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In the Matter of

STELA Reauthorization and Video Programming Reform

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Responses to Questions

In what follows we offer answers to most, but not all, of the Committee's questions. For ease of reading we have replaced the unanswered questions with asterisks. We have also attached as an appendix Geoffrey Manne's written testimony submitted to the House of Representatives' Energy and Commerce Committee on "The Satellite Television Law: Repeal, Reauthorize, or Revise?" from June 12, 2013.

STELA-Specific Issues

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

STELA (and its predecessors) as well as the Cable Act were written to promote competition and to protect consumers in nascent markets. But since their enactment the market has fundamentally changed, becoming quite competitive. Rather than continuing to try to tweak the laws of a bygone era, Congress should abandon these disparately applied, technology-specific regulations and embrace the default tool for dealing with market power across the economy: antitrust law. Antitrust is the best tool for policing market power in evolving (if not perfectly competitive) markets, to ensure that distributors with market power do not use their power to harm consumers, while recognizing the benefits that come from experimentation in new technologies and business models for delivering video content to consumers.

Particularly to the extent that STELA and the Cable Act impose regulations on satellite providers that differ from those governing cable providers – again, a relic of a very different competitive climate – the disparity is no longer defensible. But rather than impose cable's rules on satellite providers, Congress should simply remove both STELA and the Cable Act's outdated limitations. Cable providers in today's marketplace face significant competitive pressures not only from satellite carriers, but also from telcos (like AT&T and Verizon) and new entrants like Google Fiber and Sonic.Net, which similarly provide broadband and MVPD services. Satellite providers are well-established market participants in a competitive market and no longer need any "leg-up" to ensure their survival. The FCC's own data bear this out: According to the agency's latest Video Competition Report, cable operators' share of the

MVPD market continued fall, reaching 55.7% by June 2012, while satellite's share rose to 33.6%, and telcos (AT&T's U-verse and Verizon's FiOS) reached 8.4%.[4]

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

The "good faith" negotiation requirement is defined nowhere in the Act. This creates vast discretion that affords the FCC license to intervene in almost any negotiation where it can meet the low bar of *Chevron* deference to justify doing so. This, in turn, presents a significant risk of over-enforcement by the agency. Given the competitive marketplace and the reality of repeated and frequent interactions between commercially sophisticated players, there is little need for, and potentially great cost from, such a provision.

Nor does the existence of occasional blackouts suggest anything different. Broadcasters and MVPDs both have strong incentives to reach agreement. While the compulsory license/retransmission consent scheme complicates things, it is not the regime itself that gives rise to occasional blackouts, but rather the realities of complicated contract negotiations. As we suggest below, there are reasons to liberalize this regime broadly. But regardless, there is no independent justification for maintaining a good-faith negotiation requirement.

As we discuss in more detail below, the simplest, and best, way to solve the problem is to abolish compulsory license/retransmission consent regulation entirely. The problem with piecemeal reform around the edges of the compulsory license/retransmission consent regime is that Congress risks either being too specific, and thus more tightly regulating negotiations than the FCC itself might, or not specific enough, thus simply creating another statutory ambiguity that the FCC will be free to interpret, through *Chevron* deference, essentially as it sees fit.

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[4] Fed. Commc'ns Comm'n, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report* at 4(Jul. 22, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf ("15th Video Competition Report").

General Video Policy Issues

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

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

The compulsory licensing scheme on which retransmission consent is built is more accurately seen as a derogation of content owners' existing copyrights than as the establishment of a new, efficient property right held by broadcasters. Absent compelling efficiency justification there is no reason to preserve that statutory right, and every reason to restore video content owners' copyrights to their full measure.

Retransmission consent is just one part of the larger puzzle, which includes compulsory licensing, must-carry mandates, and basic tier requirements. As long as networks have highly desired content, distributors will be willing to pay them for it. Retransmission consent is simply not necessary for content creators to be compensated, nor is it necessary to ensure the availability of the programming consumers demand. Insofar as the additional requirements of the current regime needlessly interfere with straightforward negotiations among sophisticated commercial entities, they should be reformed.

