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THE STATE OF THE TELEVISION AND VIDEO MARKETPLACE

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

JUNE 5, 2019

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

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THE STATE OF THE TELEVISION AND VIDEO MARKETPLACE

WEDNESDAY, JUNE 5, 2019

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

The Committee met, pursuant to notice, at 10 a.m. in room SD–G50, Dirksen Senate Office Building, Hon. Roger Wicker, Chairman of the Committee, presiding.

Present: Senators Wicker [presiding], Cantwell, Blunt, Schatz, Capito, Markey, Tester, Lee, Thune, Udall, Blackburn, and Cruz.

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

The CHAIRMAN. Welcome. And we are delighted to have all of you with us today.

The Committee gathers to examine "The State of the Television and Video Marketplace."

I'm glad to convene this hearing with my colleague, Senator Cantwell.

I welcome our distinguished panel of witnesses and thank them for appearing. The Honorable Michael Powell, President and CEO of the NCTA—the Internet and Television Association; the Honorable Gordon Smith, President and CEO of the National Association of Broadcasters and our former colleague; Mr. David Kenny, CEO of Nielsen; and Mr. Craig Aaron, President and CEO of Free Press.

Americans are living in the Golden Age of Television. We've never had more choices and access to video content. The days when viewers had to be home at a certain time to watch their favorite show are gone. Television experience is increasingly moving away from dependence on fixed scheduled channels, programming lengths, and the confines of the family living room.

With the development of over-the-top technology, digital programming, and streaming services, consumers now control how, where, and when they watch television and video content.

The growing availability of high-speed Internet access underlies the disruption of the traditional TV industry. Internet connectivity has ignited an explosion of new video offerings on a variety of platforms and devices. Live scripted and unscripted video programming and user-generated content is now readily available on computers, tablets, smart phones, gaming consoles, and social media platforms. As a result, Americans are able to access and watch television anywhere they can get a sufficient connection online.

I hope the witnesses today will discuss the impact of rising digital and online video services on consumer viewing habits and preferences as well as the effects of growing access to content.

Internet access has also spurred changes in the ways video content is offered and packaged. This has led many to cut the cord for subscriptions to traditional pay TV offerings in exchange for online video services and I'm kin to some of those who've cut the cord.

For an example, viewers can now purchase skinny bundles or scaled-down selections of pay TV channels that more closely align with their preferences. Content is also available on demand through subscription-based offerings that provide uninterrupted ad-free viewing as well as so-called "freemium" models where the service is available free of charge with intermittent advertisements.

The growth of these offerings is delivering a more personalized and less expensive television experience.

This morning's hearing is an opportunity to discuss how television programming and the delivery of video content has evolved over the past decade, particularly within the broadcast and cable television industries.

I would also like to ask witnesses to address how new entrants into the video marketplace are transforming traditional television business models while increasing competition in consumer choice.

As technology continues to advance and transform the television industry, this hearing provides an opportunity to examine existing rules and policies governing the video marketplace.

Many of the rules which are contained in the STELAR Act and the Cable Act of 1992 are intended to promote competition and access to content. This is especially important for rural areas where many individuals live beyond the reach of a broadcast signal.

These laws have also played a meaningful role in fostering localism and viewpoint diversity, but despite an increasingly competitive video marketplace, consumers sometimes face higher bills for video content, programming blackouts, and lack of access to the most relevant programming due to market restrictions.

Our witnesses today will no doubt address their views on existing laws and policies governing the video marketplace.

I also hope the witnesses will discuss how Congress should modernize these laws, given the context of which options and services are available to the viewers.

Television and video programming industries are important sectors of the economy. They're critical communications mediums that create jobs, distribute information, drive commercial activity, and entertain. Through quality content and services, television and video programmers provide a voice to many perspectives that serve the interests of the viewing public every day.

This brings our communities closer and empowers our citizens. So I look forward to a thoughtful discussion today, truncated and abbreviated, though it might be, because of the voting schedule, but we thank you all. We'll do the best we can to fit a lot into a short time.

I now recognize and turn to my dear friend from the state of Washington.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman.

I, too, will try to be brief this morning so we can hear from our witnesses and possibly get some questions in before our 11 o'clock votes today, but thank you for holding this hearing, and thank you to the witnesses for their insights on the ever-changing content market and delivery system.

Obviously, billions are being invested in new programming and new production, and there are many more options for consumers in an ever-expanding world of content.

Entertainment is at our fingertips whenever we want it, including this hearing, Mr. Chairman, being seen, I'm sure, by many people.

The CHAIRMAN. Hello out there.

Senator CANTWELL. So much of the content in so many places, and we obviously love the notion that we can watch it when we need the content and content information.

But how has this innovation in the television and video market impacted consumers? How are they better off, and what are the challenges that we face in continuing to protect their interests?

The Committee must engage in, I believe, a robust debate about how we're going to foster true localism, diversity, and competition, and fidelity to the public interests as we work on various issues when we move forward.

Not so long ago, most of us watched TV for free over the air and the time, I guess our eyeballs were rented to watch a lot of ads to pay for that content. And we understood what that meant and we understood what the public interest meant. But, as we have changed into this larger picture, how has the heart of localism and diversity and true media competition been maintained?

So, these are the issues that I think we will be pondering with as we look at issues of broadcast and cable industry and the changes that people are proposing, the FCC's desire to strip away basic rules that would ensure that companies play fairly in a marketplace or dismantling of rules that preserve the diversity of content and media ownership, particularly impacting, I believe, in a negative way, the number of voices that we need to have in media, and also an impact of key issues.

Consumers still trust local broadcasters. In fact, a recent survey revealed that 76 percent of Americans trust their local news a great deal or a fair amount more.

So, I want to make sure that we're understanding how the public interest here is being served in this debate that sometimes can seem discussions about big business behemoths as opposed to the consumer and the content that they are after.

The cable industry led the charge to eliminate the FCC's strong net neutrality rules that help ensure that consumers are guaranteed by rule to have unfettered access to new online video content. And now the industry is asking the FCC to further eliminate its public interest obligations, including those that could potentially force localities to choose whether to keep public education and government access channels on the air.

So, I hope all these issues will be discussed this morning, and I again thank our witnesses for being here on this very important public policy debate.

The CHAIRMAN. Thank you very much, Senator Cantwell.

And we will receive in their entirety the statements submitted by all four of our witnesses, and we'll ask, beginning down here at the end of the table, for five-minute summaries, beginning with Mr. Powell.

Sir, you are recognized.

STATEMENT OF HON. MICHAEL K. POWELL, PRESIDENT, NCTA—THE INTERNET AND TELEVISION ASSOCIATION

Mr. POWELL. Thank you, sir.

Good morning, Mr. Chairman, Senator Cantwell, Members of the Committee.

I am pleased to be here today to discuss The State of the Video Marketplace.

Today's marketplace in a word is extraordinary. It is the latest installment of a multi-episode story on the evolution of television. It's a really good story and it's only getting better.

As we know, Episode 1 opens with the invention of broadcasting. Sending moving images over the air was nothing short of magical. The government licensed the airwaves in exchange for broadcasters providing free service and serving the public interest. It was a medium that delivered one show to all viewers at the same time and TV commercials with a heart of the business model. Today, broadcast content is predominantly viewed on pay TV systems.

In Episode 2, television was transformed by cable, which brought content directly to the home by wire, improving quality and improving reach. Cable created new forms of content, including CNN, ESPN, HBO, and countless other diverse varieties of niche programming.

The number of networks has ballooned from 11 to over 900 today. Cable was privately financed and supported by a subscription model. Cable regulation was focused on checking cable's commanding market position and protecting over-the-air broadcasting, a prescription now somewhat out of date in the face of a newly invigorated market.

Multichannel video attracted competitors from the satellite and teleco industries, as well. They won substantial market share, now commanding over 42 percent of that market. Of the top six MVPDs, only two today are cable companies.

In the current episode that we're in, the Internet is upending the television universe, creating a world of robust competition, continuous innovation and new consumer experiences. The key driving changes are worth highlighting.

TV providers no longer need to own an infrastructure or a license to offer video service. With lower barriers to entry, new video providers have flooded into the video space. The largest providers today are streaming services that did not even exist in 2006.

Video apps have allowed viewing on any device rendering the adage any time anywhere a cliché. The amount of video content has also soared from a 182 original scripted shows in 2002 to a staggering 495 shows last year.

Consumers now demand programming tailored to their preferences. They mingle professional and user-generated content, binge watch entire seasons, and often repel from advertising. Providers must adapt to keep pace with a whole new generation of viewers.

TV companies must compete with other Internet distractions, from gaming to Instagram. Nielsen estimates, for example, that 18- to 34-year-olds spend 34 percent of their time using a smart phone and only 22 percent on television.

A lot of this storm, it's hard to know how the corporate winners will be when the dust settles, but the mega-winner is certainly the consumer.

The cable industry has certainly felt the heat. Its dominance has receded, losing market share to traditional MVPDs and facing the challenge of cord cutting. Competition for programming is fierce and rising costs have squeezed profitability.

But despite these changes, the industry is adapting. It's improving user experiences. Such efforts include voice remote control, apps to watch your cable service on any device, and the ability to download content on the go.

The industry has also embraced streaming services, both of their own and in partnership with others, like Netflix and YouTube. Such innovations do not stop with video, however.

The industry continues to push forward with broadband. Just recently, it upgraded to one gigabit service, reaching 93 percent of the homes in our footprint.

Looking forward, the industry has announced a bold 10G initiative to bring 10 gigs to its customers and we will not rest till every rural community also has broadband.

So against this backdrop, what are some simple takeaways for policymakers?

First, it's clear that technical economic market predicates on which video laws are based have withered. Since the 1992 Act, the industry has substantially less share, less control over programming, and faces stiffer competition. Rules premised on cable's bottleneck control are just unfounded.

Second, many of the video laws apply to some industry groups and not others and the newer services are completely unregulated. Trying to create greater parity and regulatory harmony is essential.

Third, we should encourage the FCC and this body to clear away dated regulatory underbrush that no longer makes sense in this dynamic age.

And, finally and importantly, we must preserve critical social values. Diversity of voices, protection of children, trusted news and information sources, and respect for the First Amendment remain important and enduring.

Thank you. I'm happy to take your questions.

[The prepared statement of Mr. Powell follows:]

PREPARED STATEMENT OF MICHAEL K. POWELL, PRESIDENT AND CEO, NCTA—THE INTERNET & TELEVISION ASSOCIATION

Good morning Mr. Chairman and members of the Committee. My name is Michael Powell and I am the President and CEO of the NCTA—The Internet & Television Association. NCTA is the principal trade association for the U.S. cable industry. Our members include the Nation's largest providers of high-speed Internet and video service, as well as more than 200 cable program networks. We welcome this important hearing and I am pleased to be here today to discuss the state of the video marketplace.

Today's video marketplace is extraordinary. It is the latest installment of a multi-episode story on the evolution of television. Each chapter has been propelled by new game-changing advances in technology. With new capability, each phase produced more competitive choice, creative strides in storytelling, news and information, and educational content. And, consumers were treated to fresh, innovative experiences. It is a really good story, and one can only imagine what comes next.

EPISODE ONE
"UP IN THE AIR"

Episode One begins with the invention of television itself and broadcasting. Sending moving visual images over the air to people's homes was magical. The government and broadcasters advanced the medium through a partnership in which the public provided the use of its airwaves, and in exchange broadcasters provided free service to the public and promised to produce programming that served the "public interest." This social compact was the original foundation of television public policy. As a free service, TV commercials were the heart of the broadcaster business model. It was a one-to-many medium that broadcast one show, to all viewers, at the same time. But it was also limited by the vagaries of physics and long dominated by just three major networks. Still, for many years, it served as the Nation's community hearth for news, information, education, sports and entertainment. Today, it still offers popular content, though now largely viewed on pay-tv systems. Only 13 percent of the public watch TV exclusively over the air.

EPISODE TWO
"THE WIRE"

In Episode Two, the magic of television was extended and transformed with the invention of cable and the rise of satellite delivered programing. Cable brought content directly to the home by wire—improving quality and reaching consumers who could not get a broadcast signal over the air. The large channel capacity of the system, aided by satellite delivery, provided the real estate for dramatically expanding programming. Building on that capacity, cable invented entirely new forms of television, producing greater diversity and variety for viewers.

Each channel could appeal to distinct consumer interests. CNN became the first 24-hour news network. ESPN was created to cover sports. History channels, cooking channels and children's channels proliferated on the dial. The number of networks ballooned from 11 cable networks in 1980 to over 900 today. Cable also launched the first on-demand programming and is credited with the widespread use of DVRs, giving consumers powerful tools that encouraged time-shifting and content control. Cable eventually became the primary platform for television viewing. At its peak in 2001, it served 67 million homes with multichannel video programming service. Cable was privately financed and adopted a subscription business model. Most cable regulation was focused on checking cable's commanding market position and protecting the over-the-air broadcasting service, a policy prescription that has disappeared in the face of a healthier and more vigorous marketplace.

The multichannel video world attracted new entrants, delivering the first onslaught of MVPD competition. The DBS industry entered using satellites to deliver high quality, digital content directly to the home. From space, it could also reach remote rural communities. DBS took market share from cable, and now commands 32 percent of the market. Following the 1996 Act, telephone companies also entered the MVPD market bringing more rivalry to the space. The result was growing competition, delivering more choice for consumers. Of the top six traditional MVPDs in today's market, four are not cable companies. Among the top five of all video subscription services, only one is a cable company, with streaming companies Netflix, Amazon and Hulu holding the top three spots.

EPISODE THREE
"BITS BYTE T.V."

The Internet has revolutionized everything in our society, and it is no surprise that it has upended the television universe. When digitized, any kind of content can go over the Internet. Video takes up a lot of broadband capacity (in the U.S., an estimated 80 percent of total Internet traffic is video traffic), and it took time for last mile networks to be capable of handling the massive load of streaming video services. In large measure due to the investment of the cable industry in broadband, that moment arrived with a bang. Today, the Internet has completely transformed the underpinnings of the television/video marketplace, creating a world of robust competition, constant innovation, and significant changes in consumer experiences and preferences. The key driving changes are worth highlighting.

- A TV provider no longer needs to own a distribution infrastructure to provide a video service. In the past, distribution was the defining attribute in the TV value chain. You had to have a distribution partner with physical infrastructure (a broadcast licensee or cable franchisee) to reach customers. Now content services can proliferate freely over the public Internet.
- Removing distribution as a barrier to entry, new video and content providers have flooded into the video space. The largest video providers today are not traditional MVPDs, they are streaming services that did not even exist in 2006. Netflix has 60 million domestic subs. Amazon is estimated to have 40 million users of its Prime video service, and Hulu recently announced that it has 28 million users. Traditional MVPDs like Comcast, DISH, and DirecTV are also seeking to give Internet only customers new options to receive traditional program lineups. And still others are emerging on the horizon, such as Apple TV, YouTube TV, Pluto TV, CBS All Access and Disney +.
- With the rising wave of Internet delivery, the television set has been dethroned as the only viewing device. Video apps have allowed viewing on any device that can connect to the Internet. iPads, laptops, cell phones, smart TVs, Roku boxes and almost anything with glass and an Internet port all are television sets now. The adage anytime, anywhere on any device is now genuine and almost cliché.
- As video service and devices have expanded, the amount of video content has soared. In 2002 there were 182 original scripted shows, in 2018 there were 495. The quality of that programming also has been dramatically elevated, with more and more buyers chasing the best writers, directors and actors to produce compelling original shows.
- Consumer viewing experiences have also dramatically changed. Interactivity and data have allowed the unprecedented ability to tailor the video experience to individual interests. Netflix and others can now recommend shows to suit individual preferences. YouTube can merge both professional content with user-generated content and incorporate commentary. Twitter can include video clips to illuminate stories. One can expect more and more innovation, personalization and interactive viewing experiences in the future. The TV experience has been completely re-imagined around new consumer habits: Today full series are released at once, allowing for binge watching. Binging is helped along by auto-running the next episode. More programming is available without advertising, and shows are available on demand whenever and wherever you want to watch. These changes are essential to keep pace with new generations of TV audiences.
- It is also worth noting that the Internet has supplanted many of the functions TV alone once served in offering access to different content sources. Gathering information and searching for educational content for example. Kids largely consume Internet-based content. And the Internet has spawned other ways to bide one's leisure time such as gaming, Facebook, Instagram, online shopping, and Snapchat. A TV provider today not only has to compete with other TV companies, it must compete for your time and attention with these other forms of distraction. This new dynamic is particularly evident in the 18–34 demographic. Nielsen estimates that 18 to 34-year-olds spend 34 percent of their media consumption time using a smartphone and only 22 percent of their time viewing live or time-shifted TV.

The sum effect of the Internet TV era is monumental. It has enhanced traditional services, spawned the creation of new products, and opened the doors wide to a dizzying array of competitors, pursuing countless new approaches for entertaining and informing us. We are awash with content of every genre, to satisfy every conceivable preference. And every company is grappling with the disorienting and fast changes that are twisting with creative destruction. It is hard to know who the corporate winners will be when the dust settles, but the mega winner is certainly the consumer.

CABLE

To Paraphrase Mark Twain

"Reports of Our Death are Greatly Exaggerated"

The cable industry has certainly felt the enormous pressures of this new television age. Its historical dominance in the Pay TV marketplace has receded as distributors have lost market share to other traditional MVPD services and as the market itself has changed with the rise of Internet-delivered video sources. Cable and traditional MVPDs now face the daunting competitive challenge of cord-cutting, cord-shaving and cord-nevers. Competition for top programming is fierce, and the rising costs of securing and carrying content has squeezed the profitability of cable's video businesses. Despite the challenges, the industry is adapting and responding.

Cable continues to be an important presence in the video market and has taken major steps to hold and increase the value of its service to consumers. Cable still provides video service to *50 million* homes and continues to invest in new products and services that extend the video experience well beyond linear viewing. The industry has invested heavily in improving user experiences. Such efforts include voice remote controls for navigation, cloud DVRs, Apps that allow you to watch your cable service on any device, and the ability to download content on the go. The industry has also embraced the new streaming services, with a number of companies providing access through the set-top box to Netflix, YouTube and Amazon Prime.

Such innovations do not stop with video. Indeed, the industry continues to push forward with improvements to broadband connectivity that themselves serve as the foundation for new video experiences. Just recently, cable successfully upgraded its infrastructure to support Gigabit Internet to 93 percent of the homes passed by cable networks. And, not content to rest on its laurels, the cable industry has announced a bold 10G initiative to bring 10 gig to its customers in the next few years. Additionally, cable companies are offering wireless service, and WIFI access in their territories.

Cable video certainly faces disruption and more vigorous competition, but it is rising to the challenge, moving effectively to innovate and increase consumer value that will secure our industry's participation in the video marketplace for years to come.

Making the Laws

What is a Policymaker to Do?

While today's hearing is focused on better understanding the current video marketplace and not specific legislative reforms, there are some simple take-aways that are relevant to policymakers given the transformative changes we are witnessing. These principles can guide how we think about policy questions as we continue forward.

First, it is clearer than ever that the technical, economic, and market predicates on which our video laws are based have crumbled. Since the passage of the 1992 Cable Act, cable is no longer the dominant video provider. Then it had 98 percent of homes and today it has 56 percent. It has less control over programming than it once had. Then cable had an ownership stake in 53 percent of content on its systems, today only 9 percent is vertically integrated. And cable faces much stiffer competition from more quarters than it did when the Cable Act was passed. Without the factual predicate of a cable dominant monopoly, the infirmities in many of the current rules premised on cable's 'bottleneck control' of video distribution are patent and obvious.

Second, many of the video laws apply incoherently to some industry groups and not others. For example, program access, must buy and leased access rules apply to cable but not to satellite service. And, almost none of today's video rules apply to streaming services like Netflix and Amazon Prime, despite their large number of subscribers and leading market positions. Wrestling to create greater parity, consistency and overall regulatory harmony will be essential.

Third, we should encourage the FCC and this body to clear away dated regulatory underbrush that no longer has value or has lost its relevance in this current dynamic age. We support the FCC's efforts to review and reinterpret Title VI as it seeks to adapt old laws to present realities. At some point, policymakers have to recognize that fair competition can only be advanced when obligations are appropriately matched to the free-wheeling competitive bazaar of today, and not the mythology of a world from almost 30 years ago.

Fourth, we collectively must consider how to reaffirm and preserve critical social values that have long been a part of television policy. The issues of diversity of voices, protection of children, trusted news and information sources, and respect for the First Amendment remain important and enduring.

Thank you and I am happy to take your questions.

The CHAIRMAN. Mr. Powell, your ability to summarize a multipage statement like that in five minutes is breath-taking.

Mr. POWELL. Thank you.

[Laughter.]

The CHAIRMAN. Senator Smith, can you do the same?

[Laughter.]

Senator SMITH. I don't know anybody as talented as Michael, but I'll do my best.

The CHAIRMAN. You're recognized. Glad to have you.

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

Senator SMITH. Thank you, and good morning, Chairman Wicker, Ranking Member Cantwell, Members of this Distinguished Committee, my former colleagues some and my friends all.

I am Gordon Smith. I'm President and CEO of the National Association of Broadcasters.

On behalf of free and local broadcast television stations serving your hometowns, I appreciate the opportunity to testify on how Congress can ensure that viewers are better able to access their local news, sports, weather, emergency information by allowing existing provisions of STELAR to sunset this year.

Today, STELAR is not only unnecessary due to considerable advances that Michael has testified to in the media marketplace but also any reauthorization of it will further harm satellite viewers that are currently denied access to their local television as a result of this law. For these reasons, broadcasters oppose STELAR's reauthorization.

Similarly, the Copyright Office, the expert agency charged with administering STELAR's license, released a report on Monday calling for its expiration.

In today's competitive media landscape, local television remains the most watched source of news, emergency updates, entertainment programming, sports, and investigative journalism in communities across America.

Our viewers turn to local stations to get the weather reports, to learn how to help neighbors in need, and watch trusted local news anchors give an unbiased view of what's happening in their communities.

Local broadcasting is crucial. It is the critical electronic thread that runs through every community in America to keep them together, informed, and safe.

The exceptions to the benefits afforded by this local broadcast system are those communities that continue to be served by out-of-state market stations as a result of STELAR.

In 1988, when the original satellite law was enacted, viewers had two predominant choices for video programming: over-the-air broadcast television or a subscription cable package offered by a single local provider. That satellite legislation, a predecessor of STELAR, was hugely successful to better compete with the cable monopoly of that day, a monopoly that no longer exists.

But the crush it gave them was the ability to serve viewers with out-of-market network programming at a below-market rate and without having to negotiate for it with local stations.

But 30 years later, today's media market is virtually unrecognizable and dramatically different, even compared to just 5 years ago, the last time STELAR was reauthorized.

Those nascent satellite companies that Congress subsidized are now multibillion-dollar companies that have become behemoths and today's competition for viewers comes not only from those giant pay-TV providers and their cable brethren but also unregulated tech companies, such as Facebook and Google and online video providers, like Netflix and Amazon.

Most importantly, no technological impediment exists today to prevent AT&T, DIRECTV or DISH from providing local broadcast channels to their subscribers across the country. By the way, they promised to do that. DISH has. DIRECTV has not.

Yet STELAR's distance signal provisions incentivized those companies to serve a shrinking universe of eligible viewers with out-of-market subs because of this subsidy.

To put it in practical terms, DIRECTV subscribers in Nebraska recently saw a news story about a new panhandling fine in New Jersey. The local news they should have seen is that of the series of floods that have had a devastating impact on Nebraska crop yields this year.

Instead of important local election news, viewers in Montana, for example, the state capital of Helena were watching Santa Clara County, California, Board of Supervisors instead of election coverage, and when they should have been seeing emergency coverage of a possible explosion on a busy local street in Colorado, Grand Junction, they were hearing a story about California's newest Michelin-starred restaurants.

This is a business decision that AT&T/DIRECTV is making in 12 rural markets across America, a choice that puts their profits ahead of service to their consumers and ahead of the safety of communities.

Broadcasters and viewers salute the Senators who have highlighted this STELAR harm, a harm that must end.

To end this consumer harm and modernize the video marketplace laws, Congress should allow STELAR to expire as originally intended. There's no policy justification or technical reason that this outdated law should be reauthorized. The time has come to stop subsidizing billion dollar satellite companies and to instead provide viewers with the most accurate and timely source of community news, weather, emergency information from their local broadcasters.

Thank you.

[The prepared statement of Senator Smith follows:]

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

Introduction

Good morning Chairman Wicker, Ranking Member Cantwell and members of the committee. My name is Gordon Smith and I am the president and CEO of the National Association of Broadcasters. On behalf of more than 1,300 full-power, free and local broadcast television stations serving your hometowns, I appreciate the opportunity to testify on our unique and indispensable role in today's video marketplace.My testimony will focus on how Congress can ensure that viewers are better able to access their local news, sports, weather and emergency information by allowing the expiring provisions of the Satellite Television Extension and Localism Act Reauthorization (STELAR) to sunset this year. STELAR is not only unnecessary today due to considerable advances in the media marketplace, but any reauthorization will further harm the satellite viewers currently being denied access to their local television stations. For these reasons, broadcasters oppose STELAR's reauthorization.

Local Broadcasting: The Electronic Thread That Keeps Every Community Together

In today's hyper-competitive media landscape, local broadcast television remains the most-watched source of news, entertainment programming, sports and investigative journalism in communities across America. Our viewers turn to local stations to get the weather report, learn how to help neighbors in need, and watch trusted local news anchors deliver an unbiased report of what is happening in their hometowns. Local broadcasting is the critical electronic thread that keeps every community together, informed and safe.

One outstanding example is WLBT, the Gray Television-owned NBC affiliate in Jackson, Mississippi. WLBT has a long history of providing in-depth reporting and was one of the first local television stations to devote dedicated airtime and personnel to investigative journalism. Their work recently exposed a number of doctors accused of sexual misconduct, and late last year examined a local housing program that trapped low income residents in a cycle of evictions.

Of course, it is broadcasters' unique community connection and role as a trusted lifeline during times of emergency that sets us apart from other mediums. In April, as the state of Mississippi was experiencing a record 44 tornadoes over a 24-hour period, WLBT was on the air giving their viewers real-time updates on the tornadoes' locations and directing viewers when and where to seek shelter. Just as importantly, they continued their coverage in the days and weeks after the storms when the national press had departed, providing viewers with critical information such as where they could go for food, water and shelter.

Whether it is a blizzard in Seattle or Sioux Falls, or a false missile alert on a sunny day in Hawaii, Americans' first choice during emergencies is to turn to their local broadcast stations to get the information they need to stay safe and informed. Local stations prepare viewers for the coming storm, help them access needed supplies and shelter during the disaster, and help towns and cities rebuild in the aftermath.

Broadcasters invest heavily in their newsrooms and infrastructure to ensure we remain on the air in times of disaster. Because of the resiliency of the broadcast infrastructure and the power of the airwaves, local broadcast stations are often the only available communications medium during disasters, especially when cellular wireless networks fail. Local television stations are part of the communities we serve, and broadcasters do not hesitate to put themselves in harm's way to bring critical information to their neighbors.

Viewers Rely On Local Broadcasters In a Rapidly Evolving Video Marketplace

In 1988, when the original Satellite Home Viewer Act (SHVA) was enacted, viewers had two predominant choices for video programming: over-the-air broadcast television or a subscription cable package offered by a single local provider. As Congress intended, SHVA injected much needed competition into the pay-TV market from the nascent satellite industry—now AT&T-DIRECTV and DISH—and those companies flourished to the benefit of consumers.

As a result, today's media marketplace is virtually unrecognizable compared to 1988, and is even dramatically different from the one that was the subject of discussion during STELAR's passage five years ago. Today's competition for viewers comes not only from giant pay-TV providers such as AT&T-DIRECTV and Charter, but also unregulated tech companies such as Facebook and Google, and online video providers like Netflix and Amazon.

This competition benefits consumers in the form of more choice and lower prices. But for broadcasters, the competition for viewers and the advertising dollars that fuel our locally-focused programming and investigative journalism has never been more intense. As of last summer, more than 200 over-the-top video services were available in the U.S., and about 70 percent of American households subscribed to Netflix, Amazon Prime and/or Hulu.

This shift in viewership has naturally led to a shift in ad spending. In 2019, BIA Advisory Services (BIA) estimates that "pure play" digital ad platforms (online, mobile, e-mail and Internet yellow pages) will receive 31.5 percent of total ad spending across all 210 television markets combined, far outpacing the 12.4 percent of all local ad spending that TV stations will receive. BIA also estimates that Google's total local advertising revenues in 2019 will roughly equal the total over-the-air ad revenues for all TV stations in the U.S. and will soon exceed them. Meanwhile, Borrell Associates reports that Facebook has become the most popular marketing vehicle for local advertisers.

To compete in this rapidly evolving media and entertainment landscape, television broadcasters now deliver our high-quality entertainment programming, sports, local news and weather whenever and wherever viewers want to access it. Broadcasters are investing in apps, digital and new distribution platforms to fit the needs of all viewers. Moreover, broadcasters are transitioning our free over-the-air broadcasts to a Next Generation Television standard, also known as ATSC 3.0.

Next Gen TV will enable local broadcast stations to deliver their programming over-the-air not only to televisions, but also to next-gen enabled tablets and cell phones, giving consumers the ability to watch their favorite broadcast shows and local news on the go without using precious wireless data. That's in addition to enhancements like ultra high-definition video, immersive theater-like sound, interactive applications, and enhanced interactive hyper-local emergency and weather alerts.

There are significant public policy benefits to ensuring that consumers continue to enjoy our sought-after entertainment, sports programming and lifeline local information even in this fragmented media landscape. Yet, amidst this fierce competition, broadcasters are not before you today to ask for new regulations to give us a leg up in this video marketplace. Instead, we are asking this committee to preserve policies that enable investment in local programming and to not extend outdated and asymmetrical regulations that disadvantage broadcasters—and only broadcasters—against our competition. Congress can achieve these goals and update its laws simply by allowing STELAR to expire at the end of this year.

STELAR's Harm to Local Viewers Must Be Stopped

Thirty years ago, nascent satellite television companies were temporarily given a significantly discounted copyright license that allowed them to better compete with big cable monopolies at a time when there were millions of Americans who could not receive their local broadcast stations over the air, from cable or from satellite. On a temporary basis, Congress allowed the satellite companies to serve those households with a broadcast station operating outside of the local community, typically from a major city, so viewers could receive their favorite network programming. This policy was the foundation for STELAR and all of its predecessors dating back to SHVA in 1988.

