the “outdoor rooftop” criteria unchanged in its rules. Thus, the predictive model and test still assume use of equipment that almost nobody uses.

This means that satellite subscribers in rural areas often can be left without access to broadcast network programming. If, for whatever reason, a satellite carrier does not offer a local station, the subscriber often can get no network service at all. She cannot receive local signals because she is too far from the transmitter. And we cannot give her distant signals because the FCC test thinks she can receive local signals.

This occurs far more often than one might think. Last summer, DIRECTV conducted nearly 1,800 signal tests in three local markets, and compared those results to the FCC’s predictive model that is intended to predict whether people can receive local signals. As many as *two-thirds* of those predicted to receive local signals could not actually receive a viewable picture—and this was using a rooftop antenna. If it had been able to conduct indoor antenna tests, the figures would undoubtedly have been much worse still.

We thus believe that Congress should, among other things, mandate a change to the standard and give the FCC more unequivocal direction than was issued in STELA.

10. Do you believe that receiving local news, weather and emergency alerts from video subscription services is still valued by your consumers and in the best interest of the American public?

Yes.

11. In Northwest Iowa, many of my constituents are either in the Sioux City, Iowa DMA or the Sioux Falls, South Dakota DMA. Should cable or satellite providers be allowed to bring in a neighboring broadcaster’s signal to better reflect the market demands of that area? Why or why not? Some argue that the marketplace would be better served if consumers had more choice as to which broadcast signal they could receive – do you agree?

Satellite subscribers tell DISH the same things they tell Members of Congress. They do not want to be told which “local” stations they must watch. They want choices. They also want to be able to watch news and sports that originate from within their own states.

Congress could address this issue in many ways. One legislative approach would be to permit satellite carriers to provide in-state stations to so-called “orphan counties,” which are counties that receive no in-state broadcasting. Permitting the FCC to modify DMAs holds some promise as well.

Broadcasters occasionally suggest that they can “solve” the in-state local news problem by offering private copyright licenses for local news. This, however, results in a product that consumers do not want—a “channel” that offers a blank screen for as many as 23 hours a day. We know this because DIRECTV offers such a product in Arkansas. Very few people watch it. People want to watch channels with around-the-clock programming, not blank screens.

That said, we must present two notes of caution. First, we have spent hundreds of millions of dollars on spot-beam satellites and ground equipment based on the Nielsen DMA boundaries. Therefore, we may not be able to adjust our channel offerings to implement changes that Congress or the FCC might enact.

Second, for this reason, we urge Congress to avoid single market “fixes,” as it did when it passed STELA five years ago. We can comply more easily with systematic changes than with one-off changes to individual local markets.

A general remedy proposed by DISH would give subscribers the option to purchase station signals from an in-state DMA if they first receive local service. We would compensate the in-state broadcaster pursuant to the Section 119 distant signal license. To the claims from broadcasters that this would reduce local station viewership, we would note that (a) a subscriber’s local stations still would be on the channel lineup, and (b) if local programming is as important and compelling as local broadcasters claim, then no material decrease in viewership should result.

12. In Iowa, many consumers aren’t able to receive the broadcaster’s digital signal because the consumer lives outside of the broadcaster’s digital contour. So, if not for a cable TV provider, a satellite provider or the consumer installing a 30 foot antenna outside their home, the consumer wouldn’t be able to receive “free” over the air broadcast news. Should all broadcasters be mandated to serve their entire DMA footprint with a digital signal? In areas where it’s technically not feasible, should cable TV companies and satellite companies be required to pay for the signal through the retransmission consent regime?

Broadcasters should attempt to serve their entire DMA footprint with a digital signal. If they fail to do so, however, satellite providers should be able to provide a distant signal to households unable to receive a sufficient signal using an indoor antenna, as we explained in Question # 9 above.

13. How often has DISH Network utilized the “significantly viewed” option that Congress has provided in previous satellite authorizations to provide local, non-duplicative content from adjoining DMAs to their consumers?

Since 2010, DISH has not utilized the “significantly viewed” option that Congress has provided in previous satellite authorizations, and we are not aware of instances prior to 2010 where we have utilized the “significantly viewed” option.

RESPONSES OF MARCI BURDICK TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

**RESPONSE OF MARCI BURDICK TO SENATOR GRASSLEY'S WRITTEN
QUESTIONS FOR SENATE JUDICIARY COMMITTEE HEARING
"REAUTHORIZATION OF THE SATELLITE TELEVISION EXTENSION AND
LOCALISM ACT," MARCH 26, 2014**

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

Enhanced technology and increased competition in the video marketplace calls into question whether the Section 119 distant signal license should be allowed to sunset as originally intended by Congress. When Congress first enacted the satellite distant signal license, it was seen as a temporary mechanism to assist a fledgling satellite industry. Yet, here we are 25 years later debating whether to extend it for the *fifth* time for the second and third largest multichannel video programming distributors (MVPDs) with 34 million subscribers and billions of dollars of revenue.

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. Local-into-local has been a boon to the satellite industry and greatly enhanced its ability to compete with cable. In fact, DISH now offers local-into-local in all 210 designated market areas (DMAs) and DirecTV is now offering local service in 195 markets. This license also has promoted localism—the bedrock principle rooted in the Communications Act of 1934. Indeed, Congress chose to include “localism” in the very title of the 2010 satellite reauthorization.