Consumers would benefit most from a simple regime of basic copyright protection, unencumbered by special exemptions and the cumbersome regulatory structure to enforce them. This may sound counterintuitive, but without the proper incentives for creators to produce content, consumers will have much less quality programming available to them. And simpler, better-defined and more straightforward underlying property rights make negotiations and licensing cheaper and *less* – not more – likely. Meanwhile, abuses of market power, if any, can be handled by antitrust law rather than by the regulatory labyrinth currently governing the video marketplace.

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

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

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

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

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

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

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

The provisions underlying all of these proposed reforms are needless, often counter-productive interferences with market negotiations between content creators, MVPDs and broadcasters and should be repealed. Whatever the merits of any one of these proposals, collectively, they amount to little more than rearranging the deck chairs. We must stress again: This is a competitive, well-functioning market with experienced, sophisticated players. Whatever justifications may have once existed to adopt regulations to facilitate entry, protect broadcasters, or otherwise intervene in order to improve the markets' competitive conditions, these justifications no longer exist. Maintaining these provisions simply encourages endless and costly rent seeking around the margins of a needlessly Byzantine regulatory apparatus – to the detriment of consumers.

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

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

The establishment of the must-carry regime for cable providers in the 1992 Cable Act (as well as the "carry one, carry all" variant extended to satellite providers) effects a further derogation of property rights and is similarly an unwarranted intervention into market transactions. While bad enough on their own, the disparate treatment of cable and satellite operators with respect to these provisions is, in today's marketplace, completely indefensible.

The forced carriage of additional, less-favored local channels results in a "tax on capacity," and at the margins causes a reduction in quality (*e.g.*, a shift from CSPAN to home shopping channels).[5]

The must-carry rules remove from distributors the right *not* to carry local broadcast channels. As a result, carriage negotiations with local broadcasters are lopsided. Content for which the broadcaster values retransmission more than the cable provider does (who is, of course, nevertheless the one with a financial interest in and knowledge about its subscribers) will be retransmitted, and cable MPVDs cannot demand compensation in return. Consumers will be saddled with basic tier programming of lower quality than they would prefer, and perhaps even see price increases for content they do prefer as cable providers move more programming to higher tiers. In the end, must-carry rules effectively transfer significant programming decisions from cable providers to broadcast stations, to the detriment of consumers.

The harmful effects of the must-carry provisions are exacerbated by the "basic-tier" and "must-buy" provisions of the Act. The basic-tier provision requires cable operators (but not satellite operators) to maintain a rate-regulated, basic tier of service on which local broadcasters are entitled to carriage and which subscribers are entitled to purchase without being required to purchase other content. Must buy prohibits cable operators (but, again, not satellite operators) from selling subscriptions for higher content tiers unless subscribers have first purchased the basic tier – which effectively means that consumers *must* pay for broadcast content, and the associated retransmission fees, in order to buy *any* other cable content, whether they want the basic content or not. At a time when many are complaining about escalating MVPD prices, this sort of tax on video content simply makes no sense.

These provisions serve to further constrain channel capacity and remove programming decisions from cable operators' control. Particularly in a market where competition has increasingly come from OVD providers offering unbundled access to premium-only content without any basic carriage or subscription requirements, these provisions reduce cable's competitiveness. That the rules apply to cable systems but not satellite systems further impairs cable providers' ability to compete, and does so without any reasonable justification.

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[5] Thomas W. Hazlett, *Digitizing "Must-Carry" Under* Turner Broadcasting v. FCC (1997), 8 SUP. CT. ECON. REV. 141 (2000).

Although these rules may have inadvertently helped to fuel the creation of, and demand for, all-you-can-eat and *a la carte* OVD services, the ever-increasing incidence of cord-cutting by would-be and former cable subscribers suggests these provisions increasingly do not reflect consumer preferences.