Congress has succeeded in SHVA's policy goal of injecting significant competition in the video distribution marketplace that is now flourishing. Yet, those nascent satellite companies that Congress subsidized are now media behemoths: AT&T-DIRECTV is a $235 billion company, and DISH is a $17 billion company. There are no technological impediments to providing satellite viewers with their local broadcast stations rather than out-of-market substitutes. In fact, DISH is providing this service in all 210 local markets today and has been for nearly a decade.

Today, AT&T-DIRECTV and DISH provide local broadcast channels to the vast majority of their subscribers across the country (only AT&T-DIRECTV does not serve all 210 television markets). The number of households being denied their local network channels is shrinking. Although only AT&T-DIRECTV and DISH have access to the precise numbers, it is estimated that around 500,000 households that subscribed to satellite TV service in 2017 were denied their local ABC, CBS, FOX or NBC broadcast channels and instead received an imported signal from another market, primarily from New York City or Los Angeles, under the expiring STELAR distant signal provisions.

The STELAR distant signal license allows the billion-dollar satellite companies to import out-of-market TV channels for those 500,000 households instead of providing these viewers their local broadcast stations. Royalties under this outdated license are discounted substantially below the carriage fees for these stations negotiated in the market by other pay-TV providers. This below-market subsidy incentivizes the satellite companies to deny viewers local news, weather and lifesaving emergency information, while still charging their subscribers hefty fees each month for an out-of-market station.

Viewers will benefit from eliminating this outdated law, ensuring they receive the local content most relevant to them. In rare instances where a local broadcast channel is not available, private business arrangements between satellite TV providers and broadcasters can resolve these issues.

Additionally, in an earlier reauthorization of the compulsory copyright license, Congress added a requirement that broadcasters and pay-TV providers negotiate in good faith for carriage of local TV stations. In the nearly 20 years since Congress passed this provision, the Federal Communications Commission has decided only seven good faith complaints—and has found a violation of the requirement on only one occasion. Not surprisingly, the one violation was committed by a pay-TV company.

While well intended, the expiring good faith requirements have provided no quantifiable benefit to either broadcasters or pay-TV providers. This is in large part because both parties have every incentive to reach a deal and serve consumers without a regulatory requirement. Moreover, the provision has the unintended consequence of diverting time and attention from the parties' negotiations in favor of posturing in front of government officials. The countless other program carriage agreements successfully completed outside this broadcast-only framework reveal that this regulatory structure simply does not justify STELAR's reauthorization.

Conclusion

Congress should allow STELAR to expire as it originally intended. There is no policy justification or technological reason for this outdated law to be reauthorized. The time has come to stop subsidizing billion-dollar satellite TV companies and to instead provide viewers with the most accurate and timely source of community news, weather and emergency information—their local TV broadcast stations.

Thank you again for the opportunity to discuss this issue critical to America's broadcasters and the communities we serve. I look forward to your questions.

The CHAIRMAN. Thank you very much, Mr. Smith.

Mr. Aaron, glad to have you with us.

STATEMENT OF CRAIG AARON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FREE PRESS AND FREE PRESS ACTION

Mr. AARON. Thank you for having me. Thank you, Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, for inviting me today.

A thriving TV and video marketplace should spur competition, encourage innovation, amplify diverse voices and viewpoints, empower creators, and provide communities with the local news and information they need, and so often when we come together in these halls to talk about the state of the media, we talk about industry versus industry, broadcasting versus cable, old media versus new.

I hope today we'll talk more about the audience, the viewers, the bill payers, and the public. As Congress has long recognized, the companies that control the public airwaves, dig up our city streets, put up towers or launch satellites, must have public responsibilities.

What the public needs from them is more competition, more choices, more diversity, more transparency, and especially lower prices. These should be the Committee's priorities as it renews and refreshes the laws shaping our communication system.

Yes, the TV and video marketplace is evolving, but the reality is that Americans still spend far more time on traditional cable and broadcast TV than on social media or other apps.

The still powerful and profitable cable and broadcasting industries come here to Washington touting their commitments to localism and diversity but are seeking to evade those promises, undercut their competitors, and consolidate at all costs. They want all the benefits of dominating local media but none of the obligations.

It's been said that what goes up must come down and that is true for everything except your cable bill. It only goes in one direction, up and up some more. Cable prices have risen three times faster than inflation for decades and that's still happening despite the advent of online video.

Pay TV customers are spending a fortune for channels they don't want, gouged by hidden fees, locked into bloated bundles and onerous contracts. Meanwhile, broadcasters, retransmission consent, and political advertising revenues have skyrocketed to record levels, too, but broadcasters aren't reinvesting this influx of new money in local content or better journalism. The revenues flow out of local communities and into the pockets of distant executives and investors.

Years of runaway consolidation have pushed local owners out of the broadcast market, creating insurmountable barriers that shut out independent and diverse voices.

When big broadcasters and giant cable companies fight over carriage or retransmission, when their disputes leave TV screens blacked out before the big game, there's really no one to root for on either side. The winner in all these disputes may vary but the losers are always the same, the public. It doesn't have to be this way.

Congress should pass legislation allowing consumers to choose the channels they want to watch ala carte. It's time to end below-the-line fees and hidden charges and require providers to show the actual total price people will pay in their advertisements and bills.

To boost competition and support viable online alternatives, we need policies, like net neutrality, that push ISPs to invest in big open pipes, rather than cooking up schemes to crush their competition.

For broadcasters, we must put the brakes on runaway media consolidation. That starts with restoring local ownership limits, revoking the obsolete UHF discount, and refusing to raise the national ownership cap.

Better yet, we should lower that cap and divest stations to local owners and incentivizing the sale of licenses to women and people of color.

Let's consider even bolder ideas like taxing targeted online advertising to fund non-commercial local news and civic technology.

What we do know, based on decades of evidence, is that a regulation slashing race to the bottom won't create the thriving marketplace we need. We should put the power, choices, and control back in the hands of the people and local communities and empower them to connect, communicate, and create.

Thank you. And I look forward to answering your questions.

[The prepared statement of Mr. Aaron follows:]

PREPARED STATEMENT OF CRAIG AARON, PRESIDENT AND CEO,
FREE PRESS AND FREE PRESS ACTION

Introduction

Thank you Chairman Wicker, Ranking Member Cantwell and members of this Committee for inviting me to testify today on this important topic.

My name is Craig Aaron. I am the president and CEO of Free Press and Free Press Action. Free Press is a national, nonpartisan, nonprofit organization focused on issues at the intersection of media, technology and democracy. I'm here today representing more than 1.4 million of our members in all 50 states, Puerto Rico, and Washington, D.C.

Since Free Press was founded in 2003 to give the public a voice in the crucial decisions shaping the media, the landscape has changed dramatically. More than ever, media and technology are now intertwined in our daily lives, vital to the health of our communities, and essential to a functioning democracy.

The decisions and policies made by this Committee, and the agencies it oversees, will have far-reaching consequences beyond any single company or industry. A thriving television and video marketplace should spur competition, encourage innovation, amplify diverse voices and viewpoints, empower creators, and provide communities with the local news and information they need, to know what's happening where they live and here in Washington.

So often when we come together in these halls to talk about the state of the media, we talk about industry versus industry, broadcasting versus cable, old media versus new. Missing from these debates are those who should matter the most: the audience, the viewers, the public.

As Congress long has recognized, companies allowed to control the public airwaves, dig up city streets to run wires, put up towers, or launch a satellite into orbit must have public responsibilities. What the public needs is more competition, more choices, more diversity, more transparency, and—especially—lower prices. These should be the Committee's priorities as it renews and refreshes the laws shaping our communications system.

The powerful and still very profitable cable and broadcasting companies come to Washington touting their commitments to localism and diversity but seeking special favors to evade those public commitments, undercut their competitors, and consolidate at all costs. They want all of the benefits of dominating local media but none of the obligations.

Yes, the TV and video marketplace is evolving. But the reality is that Americans still spend far more time watching traditional cable and broadcast TV than they do on social media and other computer and smartphone applications. People want to watch TV, and they are willing to pay for it. They just don't want to be gouged on the price or forced to buy a bunch of things they'll never watch to get the shows they want. In a healthy market, we would see lower prices and better service. But we are getting the opposite.

Cable prices have risen steadily at nearly three times the rate of inflation despite the advent of online video. Deceptive and hidden fees continue to spread. Pay-TV customers everywhere are spending a fortune for channels they don't want, locked in by all-or-nothing channel bundles and onerous contracts. While getting rich off their local monopolies, the cable industry is shamefully trying to shirk their duty to provide local PEG channels and to fund community media centers.

At the same time, both broadcast retransmission-consent and political-advertising revenues are at record levels. Broadcasters aren't reinvesting this influx of new money in localism or better journalism. Instead, the public continues to be underserved as revenues flow out of local communities and into the bank accounts of distant executives and investors.

Years of runaway consolidation have pushed local owners out of the broadcast market, creating insurmountable barriers to entry that shut out local and diverse voices from access to the public airwaves. Despite repeated warnings and widespread public outcry, the FCC continues to gut national and local TV and radio ownership limits, erase public-interest obligations, and replace independent and local owners with giant chains that are shrinking newsrooms and pushing the same cookie-cutter content from coast to coast.

When these big broadcasters and cable companies fight over carriage, contracts or retransmission consent, when their conflicts leave TV screens blacked out before the big game, there's no one to root for on either side. While the winners in these disputes may vary, the losers are always the same: those of us in the audience.

It doesn't have to be this way. For too long, the scales have been tipped in favor of the biggest players, and they must be rebalanced. On the pages that follow, I go into greater detail about the state of the TV and video marketplace, chronicle the failure of regulators to protect the public, identify areas ripe for reform, and suggest sensible and concrete policies designed to foster a healthy media system grounded in competition, diversity and localism.

The State of Traditional TV: Strong Viewership and Finances, But Questionable Public Benefits

Rumors of traditional television's death have been greatly exaggerated, even as more people choose to watch content they've always gotten from giant studios, TV networks, and cable channels online rather than just on pay TV or over the air. Viewership remains high, and revenues continue growing as "old" media companies continue to consolidate and expand their reach. Yet the diversity of viewpoints and number of local voices they offer aren't keeping pace. Congress should preserve viewers' existing choices and empower them to make new ones.

Traditional Video Delivery Still Dominates Viewing Time in the United States

Traditional media companies love to talk about how much competition they face in the Internet era from social media and search platforms. But U.S. viewers still spend far more time watching traditional cable and broadcast TV than they do on social media and other computer and smartphone applications. And though people are slowly finding new methods to watch online video (such as via a connected device like Roku), they're still basically watching as much video as they always have. What's more, the production of the video content is increasingly concentrated in the hands of a few giant corporations, as regulators continue to approve mergers that consolidate an already highly concentrated media market.

According to Nielsen, the average U.S. adult spent 5 hours and 24 minutes per day consuming video during the 3rd quarter of 2018, only 3 minutes lower than the year prior.[1] Of this 5 hours and 24 minutes, 4 hours and 13 minutes was spent watching "traditional" live or time-shifted (*i.e.,* DVR) video. During this same period, U.S. adults averaged 45 minutes per day on social networks, down from 46 minutes the year prior (and certainly a portion of this time is likely spent sitting on the couch while watching traditional TV).

It is important to note that there are significant demographic differences in time spent consuming video. For example, Nielsen reported that Black adults consumed 7 hours and 25 minutes of video in Q3 2018, with 6 hours of this time on traditional live and time-shifted TV. But even though Black adults consume far more video programming than the average, as we discuss in greater detail below, there is still a serious lack of Black representation in the ownership of the production and distribution of this content at the national level and the local level, too.

Multichannel Subscriptions Have Declined, But Viewers Generally Still Watch the Same Content from the Same Companies Online

The U.S. video market is changing, but this is a change largely of type not degree. Users of all ages still have high demand for video content, and a high willingness to pay for it, even among those with lower incomes. This should not be surprising. Video is compelling and easily consumed. Video can deliver entertainment as well as the news and information our society needs to function. Much ink is spilled on how the Internet is disrupting old business models. But when it comes to video, subscription multichannel services remain dominant, even as a very small but growing share of viewers rediscover the benefits of over-the-air television as well as online video content that isn't produced by the largest Hollywood programming conglomerates.

It is true that in recent years there has been a decline in subscriptions for traditional multichannel video program distributors ("MVPDs"), including cable, satellite, and telecom companies with a pay-TV business. The total number of pay-TV subscriptions peaked at 101 million in 2012 and declined to 90 million by 2018. This decline is largely the industry's fault—the result of greedy programmers to greedy distributors unwilling to give consumers anything other than expensive bloated channel bundles full of stations that few want to watch.

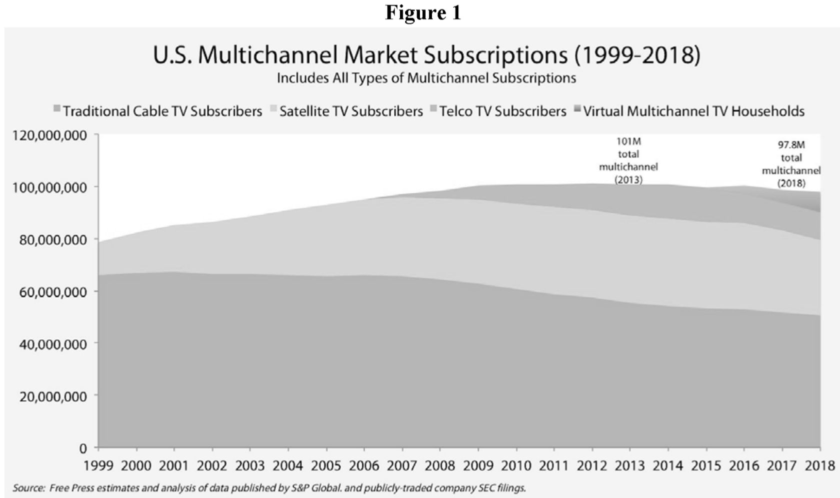
But the recent rise in "virtual" multichannel subscriptions (*e.g.,* Sling, DirecTV Now) has almost made up for the losses in the traditional space (see Figure 1). Many users aren't actually cutting a cord. But they are dumping the bloated traditional bundles in favor of the more flexible services offered by the half a dozen or so over-the-top, virtual multichannel providers.

A growing number of households rely on a combination of over-the-air antennas for their local stations, supplemented with online video services such as ad-supported platforms like Hulu and commercial-free packages from Netflix, Amazon and

[1] *See* The Nielsen Company, "The Nielsen Total Audience Report—Q3 2018" (Mar. 19, 2019).

others. Indeed, according to data from S&P Global, over the past five years the number of households buying a so-called subscription video on demand (SVOD) service like Netflix but *not* a traditional or virtual multichannel service has doubled, from 6.5 million to 13 million. Nielsen estimates that there are 16 million over-the-air homes, with about 8 million of these also using SVOD services but no virtual or traditional multichannel services.[2]

Figure 1



Thus, the alleged decline of the "cable TV" industry is vastly overstated. Programmers are thriving. Traditional cable TV distributors are thriving, due in large part to their dominance in the broadband market (even as their legacy pay-TV business loses some subscribers, those people must still subscribe to broadband to get any online programming at all). AT&T-owned DirecTV remains the top satellite TV provider, and AT&T is working to adapt to the new market realities with its DirecTV Now and forthcoming Warner Media SVOD service, even as it purposefully deprioritizes its U-Verse telecom TV offering. Dish is still profitable, and it pioneered the virtual multichannel market with Sling TV. Verizon's FiOS service has a healthy share in the markets in which it is available.

Local TV broadcasters are doing well in the internet-era, too. As discussed below, broadcasters continue to break revenue records. They are seeing substantial growth in over-the-air use and are able to negotiate carriage on the traditional MVPD platforms and the newer virtual multichannel services. And the forthcoming ATSC 3.0 broadcast standard promises to bring broadcasters newfound targeted advertising revenues—whether or not that's a good thing for people already losing their privacy to Internet companies and telecommunications providers alike.

Congress Must Address the Relationship Between Broadcasters and MVPDs Without Taking Away Viewers' Existing Rights

In light of the continued health of these industries, particularly the ones represented in today's hearing, it's hard to take seriously all their cries for regulatory relief. In warring talking points about the Satellite Television Extension and Localism Act Reauthorization of 2014 (or STELAR), lobbyists on both sides treat the needs of viewers—especially rural ones—as little more than buzzwords and bargaining chips to chase regulatory reforms best suiting their bottom lines. But there is good reason to renew this bill for another five years and much worth preserving here.STELAR, and the importation of distant TV station signals for which it allows, is not outdated. Broadcasters rightly point to the fact that one of the two major direct broadcast satellite providers (AT&T-owned DirecTV) does not provide local-into-local service for 12 of the smallest Designated Market Areas in the country, while DISH does indeed offer local signals in all 210 Nielsen DMAs. But the solution for that problem is to require local-into-local carriage and spur retransmission of those local signals whenever possible, including in those 12 markets— not to rip away channels and choices that hundreds of thousands of people have today in those

[2] *See* The Nielsen Company, "The Nielsen Local Watch Report—Q2 2018" (Jan. 14, 2019).

areas and in many others historically or currently unserved by an over-the-air broadcast signal.

Likewise worth renewing are the other expiring provisions in STELAR: the satellite distant signal statutory license that is coupled with the unserved-areas provision described above, and the obligation for broadcasters and all MVPDs alike to negotiate retransmission consent in good faith. Obviously this "good faith" prescription has never been a panacea, and even though the FCC does have in its rules some guidelines, there are questions about whether the agency has the tools it needs to enforce them. But ditching the framework in its entirety is not a panacea either, at least without even more comprehensive overhaul of United States copyright law and even deeper intervention in private contracts between giant sports leagues, Hollywood studios, broadcast networks and their local affiliates.

Pay-TV viewers are spending too much for traditional multichannel video, including and perhaps especially for the "free" broadcast TV they actually pay to get when it's retransmitted by cable and satellite providers. We describe below the skyrocketing rate of increase for MVPD subscription prices and the retransmission consent revenues received by broadcasters that help drive those price hikes. MVPDs even resort to hiding these charges as they pass them along to viewers by putting them "below the line" instead of accounting for them in the prices they advertise and quote to customers.

But it is not just the retransmission-consent provisions in the Communications Act that necessitate or generate these payments. Wiping the retransmission-consent statutes and FCC rules off of the books could change the current framework, and impact the bargaining power and incentives that networks and local TV affiliates have. It would not change the fact that broadcasters are (and should be) compensated for the content they create, and in which they hold a copyright, when it is retransmitted to paying MVPD customers. Nor would it interfere with or directly disrupt the network affiliation agreements that dictate when and where television affiliates can even negotiate for carriage in the first place.

In other words, it's not the retrans provisions in the Communications Act that prevent a TV station in Seattle from negotiating for cable carriage in Mississippi. The affiliation agreement between that Seattle station and its broadcast network are the primary reason that carriage of "distant" signals is not allowed, and not likely to happen unless lawmakers truly put the exclusivity provisions in those agreements under the microscope and move to toss out private contract clauses just as readily as Federal rules.

Proactive Policies to Strengthen and Expand Upon Gains Made Under STELAR

What can Congress do instead? Several things. STELAR added a market-modification provision for satellite carriage to the law, which was the right step. Rather than fixating on distant-signal issues, Congress could do more to help nearby neighbors get along. While viewers in so-called orphaned counties in the Nielsen DMA system can get signals from their home state rather than just being stuck with signals from the city and state next door, making that process easier for viewers to use (and tougher for industry players to evade) would go a long way toward increasing choices and reducing pressure to raise retransmission-consent fees, too.

STELAR also added a prohibition on joint negotiation of retransmission-consent agreements by broadcasters in a local market unless they are "under common de jure control permitted under the regulations of the [FCC]" 47 U.S.C. § 325(b)(3)(C)(iv). That was a modest attempt to curb the appeal of broadcasters' "sharing agreements" that allow large broadcast conglomerates to exercise de facto control over "sidecar" stations they cannot formally own and stash in shell companies instead. But however effective that joint retrans negotiation ban has been, it will become even less meaningful if the current FCC follows through on its plans to tear down all local broadcast-ownership limits, as I discuss at greater length below. A prohibition on joint retransmission-consent negotiations unless stations are commonly owned won't do very much if a single company is in fact routinely allowed to own multiple top-four network affiliates in local markets.

One more thing that STELAR did not address is the scourge of blackouts. When broadcasters and MVPDs reach an impasse in their negotiations, viewers are treated like pawns in a game that ultimately enriches those big companies at their customers' expense. Congress should solve this problem by finally clarifying and strengthening the FCC's good-faith negotiations authority. Senator Blumenthal's FANS Act is a smart but rather narrowly targeted solution that lays much of the responsibility for these negotiating breakdowns where it belongs: at the feet of the sports leagues that command such a high price and drive up costs for everyone. Congresswoman Anna Eshoo's proposals in the House would go even further: preserving the status quo and keeping content on the air by guaranteeing interim carriage while the parties negotiate and proposing arbitration measures designed to bring both parties to the table with reasonable offers in hand.

The State of Broadcasting: Making Money, Breaking Promises

Broadcasters' pleas of poverty, based on supposed competition from Internet companies, are belied by data showing broadcasters' continued fiscal growth despite changes in how people in the United States spend their free time. Broadcasters say they need government-imposed protections on other industry players in many cases, but total deregulation and freedom for themselves in others, all in order to preserve localism. This simply is not true.

Broadcast TV Revenues Continue to Grow

As we show just below, broadcast television advertising, online, and retransmission consent revenues have all grown recently, with the retransmission-revenue growth exploding in the past few years. Broadcast television advertising remains strong, even as Internet advertising grows in magnitude and importance. Broadcasters take a portion of that online ad money too, of course. And retransmission-consent revenues are an entirely new source of revenue—a gigantic source—that sprung up over the last decade.

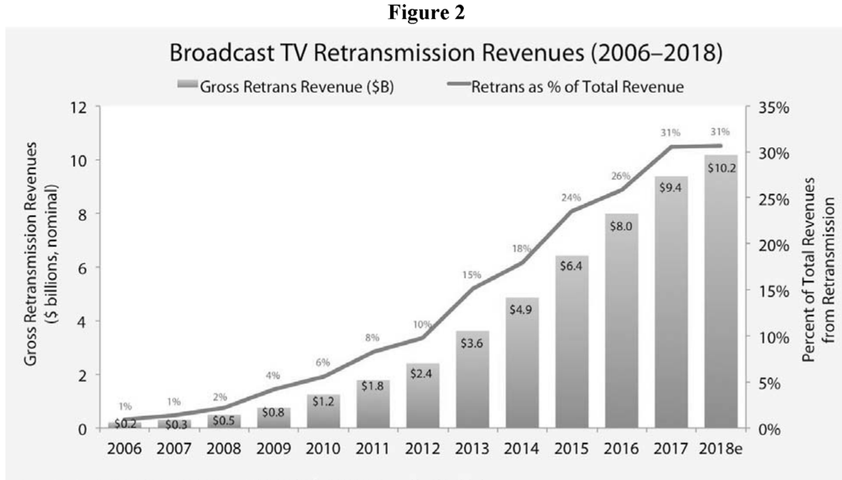
Despite this influx of new money, there is no evidence that television broadcasters invested this capital in localism, particularly in local journalism. And there is no reason to think that the regulatory changes broadcasters want, such as increasing local affiliates' leverage or their take in retransmission-consent negotiations, would lead to a flowering of local content either. In fact, as the broadcast market has become more concentrated at the national level, and in local markets, too, those revenues just continue to flow out of local communities.

For instance, local stations today generally pay a hefty portion of the retransmission-consent fees they earn for local carriage back to their affiliated networks. This phenomenon, known as "reverse retrans," sure is a backwards one. It takes money paid to local broadcasters, all under a regulatory regime supposedly designed to keep local content on the air, and sends it back to networks for the decidedly non-local content they broadcast nationwide. That is one of many reasons that retrans fees keep going up and that broadcasters also aren't meeting the public's information needs with more community-oriented and responsive content.

In recent years, broadcasters have profited handsomely from the retransmission-consent rights Congress granted them. Payments from cable, telco, and satellite MVPDs to local broadcasters reach record levels every fiscal quarter, in many cases despite declining ratings. Indeed, broadcasters' retrans revenues have seen—and are expected to continue seeing—explosive growth during this so-called Netflix era, a period in which viewership of ad-supported linear content is in decline.

Just a decade ago, retransmission-consent revenues made up less than 5 percent of broadcast television industry revenues. Now they account for approximately one-third of the broadcast TV revenue pie, at $10.2 billion and growing (see Figure 2).

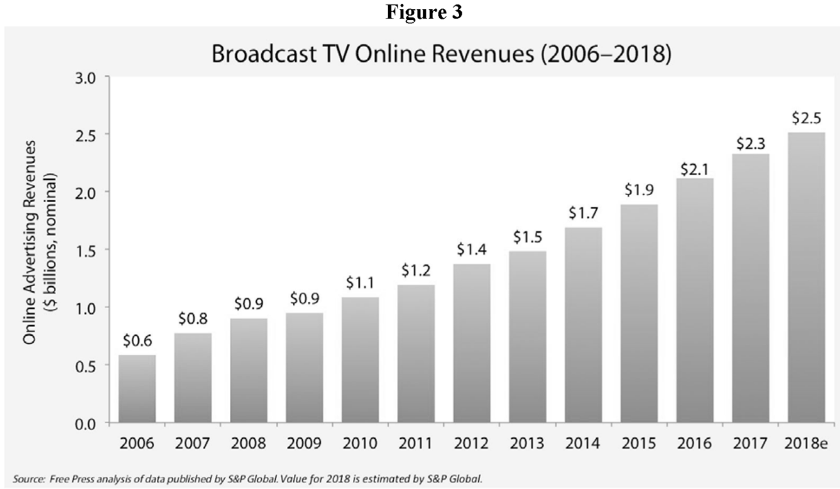
Figure 2



Source: Free Press analysis of data published by S&P Global. Value for 2018 is estimated by S&P Global.

But TV broadcasters have also found themselves flush with new cash from their online properties too. While broadcast television online revenues amounted to just $587 million in 2006, they had increased four-fold to $2.5 billion in 2018 (see Figure 3).

Figure 3



This growth in these two new revenue streams for broadcasters comes at a time when advertising revenues have rebounded from their recession-era decline (see Figure 4). And even in today's era of hyper-targeted social media ad campaigns, local TV remains dominant. Broadcast TV political ad revenues broke the $3 billion barrier in 2018, exceeding 2012's record of $2.9 billion (see Figure 5).

Figure 4

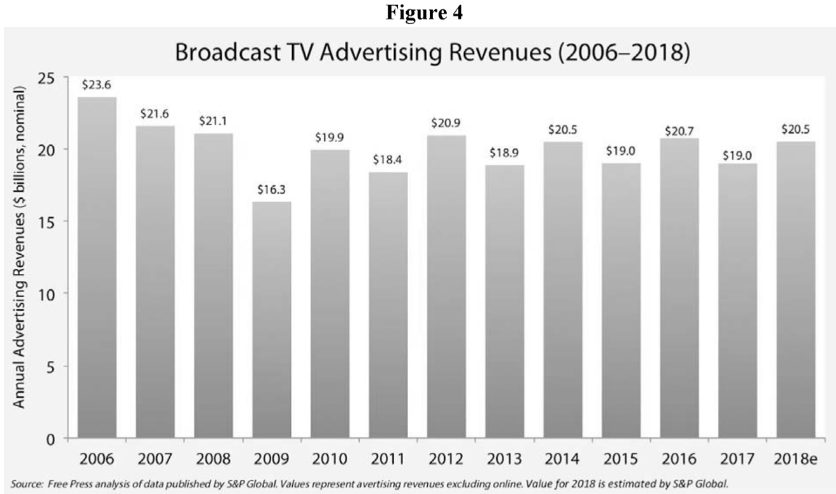
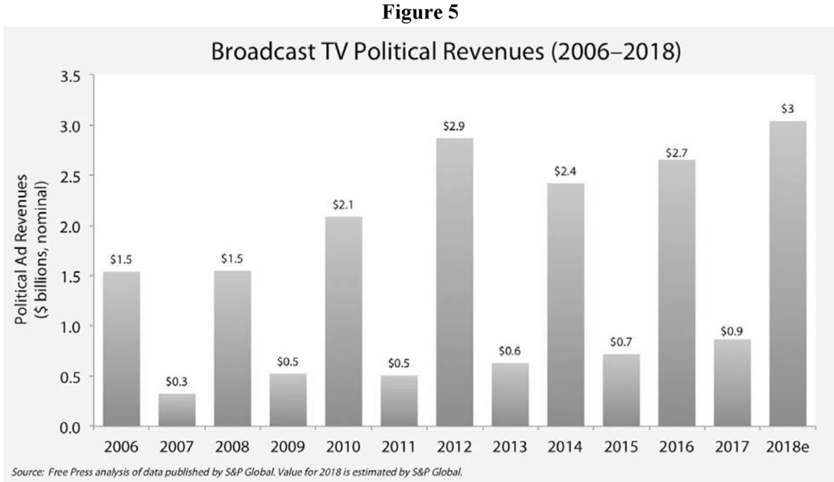
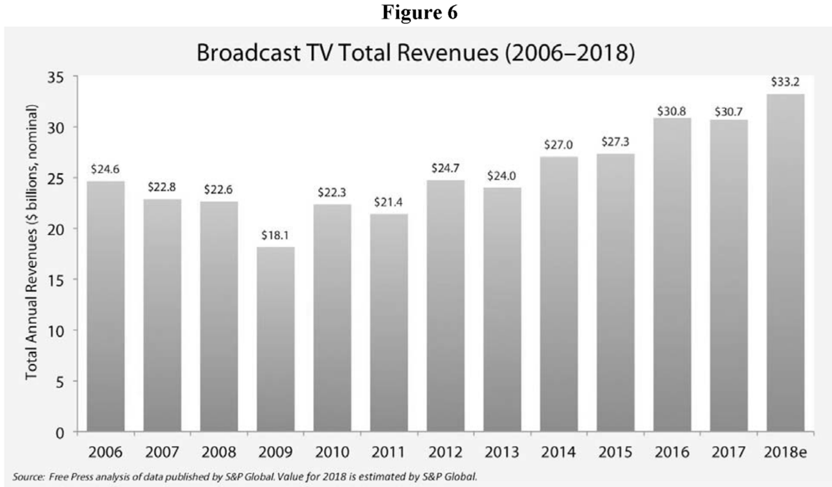


Figure 5



All of this means that, in total, U.S. broadcast television industry revenues exceeded $33 billion in 2018, smashing the historical record set in 2016 (see Figure 6). The election-year-fueled revenues for 2020 are expected to easily top this total.