In contrast, the distant signal license has long outlived its usefulness. While satellite companies are in the best position to identify precisely the number of their subscribers currently receiving distant signals, in 2009 when STELA was under consideration, only some two percent of households continued to receive a distant signal package, and that was before DISH began providing local-to-local in all markets. For this and other reasons, that number is steadily declining. Moreover, the marketplace has changed dramatically since 1988 when the big dish back-yard satellite industry was just getting started and even since the mid-1990s when DISH and DirecTV first launched small-receiver services.

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

Retransmission consent operates as an economically efficient marketplace vehicle by which local broadcasters and MVPDs can arrange for broadcast signals to be delivered to MVPD subscribers. No Congressional involvement in this process is warranted.

The free market negotiations enabled by the retransmission consent right are no different than any other relationship between a wholesaler and a retailer. The government would not think of demanding that Nike be forced to sell its shoes to Amazon, or even require CNN to provide its programming to a cable provider. Indeed, MVPDs themselves find forced carriage rules

anathema. For example, while actively urging the Federal Communications Commission (FCC) to impose mandatory interim carriage requirements on broadcasters, Time Warner Cable (TWC) has waged a court battle opposing FCC rules requiring carriage of cable network programming pending the outcome of program carriage complaints. Similarly, in response to an NFL proposal for arbitration in connection with negotiations for carriage of the NFL Network, then TWC CEO Glen Britt stated that, “[w]e continue to believe that the best way to achieve results is to privately seek a resolution and not attempt to negotiate through the press or elected officials.”¹

It’s been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

DISH, DirecTV, and Time Warner Cable, are responsible for roughly 90 percent of the disruptions experienced by consumers over the last two years. If you remove these three companies from the mix, the retransmission consent framework is achieving the result Congress envisioned when it adopted the law in 1992. So the answer to what is causing the increased number of disruptions is that the pay-TV industry – led by DISH, DirecTV, and Time Warner Cable – has attempted to manufacture a crisis in order to force government intervention in the retransmission consent marketplace.

Another reason for the increased disruptions is that retransmission consent negotiations have become much more complex, because MVPDs are demanding that broadcasters relinquish rights allowing MVPDs to transmit their programming on multiple platforms. These demands would diminish broadcasters’ ability to negotiate with other platforms to enable them to provide competition with MVPDs.

Yet another reason for increased disruptions, especially with respect to DISH, is that DISH has commenced a service that illegally deletes commercials only on network programming.

The calls from the pay-TV industry to expand the narrow examination of STELA to “reform” retransmission consent are designed to do one thing only: give them unfair leverage in negotiations and therefore undermine broadcasters’ ability to provide their communities with high-value content.

The truth is that the fees paid to broadcasters remain modest compared to those paid to cable networks.² The dual revenue streams that stations recover from advertising revenues and

¹ Cablevision Removes 2 Channels from Time Warner in Fee Dispute, Bloomberg.com (Mar. 8, 2005); NFL Offers Arbitration to Cable for NFL Network, USA TODAY (Dec. 20, 2007) (Quoting Glenn Britt, Chief Executive Officer of Time Warner Cable).

² Contrary 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 two cents of every cable bill dollar goes to broadcast retransmission consent fees. That is true in spite of the fact that during the 2011-2012 television season, 96 of the top 100 most watched prime time programs were aired by broadcast TV stations.

retransmission consent fees are the reason the broadcasting industry has been able to continue to serve its communities of license, including by making investments in local journalism and news, entertainment, weather, and public affairs programming. In fact, according to the latest RTNDA/Hofstra University Annual Survey, 27,605 hardworking American's populated local TV newsrooms. The average U.S. daily newspaper now has 27.5 news staffers while the average local TV news staff is at 38.5.³

Despite claims made by those in the pay-TV industry, it is the extremely rare occurrence where marketplace negotiations result in any interruptions in MVPD distribution of broadcast signals. Carriage disruptions from retransmission consent impasses represent only one-hundredth of one percent of annual U.S. television viewing hours. That means consumers are twenty times more likely to lose television programming because of a power outage or rainy skies (in the case of a DBS subscriber) than a retransmission consent dispute. Local broadcasters and pay-TV providers both have an incentive to complete retransmission consent negotiations and for that simple reason they almost always do — before any disruption to viewers occurs.

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

One of the reasons there is not a free market is that there are compulsory licenses that facilitate the carriage of local stations by MVPDs in local markets. Local-into-local is a win-win-win for stations, MVPDs and consumers.

Those that argue in favor of eliminating these local licenses in favor of a “free market” also propose eliminating the retransmission consent right, that is the right in the signal as opposed to the content, altogether. This would not create a free market; it would eviscerate a broadcaster's valuable right in its signal, effectively eliminating the market for that right. No one would seriously argue that cable or satellite should not be compensated for the infrastructure that assembles and distributes their service. Why are broadcasters any different?

Congress correctly established a framework where private market-based negotiations efficiently and fairly dictate the value of broadcasters' signals for those seeking to retransmit them for profit. For many years after 1992, broadcasters received almost no financial compensation.⁴ Even today, in a hyper competitive marketplace, the compensation that broadcast stations recover through retransmission consent fees are dwarfed by carriage fees paid to cable networks with far fewer viewers than local broadcast stations. In fact, broadcasters provide 35 percent of the viewing audience to MVPDs, but collect only three percent of the fees. Although this pricing disparity is deeply frustrating for television stations seeking fair market compensation, NAB is not asking the government to intervene. Quite the opposite, NAB firmly

³ http://www.rtdna.org/article/newsroom_staffing_stagnates#.UyhMNs5Ta3V

⁴ See Navigant Economics, Jeffery A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D., *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, at 5 (April 2010). This and other studies have discussed in detail why broadcasters' bargaining power relative to that of MVPDs has remained limited over time.

believes that the market is finding its equilibrium as prices for content are getting closer and closer to fair market values based on ratings and popularity.