That cable MVPDs are obligated to carry even those must-carry channels that opt in to the retransmission consent regime on the basic tier adds further insult to injury. The retransmission consent regime is consistently defended as a free-market solution to the perceived problem of cable system market power vis-à-vis broadcasters. And it is true that the regime moves the system slightly in the direction of voluntary negotiation by requiring channels that opt into the regime to give up mandatory distribution and reach a negotiated agreement to secure carriage.

But the system is far from "free." In the first place, must-carry sets a floor on the negotiated price, and it ensures that that payment never flows from broadcasters to cable providers for carriage, even though for some content this is surely the efficient transaction. Even more troubling, retransmission consent channels retain the right to carriage on the basic tier, as if they were must-carry channels. Thus, having opted in to a "voluntary" regime that enables them to secure payment for carriage, the regulations nevertheless preclude cable operators from negotiating over one of the most fundamental and valuable terms of a carriage agreement: tier placement.

As we have noted, the underlying justification for such rules simply does not exist anymore. Cable operators do not enjoy any market power that would justify the imposition of such rules. The D.C. Circuit reached this conclusion as long ago as 2009, when it struck down the Cable Act's cap on the percentage of cable subscribers a single cable operator could reach: "Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992."[6] And Judge Kavanaugh reiterated this position in his concurrence to the D.C. Circuit's recent decision in the *Tennis Channel* case: "In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market."[7]

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[6] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

[7] *Comcast Cable Commc'ns, LLC v. FCC*, No. 12-1337, 2013 WL 2302737, at *11 (May 28, 2013) (Kavanaugh, J., concurring).

It is worthwhile to elaborate on the extent to which these provisions – along with the underlying retransmission consent regime generally – unjustifiably interfere with free contracts and impair consumer welfare.

Congress should repeal the mandates for basic service tiers. While even in an unfettered market networks may choose to structure their contracts with affiliated broadcasters to give them exclusive territories and the right to negotiate over retransmission of licensed content, there is no longer any basis for the government to prohibit direct licensing of copyrighted national broadcasts by the networks themselves through the compulsory license/retransmission consent regime. Instead, the current regulatory scheme largely removes any pretense of market involvement from the process of distributors acquiring access to broadcast content. In doing so, today's byzantine regulations manage to put just about every party involved (with the possible exception of certain broadcasters) in a worse position than they would be in if the regulations didn't exist at all. These rules interfere needlessly with the full range of relationships in the process of creating and distributing video content to consumers:

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The Subscriber-MVPD Relationship

The relationship between subscribers and MVPDs is directly disrupted by must-carry, buy-through and basic tier provisions, in ways that disadvantage both parties. Cable providers are required to carry all local broadcast stations on their basic tier of service, and customers are required to purchase this basic tier before they can purchase any additional service tiers. That means cable customers can't purchase just the higher tiers of service alone, which contain channels like HBO and the NFL Network. Whether they want it or not, they have to purchase the basic tier with all of the local broadcast content first and add on additional tiers of service from there. Without these rules, cable customers and cable providers would have considerably more freedom in selecting which channels they actually want as part of their cable package. If subscribers don't value the channels on the basic tier (particularly the broadcast channels that cable companies are forced to provide), they could just bypass it and go right for the higher tiers of service. Although arguably required for the effective operation of the compulsory license and must-carry/ retransmission consent regime, these rules enforce the unnecessary regime only by imposing significant harm on consumers.

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The MVPD/Content Owner Relationship

By operation of compulsory licenses, must-carry and retransmission consent, MVPDs essentially have no direct relationship with broadcast network copyright holders. Compulsory licenses allow MVPDs to gain the public performance right to broadcast content by paying a statutory fee to the government for subsequent redistribution to copyright holders and prohibit direct negotiation over licensing terms by the parties.

The regime passes on the negotiation for rights to the broadcasters, and gives them the right to control what happens to their transmissions of content actually owned by the network. And non-duplication and syndicated exclusivity provisions prohibit networks from even assigning the right to control distribution negotiations to any particular affiliate by precluding negotiations between MVPDs and distant broadcasters over the retransmission rights to national programming.