Figure 6



In sum, local TV broadcasters are thriving. They are awash in advertising revenues and retransmission revenues. But there's simply no evidence that this massive growth in revenues has resulted in more or better quality local news.

Broadcast Television Ownership Diversity: A Shameful National Policy Failure

Though the U.S. population is rapidly diversifying, ownership of our media is not. This lack of ownership diversity is particularly appalling in our local broadcast media, a market where the local nature of the business should in theory support more diversity than in the giant national studio market dominated by conglomerates. But years of pro-consolidation policies at the FCC have pushed local owners out of the broadcast market, creating insurmountable barriers to entry that shut out diverse voices from access to the public airwaves.

In the early 1990s, at the dawn of an unprecedented era of local media consolidation, people of color comprised approximately one-quarter of the U.S. population. Today that figure is approaching 40 percent and will continue to grow. But according to the latest FCC analysis, people of color[3] collectively owned 7 percent of all U.S. full-power commercial broadcast television stations, or just 98 of the Nation's 1,388 stations.[4] (Though we note that a significant number even of these stations are only nominally owned by people of color, with broadcasters like Sinclair using shell companies headed by people of color to evade FCC ownership rules).[5]

This low level of local ownership persists despite years of supposed FCC attention to the matter, including a U.S. Appeals Court remand requiring the FCC to adequately study this issue and the impact of its policies on ownership diversity. Free Press's econometric research has shown that the probability of a media market having an owner of color is significantly lower as that market becomes more concentrated, even controlling for a variety of other factors.[6] Despite this finding that indicates the harm to diversity from continued consolidation, as opportunities for diverse owners and new entrants disappear when incumbent broadcasters can purchase all of the stations, the FCC has never adequately studied the impact of its policies on ownership diversity.

It is important to note that only 37 of the 98 full-power commercial TV stations owned by people of color are in the top 50 U.S. media markets, where the U.S. population is significantly more diverse. This reflects the reality of the barriers to entry in our Nation's over-consolidated broadcast market: Entry into the market (or staying in the market if you're not a giant conglomerate) is essentially impossible. Access to capital is of course a major barrier for would-be entrants. But the reality is that the loosening of ownership limits and the outright refusal of the FCC to enforce its ownership rules have created a market where only the biggest existing companies can own stations.

[3] People of color are defined as those holding attributable interests in FCC-licensed stations and indicating on FCC Form 323 that their race or ethnicity is one or more of the following: American Indian/Alaska Native, Asian, Black, Native Hawaiian/Pacific Islander, and/or Hispanic.

[4] *See* Federal Communications Commission, "Report on Ownership of Commercial Broadcast Stations (Data as of Oct 1, 2015)" (rel. May 10, 2017). We note that the FCC's definition of ownership for the purposes of race/ethnicity and gender classification is the share of voting interest in a station license. If persons of color and/or women have a collective voting share total exceeding 50 percent, that station is assigned to a particular race/ethnicity and/or gender. Because the FCC's ownership forms only require disclosure by owners holding 5 percent of more of the voting interest, some stations owned by publicly traded corporations will not have any identifiable race/ethnicity or gender for owners with a controlling interest.

[5] With the rise in the use of so-called Shared Service Agreements ("SSAs") there are a number of stations nominally owned by people of color or women that are not operated by these nominal owners, but by existing broadcasters (such as Sinclair or Nexstar, two of the largest firms employing SSAs as a method for evading FCC ownership rules). Thus while the FCC's most-recent data show a remarkably low level of ownership diversity, the "true" ownership diversity levels are even lower than these dismal figures.

[6] *See, e.g.,* Testimony of S. Derek Turner, Research Director, Free Press, before the United States House of Representatives Committee on the Judiciary, regarding Media Consolidation: The Impact on Minority Ownership & Localism (Dec. 12, 2007).

Figure 7

Majority Voting Interest in Full Power Commercial TV Stations as of 10/1/2015	Number of Stations	Percent of All Commercial Full Power TV Stations
Women (any race/ethnicity)	104	7.5%
Amer. Ind./AK Native (any ethnicity)	12	0.9%
Asian (any ethnicity)	10	0.7%
Black (any ethnicity)	12	0.9%
Nat. Haw/Pac. Isl. (any ethnicity)	1	0.1%
Two or More Races (any ethnicity)	1	0.1%
Hispanic (any race)	62	4.5%
All People of Color	98	7.1%
Total Full Power Commercial Stations	1,388	

Source: FCC Analysis of Form 323 filings as of October 1, 2015. Figures include all stations indicating majority-female or majority-person of color ownership voting interest, which includes a number of stations that are operated by different companies under Shared Services, Local Marketing, and Operating Services Agreements.

More Consolidation Is Not the Answer to the Harms of Consolidation

How did we get to this point then, where the population continues to diversify but broadcast ownership diversity simply does not budge? As Free Press documented in a 2014 report, the broadcast industry continued to concentrate even when the FCC, under the previous presidential administration, claimed to be keeping some of its local broadcast ownership limits in place.[7] The agency failed to police what we call "covert consolidation" by waving through more deals that depended on shell companies and so-called shared-services agreements to hide the true ownership and control of local TV stations. And while the last FCC did take a few important steps, like repealing the obsolete "UHF Discount" that lets broadcasters pretend their UHF signals only reach half of their actual audience for purposes of the 39 percent national broadcast ownership cap, it was not enough to stem the wave of consolidation already occurring.

The current FCC's response, under Chairman Ajit Pai, has been to remove every last safeguard rather than to repair the damage of runaway deregulation. Quickly after assuming office, Pai reversed the last quadrennial-review decision issued under the prior administration. He rapidly eliminated the longstanding prohibition against newspaper-broadcast cross-ownership, while opening the door to more broadcast TV duopolies. Free Press and others challenged Pai's decisions, and arguments in the case before the U.S. Court of Appeals for the 3rd Circuit will take place next week.

The FCC has been stuck in court for well over a decade now on its string of failed quadrennial-review decisions because the agency refuses to study the glaringly obvi-

[7] S. Derek Turner, Free Press, "Cease to Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation" (Mar. 2014), *https://www.freepress.net/sites/default/files/legacy-policy/Cease_to_Resist_March_2014_Update.pdf.*

ous, detrimental impact of its policy changes on broadcast-ownership diversity. Rather than fulfill its statutory duty and follow the court's instructions to do so, it continues to follow a "repeal first, ask questions later" mentality that prolongs legal uncertainty while compounding the loss of diverse viewpoints on the air.

Rather than do those studies, or at least wait and see how the court case comes out when the FCC has stubbornly refused to do its homework again, the Pai FCC charged ahead with its latest quadrennial review late last year. Looking to finish the job it started and get rid of essentially every meaningful local ownership rule (for both TV and radio), the Pai FCC now proposes to eliminate the last vestiges of ownership rules against local-TV duopolies, including combinations of top-four affiliates.

This FCC's assault on localism has not been limited to repealing the local ownership rules either. Almost immediately upon becoming Chairman, Pai reinstated the UHF Discount rule that even he admits is technically obsolete. Born in an analog era when UHF signals traveled poorly and covered fewer viewers than their VHF counterparts, there is simply no justification for keeping this 50 percent "discount" on audience reach now as digital UHF signals actually are *better* than VHF. But the Pai FCC has bent to broadcasters' wishes, put the discount back in place, and even proposed raising the 39 percent cap that Congress wrote into the statute on the basis of dubious claims regarding the agency's authority to make that change.

Last but not least, the Pai FCC repealed the "Main Studio Rule" that required local broadcasters to actually maintain a physical presence in the communities they're licensed to serve. Broadcast lobbying claims that abandoning the community will somehow improve local reporting and news coverage barely merit a response. Suffice it to say, we need more reporters on the ground in the communities they're supposed to cover, not fewer.

It's time for Congress to step in and end this onslaught on localism already underway at the FCC. Congress should also restore the local ownership limits recently jettisoned by the FCC, and in fact strengthen them, aiming for a world in which broadcasters can multicast multiple networks on a single channel but not own or control more than one TV station in each market. Congress should prevent the FCC from raising the national ownership cap to benefit a few giant broadcast conglomerates like Sinclair and Nexstar, and instead lower the cap in statute to 15 percent. And instead of only waiting for the FCC to get the doomed quadrennial-review process right some decade, Congress should repeal the quadrennial-review statute altogether and prevent this constant rush to deregulate a broadcast industry that is already highly concentrated and insufficiently local.

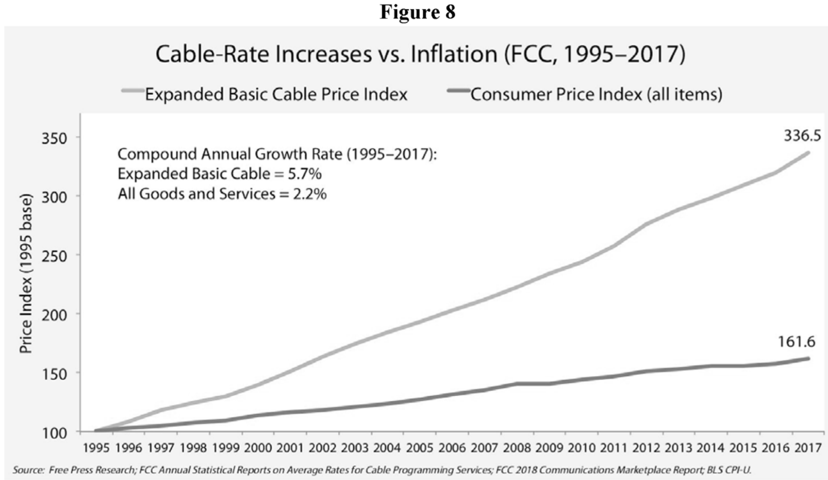
Cable Performance Remains Strong Even as Online Video Grows

Cable Television Industry Revenues and Prices Continue to Increase

Since 1996, when Congress relaxed the protections adopted in the Cable Television Consumer Protection and Competition Act of 1992, cable prices have risen steadily at nearly three times the rate of inflation (see Figure 8). And this trend is not showing any sign of improvement despite the rise of online video. Between 2012 and 2017, the average annual rate of inflation was 1.4 percent, but the price of expanded basic cable service has increased by an annual average of 4.1 percent.[8] Plus, these figures do not include mandatory equipment rental costs, which continue to skyrocket (compare Figures 9 and 10).

[8] Average annual rates of inflation described herein represent the Compound Annual Growth Rate ("CAGR"). *See 2018 Communications Marketplace Report,* GN Docket No. 18–231, Report, 33 FCC Rcd 12558, App. B at Attachment 8 (2018).

Figure 8



In fact, as Free Press has documented, the "effective competition" standard in Section 623 of the Communications Act has not succeeded in disciplining cable prices.[9] Congress should modify that standard to make the FCC determine accurately whether effective competition really exists, rather than letting the FCC pretend the mere presence of MVPDs other than incumbent cable provides "effective" competition even where cable's market share remains as high as 85 percent. This test simply does not measure whether competition actually occurs in such highly concentrated markets. That's the main reason that FCC's most-recent report on the cable industry found that "the average price of basic service in the effective competition group is 51.5 percent *higher* than the average price of basic service in the noncompetitive group." [10]

[9] *See, e.g.,* S. Derek Turner, Free Press, "Combating the Cable Cabal: How to Fix America's Broken Video Market," at 10–11 (May 2013), *https://ecfsapi.fcc.gov/file/60001009214.pdf.*

[10] *See 2018 Communications Marketplace Report,* App. B, ¶ 27 (emphasis added). We note that the 1996 Telecom Act sunset the Commission's authority to regulate rates of tiers above basic as of March 31, 1999. While the 2017 survey results finally show lower prices for expanded basic tiers in effective competition communities when compared to those for non-competitive communities ($75.19 vs. $77.24), this is only a recent reversal of the historical trends. For example, in the 2015 survey the average price of expanded basic programming in effective competition markets was $70.31, versus $67.85 in so-called non-competitive markets. In the 2012 survey, the average price of expanded basic programming in effective competition markets was $62.49, versus $60.99 in non-competitive markets.

Figure 9

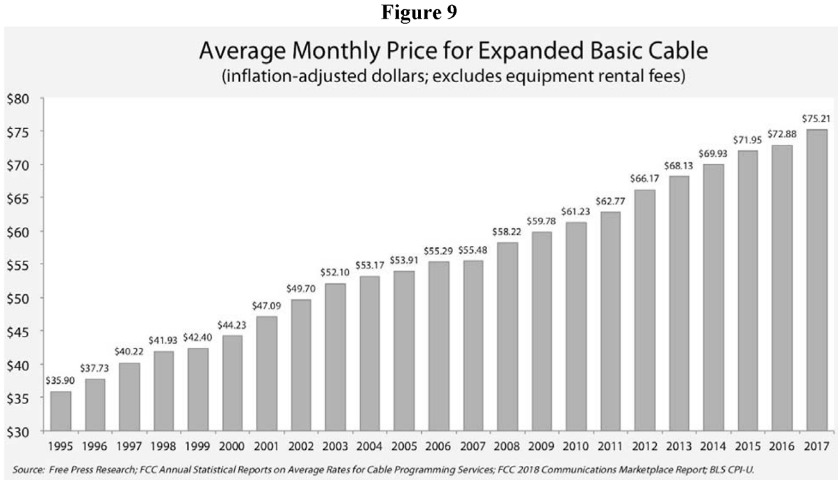
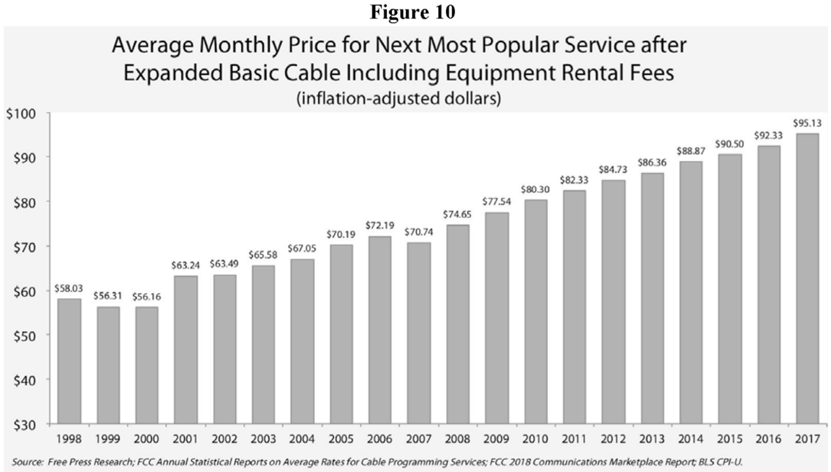


Figure 10



The data in Figures 9 and 10 comes from FCC annual surveys of what cable television providers charge, which is not the same as the average price that consumers actually pay. To get a better sense of the latter, we present data from the Bureau of Labor Statistics measuring what urban consumers spend on cable and satellite television services.[11] The trends are similar, but the differences are important for the purposes of measuring the impact of public policies,[12] particularly the effect of Congress passing the 1992 Cable Act but subsequently weakening it.

In 1992, consumers were giving Congress an earful about their cable bills.[13] A decade of deregulation prior to that meant cable subscribers had to fend for themselves in a monopoly multichannel market where cable TV companies used their pricing power. A super-majority of Congress heard their complaints and took up the

[11] *See* Bureau of Labor Statistics, Cable and satellite television service in U.S. city average, all urban consumers, not seasonally adjusted, Series ID CUUR0000SERA02.

[12] For example, the BLS data show a flat line for cable CPI during the most-recent recession, but the FCC data do not. This is because during the recession consumers cut back on expenditures like cable TV, but multichannel distributors did not cut their prices.

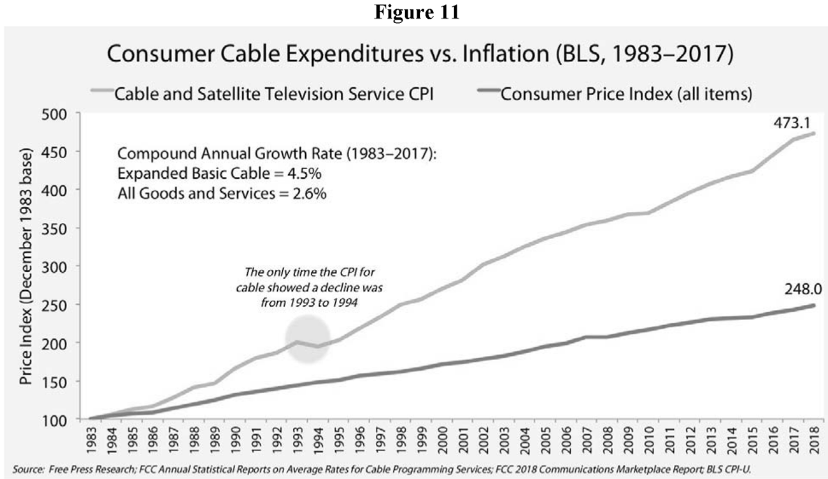
[13] *See* Dissenting Views of Reps. Markey, Studds, and Klink on H.R. 1555 (1995) ("Markey-Studds Dissent").

cause to enact the 1992 Act over a presidential veto. The political will was there because, as the 1992 Act noted in its findings, the "average monthly cable rate has increased almost three times as much as the Consumer Price Index since rate deregulation."

That 1992 law, which once more subjected cable distributors to at least some limited rate regulation on their basic and expanded-basic tiers, was far from perfect. For example, the law's "effective competition" standard mentioned above does not actually measure whether there is actually any effective competition in terms of prices or other marketplace results. It assumes instead that the mere presence of additional distributors with small market shares would be enough to warrant rate deregulation.[14] Senator Markey, then still in the House of Representatives, rightly noted that the law was working exactly as intended. After the 1992 law's implementation, cable rates had declined—a first for the industry (see Figure 11). And though the cable industry claimed that rate caps were harming investment, it turned out this was not the case.[15]

But less than two years after the 1992 law was implemented, many in Congress on both sides of the aisle were lining up to let the cable industry return to its rate-hiking ways. The new members who came into Congress during the 1994 "Republican Revolution" were eager to deregulate, and many Democrats were willing to go along.

Figure 11



Supporters of the 1992 Act were unable to get their colleagues to hold the line on rate regulation even in the face of consistent rate hikes by dominant cable providers. Many in Congress believed the emergence of new video-distribution platforms—namely satellite and telco—would remove the need for rate regulation. They argued that the additional competition from these distributors would solve the monopoly-pricing problems.

The theory was plausible, but incomplete, as it ignored the stumbling blocks posed by vertical integration and the programming industry's own market power. It didn't help that the FCC completely bungled the new law's implementation. But with members on both sides of the aisle embracing this competitive theory during the drafting of the 1996 Telecom Act rewrite, Congress moved to loosen some of the cable regulations it had adopted less than three years earlier—regulations that in their first 15 months of existence had already saved consumers $3 billion.[16]

[14] 47 U.S.C. § 543(l)(1). In general, a franchise area will be deemed effectively competitive if "the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent," or a local exchange carrier offers multichannel service.

[15] *See* Markey-Studds Dissent.

[16] *Id.*

Though it maintained the 1992 Act's structure for regulating basic cable rates,[17] the 1996 Telecom Act eliminated rate regulation of all enhanced tiers.[18] The new law also amended Title VI of the Communications Act to deem a local video market competitive as soon as a Local Exchange Carrier began offering video services, regardless of its market share.[19] And Congress stripped individual consumers of their ability to challenge a rate as unreasonable, reserving that power for the local franchising authority.[20]

Even though the mantra of the 1996 Telecom Act was "competition before deregulation," the cable industry got just the opposite. It got the rate relief it asked for—regardless of marketplace conditions and even in the absence of effective competition. Not surprisingly, FCC data show that expanded basic cable rates once again began rising annually at three times the rate of inflation, with a sharp uptick in 1999.[21]

Cable's Below-the-Line Fees for Regional Sports Networks and Local Broadcasting

One of the more-frustrating trends for pay-TV subscribers is the substantial increase in the amount of their total monthly bill that is pushed "below-the-line." Such fees include now-commonplace local broadcasting and regional sports network ("RSN") "recovery" fees. MVPDs favor this practice because it allows them to advertise a lower price, knowing that subscribers are unlikely or unable (because of long-term contracts) to switch to a different video provider once they get their surprisingly higher monthly bill.

The amount of these fees differs by market and distributor. In large urban markets that have multiple professional sports teams, the RSN recovery fee can climb to double digits on a monthly basis. For example, in Chicago MVPD subscribers are forced to shell out about $9 per month for RSNs that many never watch, a fee that is slated to rise to $13 after Sinclair's recent acquisition of the RSNs formerly-owned by FOX.[22] This hidden fee is already on top of a local TV fee that is $10 per month on some Chicago-area cable systems.

It is important to note that as high and annoying as the hidden RSN fee is, it only represents a fraction of the customer's bill that is used for sports channels, regardless of which—if any—sports they actually watch. According to S&P Global, in 2018 "the average cost per subscriber for sports networks" *excluding RSNs* was $13.30 a month, "while the weighted average for all networks was just $5.83."[23] ESPN and ESPN2, which are on almost all expanded basic plans, account for more than $9 per subscriber. With the $4–$5 average cost per RSN factored in, it is no surprise that in some markets sports channels can account for about half of a customer's monthly bill.[24]

Retransmission fees have made so-called free television quite expensive for viewers watching it on a pay-TV platform. But instead of putting these fees into the advertised price of their service, MVPDs are shoving them into below-the-line fees. And what initially was a $1–$2 annoyance is now for many customers yet-another double-digit surprise. According to S&P Global, "The weighted national average broadcast fee [was] $8.84" as of February 2019.[25] But this average is just that, and the fees are far higher for millions of video subscribers. For example, Comcast's current maximum broadcast fee is $10 per month and has increased nearly seven-fold in just the past five years. And this practice isn't limited to traditional cable operators. Dish charges $12 per subscriber on average.

In a market that was actually "effectively" competitive, sellers would not be able to saddle buyers with such giant hidden fees. If policy makers are interested in helping video consumers, they can start by regulating the use of below-the-line fees

[17] Small cable systems, however, were deregulated even on basic tier rates. *See* 47 U.S.C. § 543(m).

[18] The FCC's ability to regulate these "upper" tier rates sunset on March 31, 1999. See *id.* § 543(c)(4).

[19] *Id.* § 543(l)(1)(D).

[20] *Id.* § 543(c)(1)(B).

[21] From 1998 to 1999, expanded basic rates increased by 3.8 percent. From 1999 to 2000, these rates increased by 7.9 percent. In contrast, from 1999 to 2000 the rates for basic cable increased by 2.1 percent. *See 2018 Communications Marketplace Report,* App. B at Attachment 8.

[22] *See* Robert Channick, "Diehards and non fans alike to foot the bill for new Cubs pay TV network," *Chicago Tribune* (May 24, 2019).

[23] *See* Adam Gajo, John Fletcher, Scott Robson and Brian Bacon, "The 2019 Sports Report," *S&P Global Market Intelligence* (Apr. 4, 2019).

[24] *See, e.g.,* Joe Flint and Meg James, "Rising Sports Programming Costs Could Have Consumers Crying Foul," *Los Angeles Times* (Dec. 1, 2012).

[25] *See* Neil Barbour, "Broadcast fees in step with estimated retrans costs at national level," *S&P Global Market Intelligence* (Feb. 7, 2019).

and requiring MVPDs to advertise the real price customers must pay. Senator Markey's and Representative Eshoo's TRUE FEES Act would go a long way in illuminating and combating this problem, shining a light on the actual monthly prices cable, phone and broadband customers should expect to pay while attempting to prevent unjustified price hikes on set-top boxes rented from cable operators.

Congress could do even more, however, to provide transparency not only on below-the-line fees, but the prices that people pay for each and every channel they choose to buy—or more often, must buy—in the bloated bundles that still dominate the MVPD lineup.

Best of all would be the kind of long-overdue statutory fixes that this Committee has contemplated in the not so distant past, mandating a la carte programming options so that viewers can purchase the channels they want from their MVPD and not be forced to buy the ones they don't. But short of that, people should at least be able to see what they are paying and why, for every broadcast channel, RSN, and other cable channel in their subscription packages.

Preserving Local Content on Cable Means Ending the Attack on Community TV

Cable companies are also going on the offensive against local content, cheering on proposals at the FCC that would jeopardize funding for community-access television channels and production facilities around the country. Much like broadcasters, who want to keep all of the benefits and protections they receive in exchange for providing local content but none of the obligations to actually follow through on producing it, cable companies are looking to diminish the availability and even the viability of local PEG channels.

Cable operators negotiate local-franchise agreements with the cities and towns they serve, paying some small compensation in exchange for these companies' use of valuable public rights-of-way. Part of that bargain in many franchise agreements is money to fund the constriction and the operation of community access channels featuring local government, civic affairs, school boards, high school sports, and all manner of local-interest programming produced by actual community members. In a pending proceeding at the FCC, however, we're witnessing a sneak attack on the funding sources for these PEG channels' operating budgets, as the Pai regime proposes changes to the definitions of what counts against the 5 percent cap on franchise fees that the local government can collect from the cable company. The proposal would treat not just money paid over for PEG as a part of that franchise fee, but would place a monetary value on all manner of in-kind "contributions" by cable companies never before offset against the 5 percent cap.

As Free Press explained in our filing in that FCC docket, the cable industry's proposals here would violate the statute in the Cable Act and put continued support for these vital community voices at risk.[26] I would urge senators to make their voices heard on this issue and protect these local institutions which go far beyond community-access programming to provide technological training, youth education and other essential services.

Online Video Competition: A Ray of Hope?

Fortunately for consumers there are some signs of hope in today's online video era. While the 2017 survey results finally show lower prices of expanded basic tiers in effective competition communities compared to non-competitive markets ($75.19 vs. $77.24), this is a reversal of the historical trends, which generally showed prices for expanded basic tiers in effective-competition communities approximately 3 percent higher than in non-effective competition markets.

We believe this recent reversal of the historical trend demonstrates the importance of actual competition, as opposed to the weak and ineffective standard encapsulated in the Act's "effective competition" test. Once the FCC restored Title II nondiscrimination obligations for broadband providers, the number of online video alternatives exploded.

This development reduced the pricing power of the cable-TV distributors, while the mere presence of satellite and telco video providers did not work as the "effective competition" test speculated it could. Traditional MVPDs still pass along the increased cost of programming to their customers, but the additional competition from numerous online alternatives reduces MVPDs' ability to pass along all of these costs. This means the rate of price increases in effective competition communities

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[26] Reply Comments of Free Press, MB Docket No. 05–311 (filed Dec. 14, 2018), *https://www.freepress.net/sites/default/files/2019–05/free_press_reply_comment_on_community_access_television.pdf.*

finally slowed, relative to non-effective competition communities, even though prices in both continued to rise.

In other words, even the online video competition we see today doesn't mean that pay-TV customers are paying less, only that their bills are climbing a little less quickly.

This is a real-world example of the economic truism that "four is few, six is many." Effective competition in this market requires the presence of more alternatives than just the monopoly cable incumbent and two satellite distributors. The recent data strongly points to the continued need for public policies that ensure video consumers and online video distributors have access to high-quality, non-discriminatory broadband telecommunications services.

Unfortunately, the current FCC has moved to eliminate the very policies—namely Net Neutrality protections grounded in Title II of the Communications Act—that helped spark this more competitive environment. Senate passage of the "Save the Internet Act" introduced by Senator Markey, which passed the House of Representatives in April, is a crucial step not just to protect the free and open Internet but to bolster needed competition in the video space.

Privacy Concerns with New TV Technology

While people still love watching TV, they may not expect their TVs to be watching them. But that's exactly what is happening. And it's creepy.

Cable and telecommunications providers have access to an incredible trove of sensitive information about what their customers watch, visit and download. Unfortunately, rules that the FCC implemented in 2016 to protect this data and limit how ISPs can use it were overturned in the last Congress.[27] There's little to no accountability for what these companies are doing with that data. For example, Nielsen, which is also testifying at this hearing, has paid companies including Comcast, AT&T, Charter, and Dish to receive set-top-box data about what shows Americans are watching.[28]

New smart TVs are being sold with sophisticated content-recognition technology and other software that monitors what people watch on their sets and collects data to target them with advertising.[29] Viewers are sold on opting in with promises of better content recommendations, but many may not understand that their clicks have become a commodity or that they are being tracked across platforms so that what they watch on TV may show up Facebook, for example.

Nielsen, which has long held a monopoly over TV ratings, has now become a big data company that traffics in TV viewer data.[30] Data on your channel surfing is brokered to and from many companies. The opt-in disclosures on your set may tell you that "third parties" will see the data, but they often provide viewers with no idea of who has the data or offer any way to delete or reclaim their data once it is sold and resold.

Senators Markey and Blumenthal have raised this issue with the chairman of the Federal Trade Commission and called for an investigation into the "privacy policies and practices of smart TV manufacturers."[31] Much more oversight is needed by Congress and the Federal Trade Commission on how these companies and their partners—including Gracenote, a Nielsen subsidiary—are using the data, with whom they are sharing it, and whether it is being sold to data brokers.

Conclusion: A Different Path Forward

When it comes to the state of the media—especially local media—we are going in the wrong direction. But it is not too late to change course. This committee should enact laws, and conduct oversight of the agencies it authorizes, to stop the erosion of localism and promote diversity. We need laws and policies that improve competition, boost innovation, increase transparency, and support the creation of content from diverse, independent, under-represented and varied viewpoints. Now is the time to give your constituents more choices, lower prices, better service and new opportunities.

In sum, Free Press Action urges the Committee and the Senate to:

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[27] *See, e.g.,* Free Press, Press Release, "House Republicans Vote to Destroy the FCC's Online Privacy Protections" (Mar. 28, 2017).

[28] Daniel Frankel, "Comcast finally agrees to sell set-top data to Nielsen," *Fierce Video* (Nov. 9, 2017).

[29] Sapna Maheshwari, "How Smart TVs in Millions of U.S. Homes Track More Than What's on Tonight," *New York Times* (July 5, 2018).

[30] Mike Masnick, "Nielsen Using Patent Monopolies to Act like a Monopolist," *Techdirt* (May 23, 2019).