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

Cable rates have grown at more than twice the rate of inflation since well before broadcasters were being paid a penny for our signals. While certain laws governing the video marketplace may contribute to these price increases, the retransmission consent right is not among them.

As NAB has demonstrated in multiple economic studies, retransmission consent is not responsible for the high and rising consumer prices charged by cable operators. An independent analysis from Multichannel News found that only two cents of every dollar of cable revenues go to broadcast retransmission consent fees, while 20 cents of every dollar go to cable programming fees, even though broadcast programs remain the most popular with viewers.⁵ Recent SNL Kagan data show that retransmission consent fees are equivalent to only 2.7 percent of the cable industry's video-only revenues (and would be a considerably smaller percentage of total revenues).⁶ Today, channels with lower ratings are being paid more than broadcast channels, so any attempt to point to retransmission consent as the reason cable bills are increasing has no basis in fact.

How valuable is local programming to your consumers? What steps, if any, should Congress take to ensure that consumers receive their local programming?

NAB urges the Committee to take a hard look at some consumer friendly provisions that would mitigate consumer disruptions caused by retransmission consent impasses.

First, Congress should prohibit MVPDs from assessing early termination fees on consumers who seek to switch pay-TV providers. It is becoming increasingly common for MVPDs to lock their subscribers into early termination agreements that force a consumer to pay hefty fees when canceling services prior to the termination of a service agreement. These substantial fees act as a strong deterrent in preventing consumers from switching to different pay-TV providers in the rare event of a retransmission consent carriage dispute.

Second, Congress should require MVPDs to refund subscribers for the costs associated with the loss of promised content.

Third, Congress should consider modifying rules to ensure that consumers have adequate information to make informed decisions about how to access programming in the rare instances when they may be impacted by a negotiating impasse. Existing rules that require written notification of a removal of any broadcast signal should be expanded to all MVPDs, not just

⁵ Where Your Cable Dollar Goes, Multichannel News (Mar. 28, 2011) at 10-11.

⁶ © 2013 SNL Kagan, a division of SNL Financial LC, estimates.

cable. Increased consumer notice and education to all pay-TV subscribers will provide viewers who may be affected by a rare impasse in a carriage negotiation with the ability to make informed choices about how to avoid or minimize potential disruptions.

Fourth, Congress should consider prohibiting MVPDs from charging consumers who wish to downgrade their service package.

In Northwest Iowa, many of my constituents are either in the Sioux City, Iowa DMA or the Sioux Falls, South Dakota DMA. Should cable or satellite providers be allowed to bring in a neighboring broadcaster's signal to better reflect the market demands of that area? Why or why not? Some argue that the marketplace would be better served if consumers had more choice as to which broadcast signal they could receive – do you agree?

Local broadcasters' primary goal is to promote localism. While the DMA structure created by Nielsen is not perfect, the FCC studied the availability of in-state programming following STELA's enactment. Specifically, based on FCC data from 2010, 99.98 percent of the 117.2 million total U.S. households have access to in-state programming (at least one station) either over the air or via an MVPD. With that, broadcasters are committed to serving the public and delivering their signal to viewers, and in examples where MVPDs serving consumers outside a DMA seek to obtain an in-state station, many broadcasters have engaged in productive discussions to arrange carriage of in-state news and public affairs programming in the private marketplace. Unfortunately, in many instances MVPDs, specifically DISH and DirecTV, have refused to enter into these private agreements to provide in-state programming to their consumers.

The better approach is to pursue a marketplace solution, and NAB commits to work with you to determine whether viewers in the Iowa counties you reference are not currently served by locally-focused programming. In the event that is deemed to be the case, there are several examples throughout the country where local broadcasters have committed to provide their non-duplicative, in-state news and weather to counties that are not otherwise served by in-state locally focused programming.

Finally, consumers benefit from the current legal framework that ensures that the vast majority of viewers receive their local broadcast stations. No changes to the law should be considered that undermine broadcasting's locally-focused service.

In Iowa, many consumers aren't able to receive the broadcaster's digital signal because the consumer lives outside of the broadcaster's digital contour. So, if not for a cable TV provider, a satellite provider or the consumer installing a 30 foot antenna outside their home, the consumer wouldn't be able to receive "free" over the air broadcast news. Should all broadcasters be mandated to serve their entire DMA footprint with a digital signal? In areas where it's technically not feasible, should cable TV companies and satellite companies be required to pay for the signal through the retransmission consent regime?

Broadcasters should not be “mandated” to serve their entire DMA any more than the government should “mandate” the coverage of a satellite carrier’s spot beam or the franchise area a cable system must serve. Moreover, there are often technical and interference reasons that preclude a station from providing coverage throughout its DMA. So as a practical matter, in many instances it is the government, through limitations on a station’s power and antenna height that is “mandating” that it not provide coverage throughout its DMA.

Consumers are best served when they receive a local broadcast signal rather than a distant signal. It is only in those cases that viewers received the locally-focused news, weather, emergency service, sports and public affairs programming that make broadcast television unique among entertainment mediums. Congress should resist proposed changes in law that would undermine this local focus.

Current law enables satellite companies to import distant network signals to certain “unserved households” without obtaining retransmission consent for those signals.