Without these rules, MVPDs could go directly to the networks (or at least other broadcast affiliates) for access to the right to offer copyrighted content. MVPDs could then carry only the content that their customers want, at market-determined prices, and networks would, appropriately, retain the rights to receive payment for their content and to determine which providers could distribute their content and on what terms.

The MVPD/Broadcaster Relationship

Must-carry offers local broadcasters a spot in cable lineups in situations where cable companies might otherwise not carry those channels. It requires cable companies to set aside channels specifically for local broadcasters, and, if a broadcaster opts for must-carry, the cable company must retransmit its broadcast on one of the set-aside channels. Must-carry is most often used by smaller broadcasters whose channels are not in high demand by cable subscribers, and thus would likely not be carried if the cable company had meaningful programming discretion over local content. For DBS providers, must-carry works slightly differently. There is no obligation to carry local broadcasts, but if a DBS provider chooses to carry *one* local broadcast station's signal it must carry *all* local broadcast signals.

While these obligations may sound sensible, they are unneeded in today's market – and certainly there is no justification for different rules to apply to cable and satellite providers. In the absence of the carriage and copyright rules, to the extent that demand for locally created content is sufficient to support local broadcast programming, MVPDs would have appropriate incentives to carry such content. To the extent that it is not (particularly when the local content is often available online), mandated access for local broadcasts does not serve consumer interests. Meanwhile, the rules that grant special privileges to local broadcasts of *national* programming inappropriately constrain market negotiations over this content in order to preserve guaranteed carriage of *local* content. But this is a costly means of encouraging carriage of local content, and the rules unnecessarily burden MVPDs and harm consumers by taking up valuable channel space in MVPDs' lineups and constraining their bargaining power.

The Network/Broadcast Affiliate Relationship

Affiliated broadcasters fear irrelevance if the compulsory license and must-carry/ retransmission regime were scrapped altogether. But, as noted, this scheme artificially constrains the range of contract options between networks and affiliates, leaving essentially only the current, ham-fisted system for managing transfer payments between networks and affiliates. Retransmission consent fees have become an important means for networks to prop up affiliate broadcaster distribution of content only because the rules require it, not because it is the optimal system.

But if the networks truly value the local broadcasters as much as they claim, in a deregulated system they wouldn't let the broadcasters suffer serious financial harm. Instead, the networks and broadcasters would simply re-negotiate the contracts between one another to give the broadcasters a cut of the copyright proceeds. Or they might continue to assign their affiliates territorial, exclusive licenses, thereby enabling them to continue dealing directly with MVPDs, with payment from the affiliates traveling back up the chain. Or they might create some other form of contract.

There is nothing sacrosanct about the current system that finances local programming through both advertising and retransmission fees. In principle, any of a number of contractual arrangements between networks and their local broadcast affiliates to redistribute copyright license fees could support local programming.

The broadcasters have also claimed that eliminating the retransmission consent scheme would mean the end of local news coverage. But if MVPD customers want local news coverage, MVPDs will find a way to make it available to their customers, networks will facilitate it, and local broadcasters will receive copyright royalties for such locally created content. That may mean finding an outlet for their content online, either through OVDs or by offering it directly to consumers online—or perhaps in partnership with 4G broadcasters. The broadcasting model may in fact be born anew—if some of the spectrum currently used by broadcasters is instead made available to facilitate innovative wireless services, such as 4G LTE multicasting.

Eliminating retransmission consent and all of its components doesn't necessarily spell the end for broadcasters. It merely lets the networks and the public determine if there's truly a demand for their content, and it enables the market price for this demand to be determined unencumbered by the needless complexity of the retransmission consent regime.

Nevertheless, technological progress is bound to make certain older technologies unnecessary. If the modern video marketplace evolves (or has already evolved) to a point where traditional broadcasting is disfavored by consumers, it is difficult to sustain arguments that regulatory interventions to prop it up should nevertheless remain.