[31] Letter to the Hon. Joseph Simons from Sens. Ed Markey and Richard Blumenthal (July 12, 2018), *https://www.markey.senate.gov/imo/media/doc/FTC%20smart%20TV%20letter%20.pdf.*

- Reauthorize STELAR or its equivalent for another five years.
- Enact legislation to prevent blackouts and preserve carriage during negotiations.
- Revoke the FCC's "UHF discount," an obsolete rule that serves only to enable further media consolidation.
- Reject the FCC's efforts and broadcasters' pleas to raise the national broadcast audience reach cap above 39 percent, and instead lower that cap to 15 percent.
- Create incentives, modeled on the "minority tax certificate" program that NAB and Free Press Action alike have long supported restoring, to incentivize sales of stations to local owners who are women and people of color.
- Restore local limits on broadcast media ownership, and prevent broadcasters from operating multiple stations in a single market through shell companies
- Eliminate the FCC's "quadrennial review" of media-ownership rules.
- End below-the-line fees and other hidden charges, requiring cable and satellite providers to show the total price in advertisements and bills. Also require them to show how much consumers pay for individual channels in any package.
- Pass legislation allowing consumers to pick and choose the channels they want to watch and then to purchase multichannel programming "a la carte."
- Protect carriage and funding for PEG channels, signaling disapproval of proposals circulating at the FCC that endanger these essential local outlets.
- Support and pass the "Save the Internet Act" introduced by Senator Markey to restore strong Net Neutrality rules grounded in Title II of the Communications Act, which are essential for preserving access to competitive online video.
- Institute strong privacy protections to protect personal information, and limit its sale and exploitation not only by Internet companies and broadband providers but also by TV and video providers, manufacturers, or other parties.
- Bolster antitrust laws to prevent mega-mergers in the TV and video industries.
- Consider imposing a tax on targeted online advertising, with revenues used to fund local journalism and civic technology alongside increased support for noncommercial media in places poorly served by commercial media.

I look forward to working with the Committee and answering any questions you have.

The CHAIRMAN. Well, thank you very much, Mr. Aaron.

Mr. Kenny, you're now recognized, and I understand you really have to be out of here by 11, is that correct?

Mr. KENNY. 11:15, yes.

The CHAIRMAN. 11:15. OK. Well, that's a whole new matter.

You are recognized. We'll be delighted to hear from you.

STATEMENT OF DAVID KENNY, CHIEF EXECUTIVE OFFICER, NIELSEN

Mr. KENNY. Thank you.

I'd like to thank you, Chairman Wicker and Ranking Member Cantwell, as well as all the Members of the Senate Commerce Committee, for the opportunity to discuss the changes in the video marketplace for consumers.

As the video landscape changes, Nielsen's role is critical. Our independent measurement and analytics services allow video producers and distributors to make the decisions so that customers consume the video that they want, in a manner that they want, and from whom they want it.

Trust and transparency are the reason why Nielsen ratings are to a large extent the currency on which much of the media business is conducted. Understanding the audience makeup of a particular program helps broadcasters know where to invest in new programming and at what time and at what localities to make certain programming available.

The independence of companies, like Nielsen, matters and should be protected. Without an independent voice, industry would be left to grade its own homework, robbing consumers of their voice, and sidelining critical investment from advertisers.

As Congress develops legislation on the Satellite Home Viewer Act and considers privacy, Nielsen feels there is a legitimate interest in the use of independent third-party data collection through audience measurement.

This is an exciting time for consumers. The changes to the media landscape in just the last few years, as said, have been extraordinary. The entire ecosystem, including my fellow panelists, have moved the industry forward to ensure that consumers can receive the video content that they want, when they want it, and at a reasonable cost.

Overall video consumption has increased substantially over the last decade. However, this growth does look as if it will flatten out. Today, the average adult consumer is watching 5 hours and 24 minutes of video daily, which is a 3-minute decrease year over year between 2017 and 2018, even when taking into account all the new methods in which one can consume video content.

While the overall consumption of live television was down 4 percent between 2017 and 2018, live television still comprises 78 percent of overall video consumption. Over almost 4 hours, well, 3 hours, 44 minutes to be exact, are spent watching live television per person daily, and 30 minutes is spent watching recorded programming from live TV.

Nevertheless, we are seeing double-digit yearly growth for video consumption via TV-connected devices, such as Roku. So-called smart televisions, which are internet-connected and allow viewers to control features for streaming content in a one-stop-shop fashion, are increasing at a rapid rate, jumping 29.8 percent between Q3/2017 and Q3/2018.

The largest decline was not television usage but video viewing on a personal computer which decreased 30 percent between Q3/2017 and Q3/2018.

Many relatively recent market entrants are investing substantial sums in new programming benefiting consumers, but, interestingly, eight of the top 10 shows on Netflix, for example, come from traditional television content. *The Office, Friends,* and *Gray's Anatomy,* each independently accounted for 2 percent of Netflix's total video viewership.

When choosing what to watch on streaming services, consumers studied existing and former broadcast shows as the biggest influence. Less than half that number cited recommendations from the streaming services themselves.

Last, one of the hallmarks of Nielsen's measurement and analytics capabilities is to help video producers and industry leaders understand their audiences. We believe our service is critical to ensuring that all consumers of video should be accounted for when producing, investing, and distributing video content.

Diversity in video viewing is a monetary reality when it comes to consumption and the adoption of new technologies in a changing media landscape. Both diverse and younger consumers are more tied to their phones and have begun to move away from traditional television in favor of new video entrants on the phone.

As our country becomes more and more multi-culturally diverse, these trend lines represent the future and advertisers and video content producers would be well advised to serve these populations now.

Once again, thank you for allowing me to share the hard work my colleagues at Nielsen produce. We at Nielsen are excited about what the future brings and helping policymakers make informed decisions on everything from video regulation to privacy.

If there's one ask I would make of the Committee, it is not only to protect but embrace independent measurement and analysis. Without it, my colleagues on the panel would be unable to further invest in our media ecosystem, stagnating the exciting innovation enjoyed by consumers today and for years to come.

Thank you.

[The prepared statement of Mr. Kenny follows:]

PREPARED STATEMENT OF DAVID KENNY, CHIEF EXECUTIVE OFFICER, NIELSEN

I. Introduction

I would like to thank Chairman Wicker and Ranking Member Cantwell, as well all of the other members of the Senate Commerce Committee for the opportunity to discuss the changes in the video marketplace for consumers.

II. Nielsen's role

As the video landscape changes, Nielsen's role is critical. Our independent measurement and analytics services allow video producers and distributors to make the decisions so that customers consume the video that they want, in a manner that they want and from whom they want it.

Trust and transparency are the reasons why Nielsen ratings are to a large extent the currency on which much of the media business is conducted. Understanding the audience make-up of a particular program helps broadcasters know where to invest in new programming and at what time and in what localities to make certain programming available.

The independence of companies like Nielsen matters and should be protected. Without an independent voice, industry would be left to grade its own homework, robbing consumers of their voice and sidelining critical investment from advertisers. As Congress develops legislation on the Satellite Home Viewer Act and privacy, Nielsen feels there is a legitimate interest in the use of independent third party data collection through audience measurement.

III. Consumer Trends

This is an exciting time for consumers. The changes to the media landscape in just the last few years have been extraordinary. The entire ecosystem, including my fellow panelists, have moved industry forward to ensure that consumers can receive the video content that they want, when they want it, and at a reasonable cost.

Overall video consumption has increased substantially over the last decade. However, this growth looks as if it will flatten out. Today, the average adult consumer is watching 5 hours and 24 minutes of video daily, which is a 3 minute decrease year over year between 2017 and 2018 even when taking into account all the new methods in which one can consume video content.

While the overall consumption of live television was down 4 percent between 2017 and 2018, it still comprises 78 percent of overall video consumption. Almost 4 hours (3 hours 44 minutes to be exact) are spent watching live television per person daily and 30 minutes is spent watching recorded programming from live TV.

Nevertheless, we are seeing double-digit yearly growth for video consumption via TV-connected devices, such as a Roku. So-called "Smart" televisions, which are Internet-connected and allow viewers to control features for streaming content in a one-stop shop fashion, are increasing at a rapid rate, jumping 29.8 percent from Q3 2017 to Q3 2018. The largest decline was not television usage but video viewing on a personal computer, which decreased 30 percent between Q3 2017 and Q3 2018.

Many relatively recent market entrants are investing substantial sums in new programming, benefiting consumers. But interestingly, eight of the top 10 shows on

Netflix, for example, come from traditional television "library" content. *The Office, Friends* and *Grey's Anatomy* each independently accounted for 2 percent of Netflix's total video viewership. When choosing what to watch on streaming services, consumers cited existing and former broadcast shows as the biggest influence. Less than half that number cited recommendations from the streaming services themselves.

IV. Demographics and Diversity

One of the hallmarks of Nielsen's measurement and analytics capabilities is to help video producers and distributors understand their audiences. We believe our service is critical to ensuring that all consumers of video should be accounted for when producing, investing in and distributing video content. Diversity in video viewing is a monetary reality when it comes to consumption and the adoption of new technologies in a changing media landscape.

Both diverse and younger consumers are more tied to their phones and have begun to move away from traditional television in favor of new video entrants.

As our country becomes more and more multiculturally diverse, these trend lines represent the future, and advertisers and video content producers and distributors would be well advised to serve these populations now.

V. Closing

Once again, thank you for allowing me to share the hard work my colleagues at Nielsen produce. We at Nielsen are excited about what the future brings and helping policymakers make informed decisions on everything from video regulation to privacy.

If there is one ask I make of this Committee, it is to not only protect but embrace independent measurement and analysis. Without it, my colleagues on the panel would be unable to further invest in our media ecosystem, stagnating the exciting innovation enjoyed by consumers today and for years to come.

The CHAIRMAN. Well, thank you very much.

Let me just stay with you, Mr. Kenny. You mentioned Nielsen's measurement and analytics capabilities in assessing demographics and diversity on Page 4 of your testimony.

The provisions in STELAR help to ensure that rural communities have access to broadcast programming. What can you tell the Committee about how broadcasters are addressing the needs of America's rural communities?

Mr. KENNY. So Nielsen is known for its measurement of video consumption across the country in 208 of the 210 markets we do measure and this allows us to serve those rural communities.

It's also very important that Nielsen measures wireless coverage, which is another way that those communities are served, and I would say, you know, we continue to see that where the FCC allowing small rural cellular carriers to utilize Nielsen data to challenge coverage decisions, this does allow them access to wireless universal service funds.

Wireless satellite rural cable companies are all lifelines to rural areas because they not only bring video television but also broadband capabilities to those areas and we're really proud to play a part in making sure those economics work.

The CHAIRMAN. Is Rural America getting what it needs today?

Mr. KENNY. In most cases, we do believe so. We would continue to make sure the economics work so that Rural America has every choice that every other part of America has.

The CHAIRMAN. Thank you.

Mr. Smith and Mr. Powell, Mr. Aaron went on at length about the increasing costs, despite increased competition and more choices available, the cost of cable and satellite television is increasing and consumers are still subjected to programming blackouts. In addition, according to reports, the costs of streaming services are also rising.

Why is this happening, and do you have anything to say in response to what Mr. Aaron has had to say?

Mr. Smith, we'll start with you and then move to Mr. Powell.

Senator SMITH. Chairman Wicker, I think the best thing you can do to make sure that rural people get broadcast local television is to end STELAR.

The CHAIRMAN. Why are the costs—are the costs increasing because of STELAR?

Senator SMITH. Well, I'm the only one up here that offers every American who can receive a satellite signal to get it for free if they want it. We include everyone regardless of race, ethnicity, urban, rural. It's up there all the time. We don't have blackouts. Sometimes, as we try to bargain for the value of our content, we obviously like to make sure that the money follows the ratings and we have the best content available and people want to see it and we have the highest rating on viewership.

But things are changing and people are now watching more and more on devices and unrelated to us, there's this unregulated group of providers now, the acronym being called FANG, that is growing exponentially, even while we are kept small by rule and statute.

The CHAIRMAN. Mr. Powell.

Mr. POWELL. I would simply say I think the single greatest driver factually of rising prices is rising costs of programming and sports costs. Those costs have increased in the market by double digits across the spectrum.

Retransmission costs have increased from $500 million 10 years ago to $10 million. That all gets pushed through pay TV platforms to consumers. You can see the evidence of that of the new entrants, like YouTube and others, who in the last several weeks have raised their prices, as well, as they grapple with the ever-escalating cost of acquiring high-quality programming, and the production value of that programming has increased substantially.

It's rumored that *Game of Thrones* cost nearly $14 million an episode. As long as there's a strong appetite for content of that expense, there will be a lot of pressure on the cost to the system.

The CHAIRMAN. Thank you very much.

Senator Cantwell.

Senator CANTWELL. Thank you, Mr. Chairman.

To go back to your question about rural communities, Mr. Aaron, in your testimony, you mention broadcasters rightly point to the fact that one of the two major direct broadcast satellite providers does not provide local content service to 12 of the smallest markets. Is this something we need to address?

Mr. AARON. I definitely think—thank you for the question, Senator. I definitely think this is something the Committee needs to look at.

One of the major satellite providers has managed to serve all 210 markets. The other has not for reasons that, I'll be frank, aren't clear to me. So I think they should be encouraged to serve everyone. Although we would also support reauthorization of the STELAR bill, we don't think we want to take anything away from those who can't receive a signal and are being well served, but I do think it's worth looking closely at these 12 underserved markets and getting some clear answers from AT&T on why they still can't do local-to-local when they can do it everywhere else.

Senator CANTWELL. But Mr. Smith sitting next to you is providing that same content, is that not correct, Mr. Smith?

Senator SMITH. That is correct. We provide it free to anyone and Michael is right. I mean, one of the great drivers of program costing is obviously sports salaries and yet every American who can receive a broadcast signal gets it for free.

We need cable. We love satellite, too, but when they can make money off of what we're providing through advertising free to all Americans, we do think we have that right to bargain for its value and its viewership. So we're kind of in this together and it's a marketplace at work and it works 99 percent of the time without a disruption and so as far as we're concerned, we're never in a blackout. It's always up there.

If you just want to take a digital antenna and plug it in, you'll get it.

Senator CANTWELL. Well, no, there are some instances, I'm under one right now with a cable provider who's not providing a local channel because they're in a dispute, and so the fact that I can't get a CBS channel in my own community because of ongoing dispute between cable and broadcasters is very frustrating.

But, Mr. Aaron, back to this point, so, you know, Mr. Smith's pointing out, you know, free eyeball access to that local content, why isn't that a good thing?

Mr. AARON. Well, I think it's a great thing. I think there are a number of people who are served by satellite who cannot get their broadcast over-the-air signal. I think the number's something in the neighborhood of 850,000, according to the filings I've seen, and I think, you know, the experience of those consumers' matters. We should look out for them.

Senator CANTWELL. But that's because of the changes we've made, correct?

Senator SMITH. Yes.

Senator CANTWELL. That was what we pushed through. I raised objections to some of that because I know the grab for money that people wanted off of spectrum auctions, which is the same problem we have today. Now, people are selling off 5G, and we're going to have crazy weather forecasts loss of information because people are rushing to sell spectrum.

So, this problem you're talking about we created here. We created by making that digital push.

Senator SMITH. Senator Cantwell, to that point, I think technology is proving that whether the number is 500,000, as we calculate it, or 870, as satellite calculates it, over-the-top offerings show that there's a technological solution to this.

CBS All Access and many, many other offerings are out there that show how this can get taken care of.

Senator CANTWELL. Well, I'm definitely with Mr. Aaron on consumers should be advocated for in driving down price, and if there are solutions out there that give consumers, back to the old model, you rent my eyeballs and I watch a lot of commercials in exchange for getting free content. We shouldn't be blocking that. We shouldn't be giving people new ways to capture that and repackage it just to make money when the old model basically delivered that content in a business context for free, so to speak.

Yes, you had to pay a lot of attention to things that maybe you didn't want to pay attention to, and it's not to say you can't have other evolving models, but we should keep our eye on driving down cost to the consumers.

Anyway, I will stop with that, Mr. Chairman, although—yes, I will stop with that.

So, thank you.

The CHAIRMAN. Thank you, Senator Cantwell.

Senator Blunt.

STATEMENT OF HON. ROY BLUNT, U.S. SENATOR FROM MISSOURI

Senator BLUNT. Thank you, Chairman.

Let's talk for just a minute about those 12 unserved markets. Kirksville, Missouri's one of them, Truman State University's there, fairly substantially sized community. They have a TV station that covers me most of the time when I go there.

What changes in STELAR or why would the elimination of STELAR impact whether that community can get its local TV on cable or not?

Senator SMITH. Because, Senator Blunt, under STELAR, they are given a distance signal license, so that I don't know whether you're Missourians are getting New York or LA news but it's one of those two, where they can get that for very little money. It means they don't bargain with the local station, which means that that station then is deprived of one of its revenue sources. It's either advertising or its retransmission consent.

That retransmission consent money is shared by networks and affiliates. It supports localism. It supports great network programming, such as the NFL. If you take that away, which is being done in the case of a Missouri station by DIRECTV, that is made possible by STELAR. It should no longer be possible.

AT&T is a $200 billion company. If you add up the market capitalization of every broadcaster, network, and affiliate in America, the sum of it will not equal AT&T. They don't need the subsidy anymore.

Senator BLUNT. Mr. Aaron, do you have anything to say about that?

Mr. AARON. Well, I certainly agree with Senator Smith on the size of AT&T and that we need to be paying very much attention to the kind of consolidation that's happening there.

I do think there are elements of the STELAR bill that are important. I believe a lot of these households are in places where they cannot receive a broadcast signal and so we want to make sure that those people still have access to all kinds of programming.

That said, I think what concerns me about seeing STELAR expire is losing some of the language around good faith negotiations and what are the kind of things that are going to bring these parties to the table to ensure that we're not experiencing the blackouts that Senator Cantwell was describing and that consumers are actually taken care care of, whether that's by keeping signals on the air or other forms of arbitration that actually would encourage these folks to get these deals done and stop punishing the viewers when they can't get along.

Senator BLUNT. Let me see if I can get in one more question here and anybody can respond that wants to.

Now that this prevalence of the over-the-top, the internet, the video providers, how has it affected viewership generally, and how has it affected pricing of content? You want to start with that, Mr. Kenny?

Mr. KENNY. Yes, so from a viewership standpoint, as I said, there was an increase, but it's largely leveled out. People only have so many hours a day to watch. So they are choosing, I think, different demographics. They're moving to over-the-top faster.

I would say as there become more choices, consumers are finding ways to put the right bundle together for themselves in a way that makes sense.

I would say all of this, I think, also depends on a strong advertising market, which is why independent measurement has been important. If you go over-the-top free, the way that gets funded is advertising, and I think there's a renewed focus on making sure the ad model works, as well.

Senator BLUNT. You know, I watch some over-the-top that there is no advertising on, and I wonder as I'm watching it, are they collecting information so they can advertise to me later or what are they doing, but I don't see commercials in a number of the over-the-top things. So I wonder about that, but I don't want to lose all my time.

Mr. Powell, on that topic of over-the-top and cost impact and viewer impact, do you want to add something to that?

Mr. POWELL. Yes, Senator. I think one of the most obvious things that has resulted from many, many more distributors entering the video space is a much more aggressive arms race for the highest-quality content.

Essentially, there's a war for the best writers, artists, and directors to produce the next blockbuster original series and there are a lot more buyers in that jungle than there ever used to be. That's why we've seen just a skyrocketing amount of scripted original series created and the value of that content programming or those creative communities have gone way up.

So that's one of the reasons why you see even YouTubeTV raising the cost of their service recently because of the growing expense of acquiring content. Netflix spends $12 to $15 billion annually acquiring original content. You multiply that across all of the distributors chasing that same content, you can see what the impact on pricing can be.

Senator BLUNT. And one last question. What's been the impact on pricing of, say, Netflix? How much has that increased from their first offering to where they would be today? Does anybody have that number in mind?

Mr. POWELL. Well, I think Netflix raised prices in the last 6 months three or four dollars probably, two or three dollars. I'd have to get the exact number for you.

Senator BLUNT. But for them, three or four dollars was a big percentage increase, wasn't it?

Mr. POWELL. Yes, it was in the $10.99–11.99–12.99 price range. So I think they've been moving up closer to 15.

Senator BLUNT. OK. Thank you, Chairman.

The CHAIRMAN. Thank you, Senator Blunt.

Senator Schatz.

STATEMENT OF HON. BRIAN SCHATZ, U.S. SENATOR FROM HAWAII

Senator SCHATZ. Thank you, Mr. Chairman.

Thank you to all of the testifiers. Let me start with Mr. Powell.

I think I heard you say that the main reason that prices are going up is we're paying providers more, is that—excuse me—content creators more, is that correct?

Mr. POWELL. It's a principal reason, yes.

Senator SCHATZ. Why else are prices going up?

Mr. POWELL. Well, given that those costs have increased at rates as high as 35 percent a year, I do think—and sports costs even worse, I think those two are the most massive drivers.

Senator SCHATZ. Is profitability up?

Mr. POWELL. Not on video. It's up for the cable.

Senator SCHATZ. In the cable industry, right?

Mr. POWELL. Right, which also has other services, like broadband, which are dramatically more profitable. Actually margin, profit margins in the video business have declined over the last 10 years.

Senator SCHATZ. Do you see any path forward in terms of reducing prices or do you think this is just a fact of life that prices are going to go up and outpace inflation by two or three times?

Mr. POWELL. I think it's a challenge. I think what we're seeing is innovative experimental efforts to try to create new bundles and new business models that might be able to do that.

For example, a number of MVPDs have launched what we call skinny bundles, smaller collections of programming at significantly lower prices, though I was a little worried to see many of them feeling forced to raise prices this year, as well.

Senator SCHATZ. Mr. Aaron, you want to disagree with him?

Mr. AARON. I do, Senator. Thank you.

I think we have a huge competition problem here. We're seeing for the first time some parts of the market, thanks to some of these over-the-top services, beginning to slow the rising prices a little bit.

I think Chairman Powell is right that programming expenses are tremendous and——

Senator SCHATZ. But isn't there a big challenge on the horizon that some of these over-the-top services are being subsidized so they can grab market share so that by the time they are used as a justification for further consolidation, then there will be only a few players left and then everybody raises their prices?

Mr. AARON. Well, I think that is a risk, Senator, and I think we have to watch carefully these emerging markets. I think that's also a reason we need to really care about issues like net neutrality. How are we going to make sure that these over-the-top services can continue to reach their audience, continue to build their customer base?

We need sort of those big open pipes that I hope Chairman Powell and his members will continue to provide because we almost get passed it but in order to get any of these services, we're all having to pay broadband bills.

Senator SCHATZ. Sure.

Mr. AARON. Those are all going up.

Senator SCHATZ. And I agree with you obviously about net neutrality, but the point I would make is that there's just no evidence that these guys who rely on net neutrality and use over-the-top to grab market share are going to behave like angels once they're dominant in the marketplace either.

Mr. AARON. Absolutely not. I would urge you to watch all of them very carefully.

Senator SCHATZ. Sure. Let me just move to another topic. I want to talk about media diversity.

Senator Smith, people of color comprise about 40 percent of the U.S. population and 7 percent of the full power of commercial broadcast stations and less than 40 percent of those are in the top 50 media markets. Is this a problem in your view?

Senator SMITH. It's a problem and it's one we're working hard to fix.

First of all, NAB has a very aggressive education foundation. We've graduated now some 20 classes with curriculum that focuses on women and minorities to train them in broadcast ownership management to try to help them to become upwardly mobile.

In terms of what I would——

Senator SCHATZ. I'm sorry. What does that have to do with—I mean, the idea that you can't—without this foundation, you can't find qualified owners or something?

Senator SMITH. No. It's helpful to get them in view of the people who are doing the hiring. It's a credential that is very helpful to their upward mobility.

But when I was——

Senator SCHATZ. Can I just ask you a question because, you know, we've done a fair amount of work on diversity within the U.S. Senate and one of the things that we heard from colleagues is, you know, there's a pipeline problem. We just can't find qualified LDs and chiefs of staff and staff directors who are people of color and we found that over time we were able to prove that that is in fact nonsense and what we needed was pressure at the, in our case, principal level and I would just encourage you to go beyond the idea that you have a foundation that trains people who will eventually be qualified enough.

There are people qualified enough to run stations now and if you have 7 percent people of color ownership and 40 percent people of color viewership, it's a structural problem that will not be solved with a foundation.

Senator SMITH. What I used to do, Senator Schatz, when I was in the Senate, on this Committee, is I always was the Republican sponsor of the Minority Tax Certificate.

The problem isn't will, it's capital, in order to get more minorities into the system. When it existed for 17 years, I think minority ownership went up tenfold. That was ended in 1995. It should have been amended, not ended. I would strongly recommend to this committee that this assistance be given. It isn't a lack of will.

Senator SCHATZ. Thank you. I'll follow up.

The CHAIRMAN. Thank you very much.

Senator Capito.

STATEMENT OF HON. SHELLEY MOORE CAPITO, U.S. SENATOR FROM WEST VIRGINIA

Senator CAPITO. Thank you, Mr. Chairman.

Thank you all for being here. I think, Mr. Smith, you made it very clear that you feel the STELAR law needs to expire, but I haven't really heard, unless I'm missing it, much specificity from the other three. I think, Mr. Aaron, you disagree with that.

Could we kind of go down the—start with you, Mr. Powell, what your opinion of that would be?

Mr. POWELL. Yes, Senator. Our view is that it should be reauthorized and from our perspective, less because of the debate about what the satellite industry is doing or not doing because it creates a legal enforceable obligation to negotiate in good faith, which is already a difficult and contentious negotiation to preserve and continue FCC supervision potential over the negotiation of retransmission carriers, I think continues to be important.

Senator CAPITO. Mr. Aaron, did you—I'll come back to you, Mr. Smith.

Mr. AARON. Yes, I agree with Chairman Powell. I think that the bill should be reauthorized. I think this good faith negotiating is very, very important if we're going to have any hope of actually lowering prices and I think the vehicle of STELAR provides an important opportunity to check in on the state of the industry again in a few years and make sure things are working as they're supposed to.

Senator CAPITO. Mr. Kenny, do you have an opinion on that?

Mr. KENNY. We don't have a position on whether the Act should be renewed. What we do care is that we have independent measurement to make sure that the negotiations between the parties are based on the facts.

Senator CAPITO. OK. So, Mr. Smith, it seems like the pushback is that this ensures a good faith negotiation. What was your rebuttal to that?

Senator SMITH. Our rebuttal to that is that we have every incentive to be at the negotiating table in good faith. We want more people, as many people as possible to see our content. So we're anxious to make a deal for the value of that content, but that isn't the reason to renew STELAR.

Good faith is a wholly separate issue. It's something that we're very comfortable with but that should not be tethered to STELAR. STELAR is retarding the delivery of local news to rural communities.

Senator CAPITO. OK. Mr. Powell, let me ask you this. You mentioned in your statement just there on the STELAR issue that the FCC—that you felt that the FCC's influence might be diminished. Obviously you know a lot about this.

Could you kind of flesh that out a little bit, and do you think that that would have any impact on future innovation and technologies of the future if, I guess, the waters were muddied here a little bit?

Mr. POWELL. Well, just to reiterate, I think what STELAR includes is a provision that creates a legally enforceable obligation to negotiate in good faith. So if parties who are attempting to negotiate retransmission consent, someone acts in a way that the other finds abusive by the law, in their negotiating position they have a venue to take that complaint to and theoretically have the FCC oversee and arbitrate some aspect of that dispute.

We think that that backstop actually incentivizes more positive behavior than if that backstop didn't exist.

Senator CAPITO. So let's say the backstop didn't exist and that it was expired and let's say there was a charge of not acting in good faith, would the FCC still continue to be the arbiter in that kind of a case?

Mr. POWELL. No, I don't think they would have any——

Senator CAPITO. So it would be arbitrated in a court of law, I guess?

Mr. POWELL. Frankly, I think it would just lead to more blackouts because I don't think there would be an obvious ability to have a neutral third party oversee that question. It would just be a walk away from the table.

Senator SMITH. Senator, I would just comment that as a matter of historic record in the some 20 years this has existed, that that provision, I believe that's the length of time, there has never been a finding of bad faith on the part of broadcasters.

Senator CAPITO. OK. Let's me ask you this then. We're talking about—I'm going to switch topics here on over-the-top. I guess over-the-top is cutting the cord and you're streaming on your device.

You can stream on your device now local broadcasting. I can pull up my local WOWK local broadcast and I can watch it on my device.

Senator SMITH. There are apps to do that, yes.

Senator CAPITO. There are apps to do that. So is that local broadcaster compensated for that or how does that work in the money stream?

Senator SMITH. Well, like on the news on app, there is a coalition of broadcasters that produce this app that provide their content, so that wherever you are, you can get it streamed to you, yes.

Senator CAPITO. Or you can do it off of your own website?

Senator SMITH. That's correct, and that's something we're very—again, we're anxious for people to see our content. So we're on every device we can get on as well as cable as well as satellite and as well as over-the-top and, of course, again, we're the only one offering to those who are concerned about—a disproportionate number in the minority communities and the economically disadvantaged, we are their outlet to get everything that is available through broadcasting to get it for free.

Senator CAPITO. So just quickly, Mr. Kenny, can you measure that when somebody's doing that through an app or onto somebody's website? Is that part of what you're measuring?

Mr. KENNY. We can measure that. We have the streaming meter and we're investing in those technologies. We do think it's important that they be measured independently and in the same way so that there's nothing between that measurement. That way, the advertising can get back to the right broadcaster.

Senator CAPITO. All right. Thank you.

The CHAIRMAN. Mr. Markey.

STATEMENT OF HON. EDWARD MARKEY, U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you, Mr. Chairman.

Consumers have been surprised each month to find that their cable, phone, and Internet bills are much higher than the advertised price and that's why I introduced the True Fees Act, legislation that would put an end to these advertising practices that only confuse consumers about true costs.

The True Fees Act requires phone, cable, and Internet providers to (1) include all charges in the prices they advertise for their services, (2) allows customers to end a contract without early termination fees if providers increase their fees under that contract, and (3) to provide clear and timely notice of price changes to consumers in an easily readable high-profile, you know, message to the consumer.

Mr. Aaron, do you believe consumers should have these rights? Does Free Press support the True Fees Act?

Mr. AARON. We do, Senator Markey. We think this is an incredibly important piece of legislation because it would give consumers the ability to simply see what they're actually paying for and they shouldn't be surprised at the end of the month.

In fact, I think they should be given information on what they're paying for each and every channel. I think that would be a great innovation, but most importantly, these below-the-line fees where you respond to an advertisement or they're selling you on the phone when you're trying to upgrade or switch your service and you get the bill and it costs significantly more, it's a problem and it shouldn't be allowed. We definitely this legislation.