RESPONSES OF ELLEN STUTZMAN TO QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR

Senator Klobuchar's Question for the Record*For Ms. Stutzman, Writer's Guild West*

Independent programming that is not affiliated with a major studio or network is an important part of the video ecosystem. Over the past decade, we've seen an increase in consolidation among large programmers and cable companies. With this consolidation, we have heard increasing concerns from independent programmers about the challenges that they face in the market. The Writer's Guild represents writers who work for all programmers, large and small, affiliated and independent. Can you tell us about challenges that independent programmers and their writers in particular face? How would any changes to STELA reauthorization impact those challenges?

The most significant challenge facing independent programmers and the writers who work for such producers is finding an outlet that will license their content. In the two decades since the repeal of the Financial Interest and Syndication Rules (Fin-Syn), consolidation through vertical integration between television networks and studios has all but eliminated independently produced programs from primetime television.

According to WGAW analysis of the broadcast network schedules, only 10% of the 2013 fall primetime lineup was independently produced. This is down from 76% independently produced in 1989, when the broadcast networks were prohibited from owning the content they aired.

Broadcast Fall Primetime Lineup, 1989-2013

| Fall Primetime Lineup | 1989 | 1999 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|-------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Independently Produced ¹ | 76% | 28% | 21% | 13% | 12% | 11% | 11% | 10% |
| Media Conglomerate Produced Series | 24% | 72% | 79% | 87% | 88% | 89% | 89% | 90% |

In addition, most of the independent programs airing on broadcast television are reality series such as *Dancing with the Stars* and *The X-Factor*. These programs are typically viewed once and do not generate significant revenue from reruns, syndication and DVD sales in the way scripted programs do. As a result, the broadcast networks are less interested in owning this programming.

At the time of the repeal of the Fin-Syn rules, the broadcast networks argued that increased competition from cable networks justified retiring the rules. The proliferation of cable channels, however, has not increased competition: seven companies, five of which own broadcast networks, are responsible for 95% of all television viewing in the

¹ WGAW defines independent producers as studios or production companies that are not owned or affiliated with a major broadcast or cable network or an MVPD provider. Such a definition is essential because it exposes the true amount of programming that reaches the air without the market power or guaranteed distribution provided by vertical integration.

United States.² These seven companies – CBS, Disney, Discovery, NBCUniversal, 21st Century Fox, Time Warner and Viacom – create and distribute the majority of content seen on broadcast and cable.

When the WGAW examined the original comedies and dramas offered by basic cable networks, we found a similarly low and declining amount of independently produced series. Over the past five seasons, independently produced series have declined from 41% of basic cable dramas and comedies to only 22%.

Analysis of Original Scripted Programming on Basic Cable Networks

| | 2008- 2009 | 2009- 2010 | 2010- 2011 | 2011- 2012 | 2012- 2013 |
|------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Independently Produced | 41% | 33% | 26% | 26% | 22% |
| Media Conglomerate Produced Series | 59% | 66% | 74% | 74% | 78% |

The lucrative downstream market for scripted content – from sources such as cable and local station syndication, international licensing, and SVOD services – has created significant incentives for networks to own their lineups. In 2012, domestic syndication revenues were an estimated \$20 billion;³ international licensing of domestic television series was estimated at \$3.5 billion;⁴ and SVOD deals represented an additional \$2 billion in revenue.⁵ The importance of content ownership was recently confirmed in an *Advertising Age* interview with the executives in charge of FX and A&E Networks.⁶ Mr Landgraf, CEO of FX Networks said,

“We started FX Productions almost 10 years ago to own the content. A big part of our revenue stream is still the advertising business. A big part of our revenue is still affiliate-sales business and subscription revenue, but ultimately, if you think about a piece of content like “Hatfields & McCoys,” anything that Charlie makes or “Fargo,” something that can generate revenue over 10 or 20 years, if you don’t own it, that revenue is going to somebody else. Our studio partnership is not always helpful, because obviously they have a goal of maximizing revenue, and that often means taking away from us and selling it to somebody else. So you have to take ownership.”

² United States Government Accountability Office, “Video Marketplace: Competition is Evolving, and Government Reporting Should be Reevaluated,” GAO-13-576, June 25, 2013, p 6.

³ Anthony DiClemente and Chris Merwin, “Why TV Studio ROIC Should Improve,” Barclays, October 1, 2012, p. 5.

⁴ SNL Kagan, “Worldwide TV Programming Market for US Produced Programming,” May 21, 2013, <http://www.snl.com>.

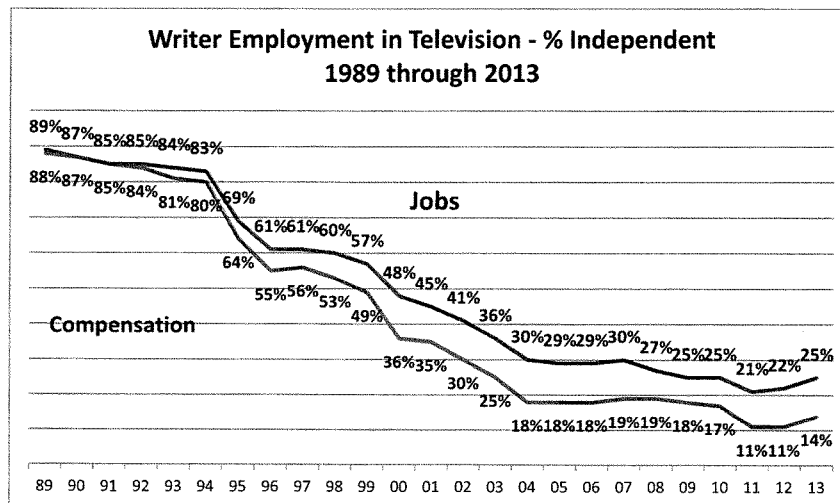
⁵ Todd Juenger, “Weekend Media Blast: SVOD-The Journey So Far,” Bernstein Research, June 17, 2013, p 3. Revenue estimates for CBS, Time Warner, Disney, News Corp, Viacom, Discovery and NBCU.