Regardless of whether broadcasting as a medium—as distinct from broadcasters as local programmers who could use MVPDs or the Internet to distribute their content—is necessary in today's video marketplace, broadcasters have adduced two additional legitimate concerns about eliminating the current legal regime. They are correct that it would lead to a period of uncertainty as MVPDs, broadcasters and networks attempt to navigate a new (de)regulatory landscape to determine the best way to do business with one another. And they are also correct that there are currently long-term contracts in place, negotiated under the old regulations, that would be interfered with if the regulations change. But these are short-term, static problems; they are not reasons in and of themselves to thwart a dynamic shift to what may be more-valuable, more-efficient business models. Precisely because of the long-term contracts, customers are unlikely to be dramatically affected by a regulatory transition, and likely won't lose access to content. Over time, these contracts can be modified to accommodate a new, simpler regulatory structure, possibly to the benefit of *all* parties involved, not just consumers. Even today affiliate contracts are regularly renegotiated anyway. And networks, MVPDs, and especially broadcasters will have to adjust to the realities of competitive changes arising from technological progress anyway (most immediately in the form of OVDs).

Much of this is contingent, of course, on the compulsory license, must-carry and their statutory brethren never being applied to OVDs at all. The debate over whether to eliminate retransmission consent for MVPDs has already been raging for years, and there seems to be an acknowledgement from all parties that it will eventually disappear. Applying this artificial method of acquiring access to network content makes little sense today for MVPDs, and applying it to OVDs could severely damage a growing industry that needs as few regulatory barriers as possible to thrive and compete with incumbent video providers. OVDs are already blazing their own path in acquiring rights to content, and they are doing just fine without compulsory licenses and the Communications Act's carriage regime. Their model is actually giving us hints of what the future might look like when retransmission consent finally goes away—replaced by a regime grounded in copyrights and policed by antitrust.

We don't know exactly what the video marketplace will look like following the elimination of compulsory licenses and the retransmission consent regime. Even some MVPDs have stayed out of the retrans fight, preferring the devil they know to the one they don't. And broadcasters are loathe to give up guaranteed revenue in exchange for unknown contractual alternatives. But that doesn't mean that the system serves the public interest anymore, and there are strong arguments for letting technological progress, competition and rules of general applicability (like antitrust) determine the market's course rather than complacency, fear and top-down regulatory structures from a bygone era.

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

Rate regulation, like all price controls, is economically unjustifiable in today's increasingly competitive environment. Congress should eliminate entirely the provisions that allow for rate regulation. Alternatively, even under the current Act, the FCC should follow the evidence from its own Report and affirmatively determine that there is effective competition essentially everywhere. By the end of 2011, 100% of households had access to at least two MPVDs, 98.6% had access to at least 3 MPVDs, and 35.3% had access to at least 4 MPVDs.[8] The Report strongly suggests that competition is vibrant, with penetration and access increasing greatly while prices have remained relatively constant.

At a minimum, this provision should be modified to account for the growing importance of Internet video distribution. While the number of Americans who have "cut the cord" – i.e., switched entirely to online video distributors – remains relatively small at around 5%, it is

[8] Video Competition Report, *supra* note 4, at 19.

growing rapidly. Moreover, Verizon is reportedly planning to launch a linear television video distribution service online this year – apparently, an over-the-top version of the video content offered to FiOS. Even this could greatly accelerate the trend towards separating video content services from their physical distribution platforms (just as could happen with local content and broadcasting if Congress removed the artificial incentive for local broadcasters to keep broadcasting). Congress should recognize that this kind of service can be "effective" competition with traditional MVPDs. Indeed, in this respect, Congress – and the FCC – should take care not to define online video competition too rigidly, because what matters is not whether consumers are using the kind of linear channel-based service that seemed permanent in 1992, but whether consumers have effective choices for the video content they want to watch.