Senator MARKEY. And, Mr. Powell, will you commit to working with me to ensure that your member companies become more transparent with their pricing practices?

Mr. POWELL. Senator, we are always happy to work with you, yes.

I would say that I think the concerns that we do have are that false and misleading practices are heavily regulated by a whole labyrinth of Federal and state laws today. We're concerned about layering that additional complexity that conflicts with those rules and we think those rules are adequate for the entire economy where these kinds of fees are prevalent.

Senator MARKEY. People just don't have enough time to get all of the—go through each one of these details. It should just be upfront, there it is. Your prices are going up. I know you're under a contract but you can't get out.

Senator SMITH. Mr. Markey, NAB supports your——

Senator MARKEY. Oh, you would? Thank you.

Senator SMITH. We support your legislation.

Senator MARKEY. Thank you. Thank you. Appreciate it. Anyone else want to interrupt me with that comment with regard to—I'll take it.

The people of Massachusetts rely on local broadcast television every day. It's how we follow the Bruins, the Red Sox, and it's how we stay informed about our state government.

Unfortunately, residents of Berkshire County have lost access to local Massachusetts broadcast television because the cable provider dropped the Springfield NBC station and the Boston ABC station from its channel lineups. So the Berkshires are just without this local television coverage because the Berkshires are technically part of the Albany, New York, designated market area, and Western Massachusetts viewers can only access broadcast stations that focus on the Yankees or the New York football Giants and Governor Cuomo, as good as he is, but not our Governor, not our sports teams, and that's why I introduced legislation to force the Berkshire cable provider, Charter, to engage in good faith negotiations with WWLP and WCBB to bring those stations back on the air in Berkshire County.

Mr. Powell, will you commit to working with me and this committee to address this and other orphan county problems across the country to ensure residents receive the local broadcasting that is relevant to their lives?

Mr. POWELL. Yes, Senator. The cable industry is always interested in trying to help with these painful orphan county situations.

First and foremost, they're a problem of market definition which the FCC and the DMA drawers have to resolve. Second, we have to deal with what rights for carriage do different local broadcasters have. Often, they're constrained or we're forced to live with——

Senator MARKEY. WWLP in Springfield says they'll give their station free over to the cable system and the syndicated programming can all be blocked out but the local news and weather and sports will be there. OK. So it just seems to me there's a fix.

Senator Smith, same question.

Senator SMITH. We support your legislation and we'd like to be carried locally.

Senator MARKEY. Thank you. I appreciate that, and I have one final question, if I may.

Mr. Chairman, in this era of media globalization and consolidation, Public Educational and Government Television, also known as PEG, or Cable Access TV gives viewers critical information about their communities and offers an important platform for local voices, but the FCC has proposed a rule change that would allow cable companies to shirk their obligations to the communities where they operate.

Under current law, towns and cities across the country are permitted to require as part of cable franchise agreements that cable operators set aside channels for PEG stations.

The FCC's current proposal would allow cable operators to assign a value to these channels and then subtract that amount and the value the operator places on any other in-kind contributions from the franchise freeze the cable operator owes. This channel would threaten PEG channels across the country.

Mr. Aaron, why is it critical that the FCC not imperil community television by moving forward with this proposal?

I have a letter with about 15 members of the Senate calling for this rulemaking not to proceed.

The CHAIRMAN. Let's include that in the record at this point.

Senator MARKEY. Thank you, Mr. Chairman.

[The information referred to follows:]

United States Senate
WASHINGTON, DC 20510

October 29, 2018

The Honorable Ajit V. Pai
Chairman
455 12th Street, Southwest
Washington, DC, 20544

Dear Chairman Pai:

We write regarding the Federal Communications Commission's (FCC) recent vote to proceed with the item, "Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992" (MB Docket No. 05-311). This proposal would potentially alter, at cable operators' discretion, the terms of the governing agreements between Local Franchising Authorities (LFA) and cable operators. In its current form, the proposal puts at risk critical funding for public, educational, or governmental (PEG) stations as well as broadband connections to schools and other public buildings. Our constituents watch PEG channels to monitor local government proceedings, hear the latest news from nearby college campuses, and consume other locally produced programming including emergency alerts and directives. Your proposal may jeopardize these important functions. We encourage you and your colleagues on the Commission to ensure that any final decision will not threaten the sustainability of PEG stations.

Under the Communications Act, towns and cities across the country are permitted to require as part of cable franchise agreements that cable operators meet demonstrated community needs by setting aside channels for PEG stations. Yet the FCC's current proposal would allow cable operators to assign a value to these channels, and then subtract that amount, and the value the operator places on any other in-kind contributions, such as free service to schools, from the franchise fees the cable operator owes. If this order is eventually adopted in its current form, cities and towns across the country may soon have to decide between supporting local PEG channels and supporting other critical institutions serving the public good. This is a lose-lose choice for LFAs and the residents they serve. We fear this proposal will result in a dire drop in resources for PEG channels throughout the nation.

In an era of media globalization and consolidation, PEG access stations continue to give viewers critical information about their communities and offer an important platform for local voices. They catalyze civic engagement and they provide invaluable educational services. As the Commission proceeds on this issue, we urge you to consider the potential impact on PEG stations.

Thank you for your attention to this issue.

Sincerely,

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Edward J. Markey
United States Senator

Tammy Baldwin
United States Senator

Margaret Wood Hassan
United States Senator

Benjamin L. Cardin
United States Senator

Jeffrey A. Merkley
United States Senator

Bernard Sanders
United States Senators

Gary C. Peters
United States Senator

Ron Wyden
United States Senator

Patrick Leahy
United States Senator

Richard Blumenthal
United States Senator

Elizabeth Warren
United States Senator

CC: The Honorable Michael O'Rielly, Commissioner
The Honorable Brendan Carr, Commissioner
The Honorable Jessica Rosenworcel, Commissioner

Mr. AARON. I believe that the FCC is going against the wishes of Congress which was very clear that these channels should be provided and that the fees are separate and they're really trying to squeeze these essential local outlets.

In so many communities, public access channels are one of the last vestiges of really local content and it goes beyond just what they put on the air. These are institutions that are providing news media training, technical training, giving people in many cases their first opportunity to be part of the broadcast or cable industry.

I think these are vital local institutions. They should be protected and they shouldn't be pitted against local governments by these companies that are making lots of money.

Senator MARKEY. Thank you, Mr. Aaron.

Mr. Chairman, Senator Cantwell asked me for her to make a request for documents to be entered into the record.

The CHAIRMAN. Without objection,——

Senator MARKEY. Thank you, Mr. Chairman.

The CHAIRMAN.—it will be done.

[The information referred to follows:]

UNITED STATES SENATE
Washington, DC

Thank you, Chairman Wicker and Ranking Member Cantwell for holding this important hearing today, and for allowing me to provide testimony. As this Committee works to reauthorize the 2014 Satellite Television Extension and Localism Act Reauthorization (STELAR) legislation, I urge you to take a holistic look at the state of broadcasting in the country. I ask that the Committee give special consideration to whether the Federal Communications Commission's (FCC) current broadcast TV rules serve the public interest, particularly in states like New Jersey that lack their own home television markets. Finally, as part of your work on a reauthorization measure, I ask that you consider including in that bill reforms to the special obligations of Section 331 of the Communications Act.

If the densely populated state of New Jersey had its own broadcast television market, it would be the fourth-largest market in the country. However, due to its position between New York City and Philadelphia—and the way The Nielsen Company draws television markets—my state is split between two designated market areas centered on those two cities. As a result, New Jersey is home to a paltry few TV stations actually licensed to communities in the state, with WWOR TV (licensed to Secaucus) as the most well-known by my constituents.

Because of the mechanism by which WWOR–TV obtained its license in New Jersey, the station has special obligations to serve northern New Jersey's many residents. In accordance with section 355 of the Tax Equity and Fiscal Responsibility Act of 1982 (which added section 331 to the Communications Act of 1934)[1] the FCC stipulated that any license holder for WWOR–TV "devote itself to meeting the special needs of its new community (and the needs of the Northern New Jersey area in general)." These requirements accorded with the original Congressional intent of section 331, which entices stations to move their community of license to unserved states by giving them a prime broadcast channel. Moreover, the authors of section 331 were my predecessor Senators from New Jersey, who understood the need to have TV stations serving the needs of these previously unserved communities.

Despite this license requirement, WWOR shut down its entire New Jersey-based news operation in 2013, forcing layoffs while absorbing some staff at Fox 5 affiliate, WNYW–TV, in New York City.[2] WWOR–TV subsequently replaced its local newscast with "Chasing New Jersey"—now called "Chasing News"—a half-hour, TMZ-style program produced by an outside company. WWOR–TV now provides just three hours of weekly news programming compared to an average of 56 hours by comparable broadcast stations in the overlapping New York City and Philadelphia media markets. This is unacceptable.

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[1] *https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg324.pdf#+page=318*

[2] *https://www.adweek.com/tvspy/wwor-replacing-evening-newscast-with-show-on-new-jersey-politics-issues/97374/*

WWOR–TV's failure to provide local news coverage goes back many years. In 2009, WWOR TV reduced its news coverage by more than half. At that time WWOR–TV broadcast only 8.8 percent as much news programming as its peer group,[3] Six years later, WWOR–TV's news programming remained stagnant at 3 hours/week, while its peer stations increased their average news coverage to 56 hours/week.[4]

This difference in local community service is simply startling—and it has prompted my constituents to complain to the FCC many times that the station's license should be revoked. And yet, last year the FCC concluded that WWOR–TV license should be renewed for another eight year term. I believe that in renewing WWOR's license, the FCC failed to live up to its statutory obligations under Section 309(k)(1) of the Communications Act to examine whether WWOR has complied with its obligation to "serve[ ] the public interest, convenience, and necessity."[5] The FCC's grant of renewal in 2018 also raises a serious question as to what a concerned local citizen would have to demonstrate for the FCC to deny a license renewal based upon the inability of WWOR, or any other station, to serve its1ocal community consistent with section 331.

The FCC's rubber-stamping of WWOR's license renewal last year portends the end of rigorous review of whether a licensee has met the public interest standard for TV licensee holders as set forth in the Communications Act.[6] I understand that the FCC does not sit as the final arbiter of what a station must or must not air—something that would be inconsistent with the First Amendment. But the FCC has a statutory duty to make sure stations like WWOR–TV are complying with their special obligations. This renewal raises serious questions about what evidence those concerned about a, license renewal must show to get the FCC to take seriously its duty to determine that a licensee is complying with the Communications Act. It is time for the FCC to adopt clear guidelines for how it will judge whether stations are meeting their responsibilities to Americans, especially for those stations like WWOR who have particularized responsibilities pursuant to their TV licenses.

To ensure that WWOR–TV and stations live up to their obligations, I ask that this Committee consider my legislation, S. 941, the Section 331 Obligation Clarification Act. The Section 331 Obligations Clarification Act would require licensee holders under this section to: (1) broadcast at least 14 hours of localized programming during primetime hours; (2) file with the FCC a quarterly disclosure of all local programming, including a separate list of particularized local content; and (3) consult with local leaders in the market served by the station. 1 would request that the Committee advance my bill, either as a stand-alone measure or as part of the STELAR reauthorization package.

The concerns I present to the Committee today rest on one simple concept—local TV viewers deserve programming that is relevant to their lives. The issue of localism has been central in past reauthorizations of the satellite TV carriage laws. In fact, it was the Senate Commerce Committee, in STELAR, that developed a TV market modification mechanism that specifically considers whether citizens are getting relevant local programming from their home state in considering whether to grant a market modification/facilitate access to that sort of in-state programming.

The citizens of New Jersey face a similar problem today. My constituents are supposed to be the beneficiaries of special protections in section 331—in practice, as documented by the issues surrounding WWOR–TV, this has not been the case. And I would note that the conversation thus far around the STELAR reauthorization has itself focused on the question of localism and access to local programming/content. In fact, one of the key arguments presented by the broadcast community for why the laws reauthorized in STELAR should not be allowed to lapse is that those laws may encourage satellite providers not to offer more localized TV stations over their systems. It would seem then that the broadcasters would support passage of S. 941, which seeks to address that same problem of lack of truly particularized local content where there are such few options to obtain it.

Citizens in New Jersey and other areas like it must have confidence that the FCC will make sure that these stations are living up to their commitment to their local communities and the public trust placed in them as holders of broadcast TV li-

[3] "Petition to Deny Renewal, Filed by Voice for New Jersey, Before the Federal Communications Commission: File No. BRCDT-20150202ACT." FCC.gov. May 1, 2015. Accessed December 19, 2017. *http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_-exh.cgi?import_letter_id=64062.*

[4] *Id.*

[5] 47 U.S.C. Sec. 309(k)(l),

[6] *https://www/document/fcc-affirms-license-renewal-aplication-grant-wwor-tv*

censes. My constituents also deserve assurances that the FCC will revoke a station's license for failure to meet its responsibilities. Thank you for your consideration.

ROBERT MENENDEZ,
New Jersey.

CONSUMER REPORTS
June 5, 2019

Senator ROGER WICKER,
Chairman, U.S. Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Senator MARIA CANTWELL,
Ranking Member, U.S. Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Re: June 5, 2019 Senate Committee on Commerce, Science, and Transportation Hearing, "The State of the Television and Video Marketplace."

Dear Chairman Wicker an·d Ranking Member Cantwell:

Consumer Reports'[1] appreciates the Committee's consideration of the many consumer interests implicated in examining the video marketplace at today's hearing. Also important to consider is the reauthorization of the STELAR Act (STELA Reauthorization Act of 2014). Important provisions of that law are set to expire at the end of this year, and Congress would be wise to not only extend, but improve the statute to better benefit consumers.

Dating back to the very first satellite television bill which permitted direct broadcast satellite (DBS) operators to offer "local-into-local"market channels to consumers, the Satellite Home Viewer Improvement Act of 1999,[2] and in every five-year reauthorization statute bearing a new acronym after that, Congress has attempted to deal with the problems consumers face in the video marketplace. Outside of those efforts, the several issues that plague consumers have not been addressed in a comprehensive manner since the 1992 Cable Act. That Jaw introduced the retransmission consent regime and the basic tier buy-through requirement—where cable operators and consumers are more or Jess required to offer and purchase local broadcast channels, thus preventing any *à la carte* offering of those channels—both of which have been the source of so many consumer headaches. In any discussion of how to improve the video marketplace, the Committee must address how best to update this twenty-seven year-old Jaw.

Rather than engaging in another quinquennial patchwork effort to deal with these broken provisions, Congress should embark upon a serious, bipartisan effort to rewrite the laws that govern ALL video offerings, including traditional cable and DBS offerings along with services provided by online video distributors (OVDs). Consumer Reports is aware of the recent work undertaken by House Representatives Anna Eshoo and Steve Scalise to introduce legislation to overhaul the rules underpinning the video marketplace, and we look forward to engaging with them and other Members of Congress to advance workable solutions that will benefit consumers far better than the current dysfunctional status quo.

Consumers Reports is on record stating that the retransmission consent regime is broken. Though cable and DBS operators endure rising retransmission consent fees, it is consumers who ultimately pay for these increases in the form of the now ubiquitous "broadcast TV fee"—a fee that accounts for billions of do1lars of extra revenue for cable companies. And the price tag for this and other company imposed fees is rising dramatically. For example, Charter Communications increased its "broadcast TV fee" not once, but twice, since last November, from $8, to $9, and now

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[1] Our advocacy work officially moved under the Consumer Reports (CR) banner starting last November. We were founded as the Consumers Union of America in 1936 and became known by millions of Americans for our award-winning magazine *Consumer Reports.* In recen t years, our overall organization transitioned to the name Consumer Reports. Consumer Reports is an organization with more than six million members that advocates for a fair, safe, and transparent marketplace, fueled by our trusted research, journalism, and insights. We believe this integration of our advocacy work under the CR name will communicate the depth and breadth of our mission and values, and will help us make an even greater impact to advance the issues that matter to consumers and the world. We invite you to come see what we are doing at *consumerreports.org/advocacy.*

[2] Satellite Home Viewer Improvement Act of 1999, Pub L. No. l 06–113, App. I.

$12 per month.[3] Consumers are rightly furious to find that the advertised rate for cable service does not clearly include these fees and others that can dramatically raise the price of service. Antiquated rules passed into. law more than a quarter century ago have set the stage for this consumer nightmare, and they must be revisited and changed where necessary.

This is one of the many challenges facing consumers in today's video marketplace. We stand ready to work with you to craft viable and creative solutions-either as part of the STELAR Act reauthorization, the TRUE Fees Act (S. 510), or new legislation—that level the playing field for consumers in an increasingly expensive market.

Please do not hesitate to contact me with any questions.

Sincerely,

JONATHAN SCHWANTES,
Senior Policy Counsel.

cc. Members of the U.S. Senate Committee on Commerce, Science, and Transportation

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WRITERS GUILD OF AMERICA WEST
June 3, 2019

Hon. ROGER WICKER,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Hon. MARIA CANTWELL,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Dear Chairman Wicker and Ranking Member Cantwell:

As you consider the current state of the television and video marketplace, Writers Guild of America West (WGAW) asks the Committee to support the necessary protections that promote competition and limit consolidation in these markets. Specifically, WGAW strongly opposes modification or repeal of the Dual Network rule, which preserves competition in a critical media market by prohibiting a merger between any of the four major broadcast networks.[1] As the labor union representing more than 10,000 professional television and film writers, including writers of nearly all of the scripted primetime programming aired by the major broadcast networks, as well as a number of local news writers, WGAW urges the Senate Commerce Committee to support the preservation of this critical rule at the FCC.

The Dual Network rule remains relevant and necessary to promote competition and viewpoint diversity and to protect local news. The four major broadcast networks ABC, CBS, NBC and Fox-continue to provide a unique offering to the public that is unmatched by new entrants in the broader media marketplace. Broadcast programming consistently captures the largest audiences and remains highly valuable for advertisers. It is the most accessible market for professionally-produced entertainment and news media because it is available for free over the air. The Dual Network rule is needed to protect competition in this unique market.

Online streaming video services do not offer a complete substitute for broadcast programming. While subscription streaming services have released popular scripted and unscripted series, they are weak or non-existent competitors in live sports and have no original or local news programming. The Internet has given consumers access to a variety of content on new platforms, yet this has not increased competition with broadcast television from new diverse and independent sources of robust news coverage.

Repeal of the Dual Network rule would lead to increased concentration in the national television marketplace, decreased diversity of content and harm to local news. The broadcast market continues to experience consolidation at all levels and removing this ownership restriction would inevitably trigger new mergers; indeed, the Dual Network rule is likely the only reason that Disney does not currently own both ABC and Fox broadcast networks. Telecommunications deregulation and media consolidation over the last two decades has not only harmed consumers through loss of viewpoint diversity, it has harmed competition in the labor market for creative talent, leading to downward pressure on compensation despite rising demand for

[3] J Jon Brodkin. *Charter Raises Sneaky 'Broadcast TV' Fee for Second Time In Four Months,* ArsTechnica (Feb. 6, 2019).

[1] See Comments of the Writers Guild of America, West, Inc., in the Matter of 2018 Quadrennial Regulatory Review—Review of The Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996, MB Docket No. 18–349 (Apr. 29, 2019).

content and increased corporate profitability. Rescinding the Dual Network rule would negatively impact creators and audiences alike as large media and telecommunications companies gain an even greater share of control over programming, and news programming will suffer from less diversity of viewpoints and in depth coverage.

The FCC should be increasing protections against harmful consolidation, not eliminating them. The Dual Network rule is easily administrable and prevents such consolidation. The protection afforded by this rule remain necessary despite changes in the video market For these reasons, WGAW urges the Senate to call on the FCC to maintain the Dual Network rule and similar measures that promote competition and prevent media consolidation.

Sincerely,

CORRINA FREEDMAN,
Political and Legislative Director.

The CHAIRMAN. Senator Tester, you are next.

STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you. Thank you, Mr. Chairman.

So I want to go into the orphan counties in a little bit, but, Mr. Powell, you're off the hook for the moment. I'm going to go over to Mr. Kenny.

In Northwest Montana, we have an orphan county situation, Lincoln County, getting their news out of Spokane, and so here's the deal. It's not about watching the Red Sox or the Yankees. You got a forest fire burning. They need to get it local. Otherwise, human lives are at risk.

Is there anything that Nielsen can do about deciding these markets?

Mr. KENNY. Nielsen measures what people watch, which starts with the DMA. Then there is a process where you can——

Senator TESTER. Yes. But if they don't have access to the local channels, they can't watch them, so it can't be measured.

Mr. KENNY. I understand that. That's a decision that needs to be made by appealing to the FCC as to where they want to make the allocation and what——

Senator TESTER. OK. So——

Mr. KENNY. We don't tell the FCC what to decide.

Senator TESTER. OK. So what, write them a letter, is that the deal, or does it take an act of Congress? If we don't get anything done, so they don't have to do anything?

Mr. KENNY. I think you have to write them a letter. I think you can make a local appeal to change the allocation,——

Senator TESTER. OK.

Mr. KENNY.—but it has to be done locally and they're the body that decides.

Senator TESTER. I got it. Senator Smith, you had something you wanted to add?

Senator SMITH. Yes, Senator Tester. I would just point out that the FCC has a market modification process. NAB is very supportive of that, has used it to resolve some of these very kinds of orphan situations.

I would just commend it to your attention and use and will help you with that.

Senator TESTER. OK. Well, I appreciate that very much. This isn't that tough, to be honest with you, and so we ought to figure it out.

So I'll stick with you, Senator Smith. There are new players in the video marketplace. We talked about this. However, people in Montana aren't going to get highlights of their high school football team from Netflix by any stretch of the imagination and as you know, we rely heavily on local broadcasts for news, for information about what's going on both locally, state, and nationally, politically, for safety alerts, for community events.

What can this committee do to ensure that local news continues to play the role it's traditionally played and continues to, quite frankly, thrive?

Senator SMITH. Candidly, the most obvious and most immediate thing you could do is to let STELAR sunset because then what would happen is AT&T would be in a position where they have to deal with the local stations for the local content instead of providing in two markets in Montana with the news from Los Angeles.

Senator TESTER. OK. What are your thoughts, as long as you're going and as long as the mike is hot, what are your thoughts on consolidation amongst the entire video landscape?

Senator SMITH. You know, I would just simply note that because broadcasting, as Michael pointed out, was the first or the most highly regulated and left unregulated at all of these new entrants, the acronym being FAANG, Facebook, Amazon, Apple, Netflix, Google, they're wholly unrelated, and yet they are cannibalizing the advertising market that sells Chevys and Bozeman, a market that sells furniture in Missoula, and if localism matters, then I think they should be held to the standards we are held to because they are growing—they're like separate nations now and we're all trying to fight to stay alive for our members and I just think as many Senators have started drawing attention to this issue, I salute them for that.

Senator TESTER. Well, I appreciate those comments and hopefully the chairman of this illustrious committee would agree with your perspective because I do think leveling the playing field is very, very important.

Thank you all very, very much.

The CHAIRMAN. Thank you, Senator Tester.

Senator Lee.

STATEMENT OF HON. MIKE LEE, U.S. SENATOR FROM UTAH

Senator LEE. Thank you very much, Mr. Chairman, and thanks to each of our witnesses for being here. You're an insightful group. You've got a lot of information to share with us and we really appreciate that.

Mr. Powell, I'd like to start with you.

Mr. POWELL. Yes, sir.

Senator LEE. Do I understand from your comments a minute ago, would you agree that, is it fair to say that our current video entertainment marketplace is being governed largely by laws passed in 1992?

Mr. POWELL. Absolutely, it is, yes.

Senator LEE. And 1992 was a good time. I remember it well. It was a different era, though. You know, we didn't really have the internet. Ordinary people and ordinary circumstances didn't have access to anything even akin to the internet. If you wanted to watch a movie that wasn't airing on cable or broadcast television or perhaps if you were lucky enough to have a satellite television system, then you'd go to Blockbuster and typically you'd go there may be looking for *Adventures in Babysitting* and that was rented out, so you'd have to watch *Iron Eagle IV*. Nobody knew what *Iron Eagle IV* was, but they watched it anyway and pretended to like it.

Mr. POWELL. Go with Say Anything every time.

Senator LEE. Right. Yes, yes, exactly, exactly. Does that technological world in any way reflect the way Americans consume video entertainment today?

Mr. POWELL. No, it doesn't. I mean, we have a chart which I'd be happy to share with you talking about then and now and I think law is only as good as the technical, economic, and market predicates on which it's built.

An enormous premise built in the 1992 Act is that the cable industry has 98 percent of all the video viewing market which, candidly, it did. When you said it was a good time, it was a particularly good time for the cable industry, but that share has fallen all the way down to 56 percent today. Back then, we owned 50 or more percent vertically of all the content that was aired on those networks. Today, that number is single digits.

So there has been an enormous transformation and, more importantly, the rapid innovation that's brought about by internet-fueled services really has upended the model all together.

Senator LEE. Indeed, indeed. Mr. Smith, one of the things we've seen since then is the development of OTT services. Those didn't exist back then, did they?

Senator SMITH. No.

Senator LEE. And the technology for providing them wasn't accessible and so there was no reason for them to exist.

Senator SMITH. Correct.

Senator LEE. But you'd agree that they've changed the marketplace today?

Senator SMITH. Totally. And I think you've zeroed in on the reason we asked for STELAR to sunset. The technology exists making it unnecessary. The competition exists that didn't exist then and the harm is very real now as a matter of public policy to local communities.

Senator LEE. So should OTTs be somehow folded into the 1992 legislative framework?

Senator SMITH. I can't speak to that. I haven't considered that, but what I am saying is it is filling a niche where people want to watch video on other platforms that currently are not available through cable or broadcast.

Senator LEE. Right.

Senator SMITH. By the way, they should be available through broadcast but the companies bar that.

Senator LEE. I guess what I'm seeing is we've got these two separate frameworks. One is operating with 1992 technology and regulated with 1992 laws. Another one is operating with cutting edge technology that operates in a different world and has resulted in substantial innovation, cost reductions to the consumer, and to me that suggests that we ought not try to hobble the part of the market that is thriving through technological innovation with the legislative framework meant for another era, an era when, I would add, we had just recently discovered that Milli Vanilli was kind of a fraud. It wasn't really sad to me but, you know, some people got bent out of shape on that.

OK. Let me ask both of you now, Mr. Smith and Mr. Powell, you can answer in whatever order you would prefer.

Is there room for reform in the video marketplace, and if we're talking about legislative reform, what key principles should drive that?

Senator SMITH. I believe a key principle should drive the reform that we're asking for is a recognition that the world has changed, that STELAR, which is over 30 years old, is out of date, should lapse, and some of the provisions that may still have some merit should not be held hostage to this bill. They can be dealt with separately.

My own view is while I'm not for regulation and all of that, but I am for markets but you have half of the video industry, you know, shackled by old regulations and statutes and the other completely unfettered, and I would just simply note in my own political experience that social media began to explode and video began, our civil discourse began to deteriorate, as well, and I don't have the answer to that, but I am just saying that we would ask for a level playing field.

I would note that what is really important in this age of charges of fake news is that somebody is still doing journalism. Broadcasters are doing it on a local and a national level, and if we care about the news being about Utah senators in Utah, then I think you need to look about how are the revenue streams to broadcasters being damaged because when you damage those, you damage localism and then the news is just national and not about the local civic information.

So I think we deliver a durable public value that should be respected and supported.

Senator LEE. Mr. Chairman, could I have Mr. Powell answer the same question? Then I'll close. Mr. Powell.

Mr. POWELL. Yes, Senator. I'd offer you sort of a schematic of how to approach the problem. I think I would start with modernizing and recontextualizing the technical, economic, and factual predicates, right.

What are the technologies used today to deliver video signals as compared to 1992? You know, what are the economic realities of the modern marketplace, both in the context of how traditional providers are monetizing their services as well as the new entrants?

The one thing we haven't mentioned is the new entrants are some of the biggest companies in the history of the industrialized world, many of whom have massive amounts of capital and access to other sources of monetizing that payout, you know, make our services pale in comparison.

So I think getting that factual predicate correct is step one. Step 2 is harmonizing the incongruity. I could go through chapter and verse of rules that apply to cable but don't apply to satellite, rules that apply to satellite but don't apply to broadcasting, rules that apply to broadcasting of which none apply to the modern new entrants.

It's just incoherent ultimately to have a regulatory framework where you can't reconcile from the eyes and ears and perspective of the consumer the varying regulatory environments when the consumer sees all of those as compelling substitutes of each other.

Senator LEE. Well said. Thank you very much. Thank you, Mr. Chairman.

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

Senator THUNE. Thank you, Senator Lee, and, as always, showing his great grasp of pop culture with the Milli Vanilli references there.

I'm told, Mr. Kenny, that you have to depart, is that correct?

Mr. KENNY. Yes, thank you.

Senator THUNE. OK. We will release you.

Mr. KENNY. Thank you.

Senator UDALL. Mr. Chairman, I had a really tough question——

Senator THUNE. Did you?

Senator UDALL.—but I'll let him go.

Mr. KENNY. Are you sure? I'll wait, Senator.

Senator UDALL. I'm kidding.

Mr. KENNY. OK. Good to see you. Thank you.

Senator THUNE. If I might, I'm going to direct this question to Chairman Powell, but we all know and it has been discussed at length, I think, here today that the marketplace for video services has changed dramatically since the last time the Committee examined this issue.

Consumers have a lot more choices for video services and content than ever before, so much so that now Netflix is America's largest video service in terms of subscribers since producing much of its own content. You have Amazon's Prime subscription offering, exclusive video programming, and these are two of the numerous over-the-top video services, investing tremendous amounts of resources to capture a greater share of that marketplace.

So one of the factors that has brought this rapid change is the expansion of reliable broadband connectivity.

Chairman Powell, in your testimony, you briefly discussed the ways improvements in broadband connectivity have created new video experiences. Could you elaborate on what your members are doing to ensure that rural areas, like my home state of South Dakota, have access to reliable broadband and what new services it brings them?

Mr. POWELL. Yes, sir, I'd be happy to. I would start with this statement. I think solving the rural broadband issue is the seminal issue of infrastructure today. I don't think you can be an active participant in society or the economy without having the ability to access that infrastructure. So we think it's essential.

These are our communities, our neighbors. The cable industry was founded as a rural service to reach people who couldn't otherwise get a broadcast signal. We have many, many, many companies operating in those parts of the world.

The first thing we're doing is trying to get a much better mapping dataset. We have heard the conversation for many, many years that it's difficult to identify and target unserved areas because of the inadequacy of data collection and the granularity of those maps.