⁶ Jeanine Poggi, “Meet the Hitmakers: AMC’s Collier, A&E’s Dubuc, FX’s Landgraf Are Keeping Broadcast Nets Up at Night,” *Advertising Age*, April 7, 2014.

Ms. Dubuc, President and CEO of A&E Networks also said, “Even in the distribution, if you don’t own it, you’re not going to be a part of the over-the-top [selling content to streaming services]. Ownership is critical.”

Downstream revenues incentivize network ownership of content and because rules no longer exist to ensure independent content is offered on television, independent producers lack the power to get their content on television.

The decline in independent programming has reduced the number of potential employers for writers. In 1989, 89% of TV writing jobs and 88% of TV writing compensation came from outside the conglomerates. By 2013, those figures have declined to 25% and 14%, respectively.⁷ The pivotal moment was the repeal of Fin-Syn in the 1990s. Despite the expansion of television outlets, both jobs and compensation have shifted from independent studios and production companies to vertically integrated media conglomerates.



The consolidation has caused considerable harm to the creative community. The market power possessed by these media conglomerates allows them to capture a majority of the economic value created by television production, to the detriment of actual content creators. Studios, now guaranteed distribution by virtue of having vertically integrated with networks, no longer compete for talent as a means of differentiation. The inordinate power held by these media conglomerates allows them to make increasing demands on

⁷ These figures include all broadcast, cable and pay TV programming written by WGAW members, not just prime time.

the talent community. The result is that writers must do more work for less pay and are deprived of the funds necessary to continue developing creative works.

Because television networks insist on content ownership, the WGAW believes that independent programming will continue to decline on television unless regulations are put in place that require minimum levels of independent programming for broadcast and cable networks.

However, the rise of the Internet as a platform for original video programming offers some promise for the reintroduction of independent content. 2013 marked the debut of original television-length programming from outside the television ecosystem as Netflix and Amazon began offering original drama and comedy series directly to consumers. Press reports indicate Xbox, Sony Playstation and Yahoo! will be the next online providers to offer such programming.⁸ Many of the original series debuting on Netflix have come from independent producers who do not own a television network, including Media Rights Capital, Lionsgate, Sony and Gaumont International Television. Press reports indicate that content being developed for the Xbox will also come from independent sources. These additional outlets have created new space for independent producers, but only an open Internet that prohibits discrimination at interconnection points or over the "last mile" will ensure this progress continues.

We do not believe that reauthorizing the Satellite Television Extension and Localism Act will improve or worsen the availability of independent programming on television.

⁸ Nellie Andreeva, "XBox Develops Pro Skater Comedy Series," *Deadline Hollywood*, December 6, 2013; Marc Graser, "Microsoft to Launch First Original Shows on Xbox in Early 2014," *Variety*, December 13, 2013; Nellie Andreeva, "Xbox Developing 1990s Music Series Based on Rapper Nas' Life," *Deadline Hollywood*, February 11, 2014; Bryan Bishop, "Sony's first original TV series for Playstation will be 'Powers,'" *The Verge*, March 19, 2014; Mike Shields, "First Netflix and Amazon. Now Yahoo to Get Into TV Programming Game," *The Wall Street Journal*, April 5, 2014.

RESPONSES OF ELLEN STUTZMAN TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR SENATE JUDICIARY
COMMITTEE HEARING "REAUTHORIZATION OF THE SATELLITE TELEVISION
EXTENSION AND LOCALISM ACT," MARCH 26, 2014Questions for Ellen Stutzman (Writers Guild)

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

Over the last five years, there have been positive developments in the video marketplace including new devices for video consumption like tablets and Internet connected set-top boxes, new video services like Netflix and Amazon Prime, and increased on-demand programming options, almost all a result of rise of the Internet as a video distribution platform. But, this progress has largely occurred at the edges of the video marketplace, while the state of the multichannel video programming distribution (MVPD) business has remained largely unchanged. MVPDs remain the dominant video providers, with 90% of television households having an MVPD subscription.¹ And, the MVPD market is concentrated, with four companies controlling two-thirds of subscribers.² The proposed Comcast-Time Warner Cable merger would further concentrate market control through the combination of the first and fourth largest MVPDs. In its most recent report on cable industry prices, the Federal Communications Commission reported that the average cost of expanded basic cable service was \$61.63 per month in 2012, up almost 18% from 2009.³

Because cable operators have largely chosen not to compete directly, satellite has provided consumers with some measure of choice for cable television service. But the choice between 3 operators can hardly be considered robust competition. While AT&T and Verizon have also entered the MVPD market, they only serve about 40% of the country and Verizon has stopped expanding its service to new markets.^{4,5} Because satellite does provide consumers with an alternative to cable, it is important that Congress reauthorize STELA.

Online video has the potential to increase competition and provide consumers with additional choices that may address price concerns. For instance, a Netflix or Hulu Plus subscription is available for only \$7.99 a month and both offer thousands of on-demand video choices. However, online video services are not substitutes for an MVPD service. A service such as Netflix is akin to an individual television network like HBO. It offers only a limited menu of programming, and, in the case, does not offer must-have content such as news or live sporting events. So, the availability of such alternatives may exert

¹ FCC, *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket 12-203, Table 17, (2013).

² SNL Kagan, "U.S. Multichannel Industry Benchmarks," 2013 and "U.S. Cable Subscriber Highlights," 12/13Q.

³ FCC, *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, p. 23, June 7, 2013.

⁴ SNL Kagan, "Media Trends," 2013 Edition, p. 212.

⁵ Steve Donohue, "Verizon pressured to expand FiOS in New Jersey," *Fierce Cable*, October 4, 2013.

some pressure on competing channels such as HBO or Showtime, but exerts no pressure on MVPDs. But, online video services will only flourish in an environment where Internet service providers (ISPs) do not act as gatekeepers. Unlike traditional MVPDs, online services rely on ISPs to deliver their content to consumers. Since most ISPs are also MVPDs, the online video market requires strong nondiscrimination rules to ensure that incumbent firms do not limit the development of robust competition. This is particularly important given the history of Comcast throttling Bit Torrent traffic and exempting its own video service from data caps when watched through Xbox devices.

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

The proper role for Congress is to broadly review market activity to determine if existing laws promote competition, diversity, innovation and consumer choice. Such a role is preferred to responding to individual disputes between MVPDs and broadcast and cable channels.

It's been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

While retransmission consent has been in place since the passage of the Cable Television Consumer Protection and Competition Act in 1992, the recent change in practice has been for broadcasters to seek per-subscriber compensation as a part of retransmission negotiations. Prior industry practice had been to use retransmission negotiations to secure carriage of additional cable networks. This change may be undesirable for MVPDs, but broadcasters are within their rights to seek compensation and doing so does not mean the system is broken.

Broadcasters appropriately have the right to withhold programming if they cannot reach an acceptable agreement with an MVPD. This is necessary because television networks sell to a concentrated MVPD market, controlled by a few large and powerful buyers. While households can access local stations using a digital antenna, almost all television households use an MVPD service to watch the broadcast networks. That broadcast networks must go through MVPDs to reach the public gives these distributors significant negotiating leverage. It is, therefore, appropriate that broadcasters have the right to resist MVPD efforts to avoid paying for content. Without the right to engage in retransmission negotiations, revenue available to invest in programming would decline, harming content creators and consumers.

We believe that broadcasters continue to have sufficient incentive to reach agreement. Broadcast stations cannot afford a strategy in which they lose viewers, even temporarily. The business model of network television and the competition for television viewers necessitate uninterrupted distribution of broadcast programming through MVPDs.

Further, broadcast network programming is funded by advertising revenue with retransmission revenue playing a small but important supplementary role.

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

In a free market, we would expect that the content valued by consumers would be the content they would choose to purchase. However, at present consumers do not have the ability to select only the content they want to watch. Rather, large and powerful distributors in a concentrated MVPD market sell bundles of television channels in various programming packages as well as bundles of services that include telephone and Internet access. Absent a la carte requirements, these middlemen set the price for bundles of content and through their size and control of access to consumers have both the means and incentive to limit both consumer choice and compensation paid to broadcast and cable networks. This is why rules such as retransmission consent are necessary, as they help provide some balance between broadcasters and MVPDs. Other rules, such as independent programming and a la carte programming requirements would also restore competition to this marketplace and give consumers the ability to make choices in a free market; currently such a free market does not exist.

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

The ability of incumbent MVPDs to bundle programming such that consumers must pay for channels they do not wish to purchase costs some consumers more than if they were free to choose just the channels they wish to subscribe to.

How should we address the nascent online video distribution models which may displace the traditional distribution methods altogether? Should internet-based video distribution models receive statutorily-imposed rights, obligations, and prohibitions like their satellite and cable company counterparts? Or should the government let the free market work?

To enhance competition and make online video a viable substitute to MVPD offerings, the WGAW believes that changes to existing regulations are necessary and should include the expansion of the definition of an MVPD. In 2012 the FCC sought comments on the interpretation of the terms "Multichannel Video Programming Distributor" and "Channel" arising from a Program Access complaint involving an OVD provider of a cable subscription service.⁶ The WGAW supports an MVPD definition that recognizes that programming distributors need not provide the transmission path in addition to the

⁶ Public Notice, *Media Bureau Seeks Comment on Interpretation of the Terms, "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, DE 12-507, March 30, 2012.

video programming. The inclusion in the MVPD definition of entities that make use of third-party facilities to provide video programming would be consistent with Congressional intent to enhance competition in video programming distribution. In recent years, with the development and adoption of high-speed Internet, it has become possible for MVPDs to deliver multiple channels of video programming without owning the “facilities” or the transmission path. Given the concentration that currently exists in the MVPD market, this technological breakthrough could play an integral role in enhancing competition. We are encouraged by recent press reports that indicate satellite provider Dish has reached agreement with Disney to offer its channels in a virtual cable package, but we are at the same time concerned that only large incumbents like Dish have the power to negotiate such deals, with new competitors continuing to be barred from the market.⁷ Intel abandoned its virtual MVPD efforts in 2013, selling its technology to Verizon.⁸ Sony has been working on a virtual cable service for its Playstation console, but reports indicate that licensing negotiations have slowed progress.⁹ A change in the MVPD definition would help with content licensing, ensuring these virtual MVPD efforts become a reality.