The FCC currently has a proceeding underway that we're actively participating. We have made a proposal to use something called "shapefiles" which provide much more dramatic detailed mapping of unserved areas that allow us to better target limited resources to those communities that most need it.

We have also fought frequently in public policy to make sure dollars go to the unserved before they go to the underserved. We follow the view that nobody should get seconds until everybody's eaten once. We think that's been a flaw of many subsidy programs in the past.

On the ground, we're doing a lot of things. One thing we worked to do is demand aggregation. I can find examples for you, like Eagle Communications in Kansas who works with the local government, businesses, to try to essentially create buying consortiums and co-ops to help lower the problem of revenue in order to serve those communities.

A lot of our cable companies are now experimenting with very innovative fixed wireless technologies attached to the end of their network, run a fiber to a grain elevator, and then use fixed wireless to hop another six to eight miles and hop again and reach homes 40 miles from that last wired point.

I would point you to Media Midcontinent, which is doing that in the Dakotas, I think you're probably familiar with, and we have other big companies looking at that option, as well.

At the end of the day, we also need to be candid. That last two or three percent, that is a really, really tough problem for a wired infrastructure. We need to find ways to empower both wireless and satellite delivered services when we get down to that last really, really difficult part. Running a wire between two homes 500 miles apart to pick up two customers will always be difficult, but from 28,000 feet in space, it's a minor problem.

All major tech companies have announced new broadband satellite initiatives, claiming to desire to close the digital divide. I think often they're talking about Africa and India. I think they should be compelled to be talking about Iowa, Montana, and South Dakota.

Senator THUNE. Senator Smith, during yesterday's House hearing examining STELAR, retransmission consent fees were discussed at length, including the FCC's finding that small providers pay substantially more for retrains consent, both in total and per channel, than larger providers to carry broadcasters' programming.

Could you clarify what goes into determining rates for retransmission consent, help us understand why smaller providers, like those rural areas, may be paying more in retrains fees, whether the same market dynamic applies to non-broadcast programming fees?

Senator SMITH. Well, I'm not a part of those negotiations, Senator, but I do know that what broadcasters are trying to focus on in their system is to get value for their viewership and for the value of their content.

Obviously when you have a small cable company against a larger broadcaster that is one dynamic. Most of the dynamics we confront are small broadcasters dealing with much larger cable companies and so the bargaining power is not always the same. It is never perfect, but what we try to do is to make sure that this system that works 99 percent of the time without an interruption is a market that is respected and that members will see that it does ultimately support the programming that we've all acknowledged here is becoming more expensive and you can get it for free if you put up an antenna, but if you want a paid TV subscription, you can get that, too.

Senator THUNE. Chairman Powell, any comment on that? I mean, you're obviously the other player in a lot of those or your folks are a lot of the other players in those negotiations. Any perspective on that dynamic?

Mr. POWELL. Yes, Senator. We——

Senator THUNE. Again, small versus large.

Mr. POWELL.—have many, many small cable operators that face this challenge. I think Senator Smith is right that a big part of that problem is asymmetry of bargaining power and I think many small cable operators have attempted to solve that through buying consortiums, like NCTC, and encourage broadcasters to be willing to negotiate with that collective entity.

For more information on this, I think there was excellent testimony yesterday by the CEO of Boycom herself, a leader of a smaller cable company, who I thought thoughtfully articulated that challenge from the small operator's perspective.

Senator THUNE. Well, I'm going to wrap up. I need to go vote, but I'd just like to note that in previous Congresses, this committee has taken a serious look at the overdue video reforms of which there are many and as chairman of the Communications and Technology Subcommittee, I intend to continue some of the discussions that we started here today, and I for one believe that consumers are smart and that we ought to make it easier for them to make informed choices about their news and media consumption while also recognizing the critical service that's provided by local broadcasting in our communities across this country.

So I hope that as STELAR is given additional consideration in the coming months that we can work together on this committee and try and find ways to advance transparency and pro-consumer solutions in the changing video marketplace while again always protecting the important role that local broadcasting plays.

So I will recognize the Senator from New Mexico. I assume you've already voted?

Senator UDALL. Yes.

Senator THUNE. OK. And then——

Senator UDALL. Yes, I have.

Senator THUNE.—Senator Young is here to take over. Thank you.

Senator Udall.

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

Senator UDALL. Thank you, Chairman Thune, and thank you to all the witnesses here today.

You know, support of local media means we need media in our communities reporting on local events and stories of local interest, not prepackaged stories that don't reflect the community.

Now I understand the claim that the number of hours of news is increasing but more is not always better. One data point is illustrative. On May 6 of this year, the United Nations' chartered panel of scientists released a critical report warning that one million animal and plant species are threatened with extinction because of destructive human activity, including climate change, and on that same day, Baby Archie, Baby Archie was born to Prince Harry and Duchess of Sussex. Guess which story got more air time on the three major broadcast stations nightly news. I think probably this panel could——

Senator SMITH. Baby Archie I think won.

Senator UDALL. Yes, yes. Overwhelmingly, overwhelmingly, Senator Smith.

Well, the three stations spent nearly 18 minutes over the next week on Baby Archie and the only station, CBS, spent one minute and 21 seconds on the U.N. report. That's, I think, a really sad reflection on our priorities.

This is an even more interesting little graph here. Here you have ABC News and the one week of royal baby coverage. Now here we're talking a whole year. This is one week of coverage of the baby. This is an entire year of climate change, 2018, so seven minutes versus six minutes.

So we're in a situation where the media is not focusing on the existential issue that's facing us and for sure the media, especially the journalists, are up against tough challenges these days.

The President continues his attacks on fake news by which he means the news that does not flatter him, ownership of major news media outlets is dwindling to record low numbers. All of this has a chilling effect on a free and robust press.

We must continue to have newsrooms that pursue investigations of public interests, free of worry that the FCC will pull their license for no good reason or that the Department of Justice will be pressured to rule against them.

Now this is a question for all the panelists here. A couple of weeks ago, a blogger pushed out a doctored video to make it seem as though Speaker Pelosi was impaired. As so-called "deep fake technology" becomes more sophisticated, we are threatened with foreign actors using it to stoke division within our country.

What role should broadcasters and video providers play in monitoring this type of content and making sure unquestionably false and bad faith content is not further amplified?

Senator SMITH. I would just note that I don't think either Michael or Aaron or I have any editorial control of what—it's kind of a chicken and egg thing as to what people want to hear about.

That said, I tell my wonderful members constantly report the news without fear or favor. You're the Fourth Estate. It's vital that you play your role and the First Amendment is not subject to repeal, as far as I can see, and state laws on freedom of speech are very much intact and so we have a job that we're proud to do and will continue to do it, however imperfectly.

Senator UDALL. Mr. Powell.

Senator SMITH. I would note to your point about fake news and doctored videos, we have statutes and regulations we have to obey and we're happy to do it, but all of these new entrants on the Internet are wholly unregulated. So it goes to the point that's been made many times by this panel that the playing field should be leveled as it relates to our election integrity.

Senator UDALL. Mr. Powell.

Mr. POWELL. Senator, I'd only say things like deep fake and altered video, the shape of things to come with the rise of artificial intelligence, it's a sad state of affairs, and I think that any publisher that puts up content should accept certainly a moral, ethical, and professional obligation to try to weed out such things to the extent that they're able to determine them.

They obviously are First Amendment speakers and enjoy certain protections specifically when it comes to public figures, but, nonetheless, I think a party outside is going to navigate the torrent of this kind of stuff that's to come. We all have to accept some responsibility for it.

Senator UDALL. Mr. Aaron.

Mr. AARON. Senator, I think that when we're talking about these issues, we do have to look at the shared responsibility. These are videos may have emerged on one platform but then they get rebroadcast on Fox News or on local TV again and again and again and I think we need to be paying attention to everyone stepping up and taking that responsibility and when I think we look at the changing media market, one great way to prevent this kind of content, fake content from being aired as news is to invest in newsrooms and unfortunately with runaway media consolidation, we've seen these cutbacks, so we lose the veteran editor, we lose the producers who are there, and if we're actually investing in that local product, there'd be more people saying wait, stop, before that gets out there and over our airways.

Senator UDALL. Thank you. And thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Udall.

Senator Blackburn.

STATEMENT OF HON. MARSHA BLACKBURN, U.S. SENATOR FROM TENNESSEE

Senator BLACKBURN. Thank you, Mr. Chairman, and thank you all for staying with us.

Mr. Aaron, to your comment that you just made about investing in newsrooms, I think if some of our social media platforms were to have such before they put things up that would be something that would be helpful.

I'm so glad we're doing this hearing today because the video marketplace is indeed vibrant. I serve not only here on Commerce but also on the Judiciary Committee and probably most importantly represent the great state of Tennessee which, of course, songwriters live, call that home, and copyright and protecting copyright is how they really make their living and as I lamented and spoke about in the last reauthorization of STELAR, that was in the House, the laws that we make do not keep up with the evolving video and technology marketplace and so I think it's something we have to pay very close attention to because it evolves much faster than Congress operates.

So we need to keep that in mind as we look at the technology and the delivery systems that are made available to the American public today.

Mr. Powell, if STELAR were to expire, what impact would that have on retransmission consent negotiations?

Mr. POWELL. For our members, Senator, the provision that is most important to us in STELAR is the good faith legal obligation that both parties have to negotiate in good faith and failure to do so at least can invite the oversight and response by the Federal Communications Commission.

We think that's an important disciplining element of those negotiations to try to limit those negotiations from failing and leading to consumer blackouts.

Senator BLACKBURN. OK. Mr. Smith, same question.

Senator SMITH. We have no problem with good faith, but to your earlier point that shouldn't be the reason that STELAR is reauthorized. That could be a separate issue and I would just simply note during the life of STELAR, 30 years now, the broadcasters have never been found in violation of good faith standard.

We have every incentive to make a deal. We want more people to see our content and it is our incentive and our desire to act in good faith and I pledge to you that that will not change.

Senator BLACKBURN. OK. And I think it's fair to say that you would like for STELAR to sunset.

Senator SMITH. I would.

Senator BLACKBURN. And in part because it provides satellite companies with the continued ability to rebroadcast the signals over the air TV without authorization of all the copyright holders through the use of a blanket compulsory license, is that right?

Senator SMITH. That is correct.

Senator BLACKBURN. OK. And it is your view that retransmission should require the actual consent of those who own the copyrights, correct?

Senator SMITH. Correct.

Senator BLACKBURN. OK. Then I want you to do this and you probably know this question's coming because I ask it every time.

Senator SMITH. You're welcome to do it, please.

Senator BLACKBURN. Could you help me understand why you think that consent should be required for retransmission of TV broadcast but not also for radio transmission of sound recordings where the copyright is owned by third parties?

Senator SMITH. I wasn't here in the early 1930s when Congress wrote the law that said performers got their remuneration through contract and songwriters got it through copyright. Congress certainly has the ability to change that if it will.

What I'm charged to do is to protect an industry, radio-free local. When we put it out there, we don't charge anyone for it, except those who wish to advertise on those stations. We provide tremendous value in terms of advertising for new songwriters, but when we put it up on the screen and someone else is trying to get a paid radio subscription, we pay a copyright on that because Congress created that law.

Senator BLACKBURN. And you're——

Senator SMITH. We consistently observe the laws.

Senator BLACKBURN. Yes. But your position would be because radio transmissions are not protected by copyright and——

Senator SMITH. That's correct.

Senator BLACKBURN.—you agree with that, but then shouldn't your position be that it should be like policy for like policy and both should be protected by copyright?

Senator SMITH. I think if we're interested in recognizing the reality on the ground as well as the principle you're stating, most of the radio stations out there are mom and pop operations that rural communities in Texas and otherwise depend on for lifesaving information as well as music entertainment.

I'm charged to keep them alive, too, and if you look at the streaming rates we pay on copyright as required by law, there are very few radio stations that are able to do that anymore because there's simply no money in it and so if we're interested in the benefit of all music and the Congress wants to get into what those rates should be, then I would just say please, for the sake of your constituents, take care of this lifeline information of free and local radio. I'm not unsympathetic to the performance community.

Senator BLACKBURN. Well, I would hope that we can reconcile these positions. I'm overtime. I'm going to yield back my time and thank you all for being here.

Senator SMITH. Thank you, Senator.

The CHAIRMAN. Thank you, Senator Blackburn.

Senator Cruz.

STATEMENT OF HON. TED CRUZ, U.S. SENATOR FROM TEXAS

Senator CRUZ. Thank you, Mr. Chairman. Thank you to each of the witnesses for being here today.

Today's video and television marketplace is vastly different from what it was in the 1960s and 1970s when consumers only had three broadcast channels to choose from. Cable and satellite industries have grown and they're no longer the new entrants that they once were and new and innovative services and platforms not only offer consumers more options for enjoying TV and video services but they also allow content creators the opportunity to produce more and better content that can actually reach its intended audience.

And yet despite this vast transformation of the video marketplace in the last half century, consumers remain frustrated as there is still a litany of government regulations that restrict how content is ultimately delivered to consumers.

I appreciate that the Committee is holding today a hearing reviewing STELAR. It's worth noting, however, that it has been more than 30 years since Congress passed the first iteration of that bill and almost 30 years since Congress passed the Cable Act.

The TV and video marketplace has evolved into something no one from 1990 would recognize and a multi-billion dollar part of the economy that only continues to grow and so my question for each of the members of the panel is, is it time for Congress to look at reforms beyond the narrow lens of STELAR and consider broader and more sweeping and holistic reform to the rules and regulations that govern the TV and video marketplace, and, if so, what specifically would you recommend?

Mr. POWELL. I'm happy to go first, Senator. Yes, we always would welcome that inquiry.

As I stated in my testimony, there are several guiding principles that we think are important to drill into. The first is just the revolution in the predicates that underpin the 1992 Act. The technologies have been radically transformed. So many video services of the past were built around the limitations of the technology that distributed to them. Much of those premises have been upended. The economic conditions are different. The markets are different. All of those need to be reformed and modernized.

Second, as I mentioned before, the rules do not apply coherently across the space. I'm a fan of regulations that look through the eyes of the consumer who sees video from one platform to the other, not too differently, but yet there are radically different regulatory regimes that apply to the different sources of content vying for that consumer's attention.

I think a regime that doesn't harmonize that regulatory structure is one that is weak and ineffective, and then, finally, I think we just have a whole conglomeration of giants who are now driving this space who weren't even remotely contemplated in 1992 and really are the principal drivers of trains across the whole Internet economy.

Senator CRUZ. And particularly with regard to those giants, how should government policy respond to them?

Mr. POWELL. Well, I'm a fan of light regulation, so I don't like to reflexively say regulate them like me, but I think you have to reconcile what they do and what we do and make sure that whatever the public interest principle is, it's manifested in both environments, and I think right now, they don't even have any consideration of the kind of things our industries do, whether it be diversity of content, trusted sources, obligations to consumers, billing rights, fees, none of that applies in that community which gives them an enormous advantage.

The one other thing I would highlight for the Committee is they often are in video as an "also ran," meaning they had massive financial engines around a second product and they're often using the video business to drive power into that other product, so Google with Search, Facebook with Posting and Sharing, Amazon with Retail.

So those dynamics are very, very different than in Gordon's business and mine which are wholly dedicated to video and that has to in some way be understood in this process, as well.

Senator SMITH. Senator Cruz, of course, we'll always be anxiously engaged and constructively working with you as video reforms come to mind.

I feel because of your question to share with you what I always tell my broadcasters and that is the new entrants and everyone in telecommunications, they want two things from broadcasters. They want your content and they want your spectrum, but they don't want to do what you do, which is localism and journalism, and we're trying not to become the newspaper industry.

We have two sources that support localism and localism, candidly, is the envy of the world. Our country has it because of laws Congress passed that creates this relationship with networks and affiliates, national and local, all these other platforms, but when those revenue streams are cannibalized, mainly advertising, which sells Chevys in Texas and furniture in Texas and gasoline prices in Texas, we're still the best source of informing the public how to move commerce, which creates jobs, and, frankly, we're essential to making sure that the news is about you in Texas and not about somebody in New York or Los Angeles.

So retransmission consent is a system that people complain about, but it's a market working. We don't think it's broken and so I would just simply ask you to remember that the way you pay for localism in this miracle of network broadcasting and affiliate relationships, you do it through advertising. You do it through retransmission consent. If either of those is unduly damaged and advertising is being cannibalized right now in the digital age, you lose localism and America loses something pretty precious.

Senator CRUZ. Mr. Aaron, did you have a comment?

Mr. AARON. Yes, thank you, Senator. I would just add I think we need to look back at the laws we passed in the past and see what's working.

I know 1992 seems like a long time ago. That was also the only time right after passage of the Cable Act that cable bills actually went down in the last 35 years immediately after passage of that bill. So we should figure out what's working there and then update it. I think the thing to look at is how do we empower consumers with more choice. Why can they not—their cable system work just like online, pick and choose the channels they want, pay for them, but I think if we empower consumers, we're going to get a lot more effective market, and we need to put more of those choices back in the hands of consumers.

If they want local stations on their cable system, they'll pay for them. If they want other stations, they'll pay for them. If they want sports, they'll pay for them. We should give them that choice and then look at why things like retransmission consent fees, it is working, it's working for the broadcasters. I think they're up 2,000 percent in the last decade.

Senator SMITH. Which is not hard when you start from zero.

Senator CRUZ. Thank you.

The CHAIRMAN. Thank you, Senator Cruz, and thank you, gentlemen, for your testimony today.

The hearing record will remain open for two weeks. During this time, Senators are asked to submit any questions for the record. Upon receipt, the witnesses are requested to submit their written answers to the Committee as soon as possible but no later than Wednesday, June 19.

So thank you very much. It has been a good hearing and we managed to get in quite a lot. There's one minute left on the second vote.

So at this point, we will close the hearing.

[Whereupon, at 11:43 a.m., the hearing was adjourned.]

A P P E N D I X

AMERICAN TELEVISION ALLIANCE
June 4, 2019

Hon. ROGER WICKER,
Chairman,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Hon. MARIA CANTWELL,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Re: STELAR Review: Protecting Consumers in an Evolving Media Marketplace

Dear Chairman Wicker and Ranking Member Cantwell:

I write on behalf of the American Television Alliance [1] to provide our perspective in advance of your hearing on "The State of the Television and Video Marketplace."

At this hearing, you will hear a lot about the evolution—if not the *revolution*—in the media marketplace. The advances really are amazing. Those of us old enough to remember when you had "appointment television" to catch your favorite show can't help but be amazed to see our younger colleagues on their smartphones (and tweeting or snapping about it to the world at large). I'm happy to say that ATVA members are justifiably proud of their roles in this revolution. From offering innovative video streaming services that allow consumers to watch programming when and where they want it to building the blazing fast broadband networks that make those services possible, ATVA members can claim as important a role in the video marketplace revolution as anybody.

Yet there remains one sector of the media marketplace where the news is far less good—retransmission consent remains governed by rules Congress enacted in 1992, before anybody had heard of the Internet. Whatever Congress intended almost thirty years ago, this is what the retransmission consent marketplace looks like today:

Skyrocketing prices for lower-rated programming. Broadcast prices go up by double digits every year. Last month, Nexstar reported a 14 percent rise in retransmission consent revenue to $314 million,[2] Gray reported an increase of 26 percent to $204 million,[3] Sinclair reported an increase of 12 percent to $352 million,[4] compared to $314 million in the first quarter of 2018, while Fox reported a 29 percent jump in retransmission consent revenue.[5] These increases are far higher than inflation—and, indeed, far higher than can be found in any other sector of the economy. Indeed, as one of our members explained, retransmission consent fee increases over the last decade exceeded hyperinflation in Brazil and Argentina in the 1980s.[6] Yet

[1] ATVA seeks to be a voice for the American television viewer. Our members include cable and broadband operators, satellite carriers, phone companies, trade associations, independent programmers, consumer groups and others concerned about the state of the video marketplace. You can find out more information about us at *www.americantelevisionalliance.org.*

[2] Mike Farrell, "Retrans Helps Drive Record Q1 for Broadcaster Nexstar," Multichannel News (May 8, 2019), *https://www.multichannel.com/news/retrans-helps-drive-record-q1-for-broadcaster-nexstar.*

[3] Thomson Reuters, "Edited Transcript of GTN earnings conference call or presentation 9–May–19 3:30pm GMT," Yahoo Finance (May 8, 2019), *https://finance.yahoo.com/news/edited-transcript-gtn-earnings-conference-233214931.html.*

[4] Mike Farrell, "Revenue Up, Profits Down in Q1 at Sinclair," Multichannel News (May 8, 2019), *https://www.multichannel.com/news/revenue-up-profits-down-in-q1-at-sinclair.*

[5] Dade Hayes, "Fox Tops Wall Street Forecasts In First Quarterly Report As Stand-Alone Company," Yahoo Finance, (May 8, 2019), *https://finance.yahoo.com/news/fox-tops-wall-street-forecasts-203152097.html.*

[6] Petition to Deny of DISH Network L.L.C., MB Docket No. 17–179 at 37 (filed Aug. 7, 2017)(comparing figures from SNL Kagan, a media research group within the TMT offering of S&P Global Market Intelligence, "Broadcast retransmission and Virtual Service Provider Carriage Fee Projections Through 2023" (July 2017) with "Brazilian Hyperinflation," Encyclopedia

Continued

these increases are not for better or more popular programming. To the contrary, broadcast ratings overall are far lower than they were ten years ago.[7] Indeed, the broadcasters themselves cite these lower ratings as a reason why they should all receive a "discount" off the FCC's national ownership cap.[8]

MVPDs have three choices in the face of such price increases. They can refuse to carry the programming, which is bad for subscribers and may cause them to look elsewhere because they have other ways to watch broadcast programming. They can accede to the outrageous demands and "eat" the cost increases themselves, though no business can swallow increased input costs forever without increasing retail prices. Or, as is almost always the case, they can try to pass these increases along to your constituents in the form of higher prices while hoping that the latest broadcaster-induced increase does not prompt subscribers to discontinue their pay-TV subscriptions.

Broadcast consolidation within local television markets. These retransmission price increases result, in part, from local consolidation among broadcasters. FCC rules nominally prohibit a single broadcaster from controlling, say, the CBS and ABC affiliates in any given television market. But broadcasters have increasingly used loopholes, like airing the second affiliate on a multicast channel or a low power station, to get around this restriction—and the FCC may soon loosen this restriction further. As the *Sinclair-Tribune* transaction demonstrated, moreover, broadcasters can also use "sidecar" agreements to violate this and other FCC restrictions. The result? "Duopolies" in more than a hundred local markets. Indeed, a single entity controls *all four* major network feeds in two markets, with a third possibly coming soon. Obviously, an MVPD negotiating with a combined CBS/ABC (much less a combined CBS/ABC/NBC or CBS/ABC/NBC/FOX) will pay more than an MVPD negotiating with four individually owned network affiliates.

Broadcast consolidation raises another issue: the threat to diverse voices in local markets. Regardless of one's political persuasion, we should all be wary of any one entity controlling the commentary, comments and political activity that is available in the market. Without belaboring the point, members on both sides of the aisle can easily imagine scenarios in which their perspectives—or those of groups they support—could be suppressed by a broadcaster offering the only game in town.

Blackouts. Most of you probably know about "blackouts," which is the term for when a broadcaster pulls its signal from an MVPD. By our count, broadcasters have blacked out your constituents more than *one thousand times* since 2010. If indeed broadcasters are an irreplaceable source of local news and information—as they say they are—this figure should be entirely unacceptable.

It gets worse. If you follow the industry closely, you probably also know that most blackouts take place at a particular time of the year—late December and early January. This isn't because of the holidays, or the first snow of the year, or even the end of the calendar year. It's because of football. College bowl games and the NFL Playoffs are among the most important programming in the viewing year. So, it's no surprise that broadcasters like to have their contracts expire immediately prior to such events. This is when they have the greatest ability to charge the highest prices. Of course, football isn't the only important programming on television, and so New Year's isn't the only time broadcasters try to black out programming. Some broadcasters like to black out before the Oscars or the World Series. Some broadcasters have even blacked out MVPDs as hurricanes approached.[9] When such deliberately timed blackouts actually occur, your constituents are harmed. When they are even *threatened,* your constituents pay higher bills.

"Phantom subscribers." Historically, stations charge MVPDs per subscriber, per month—meaning that the MVPD pays a certain amount each month, for all of the

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of Money (*last accessed:* May 31, 2019), *http://encyclopedia-of-money.blogspot.com/2010/01/brazilian-hyperinflation.html* and "Hyperinflation in Argentina," Citéco (*last accessed:* May 31, 2019), *https://www.citeco.fr/10000-years-history-economics/contemporary-world/hyperinflation-in-argentina).*

[7] Rick Porter, "TV Long View: The Bar for Rating Success Has Come Way Down—or Has It?" Hollywood Reporter (May 11, 2019), *https://www.hollywoodreporter.com/live-feed/bar-ratings-success-has-come-way-down-has-it-1209741.*

[8] *See* Comments of the National Association of Broadcasters, MB Docket No. 17–318 at 23–25 (filed Mar. 19, 2018).

[9] Press Release, "ACA President & CEO Matthew M. Polka Condemns LIN TVs Retrans Blackout Threat As Hurricane Irene Bears Down On Eastern Seaboard," ACA Connects (Aug. 26, 2011), *https://www.americancable.org/aca-president-ceo-matthew-m-polka-condemns-lin-tvs-retrans-blackout-threat-as-hurricane-irene-bears-down-on-eastern-seaboard/;* Press Release, "ACA Launches 'TV Ransom' To Highlight Broadcasters' Abusive Behavior With Retransmission Consent Resulting In Consumer Harm," ACA Connects (Oct. 4, 2017), *https://www.americancable.org/aca-launches-tv-ransom-to-highlight-broadcasters-abusive-behavior-with-retransmission-consent-resulting-in-consumer-harm/.*

subscribers who get that station via the MVPD. Recently, however, broadcasters have sought to charge MVPDs for subscribers who do not even receive the broadcaster's signals from the MVPD. So, in the end, consumers have to pay a higher price for programming. For example, a broadcaster might charge a satellite carrier for subscribers who have elected *not* to receive local stations from that satellite carrier and instead get their "free" broadcast signals over the air. Alternatively, a broadcaster might charge a cable operator for subscribers who only receive their broadband service from that operator and have chosen not to buy the video product. Or a broadcaster might require a "penetration rate" of 95 percent and charge the MVPD based on that rate, even if fewer subscribers actually receive the stations. In each case, your constituents pay for service that is not being "retransmitted" by the MVPD and therefore they do not even receive. Again, this artificially raises prices.

Forced bundling with broadcast stations. A retransmission consent agreement is supposed to be simple: it is a commercial contract permitting MVPDs to retransmit the signals of television stations so that customers can view the network programming they want. And yet, there is nothing simple about these agreements, and their complexity level only continues to grow. Many broadcasters—especially the largest ones—insist on "bundling" other programming as a condition of negotiating retransmission consent agreements. This leads to higher prices for consumers and carriage of undesirable stations that aren't supported by market forces and diverts capacity that could be used to provide broadband services or new innovative video products.

* * *

This is clearly not a competitive marketplace. Indeed, it stands in stark contrast to all of the other parts of the video marketplace that you will be discussing at your hearing—in which innovation has led to lower prices and more choice.

What, then, should Congress do? Most important is that it does *something.* By no means should Congress miss the opportunity presented by this STELAR reauthorization to examine the *entire* video marketplace and consider updates to rules that no longer work. (We assume, of course, that Congress has no intention of accepting the broadcasters' self-serving invitation to ignore STELAR entirely and thereby strip almost 900,000 satellite customers of programming they have grown to rely upon.)

We also continue to support an approach based on an idea presented during the last reauthorization in which each TV station could set whatever price it wanted, pay-TV subscribers would be free to take or leave it, and MVPDs would collect fees and remit them to the broadcast station. Broadcasters and viewers, in other words, would participate in the purest of marketplaces—transparent prices, empowered consumers, and choice. And MVPDs would give up the role of local-TV middleman once and for all. You would never see another broadcast blackout again.

Yet we are not limited to the above approach in solving the retransmission consent problem. There are plenty of other ideas that range in their level of disruptiveness to the current regime. We stand ready to provide any information we can in support of your work on these issues and thank you again for holding this important hearing today.

Sincerely,

/S/ MIKE CHAPPELL,
Chairman,
American Television Alliance.

R STREET INSTITUTE
Washington, DC, June 5, 2019

Hon. ROGER F. WICKER, Chairman,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Hon. MARIA E. CANTWELL, Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

RE: Hearing on "The State of the Television and Video Marketplace"

Dear Chairman Wicker and Ranking Member Cantwell:

We at the R Street Institute ("R Street") commend you and the Committee for holding this hearing on "The State of the Television and Video Marketplace."[1] Given the impending expiration of several key provisions that govern program carriage agreements and the broader shifts underway in the video marketplace, it is both appropriate and timely.

R Street's mission is to engage in policy research and outreach to promote free markets and limited, effective government. As part of that mission, we have researched and commented upon multiple policy issues related to American media regulation, including some of the video competition rules currently in place at the Federal Communications Commission ("FCC").[2] For the Committee's convenience, we would like to highlight the following specific recommendations:

To ensure a level playing field, program carriage rules must be harmonized across distribution platforms.

The history of video competition and the regulatory framework that governs this market is long and complex. To account for new distribution platforms and business models, Congress and the FCC have updated these rules periodically but there remains a great deal of regulatory underbrush.[3] Worse yet, these legacy regulations are uneven and tend to favor certain distribution platforms and business models over others, which ultimately distorts the market and harms competition. Set to expire at the end of this year, the STELA Reauthorization Act of 2014 is one example of such uneven regulation that distorts the video marketplace.

Originally with the Satellite Home Viewer Act in 1988 and periodically since then, Congress gave satellite television distributors certain rights that other multichannel video programming delivery ("MVPD") services did not have, including a right to import distant broadcast signals into a local video market pursuant to a compulsory statutory license.[4] This is similar to, but distinct from, the statutory license available to wireline MVPDs under Section 111(d) of the Copyright Act.[5] When they were first developed, different carriage rules for these different distribution platforms made some sense as a way to encourage new competition from satellite MVPDs in local video markets. But the video marketplace has changed dramatically since then. Wireline and satellite MVPDs now compete head-to-head in most local markets, and both sets of MVPDs must grapple with ongoing technological shifts that are enabling new competitive viewing options for consumers and programmers—including broadcasters' new ATSC 3.0 protocol and improved over-the-top video services enabled by the Internet Engineering Task Force's ("IETF") Real-time Transport Protocol ("RTP"). Accordingly, to promote fair and open competition among MVPDs, broadcasters and new entrants into the video marketplace, program carriage rules should be harmonized across distribution platforms as much as possible.