Another critical component necessary for a competitive online video market is an open Internet. Online services rely on Internet service providers (ISPs) to deliver their content to consumers. Since most ISPs are also MVPDs, the online video market requires strong network neutrality rules to ensure that incumbent firms do not engage in anti-competitive conduct. Such action is necessary because the broadband Internet market is not competitive. Four companies control 68% of the broadband market.¹⁰ In addition, almost one in three Americans has only a single option for Internet service fast enough to stream videos.¹¹ The large capital expenditures necessary to build out broadband service limits consumer choice. Verizon and AT&T fiber offerings are only available in about 40% of the country. While ISPs may point to Google’s entry into the broadband market as evidence of competition, it is worth noting that even if Google were to expand into all of the 34 cities it recently expressed interest in, its fiber network would only pass a total of about 3.9 million households out of 119 million occupied U.S. households in 2013.¹² The lack of competitive broadband offerings coupled with MVPD control of broadband, makes strong net neutrality rules that apply to interconnection as well as the “last mile” of broadband service necessary. This is the only way to guarantee a robust, competitive online video market.

⁷Todd Spangler, “Disney Deal Gives Dish the Rights for a Virtual-MSO Foray,” *Variety*, March 12, 2014.

⁸ Steve Kovach, “Intel’s Revolutionary Internet TV Service Is Coming To Verizon,” *Business Insider*, January 21, 2014.

⁹Liana B. Baker, “Sony to test PlayStation-based cloud TV service,” *Reuters*, January 7, 2014.

¹⁰ Leichtman Research Group, “2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013,” March 17, 2014.

¹¹ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012*, December 2013, p 9.

¹² Kamran Asaf, “Google targeting over 3 million households with its planned fiber expansion,” *SNL Kagan*, March 4, 2014.

RESPONSES OF JOHN BERGMAYER TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR SENATE JUDICIARY COMMITTEE HEARING "REAUTHORIZATION OF THE SATELLITE TELEVISION EXTENSION AND LOCALISM ACT," MARCH 26, 2014**Questions for John Bergmayer (Public Knowledge)**

Do you see any of the Title 17 statutory licenses as necessary to foster competition in the video market? Why or why not?

Compulsory licenses are needed in some markets to ensure that a wide variety of competitors have access to content, and to ensure that all creators are paid at least a fair, baseline rate for their work. However, the video compulsory licenses may have outlived their usefulness. The existence of cable channels demonstrates that copyright and contract are enough to ensure that programmers can package and MVPDs can deliver a variety of video programming.

However, in the short term, the video compulsory licenses continue to be necessary because of the business practices that have been built up around them. Their reform should take place gradually. Finally, while they still exist they should be technology-neutral: cable, satellite, and online video should not operate under different copyright regimes.

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

There are indications that increased competition from online video is possible. One interesting trend is that growing numbers of younger viewers are "cord-nevers" who never get cable subscriptions to begin with. This is potentially a more significant trend than cord cutters.

Beyond this, though, the overall competitive picture is not very different. Cable continues to dominate video delivery and DBS continues to attract a large number of subscribers on a nationwide basis (though is often behind cable in markets where they directly compete). All of the reasons Congress reauthorized STELA before apply today.

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

Congress sets the rules of the road and should revisit them as necessary. It is proper for Congress to gather information as to the functioning of the marketplace so that it can see if its rules are working. Congress should also ensure that the FCC is doing its job of protecting consumers and competition and is using its statutory powers effectively.

Individual members of Congress can and should weigh in on particular disputes to ensure that the needs of the constituents are not being trampled by disputes between companies, as well as encouraging the FCC to use its authority to intervene when appropriate.

It's been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is

causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

In the past, MVPDs could easily pass along rate increases to their subscribers. But while cable bills continue to rise there is an increasing recognition that many consumers are near the breaking point. Negotiations are much tougher now because they are getting closer to becoming a zero-sum game.

Additionally, content negotiations in the past often involved carriage of extra cable channels: that is, to get rights for a particular broadcast network or popular cable channel, an MVPD would agree to also carry one of the programmers newer, untested channels. But it has become more difficult to launch a new cable channel in this environment, since there already are so many of them.

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

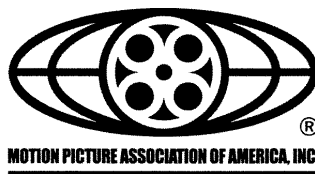
As a general matter this is true, though the free market alone might not be enough to ensure that the needs of minority communities, low-income viewers, or rural residents will be met. Nor is it clear that the free market alone will produce adequate public affairs or educational programming. That said, the free market by itself should be enough to ensure most quality programming is created and distributed.

But the current market is not a “free” market: it operates under an accretion of rules that Congress and the FCC have created over the decades. These rules prevent the market from evolving and from better adapting to viewer demand. Congress should first reform these rules in a pro-competitive manner (by increasing competition from new platforms) to ensure that the beneficiaries of the current regulatory system are not able to simply lock in their current advantages permanently.

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

Yes. First, the different treatment of MVPDs vs. online providers limits choice and keeps video subscription bills high. Second, protectionist rules—such as those that guarantee local broadcasters territorial exclusivity for certain content—enshrine into law business arrangements that may no longer serve a purpose.

MISCELLANEOUS SUBMISSIONS FOR THE RECORD



Statement for the Record

Senate Judiciary Committee Hearing
on "Reauthorization of the Satellite Television Extension and Localism Act"

March 26, 2014

A quarter century after Congress first created a satellite television compulsory copyright license, there is no reason why the government should be forcing the Motion Picture Association's members—or any content creator—to subsidize satellite providers. When Congress enacted the section 119 compulsory license with the Satellite Home Viewers Act of 1988, satellite television was a nascent industry. Today, DirecTV and Dish are the second and third largest pay-TV providers in the country, serving 20 million and 14 million households and generating 2013 revenues of \$32 billion and \$14 billion.