As competition grows, legacy rules should be relaxed or eliminated.

Open and fair competition can come only from a regulatory framework that levels the playing field and treats all video distribution platforms the same. One way to do that and to harmonize program carriage rules would be to regulate upward, imposing the rules that currently govern wireline MVPDs onto satellite MVPDs (and perhaps over-the-top video providers, as well). This could be done by making STELAR's provisions permanent and harmonizing them with Section 111(d) or by simply incorporating satellite MVPDs into Section 111(d). However, new competition

[1] *Hearing on 'The State of the Television and Video Marketplace' Before the Senate Committee on Commerce, Science, & Transportation,* 116th Cong. (June 5, 2019), *http://bit.ly/2XrVwog.*

[2] *See, e.g.,* Tom Struble and Joe Kane, "Comments of R Street Institute," *In the Matter of Modernization of Media Regulation,* MB Docket No. 17–105 (July 5, 2017), *http://bit.ly/2wA0jbK.*

[3] *See* Committee on Energy and Commerce Staff, "Memorandum Re: Hearing on 'STELAR Review: Protecting Consumers in an Evolving Media Marketplace,'' (May 31, 2019), *http://bit.ly/2wzxfkD.*

[4] 47 U.S.C. § 325(b)(2)(C); 17 U.S.C. § 119.

[5] 17 U.S.C. § 111(d).

from satellite MVPDs and other video providers suggests that many of the legacy regulations that govern these markets could be relaxed or even eliminated, as market forces may be able to sufficiently constrain bad behavior and protect consumers. Doing so would achieve parity and harmonize program carriage rules across distribution platforms by regulating downward, such as by allowing STELAR to expire and then removing the compulsory license for wireline MVPDs in Section 111(d), too. The video marketplace has been governed by specific rules and regulations for decades, but general copyright, contracts and antitrust law could also be used in this area, perhaps to even greater effect. Such an approach would take more effort on the part of Congress, but it may ultimately lead to better outcomes in the video marketplace.

Incremental changes could be made now, but any major reforms should be gradual and phased in over time to minimize disruptions in the current video marketplace.

Regardless of the course of action Congress pursues here, lawmakers should carefully consider the impact that a sudden shift in the regulatory environment could have on the current video marketplace. Many consumers rely on video programming for vital news and weather alerts, so Congress should try to minimize disruptions to these consumers. Incremental reforms could be made now, but any major reforms to the video marketplace should be gradual and phased in over time. For example, in 1996, when Congress directed the FCC to oversee the shift from analog to digital broadcasts, they did not simply allow all analog signals to be turned off with no chance for consumers to plan for the changes.[6] In fact, after several delays and efforts to help consumers adapt, it was not until 2009 that analog service was phased out completely, thirteen years after the passage of the Telecommunications Act.[7] Any major and unexpected changes to the video marketplace now could similarly harm consumers and thus Congress should ensure that any major reforms to the video marketplace are phased in gradually with adequate notice to consumers before implementation.

* * *

Again, we commend you for your efforts to protect consumers in an evolving media marketplace. We also look forward to working with you and the rest of the Committee as you consider potential legislation in this area.

Sincerely,

TOM STRUBLE,
Technology and Innovation Policy Manager,
R Street Institute.

JEFF WESTLING,
Technology and Innovation Policy Fellow,
R Street Institute.

PREPARED STATEMENT OF NEIL FRIED, SVP & SENIOR COUNSEL, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Summary

Describing today's programming marketplace as embodying another Golden Age of television has become cliché because it's true: American viewers have never had as much compelling content to choose from. Nor have they had as many ways to view that content, whether on their televisions, computers, gaming systems, or personal devices. The MPAA's members—Walt Disney Studios, Netflix Studios, Paramount Pictures, Sony Pictures, Universal City Studios, and Warner Bros. Entertainment—work to provide audiences with television and movie content where, when, and how they want to watch it, including over broadcast, cable, satellite, wired or wireless telephony, and online services.

This vibrant content market benefits not only television and movie fans, but also the national and local economies. The investment and work that goes into producing shows and movies helps drive jobs, wages, and trade. What makes this all possible is the dual American values of respect for free speech and respect for copyright. Together, they enable content creators to tell their stories, to recoup their investments, and to reinvest in the next project. Negotiated licensing of content in the free mar-

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[6] *See* "Digital Television," *Federal Communications Commission* (last visited June 3, 2019), *https://bit.ly/2WmnwgO.*

[7] Ibid.

ket best ensures audiences have robust programming options. For that reason, the MPAA disfavors compulsory copyright licenses.

Despite the vitality of the television programming market, however, piracy remains a problem. Copyright infringement harms legitimate production and distribution, reducing proceeds to pour back into both businesses, stealing significant revenue from cast and crew that would otherwise fund their health plans and retirement funds, and making it harder to continue providing viewers a wide array of content. And just as legitimate distribution is moving toward streaming, so too is piracy, posing ever more problems for creators, as well as a growing malware threat to consumers.

The MPAA has a three-pronged approach to combating digital piracy: 1) We look for voluntary initiatives by others in the online ecosystem to combat content thieves' illicit endeavors, and hope Congress will encourage such initiatives; 2) the MPAA's members, along with the Alliance for Creativity and Entertainment—our growing cross-industry coalition—bring civil actions against pirate enterprises; and 3) we refer cases to the DOJ for criminal enforcement against operations engaged in sufficiently significant infringement, something we hope members of the House and Senate will urge the government to pursue.

One development making the piracy fight even harder, however, is diminished access to WHOIS data, which contains basic contact details for holders of Internet domain names. Domain name providers have begun restricting access to WHOIS data based on an overapplication of the European Union's General Data Protection Regulation. This is not only limiting the ability of content creators to track down pirates, but also hindering the efforts of others to thwart online lawlessness generally. The Internet Corporation for Assigned Names and Numbers has been trying to resolve the WHOIS problem for more than a year. If it fails to do so soon, Congress may need to legislate.

This industry is a success story of free expression, free markets, and intellectual property rights. Helping that success continue requires collaboration between and among private-sector actors and government to ensure the Internet connects audiences with storytellers, not pirates.

The Vibrant Content Marketplace

Television viewers have more content choices than ever before. The number of scripted, original series available over traditional and online sources is up from 389 in 2014 to 495 in 2018, with the number of those series originating online growing from 33 to 160.[1] The industry makes that content available not only over broadcast, cable, satellite, and telephony services, but also through 144 lawful online services available to American audiences as of 2018, up from 112 in 2014.[2] American viewers used those online services to access 11.5 billion movies and 170.6 billion TV episodes in 2018, up from 5.4 billion and 71 billion in 2014.[3]

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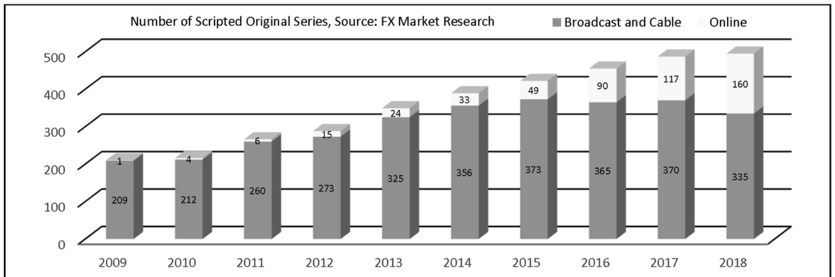
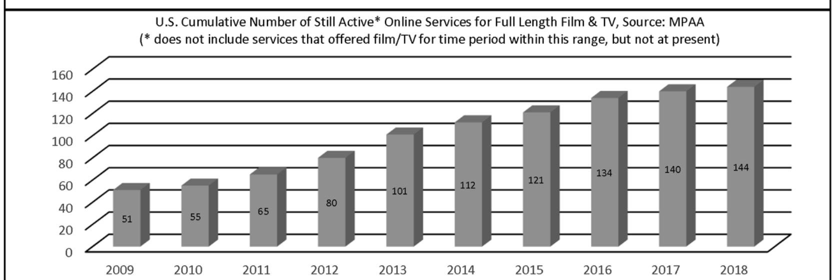
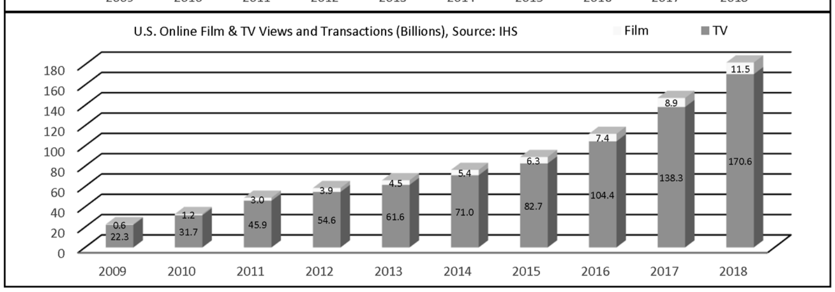
[1] FX Networks Research (2018).
[2] MPAA database.
[3] IHS Markit. *See* www.IHS.com.







Technological protection measures—also known as digital rights management—facilitate all this by enabling creators and distributors to offer a variety of viewing options at different prices. Because of digital rights management, audiences can choose how to access programming, including by downloading content, streaming content on a pay-per-view basis, enjoying content as part of a subscription service, watching content over TV Everywhere applications in different places across different devices, and accessing full seasons of a television series, either to catch missed episodes or to watch them all at once when a content creator makes them available *en masse.* Without technological protection measures to ensure only authorized viewers gain access to the programming, and only as authorized, content creators could not offer these choices, resulting in one-size-and-price-fits-all offerings and fewer options for viewers.

Audiences are not the only beneficiaries of this vibrant film and programming marketplace. So, too, are the national and local economies. In the process of making content available online and off, the television and film industry supports 2.6 million jobs and $177 billion in wages across all 50 states; enlists more than 93,000 businesses, 87 percent of which are small businesses employing fewer than 10 people; contributes $229 billion in sales to U.S. GDP; generates $17.2 billion in exports; and exports 2.5 times what it imports, yielding a positive balance of trade in every major market in the world and producing a $10.3 billion trade surplus—larger than each of the surpluses in the telecommunications, transportation, mining, legal, insurance, information, and health-related services sectors.[4] In addition, the industry

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[4] 1T4AMPAA, The Economic Contribution of the Motion Picture & Television Industry to the United States (Nov. 2018), *https://www.mpaa.org/wp-content/uploads/2019/03/Economic_contribution_US_infographic_Final.pdf.*

pays $44 billion to more than 250,000 local businesses each year.[5] A major motion picture filming on location contributes on average $250,000 per day to the local community, and a one-hour television episode contributes $150,000 per day. Notably, the local community sees that up-front investment regardless of whether the film or TV show becomes a hit or a flop.

A Product of the First Amendment and Strong Copyright Policy

Underlying this vibrant content marketplace is America's respect for two fundamental and complementary values: free speech and intellectual property. Under the First Amendment, the speaker and the audience acting in the marketplace—not the government—determine what is said and heard. And the Constitution's Copyright Clause recognizes that honoring the right of creators to determine how to disseminate their works increases both the production and distribution of content, to the public benefit.[6] The ability of content producers and distributors to decide what programming to create, disseminate, and license is what makes the online marketplace so dynamic.

This respect for the First Amendment and copyright law also enables companies to manage the economic risks in the ultra-competitive video marketplace, allowing them to continue investing and innovating to deliver high-quality and diverse content to viewers. Producing and distributing a major motion picture typically costs at least $100 million, and six out of ten never recoup their initial investment. Major television productions now rival feature films not only in quality, but also in cost, sometimes reaching millions of dollars *per episode.* Yet according to one rule of thumb, 80 percent of scripts never become a pilot, 80 percent of pilots never become a series, and 80 percent of series never see a second season. Our nation's respect for the First Amendment and intellectual property rights are very significant contributors to making America the global leader in the creation of premium content enjoyed by audiences worldwide. The best way to ensure audiences have a robust, diverse array of programming—and that creators reap the fruits of their labors to continue investing in the next story—is through negotiated licensing of content in the free market. For that reason, when it comes to the licensing marketplace for video content, it is the MPAA's position that compulsory copyright licenses should be disfavored, and that its members are most fairly compensated through market-based negotiations consistent with copyright's exclusive rights, and without unnecessary government intervention.

Just as a commitment to strong copyright policy in our domestic law is necessary to promote this dynamic at home, such a commitment in trade agreements is necessary to continue our market leadership abroad and to preserve the positive balance of trade. That is why the MPAA supports the copyright and intellectual property enforcement provisions of the United States-Mexico-Canada Agreement. Although the agreement should not be held out as a model for other trade pacts, it significantly improves upon the intellectual property provisions of the North American Free Trade Agreement.

Piracy, However, Continues to Present Challenges

Although the motion picture and television industry has unquestionably embraced the Internet as a powerful means of reaching audiences through lawful services, online piracy remains a problem. In 2017, an estimated 542 million pirated movies and TV shows were downloaded in the United States using peer-to-peer protocols alone.[7] And just as the legitimate marketplace is moving toward streaming, so, too, is the illegitimate marketplace. Streaming piracy has now surpassed illicit downloading via peer-to-peer protocols, with streaming piracy sites representing 37 percent of visits to sites with unauthorized content, host sites representing 36 percent, and peer-to-peer representing 27 percent.[8] Streaming device-based piracy, in particular, is a growing issue. The devices, often Android-based "set-top boxes," are typically built around the Kodi open-source media software, but modified with illegal "add-ons." The add-ons connect users to stored or "live" streams of pirated movies and television programming, and enable "plug and play" connection to a tele-

[5] *Id.*

[6] *See* U.S. CONST., art. I, § 8, cl. 8 (conferring upon the legislative branch the role "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 558 (1985) (stating that "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

[7] MarkMonitor. *See* www.markmonitor.com.

[8] Analysis of SimilarWeb data, based on sites with at least 10,000 copyright removal requests in 2017 according to the Google Transparency Report.

vision. Six percent of North American broadband households—some 6.5 million homes—are accessing known subscription television piracy services, generating for pirate operations ill-gotten gains of $840 million per year in North America, according to a report by Sandvine.[9]

All this infringement harms a broad swath of the legitimate movie and television production and distribution sectors, including content creators, skilled craftspeople earning a middle-class living in the industry, movie and television studios large and small, sports leagues, broadcast and pay-TV networks and distributors, and over-the-top services. The illicit activity unlawfully competes with digital entrepreneurs and established players trying to grow lawful and innovative streaming content and distribution businesses to meet evolving consumer demands. To the extent streaming piracy diverts subscribers from legitimate services and siphons money otherwise available to re-invest, it harms competition and limits the ability of content creators and distributors to offer audiences choices in movies, television programming, and services.

Because many pirate sites disseminate malware, the spread of streaming piracy devices and applications into living rooms also presents a growing threat to consumers and a new vulnerability to cybersecurity. One-third of pirate sites expose users to malware, and pirate sites are 28 times more likely to infect users with malware than mainstream websites, according to the Digital Citizens Alliance.[10] Making matters worse, when people use streaming piracy devices and applications, they typically place the devices on the other side of the router, past the firewall or other security measures.[11] This helps usher hackers beyond the defenses of the network the device is connected to, which can result in access to anything else connected to that network; the siphoning of massive amounts of data; theft and sale of user names, passwords, credentials for legitimate services, credit cards, and identities; remote, third-party control of devices and applications on the network; surreptitious use of the network by someone else, such as for mining crypto-currency; creation of a botnet; or other harms.[12] And any malware installed can continue to reside within the network even after the user removes the piracy device.[13] Troublingly, 44 percent of individuals that have a piracy device in their home reported experiencing malware-related problems, as compared to 7 percent for individuals who did not have such a device installed.[14]

Combating Piracy

The MPAA has a three-pronged approach to combating online piracy that involves: (1) voluntary initiatives by private-sector participants in the Internet ecosystem; (2) civil action; and (3) criminal referrals to law enforcement.

Voluntary Initiatives. One of the internet's strengths is its distributed, interconnected nature. Because no one entity controls the web, anyone across the globe can contribute to its architecture, as well as the services and content it carries. As a result, however, no one entity can address problems that arise. Consequently, the MPAA often looks for voluntary efforts by others in the online ecosystem to join in the fight against piracy, which poses a threat to consumers and legitimate commerce. Visa, MasterCard, and PayPal, for example, work to minimize the ability of pirate websites and sellers of streaming piracy devices to misuse those financial networks to collect subscription fees or other revenue from their unlawful pursuits. Advertisers, advertising agencies, and online ad networks have formed the Trustworthy Accountability Group to minimize the likelihood that household-name advertising inadvertently ends up on pirate websites, generating revenue for the pirates. Amazon, eBay, and Alibaba are taking steps to keep their digital marketplaces free from trafficking in streaming piracy devices. Donuts and Radix, operators of relatively new domain name extensions—such as ".movie" and ".online"—have each separately established "Trusted Notifier" programs to ensure that websites using domains registered to those companies are not engaged in large-scale piracy. Under the programs, the MPAA may refer such sites to the companies. If the companies determine that such a website is engaged in illegal activity in violation of the com-

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[9] SANDVINE, SPOTLIGHT: SUBSCRIPTION TELEVISION PIRACY 2 (Nov. 2017), *https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf.*

[10] DIGITAL CITIZENS ALLIANCE, DIGITAL BAIT 2 (Dec. 2015), *https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/digitalbait.pdf.*

[11] *Id.,* FISHING IN THE PIRACY STREAM: HOW THE DARK WEB OF ENTERTAINMENT IS EXPOSING CONSUMERS TO HARM 3, 8 (April 2019), *https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/DCA_Fishing_in_the_Piracy_Stream_v6.pdf*

[12] *Id.* at 3–5, 8, 15–20.

[13] *Id.* at 14.

[14] *Id.* at 4, 22.

panies' acceptable use and anti-abuse policies, the companies may act within their already established authority to put the infringing site on hold or suspend it.

Similar initiatives by other domain name providers would be welcome. So, too, would increased efforts by video hosting services to ensure third parties are not using their platforms and storage space to pedal stolen content. And while reverse proxy services helpfully fend off denial-of-service attacks by interposing themselves between the websites of legitimate businesses and would-be hackers, the proxy services could do a better job ensuring that pirates don't use those services to mask their true IP addresses and impede efforts to stop their theft. The proxy services should also stop doing business with repeat infringers. Some social media platforms have taken productive steps to remove piracy-related links, but pro-active efforts to take down unauthorized live streams of content, as well as generic promotions of piracy pages, would also be helpful. Congressional encouragement of these and other voluntary initiatives could help put a dent in intellectual property theft.

Civil Action. The MPAA members, along with the Alliance for Creativity and Entertainment[15]—a coalition of more than 30 content producers, distributors, and online services—file civil actions against illicit enterprises engaged in piracy. Just short of two years old, ACE counts Amazon, AMC Networks, CBS, Discovery and our six studios among its growing numbers. The alliance has already brought lawsuits in the United States that have contributed to the shuttering of three large providers of streaming piracy devices and applications: Tickbox, Dragon Box, and Setvnow.

Short of litigation, ACE also conducts "knock and talks," which involve significant forensic work to locate key individuals involved in substantial streaming piracy operations, presenting those individuals with evidence of their illegal activity, and agreeing not to take them to court if they cease their activities and help locate others higher up in their unlawful enterprises. ACE similarly works to disrupt central, back-end elements of the streaming piracy ecosystem—such as repositories for illicit streaming applications or purveyors of unauthorized streams—to disable multiple piracy services in one fell swoop.

Criminal Referrals. The MPAA and ACE also provide evidence packages to U.S. and foreign law enforcement agencies to help those agencies bring criminal actions against sufficiently significant piracy operations. Although the U.S. government does not take many such actions, those they do can have a greater deterrent effect than civil suits because criminal cases bring more attention, along with the possibility of jail time for convicted culprits. Indeed, a 2012 U.S. action against Megaupload—then the largest piracy "cyberlocker," accounting for 4 percent of *all* internet traffic—increased lawful digital sales by 6.5 to 8.5 percent for three major studios in 12 countries.[16] The MPAA has pending a number of criminal referrals to DOJ regarding streaming piracy operations, with the goal of replicating a comparable uptick in legitimate consumption. Our hope is that Congress will encourage DOJ to move forward with those cases.

Reduced WHOIS Access Is Hurting the Fight Against Piracy and Other Online Lawlessness

One development making the piracy fight even harder is diminished access to WHOIS data, which contains basic contact details for holders of Internet domain names. WHOIS information has been publicly available since the founding of the commercial internet. Access to WHOIS data forms the basis of online transparency, security, and accountability, and is necessary to protect consumer privacy, ensure public safety, and promote lawful commerce. Indeed, a recent DOJ cyber report states that "[t]he first step in online reconnaissance often involves use of the Internet Corporation for Assigned Names and Numbers' WHOIS database."[17]

Domain name providers have begun restricting access to WHOIS data, however, based on an overapplication of the European Union's General Data Protection Regulation. The GDPR does not apply at all to non-personal information;[18] and even in the case of personal information, the regulation acknowledges disclosure is warranted for legitimate interests such as public safety, law enforcement and investigation, enforcement of rights or a contract, fulfillment of a legal obligation, cybersecu-

[15] *See https://www.alliance4creativity.com/*

[16] BRETT DANAHER AND MICHAEL D. SMITH, GONE IN 60 SECONDS: THE IMPACT OF THE MEGAUPLOAD SHUTDOWN ON MOVIE SALES 4 (Sept. 2013), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229349.*

[17] DOJ, REPORT OF THE ATTORNEY GENERAL'S CYBER DIGITAL TASK FORCE 35 (July 2018), *https://www.justice.gov/ag/page/file/1076696/download.*

[18] *See* GDPR, art. 1 (describing the subject matter and objectives of the regulation as relating to the processing and protection of personal data), *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679.*

rity, and preventing fraud.[19] Moreover, the GDPR does not apply to American registrars and registries with respect to domain name registrations by U.S. registrants, or where domain name registrants and registrars are located outside the European Economic Area.[20] Furthermore, it applies only to information about "natural persons," and so imposes no obligation to obfuscate information about domain name registrants that are companies, businesses, or other legal entities, irrespective of the nationality or principal place of business of such entities.[21]

Domain name providers' overapplication of the GDPR is not only limiting the ability of content creators to combat piracy, but also hindering efforts by public interest groups, the private sector, cyber-security firms, Federal agencies, and law enforcement authorities to thwart online-lawlessness generally—including identity theft, theft of intellectual property, fraud, cyber-attacks, election interference, illegal sale of opioids, and human trafficking. According to an analysis by two cybersecurity working groups of more than 300 survey responses, the restriction of WHOIS data is impeding attempts to investigate cyber-attacks.[22] A survey of 55 global law enforcement agencies by ICANN's Public Safety Working Group reveals that 98 percent found the WHOIS system aided their investigative needs before domain name providers took these steps, as compared to 33 percent after.[23] The U.S. Department of Commerce has also been outspoken about the value of WHOIS information to governments, businesses, intellectual property owners, and individual Internet users across the globe, and has conveyed the concern of the United States about the lack of certainty around access to WHOIS data for legitimate purposes.[24]

ICANN has been seeking to resolve the WHOIS problem for more than a year. If it fails to do so soon, Congress may need to legislate. Indeed, the Department of Commerce sent ICANN a letter April 4 stating that "[n]ow is the time to deliberately and *swiftly* create a system that allows for third parties with legitimate interests, like law enforcement, IP rights holders, and cybersecurity researchers to access non-public data critical to fulfilling their missions."[25] The letter added that the U.S. government is expecting ICANN to "achieve substantial progress, if not completion, in advance of ICANN's meeting in Montreal in November," and observed that "[w]ithout clear and meaningful progress, alternative solutions such as calls for domestic legislation will only intensify and be considered."[26] Senate Commerce Committee Chairman Roger Wicker echoed that sentiment in a May 6 letter to the Department of Commerce, stating that "[a]bsent a meaningful resolution to these issues, Federal legislation guaranteeing access to WHOIS data may be warranted."[27]

Conclusion

The video content business is a success story of free expression, free markets, and intellectual property rights. Our community—the MPAA studios and the many thousands of people who work to create and make available great television shows and movies—is committed to investing and innovating to keep meeting audiences' expectations. As the Committee considers the appropriate policies for the future of the video marketplace, we hope it will recognize that as wondrous as all the forms of distribution are, they rely on the production of content to deliver value to consumers. Producers and creators take financial risks to make that content available. As those producers and creators continue to explore ways to distribute content, re-

[19] *See id.,* arts. 2(2)(d), 5(1)(b), 6, 23. *See also* ICANN, GOVERNMENTAL ADVISORY COMMITTEE, *Communiqué—San Juan, Puerto Rico* (Mar. 15, 2018) (stating that the GDPR allows for access to data for legitimate purposes), *https://gac.icann.org/advice/communiques/20180315_icann61%20gac%20communique_finall.pdf.*

[20] *See* GDPR, arts. 2(2)(a), 3.

[21] *See* GDPR, art. 1 (describing the subject matter and objectives of the regulation as relating to the protection of natural persons). *See also GAC San Juan Communiqué* (stating that the GDPR applies only to the privacy of natural persons, not legal entities).

[22] ANTI-PHISHING WORKING GROUP, ICANN'S TEMPORARY SPECIFICATION SURVEY (Oct. 18, 2018), (*https://apwg.org/apwg-news-center/icann-whois-access/temporySpecSurvey.*

[23] LAUREEN KAPIN, FTC COUNSEL FOR INTERNATIONAL CONSUMER PROTECTION & CO-CHAIR, ICANN PUBLIC SAFETY WORKING GROUP, ICANN63 GAC PLENARY MEETING 8 (Oct. 23, 2018), *https://gac.icann.org/presentations/icann63%20pswg.pdf.*

[24] *See, e.g.,* Remarks of David J. Redl, Assistant Secretary of Commerce for Communications and Information, ICANN 61 (Mar. 12, 2018), *https://www.ntia.doc.gov/speechtestimony/2018/remarks-assistant-secretary-redl-icann-61.*

[25] Letter from David J. Redl, Assistant Secretary of Commerce for Communications and Information, to Cherine Chalaby, Chair, ICANN Board of Directors (April 4, 2019).

[26] *Id.*

[27] Letter from Sen. Roger Wicker, Chairman, U.S. Senate Committee on Commerce, Science, and Transportation, to David Redl, Assistant Secretary for Communications and Information, U.S. Department of Commerce (May 6, 2019).

spect for copyright is necessary to help safeguard their investments from theft and illicit distribution, especially as access to stolen content becomes easier over the internet. Helping to write future chapters of the great American success story that is the television and film industry will require collaboration between and among private-sector actors and government to ensure the Internet connects audiences with storytellers, not pirates.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TODD YOUNG TO HON. MICHAEL K. POWELL

Question 1. Mr. Powell, your testimony highlighted an issue that is a priority for me and my constituents: rural broadband. Can you discuss more about what your members are doing to ensure that communities across the country have access to broadband and the many services it enables?

Answer. NCTA's members are expanding the reach of their networks, including through the use of innovative technologies, to bring the benefits of broadband as rapidly as possible to all Americans, including those in rural America. Today, thanks to cable's continued investment, 93 percent of the country has access to high-speed cable broadband. Median cable broadband speeds are at 100 Mbps, and speeds in many areas, including rural areas, reach 1 Gig. Comcast last fall announced that it offers gigabit broadband to nearly all of the company's 58 million homes and businesses passed in 39 states and the District of Columbia, achieving this goal by increasing speeds 17 times in 17 years and doubling the capacity of its broadband network every 18–24 months. Cox has been rapidly rolling out its "Gigablast" service throughout its service area, and Charter has rolled out its "Spectrum Internet Gig" service. To power these massive broadband deployments, the cable industry has increased its investment in capital infrastructure significantly—from $206.6 billion in 2012 to $290 billion in 2018.

Ensuring that rural communities have access to high-quality broadband is a priority for the cable industry. For example, in 2017, NCTA member MidCo, a provider of Internet and cable service to rural communities, launched the MidCo Gig Initiative—a commitment to extend gigabit speeds—which are already available to more than 90 percent of its customers—to its entire, mainly rural, service area. It does so using an innovative fixed wireless approach to extend its network beyond the reach of its hardwired fiber networks. This process is one example of how cable ISPs are exploring innovative approaches to extend broadband in rural areas, powering innovations from rural telehealth to precision agriculture.

Question 2. We all can agree that for vast majority of Americans the video marketplace has changed over the past several years. What are the key drivers of this transformation? How should we think about these changes when it comes to STELA reauthorization?

Answer. The transformation in the video marketplace is being driven by previously unimagined levels of competition. Today, consumers enjoy a historic level of choice in content, and more ways than ever before to watch it:

- First, today's video programming ecosystem is more diverse and higher quality than ever before. The cable industry's investment in content has been well received, with cable networks winning 65 Primetime Emmy Awards in 2018.
- Second, there are many new sources of content. Content spending by online video services is staggering and fueling their growth in popularity. Netflix spent $12 billion on content in 2018, and analysts predict that figure will grow to $15 billion in 2019. Even entities that were not traditionally video content providers, such as Amazon and Twitter, are investing in video content.
- Third, how cable delivers content to subscribers is also changing. Cloud DVR, "TV Everywhere" offerings, and extensive On Demand libraries allow cable customers to view their content whenever and wherever they want.
- Finally, today's cable operators face vigorous competition from MVPDs, online video distributors like Netflix, and content providers selling directly to consumers. This competition has created a marketplace where no single type of video service is dominant. Of the top ten video subscription services, only four are cable companies. Providers like Google, Netflix, Amazon, Hulu, and Sling TV have not only emerged, but gained well over 100 million subscribers, and the number of consumers that receive their programming through virtual MVPDs and online-only subscribers has rapidly increased from 12.9 million at year-end 2015 to 20.7 million households at year-end 2018.

These changes in the video marketplace inevitably argue for legal changes that would promote fair competition by removing unduly burdensome requirements that current law imposes on cable operators and programmers, but not their competitors. Congress should keep these marketplace realities in mind when it considers STELA or any other video legislation.

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

Question. While diversity of viewpoints has long been an important part of the U.S. media market, recently, numerous mergers and acquisitions have resulted in four companies owning 80 percent of the cable and satellite pay television marketplace and eight companies controlling nearly 80 percent of the cable and satellite networks. Can you speak to the effects of consolidation in the media, both in terms of the diversity of voices that are represented in the media marketplace and the protection of innovation and small businesses?