The Motion Picture Association of America represents Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc., which produce and distribute movies, television series, specials, and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the Internet. As the committee begins its re-examination of the law authorizing satellite providers to deliver television broadcast programming to their subscribers, the MPAA's goal is to provide consumers the greatest possible quantity and selection of television programming in the most innovative ways. To do that, the men and women who invest their talent and capital to create that programming must receive fair market compensation, and the law must promote marketplace innovation.

Our message is straightforward: 1) the anachronistic distant signal compulsory license is not justified in today's television program marketplace; and 2) if Congress retains the compulsory license, it should not broaden its scope, should compensate program owners fairly, and should encourage licensing.

Congress intended the satellite compulsory license to be narrow and short-lived. The goal was to give fledgling and capacity-strapped satellite providers a foothold in the marketplace and help viewers who were out of reach of their local, over-the-air television broadcast signals. To do so, the law granted satellite providers permission for six years to deliver broadcast television programming from a few distant markets to "unserved households" without the copyright owners' permission and without giving them any ability to negotiate a fair, marketplace price. Since then, the satellite compulsory license has grown beyond recognition and outlived its usefulness, as DirecTV and Dish are far

from fledgling and now have more than enough capacity to carry local broadcast programming to local viewers.

Background

Congress extended the satellite distant signal compulsory license for five-year periods in 1994, 1999, 2004, and 2009. The 1994 renewal included a royalty rate adjustment procedure aimed at providing copyright owners with market-value compensation for the use of their programming by satellite companies. This procedure resulted in the establishment of market-based royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office. The Panel specifically endorsed the approach taken by PBS that looked to the viewing rights to 12 popular basic cable networks (A&E, CNN, Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA) that represented the closest alternative programming to broadcast programming for satellite homes. PBS then calculated a 'bench-mark' rate for these networks as representative of the fair market value of broadcast signals carried by satellite carriers. That benchmark rate produced average market rates of 26 cents in 1997, 27 cents in 1998, and 28 cents in 1999, which translated to a royalty rate of at least 27 cents for the 1997-99 period.¹ These market-based rates were short lived, however.

Although satellite companies pay market-based license fees for the hundreds of non-broadcast program services that they sell to their subscribers, they strongly objected to paying market-based royalty rates for broadcast programming. They successfully petitioned Congress to impose a substantial discount on the market-based rates, essentially creating a subsidy for satellite television services borne by the creators of broadcast programming. As a result, Congress cut these market rates by as much as 45 percent.

After the reduction of satellite royalty rates in 1999, Congress in the 2004 reauthorization provided for an adjustment of the rates under the supervision of the Librarian of Congress. Voluntary negotiations between satellite carriers and program owner groups resulted in only a marginal rate increase and an annual inflation adjustment. Today, more than 15 years later, the current royalty rate paid by satellite carriers under section 119 finally equals what was considered the market rate in 1999, notwithstanding substantial increases in programming costs and the market-based rates paid by cable and satellite operators for non-broadcast channels since that time.

Today

The market conditions that gave rise to the satellite compulsory license in 1988 have long since disappeared. The emerging direct-to-home satellite industry offered some non-broadcast networks in 1988, but the ability to offer broadcast programming was seen

¹ Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55742 at 55648 (Oct. 28, 1997), *aff'd SBCA v. Librarian of Congress*, 172 F.3d 921 (D.C. Cir. 1999).

as critical for satellite television services to compete with more established cable services. The prevailing opinion at the time was that satellite companies were not viable enough to bear the “transaction costs” of negotiating rights for the television broadcast programming that was so essential to these still emerging services. This was the theory used to justify government intervention in the marketplace.

Today, television broadcast signals remain a valuable part of satellite program packages, but account for a relatively small amount of the programming sold by satellite carriers to their subscribers. In thinking about whether distant signal compulsory licensing can be justified in today’s marketplace, it is important to recognize that each one of the thousands of hours of non-broadcast programming sold by satellite systems to their subscribers is licensed on marketplace terms and conditions. Only the relatively small amount of broadcast programming that satellite providers offer is subject to a government-imposed compulsory copyright license.

That the overwhelming majority of programming offered by satellite companies is licensed in marketplace transactions suggests that there is no longer any justification for retaining the historical relic that is the distant signal satellite compulsory license. It can be eliminated with creation of a transition mechanism enabling programmers, broadcasters, and satellite operators to accommodate the changes in their contracts. Whatever Congress does, there is certainly no justification for continuing to require licensing of broadcast television content to satellite operators at below-market, government-imposed rates. As the Register of Copyrights stated in the Copyright Office’s most recent Section 109 Report:

The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system. They have substantial market power and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Office finds that the Internet video marketplace is robust and is functioning well without a statutory license. The Office concludes that the distant signal programming marketplace is less important in an age when consumers have many more choices for programming from a variety of distribution outlets.²

When direct-to-home satellite services came on the scene, they provided no local stations and only a few distant signals because of bandwidth limitations. They catered to rural customers who had available few, if any, over-the-air local stations and were in areas where satellite service had an infrastructure cost advantage over cable. Currently, Dish provides local signals in all 210 local markets and DirecTV provides local signals in 197 local markets. And both providers are robust competitors in urban, as well as rural, markets.

² Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, *A Report of the Register of Copyrights, June 2008*, at page 219.

The evidence is overwhelming that the marketplace works for the vast majority of satellite programming without the need for compulsory licensing. If Congress decides to continue to allow satellite companies to use broadcast programs pursuant to statutory license, certainly there is no justification for continuing the practice of below-market license rates to compensate program owners, for further expanding the current licenses beyond the entities now eligible, or for applying them in situations not already covered.