Answer. It is impossible to assess the diversity of today's media voices by looking only at the cable and satellite industries. There are many new sources of content and delivery.

Today, only 9 percent of programming on cable is cable-affiliated; the vast majority of content comes from other sources. Netflix, for example, spent $12 billion on content in 2018, and analysts predict that figure will grow to $15 billion in 2019. Even entities that were not traditionally video content providers, such as Amazon and Twitter, are investing in video content. All of these new entrants contribute to the diversity of today's media voices.

Similarly, there any many, many ways for viewers to receive that content, other than through carriage by a cable or satellite provider. Of the top ten video subscription services, only four are cable companies. Providers like Google, Netflix, Amazon, Hulu, and Sling TV have not only emerged, but gained well over 100 million subscribers, and the number of consumers that receive their programming through virtual MVPDs and online-only subscribers has rapidly increased from 12.9 million at year-end 2015 to 20.7 million households at year-end 2018. And even within the narrow category of MVPD service offerings, cable share of customers, which was 98 percent at the time of the 1992 Cable Act, has plateaued for the last few years at approximately half—53 percent

Finally, the near-ubiquity of an Internet connection means that today, everyone can be a content creator. Small businesses or other innovators with a story to tell have the venue and tools to produce compelling video narratives. Countless authors, musicians, and other video bloggers have enhanced their brand and visibility by spreading their user-created content. 45 percent of people watch more than an hour of Facebook or YouTube videos a week. YouTube's search engine receives more than 1.5 billion users per month and plays over 1 billion hours of video each *day* to users.

In short, the media marketplace has never been more diverse.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. MICHAEL K. POWELL

Question 1. Mr. Powell, you have an extensive media background—as a former Chairman of the Federal Communications Commission and now as President of the Internet & Television Association. In your experience, have you ever seen the kind of undue pressure and false accusations leveled against regulated media companies by any president or Federal agency as we have seen with President Trump? Can Americans reasonably have confidence that FCC and DOJ decisions about media corporations are being made free of political pressure?

Answer. The FCC is an independent agency and it should exercise independent judgment in crafting new rules or making decisions about media corporations. When Chairman of the FCC, I took that responsibility very seriously, and I know that Chairman Pai does as well.

Question 2. Mr. Powell—your testimony pointed out the many options available to consumers over the internet. But an essential part of that equation is that consumers can only shift to over-the-top programming if they have access to broadband. And we know that there are too many areas of my state and the Nation that still lack broadband capable of carrying the speeds necessary to stream this content.

I am also concerned about an issue we don't hear much about: As companies push more and more content to apps and online delivery systems, consumers can still get locked out of content by owners who will only allow their content to be available on certain device. For example, AT&T unveiled its Watch TV—a $15 dollar package for limited channels. While this sounds great, it's only on AT&T-approved devices, and does not include a popular one—Roku. Are we headed toward a scenario where consumers must purchase 3 or 4 or 5 different devices to watch the content they are paying for?

Answer. The vast majority of online content is available on any device with an Internet connection. Most content accessed through an MVPD is also widely available on multiple devices.

- All of the ten largest MVPDs (representing 95 percent of the MVPD market) now offer consumers apps that can be used on hundreds of millions of consumer-owned Internet-connected devices, such as smartphones, tablets, personal computers, select Smart TVs, game consoles, and streaming devices such as Apple TV, Roku, Google Chromecast and Amazon Fire.
- By the end of 2018, consumers owned more than 840 million of these types of devices, and two-thirds of the devices can access the programming of each of the ten largest MVPDs.
- Nearly all TV households have at least one of these devices, and more than two-thirds can stream video to their televisions.
- Consumers actually used tens of millions of these devices to watch MVPD video in 2018 without using a set-top box. Usage of customer-owned devices increased by 25 percent from 2017.

Independent Television Issues/Most Favored Nation Negotiations. I have been hearing for a number of years about the challenges that independent TV programming networks face in the video market. In particular, there is concern over their treatment at the hands of the large cable and satellite distributors that use their outsized leverage and Most Favored Nation contract clauses to the disadvantage of independents. Independent networks are paid far lower license fees compared to comparably-rated channels affiliated with distribution and programming conglomerates, and are often provided poorer menu placement and packaging. As a result, only half the number of independents exist today, as compared to a little over a decade ago.

Making the situation even more challenging for independents—change is rapidly occurring in this video market with many Over the Top or "OTT" platforms meeting the demand for video streaming that is coming from the "cord-cutters" or "cord-nevers" seeking all of their content through streaming.

These OTT platforms come in different shapes and sizes, and each has a different model and different approach to contracting. But MFN restrictions limit the flexibility of independents to negotiate contracts with OTTs.

Question 3. Isn't time to revisit the kinds of protections for independents proposed in the FCC's September 2016 Notice of Proposed Rule Making that would have banned unconditional MFNs and OTT restrictions?

Answer. Today's video programming marketplace is intensely competitive, offering consumers an enormous array of diverse programming—on MVPD systems and online—from a large number of content owners, the vast majority of which are unaffiliated with any MVPD. By any measure, the goal of ensuring a robustly competitive video programming marketplace in which diverse independent programmers can make their content available to viewers has been achieved. In such a competitive marketplace, regulatory intervention for the purpose of promoting particular programming based on ownership or content, such as that proposed in 2016, is not only unnecessary, but is also likely to distort rather than promote the competition that Congress and the Commission favor, and in any event would raise serious First Amendment problems.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JACKY ROSEN TO HON. MICHAEL K. POWELL

Broadband Needed for Streaming. Access to today's television programming and video content more often than not also means access to broadband. In my home state of Nevada, my constituents living in cities such as Las Vegas and Reno have access to high-speed broadband, giving them access to everything from social media to television shows to binge-watching. In fact, not only do they have access to fast fixed service, but Las Vegas also will be one of the first cities in the Nation to receive 5G mobile service next year. But for rural Nevadans, such as those living in Nye, Elko, and White Pine counties, high speed broadband isn't an option. And I don't have to remind this committee the importance of broadband for running small businesses, modernizing agriculture, expanding access to telemedicine, and teaching our children, in addition to providing entertainment.

Residents of Elko and Ely should have the same access to affordable broadband as those in Las Vegas and Reno. They should be able to enjoy the entertainment options available to Members of Congress here in Washington DC.

Question. Mr. Powell, as more and more people are cutting the cord and moving from cable and satellite services to non-traditional "over the top services", how are your members ensuring that their customers are getting access to the high-speed broadband necessary to enjoy streaming services?

Answer. NCTA's members are expanding the reach of their networks, including through the use of innovative technologies, to bring the benefits of broadband as rapidly as possible to all Americans, including those in rural America. Today, thanks to cable's continued investment, 93 percent of the country has access to high-speed cable broadband. Median cable broadband speeds are at 100 Mbps, and speeds in many areas, including rural areas, reach 1 Gig. Comcast last fall announced that it offers gigabit broadband to nearly all of the company's 58 million homes and businesses passed in 39 states and the District of Columbia, achieving this goal by increasing speeds 17 times in 17 years and doubling the capacity of its broadband network every 18–24 months. Cox has been rapidly rolling out its "Gigablast" service throughout its service area, and Charter has rolled out its "Spectrum Internet Gig" service. To power these massive broadband deployments, the cable industry has increased its investment in capital infrastructure significantly—from $206.6 billion in 2012 to $290 billion in 2018.

Ensuring that rural communities have access to high-quality broadband is a priority for the cable industry. For example, in 2017, NCTA member MidCo, a provider of Internet and cable service to rural communities, launched the MidCo Gig Initiative—a commitment to extend gigabit speeds—which are already available to more than 90 percent of its customers—to its entire, mainly rural, service area. It does so using an innovative fixed wireless approach to extend its network beyond the reach of its hard-wired fiber networks. This process is one example of how cable ISPs are exploring innovative approaches to extend broadband in rural areas, powering innovations from rural telehealth to precision agriculture.

Response to Written Question Submitted by Hon. Roger Wicker to Hon. Gordon H. Smith

Question. To ensure Americans in so-called "orphan counties" are able to receive relevant broadcast signals (*i.e.,* in-state, but out-of-market broadcast programming), broadcasters are free to provide retransmission consent without compensation, are they not? Moreover, broadcast stations could waive their network non-duplication and syndicated exclusivity rights in those limited circumstances, couldn't they?

Answer. As a matter of law, local broadcasters are able to offer retransmission consent without compensation, and in certain cases they choose to do so. However, the production of locally-focused news, investigative journalism, weather, sports and entertainment content is costly, and the loss of retransmission consent revenues would undermine local stations' ability to offer a high quality product. Further, the pay-TV industry's suggestions that broadcasters ought to waive their retransmission consent right in any circumstance devalues this local content.

Network non-duplication and syndicated exclusivity rights are the backbone of a legal regime that has enabled this country's locally-focused broadcast industry to flourish. As a result, last year, 95 out of the 100 most watched shows were on broadcast television, and that high quality entertainment and sports programming is coupled with locally-focused content in 210 distinct media markets. The law does allow cable and satellite operators the right to negotiate for out-of-market broadcast stations, most notably where the Federal Communications Commission (FCC) approves a market modification or when the out of market broadcast station is considered a "significantly viewed" station.

Response to Written Question Submitted by Hon. Rick Scott to Hon. Gordon H. Smith

Question. Rural Americans rely on local broadcasting for critical information and news about their local communities and emergency information. Major satellite television providers are carrying television stations from outside these rural areas rather than local stations themselves.

Senator Smith, as I witnessed firsthand as Governor, local broadcast stations play a critical role across the state of Florida when it comes to keeping our communities safe and informed, particularly during hurricane season. Could you explain how STELAR can impact viewer's ability to receive local emergency broadcasting during a natural disaster?

Answer. STELAR allows satellite operators to import the distant signal of a New York City or Los Angeles broadcast television station to subscribers in markets like Bowling Green, Kentucky and Glendive, Montana. Subscribers in these markets will still receive national network content, but instead of receiving the local news and emergency weather coverage you reference, they see traffic updates on the Holland Tunnel or a car chase on the I–5.

At the law's outset, the technology simply did not exist for the nascent satellite industry to provide viewers their local broadcast stations. Fortunately, that is no longer the case and there is no technological justification for the multi-billion dollar satellite industry to avail themselves of this congressional subsidy instead of investing in the local carriage that will better serve their viewers.

STELAR is an outdated law whose main function now is to deprive local viewers in small, rural markets from receiving what is in some cases life-saving emergency and weather alerts, among a host of other valuable information and services that local broadcast stations offer their communities. For the benefit of viewer safety during a natural disaster or other emergency situation, Congress should allow STELAR to sunset at the end of this year as scheduled.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. GORDON H. SMITH

Question 1. I am an unyielding supporter of local broadcasters, and have a lot of respect for so many of your members in New Mexico. However, your organization has been active seeking relief from the FCC from certain important public interest obligations. And it is hard to see how the public benefits.

For example, NAB advocated that the "Main Studio Rule" be repealed—thereby setting up a situation that a broadcast channel's organization no longer needs to be located in the community they serve. How will your members meet their public interest obligations with the significant amount of "relief" that the FCC has granted them in the last two years? What guarantees can you provide?

Answer. The "Main Studio Rule" was put in place over 80 years ago to facilitate both input from the community and station participation in community activities through physical access to the local studio. Today, however, widespread use of electronic communications enables efficient interaction between stations and their local communities of license without the need for the physical presence of a physical studio. Anyone with an Internet connection can access a broadcaster's online public file and individuals can now communicate directly with a station through their website, e-mail and over the telephone, among other means. The elimination of the main studio rule allows cost savings and other efficiencies that stations can instead invest in local news staff, local content and high quality programming necessary to compete in a dynamic video marketplace.

Question 2. As we discussed, retransmission fees are replacing a significant portion of advertising revenue, but I am concerned with these fees leaving our local stations and instead they are being sent to the networks. Is it possible for these fees to be more transparent? Would your organization support a mandate that a significant portion of any retransmission fee stay with the local broadcaster?

Answer. The relationship between affiliate broadcast stations and their network partners is the bedrock of U.S. broadcast television and the envy of other countries. It is an effective and efficient delivery system for both national and local programming that hundreds of millions of Americans rely on for local news, weather, sports and entertainment programming. Like franchise agreements in other industries, the symbiotic relationship between national and local broadcast partners has led to a thriving local broadcast industry which continues to serve and inform viewers, even at a time when the pay-TV marketplace is undergoing massive change. NAB does not support any regulations which would encumber this relationship or, even inadvertently, undermine the high quality programming that is available for free on broadcast television.

Independent Television Issues/Most Favored Nation Negotiations. I have been hearing for a number of years about the challenges that independent TV programming networks face in the video market. In particular, there is concern over their treatment at the hands of the large cable and satellite distributors that use their outsized leverage and Most Favored Nation contract clauses to the disadvantage of independents. Independent networks are paid far lower license fees compared to comparably-rated channels affiliated with distribution and programming conglomerates, and are often provided poorer menu placement and packaging. As a result, only half the number of independents exist today, as compared to a little over a decade ago.

Making the situation even more challenging for independents—change is rapidly occurring in this video market with many Over the Top or "OTT" platforms meeting the demand for video streaming that is coming from the "cord-cutters" or "cord-nevers" seeking all of their content through streaming.

These OTT platforms come in different shapes and sizes, and each has a different model and different approach to contracting. But MFN restrictions limit the flexibility of independents to negotiate contracts with OTTs.

Question 3. Isn't time to revisit the kinds of protections for independents proposed in the FCC's September 2016 Notice of Proposed Rule Making that would have banned unconditional MFNs and OTT restrictions?

Answer. Although we continue to believe that the system of market-based negotiations for retransmission consent generally works, broadcasters face significant challenges negotiating agreements with outsized MVPDs. While local broadcast stations are always available for free, over the air, they have every incentive to be on as many platforms as possible to reach their audience, whenever and wherever the viewer is watching. NAB previously urged the FCC to include broadcasters among the independent programmers that qualify for protections from unconditional MFNs (should the FCC adopt them). Additionally, NAB believes that the ability of MVPDs to extract such contract terms ought to provide a stark reminder to the Congress of the negotiating leverage that these same MVPDs wield in retransmission consent negotiations with local broadcasters.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JACKY ROSEN TO HON. GORDON H. SMITH

Broadband Needed for Streaming. Access to today's television programming and video content more often than not also means access to broadband. In my home state of Nevada, my constituents living in cities such as Las Vegas and Reno have access to high-speed broadband, giving them access to everything from social media to television shows to binge-watching . In fact, not only do they have access to fast fixed service, but Las Vegas also will be one of the first cities in the Nation to receive 5G mobile service next year. But for rural Nevadans, such as those living in Nye, Elko, and White Pine counties, high speed broadband isn't an option. And I don't have to remind this committee the importance of broadband for running small businesses, modernizing agriculture, expanding access to telemedicine, and teaching our children, in addition to providing entertainment.

Residents of Elko and Ely should have the same access to affordable broadband as those in Las Vegas and Reno. They should be able to enjoy the entertainment options available to Members of Congress here in Washington DC.

Question. Senator Smith, please discuss the importance of local broadcasts in rural areas that lack significant access to broadband? What does it mean for people living in remote areas with either limited or no access to broadband to be able to get access to over the air broadcasts for their local news?

Answer. Over-the-air broadcast signals are available to anyone with a television and an antenna, for free. Our viewers turn to local stations to get the weather report, learn how to help neighbors in need, and watch trusted local news anchors deliver an unbiased report of what is happening in their hometowns. Local broadcasting is the critical electronic thread that keeps every community together, informed and safe. As your question suggests, this uniquely local broadcast programming is an especially important lifeline in rural communities that lack access to high speed broadband.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO CRAIG AARON

Question. Most consumers must choose between an incumbent cable provider and two large satellite distributors. That's one of the reasons why I joined the Save the Internet Act—which passed the House in April—to restore net neutrality rules to ensure protections for small businesses and innovation. In your testimony, you stated that recent data highlights the need to ensure that video consumers and online video distributors have equal access to high-quality, nondiscriminatory broadband services. How will the repeal of net neutrality protections impact consumers looking to purchase video services?

Answer. Thank you for the question, Senator Klobuchar, and thank you for supporting the Save the Internet Act. That essential bill would reverse the current FCC's wrongheaded decision to repeal all of the agency's Net Neutrality rules and, in the process, to abandon the statutory mandate Congress gave the FCC to prevent unjust, unreasonable and unreasonably discriminatory behavior by broadband Internet access service providers. The repeal of Net Neutrality protections, if not remedied by Congress or by the U.S. Court of Appeals (where Free Press and others have sued the FCC) will continue to have dire impacts on people looking to purchase online video services as well as the creators and distributors of such video services.

In our comments submitted to the FCC prior to its repeal decision issued in December 2017, Free Press explained that the Net Neutrality framework then in place had been good for business—both for broadband providers and over-the-top video providers alike. Despite the mistaken and misleading suggestions put forward by cable lobbyists and embraced by the current FCC majority, the 2015 Net Neutrality rules and Title II legal framework on which they stood did not deter broadband investment and deployment. Instead, coverage and speeds in urban and rural areas alike improved with those rules in place. Broadband investment and deployment decisions are driven by demand, competition and other fiscal realities (such as tax law, depreciation allowances, and interest rates) far more than they are by FCC rules and policies such as Net Neutrality.

In other words, the restoration of longstanding telecommunications nondiscrimination safeguards did *not* change broadband providers' business models or bottom lines. In fact, as prior FCC administrations have suggested, and as Free Press has documented in a wide range of agency proceedings over the years, the so-called "virtuous cycle" of increased usage of the open Internet actually promotes broadband deployment and capacity upgrades, which in turn open up more opportunities for new applications and usage of that capacity. Preserving the open internet—and prohibiting harmful behavior like blocking, throttling or otherwise deprioritizing Internet traffic from certain sources—actually incentivizes broadband providers to meet the demand for video and other bandwidth-intensive uses of their network, rather than choking off the flow of information and attempting to profit from the resulting artificial scarcity.

As we demonstrated in our 2017 filings at the FCC, there were more new "over-the-top" video services launched in the United States in the two years after the FCC's issuance of its landmark 2015 *Open Internet Order* to protect Net Neutrality than had launched in the seven years prior. While we would not attempt to attribute all of that growth to the restoration of Net Neutrality rules on solid legal footing in 2015, it was no accident. The Obama-era FCC's decision to put Net Neutrality rules in place, and its choice to ground them on Title II authority that the U.S. Court of Appeals for the D.C. Circuit then upheld in all respects in mid-2016, gave certainty to online video providers that their offerings could not be shut down or displaced by large broadband providers in favor of video content produced by legacy phone, cable and satellite TV companies.

What we have seen since the 2017 Net Neutrality repeal, however, is reason for concern for the entire competitive video marketplace—and especially for the people watching online video. Broadband providers have not yet taken full advantage of the repeal and the resulting regulatory vacuum to block rival sites as Comcast once did, or to charge extra fees for prioritized delivery of content as AT&T and Verizon have indicated they might. But they have continued to chip away at the open nature of the Internet and the competitive video market that depends on it. For example, AT&T decided to eliminate data caps and overage fees for its wired broadband customers—but only when those customers also paid for the broadband provider's own DIRECTV video products. Researchers have also suggested that wireless Internet providers may be throttling different video sites like YouTube and Netflix, perhaps providing different treatment to the sites with which they have contractual relationships and promotional deals.

Broadband customers pay handsomely for their Internet connections, and they should be able to use them however they choose. They should have access to the video (or other online content) of their choosing, without undue interference, penalties or additional fees imposed by incumbent pay-TV providers who also happen to be the Nation's largest wired and wireless Internet providers. Under the Communications Act as properly read, Internet users do indeed have the legal right to make such use of their Internet connections free from unreasonable discrimination by their broadband providers. But without Net Neutrality rules in place, and without passing the Save the Internet Act, broadband providers will have every reason and every opportunity to interfere with Internet customers' rights in ways that disadvantage online video alternatives and favor the incumbents' pay-TV businesses and their affiliated video services.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO CRAIG AARON

Question 1. Mr. Aaron—your testimony highlights significant problems that consolidation in the television and video marketplace has created. Do you agree with those on the panel who believe that this consolidation has helped local broadcasters increase their coverage of local issues? And, if not, could you explain?

Answer. Thank you for the questions, Senator Udall. In a word, no. Free Press does not agree with anyone espousing the view that consolidation increases or improves local news coverage.

The FCC has an obligation to study the impact of any changes it makes to its local ownership rules in the quadrennial review that the agency must conduct pursuant to Section 202(h) of the Telecommunications Act of 1996. Yet the FCC has repeatedly fallen down on the job and failed to adequately account for broadcast ownership, let alone study the impact of changes in its rules that have spurred greater consolidation. That inability to measure its progress is why the FCC has lost so many times in court challenges to its quadrennial reviews. Yet the agency has plowed ahead nonetheless, continuing to relax its rules and allow more consolidation on the basis of unsubstantiated claims that more concentration creates more local news.

As research by Free Press and others over the past decade-plus demonstrates, allowing more common ownership of broadcast stations and other local news outlets in a media market may at times lead to an increase in the sheer number of hours of news aired. But that increase can be attributable to nothing more than *repeat* airings of the same newscast across multiple timeslots—and even across multiple channels that "share" the same newsrooms and journalists in a market where one licensee controls several stations.

What's more, an increase in news output by the dominant local conglomerate may lead to a net *decrease* in the amount of news available market-wide, as stations not under common control cut back and invest less in news coverage when forced to compete against outsized companies controlling multiple stations. And there is no guarantee that a consolidated owner with more stations and more assets at its fingertips actually will invest more in local news or in any aspect of its stations. Hedge funds and venture capitalists often treat the stations and news outlets they acquire as assets to be squeezed for profits and stripped for parts. They fire journalists, shutter newsrooms, and flip the properties to new owners or simply shut them down.

Lastly, it must be said that a sheer increase in the quantity of local news coverage—even if it were real, and not simply repeats and carbon-copy newscasts across stations—is not the only metric the FCC should value. The agency's longstanding public interest standard for broadcast regulations historically emphasizes localism, competition and diversity of viewpoint and ownership as the goals of its local media ownership rules. Allowing more concentration in local markets and nationwide serves none of those goals.

A broadcast conglomerate like Sinclair, which pushes the envelope and skirts the FCC's rules so often that it is currently under investigation for lying to the agency in its failed bid to acquire Tribune, overrides local editorial control constantly. It forces all of its stations around the country to air "must-run" screeds in place of local news truly responsive to and generated in the community. This kind of force-fed, cookie-cutter content makes a mockery of localism, with the FCC ignoring the fact that content is not truly local (merely because it airs on a broadcast station) when it has been produced for nationwide distribution. And consolidation obviously and inexorably diminishes competition, diversity of ownership, and diversity of viewpoint, when instead of multiple journalists competing for stories and providing diverse takes on them we see a single entity programming multiple stations and dictating the editorial decisions of multiple newsrooms.

Question 2. Mr. Aaron—do you believe the FCC is currently effectively holding broadcasters accountable to its public interest standards during the license renewal process?

Answer. No, Senator Udall, the FCC is not effectively holding broadcasters accountable to its public-interest standard during the license renewal process, largely because it has abdicated its responsibility to even assess local broadcasters' success in meeting that standard. As I noted in response to your first question, the FCC has always said its broadcast-licensing decisions, ownership limits, and license transfer reviews are predicated on promoting localism, competition and diversity in broadcasting. But in reality, the license renewal process for the past several decades has been little more than a rubber-stamp approval for any and all incumbent broadcasters other than those who've committed a felony or demonstrated some other such demonstrable shortcoming in their putative fitness to hold a license.

An excellent case in point on the FCC's unwillingness to hold licensees accountable—not just for failing to serve the public interest but even to follow the Communications Act and the agency's own rules—is WWOR, a station licensed to serve Northern New Jersey that focuses almost entirely on New York. WWOR's license renewal was challenged by a broad coalition of local and national media accountability advocates when the initial waivers allowing Rupert Murdoch to control multiple television stations and own newspapers in the New York City market were set to expire. The FCC refused to grant the station a permanent waiver, but effectively granted just that by allowing this violation of its local ownership rules to persist until the current leadership of the agency had obliterated those same ownership rules. To add not just insult but further injury, WWOR sold off its New Jersey studio and offices, taking advantage of the FCC's lax attitude in general and its specific decision to eliminate the "Main Studio Rule" that required broadcasters to maintain a physical presence in the community they are licensed to serve.

In its now essentially automatic license-renewal proceedings, as well as other policy positions it has taken, the present FCC has followed the unfortunate lead of its predecessors—under presidents from both parties, it must be said—allowing broadcasters to consolidate more and serve their local communities less and less each year. The agency has refused to even study whether stations are meeting the information needs of local communities, assuming away the problem by simply closing its eyes to the reality that many stations clearly do not do so.

Question 3. Do you think the so-called reverse retransmission regime should be capped, or at the very least there should be more transparency into the fees that are ultimately being paid by consumers?

Answer. Yes, we certainly believe there should be more transparency on the fees that are ultimately foisted on pay-TV customers. But whether or not Congress or the FCC can demand more information about the contract structure and dollar figures set in affiliation agreements, it is cable and satellite TV customers who truly need more information about the prices they pay—and beyond information alone, more power to choose whether or not to pay them.

For one thing, as discussed in our written testimony for this hearing, Free Press Action supports the TRUE FEES Act that you have co-sponsored, Senator Udall, because it would help pay-TV customers to know more about the actual, bottom-line price they pay for service. At present, those customers too often face the unwelcome surprise of additional "below-the-line" fees for broadcast television stations that the provider carries, along with other such hidden fees that should instead be disclosed up front and factored into the prices the pay-TV provider advertises.

As we also discussed in our written testimony, the "reverse" retransmission consent payments that local stations collect and then ship back to their affiliated networks contribute greatly to the ballooning size of retransmission payments overall. This phenomenon takes money paid to local broadcasters, under a regulatory regime supposedly designed to keep local content on the air, and sends it back to networks for the decidedly non-local content they broadcast nationwide. That is one of many reasons that retransmission fees keep going up, and that broadcasters also don't have as much funding to invest locally for meeting the public's information needs with more community-oriented and responsive content.

Free Press Action has not taken a position on whether congressional or other regulatory action is necessary to cap "reverse" retransmission fees, but we do believe firmly that viewers should have a choice about whether to pay such fees when the pay their monthly subscription. One great way to provide market discipline for runaway carriage fees in general would be to give customers an opportunity to opt out. New legislation mandating "a la carte" programming options, so that viewers can purchase the channels they want from their pay-TV provider and not be forced to buy the ones they don't want in a bundle, would be a tremendous step forward in terms of increasing the choices available to people while reducing the stress on their pocketbooks. But short of having a la carte options guaranteed to them, people should at least be able to see precisely what they pay for every broadcast channel, regional sports network, and other cable channel in their subscription packages.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO DAVID KENNY

Question 1. Does Nielsen, Inc. or one of its subsidiaries receive data from unaffiliated companies? If yes, please list the companies from which Nielsen receives information as well as the types of information it receives, including, but not limited to, data concerning the content Americans are consuming on their televisions and online.

Answer. Nielsen's proprietary panels remain at the core of Nielsen's media measurement business, rather than third party datasets. Contractual agreements prevent us from listing our clients and strategic partners, but in the media space we do receive data from satellite and cable providers regarding TV viewership, demographic partners regarding online consumption, and behavioral and purchase data. Generally, such information does not contain directly identifiable information, but it does on occasion include information that may be classified as identifiable, such as unique device identifiers. On our Connect side of the business, we receive aggregated data from retailers to help us determine market share for companies that sell packaged goods in the marketplace.

Question 2. Please explain if and how Nielsen or its partners obtains clear notice and informed opt-in or opt-out consent to obtain the information described in question one.

Answer. Nielsen has direct relationships with panelists who are specifically recruited to participate in television or marketplace measurement and explicitly agree to provide us information about their activities. In circumstances where Nielsen does not interact directly with the individuals/data subjects, we require that third parties who share data with us or who facilitate our receipt of data to contractually agree to provide notice to data subjects about the collection, use and disclosure of their data for Nielsen's purposes, as well as choices concerning the collection of data (e.g, opt-out options). We also maintain our own publicly available privacy statements, which include opt out mechanisms.

Question 3. Nielsen and its subsidiaries generate and aggregate considerable amounts of data. Does Nielsen or any subsidiary license, sell, or transfer any data to other companies? Please specify the exact data, the users affected, and to whom it is transferred.

Answer. Nielsen's Media business focuses on measuring how content and ads drive audience viewership and outcomes. We provide reporting (which is generally aggregated) that constitutes data and information to our clients, including broadcasters, publishers, advertisers and agencies, regarding the reach and effectiveness of their advertising, including related analysis. Nielsen's proprietary panels remain at the core of Nielsen's media measurement business, and Nielsen also uses third party datasets with appropriate contractual protections, as discussed in Question 2. Nielsen's data measurement platform facilitates the activation of datasets, allowing advertising and agencies to reach the right consumers, following appropriate data subject protections.

The Connect side of the business equips consumer packaged goods companies and retailers with trusted measurement data, tools and insights. The data includes categories, brands and specific product performance, assessing aggregated sales and marketing data along with purchasing by individual panelists, from whom Nielsen has received affirmative consent. The privacy-centric manner in which Nielsen collects its data leads to more precise predictions, stronger product development and, most importantly, deeper trust with customers.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JACKY ROSEN TO DAVID KENNY

Broadband Needed for Streaming. Access to today's television programming and video content more often than not also means access to broadband. In my home state of Nevada, my constituents living in cities such as Las Vegas and Reno have access to high-speed broadband, giving them access to everything from social media to television shows to binge-watching . In fact, not only do they have access to fast fixed service, but Las Vegas also will be one of the first cities in the Nation to receive 5G mobile service next year. But for rural Nevadans, such as those living in Nye, Elko, and White Pine counties, high speed broadband isn't an option. And I don't have to remind this committee the importance of broadband for running small businesses, modernizing agriculture, expanding access to telemedicine, and teaching our children, in addition to providing entertainment.

Residents of Elko and Ely should have the same access to affordable broadband as those in Las Vegas and Reno. They should be able to enjoy the entertainment options available to Members of Congress here in Washington DC.

Question. Mr. Kenny, what does Nielsen ratings data tell us about access to and use of streaming services in rural communities?

Answer. While Nielsen does not have exact streaming information on a county by county basis in rural areas, we do know urban areas have a higher penetration of homes with access to broadband versus rural areas. We feel it is quite safe to assume that with lower broadband penetration there is less usage of specific applications that require more bandwidth, such as streaming.