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

There is no reason to maintain the set-top box integration ban. The fundamental justification for the integration ban is a fear of vertical integration – a fear that cable operators that offer their own set-top boxes will favor their own products and harm competition in the device market by foreclosing stand-alone competitors. But there is no economic justification for such a presumption. Market forces – like consumer and content owner demands for innovations that independent device makers like TiVo may offer, coupled with strong horizontal competition – are more than sufficient to ensure that consumer welfare is served. As the FCC notes in its 15th Report on Video Competition, "the [set-top box] marketplace is more dynamic than it has ever been offering consumers an unprecedented and growing list of choices to access video content."[9] The Report's discussion strongly suggests that this competition is not a function of the integration ban but rather strong consumer demand for innovative devices.

Meanwhile, the integration ban, in the form of the CableCard and AllVid mandates, currently imposes significant costs on consumers and stifles innovation. A simple weighing of costs and benefits thus counsels strongly in favor of repeal.

Also problematic, the integration ban applies only to cable operators and not to satellite or telco MVPDs. But there is no justification in today's competitive market for this disparate

[9] *Id.* at 176.

treatment that imposes regulatory compliance costs on cable MVPDs that are not borne by their direct competitors.

Any harm to competition that might result from set-top box integration can already be handled under antitrust law. The standard applied by Congress to ensure competition in the set-top box marketplace should be the same as that under antitrust law: the protection of competition, not competitors.

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

Congress should consider such agreements under the same consumer welfare standard as antitrust law. SSAs and JSAs help broadcasters bring programming to unserved or underserved areas. The proposal to limit two independent stations from negotiating retransmission consent without the consent of cable or satellite operators is unneeded. JSAs and SSAs are similar to joint buying arrangements familiar to antitrust law – abuses that hurt consumers are already deterred likely deterred by threats of treble damages and other penalties.

Currently, other video platforms are free under the law to enter into any economic arrangements, including joint negotiations, which enable such entities to take advantage of economies of scale. The difference here is that the complexities introduced by the FCC's media ownership rules make such agreements necessary. The FCC has allowed JSA and SSA agreements to go forward in the past in a less competitive market environment. As argued by Commissioner O'Rielly:

> Based on all available data, I think it is fair to say that the media marketplace is far more competitive than it was decades ago when the FCC's media ownership rules were established, or in 2002 (completed in 2003) or 2006 when they were last reviewed. That is why I would be perplexed and deeply concerned by a push to abruptly switch gears and tighten the rules as part of a media ownership proceeding. Such a move would conflict with the spirit, intent and wording of the statute. It would also likely harm the public interest if fewer stations could offer local news, especially in smaller communities.[10]

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[10] Micahel O'Rielly, *Commissioner O'Rielly's Thoughts on Broadcast Television JSAs and SSAs* (Feb. 18, 2014), OFFICIAL FCC BLOG, *available at*
http://www.fcc.gov/blog/commissioner-o-rielly-s-thoughts-broadcast-television-jsas-and-ssas.

The economics of the production, distribution and marketing of video content are such that joint agreements among broadcasters likely promote, rather than detract from, consumer welfare over all. Whether intentionally or not, the media ownership rules serve to prohibit broadcasters from realizing simple economies of scale that are essential to the costly and complicated marketing required to finance programming. Whatever their merits, the media ownership rules were not intended to hamstring broadcasters in their efforts to offer more content; rather, their aim was ostensibly the opposite: to encourage a wider diversity of programming. They should not be used now to foreclose efficient economic organization out of a blind allegiance to formalities (that JSAs *look like* co-ownership) when doing so harms consumers and arguably undermines the *purpose* of the rules.

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

If the increasing cost of video programming is the main cause behind the consistent rise in pay TV rates, it is because consumers demand such programming. Any effort to "respond" to this dynamic will harm, not help, consumers.

Moreover, if anything, consumer choice is *increasing* in today's market, with more *a la carte* choices available online through services like Hulu, Amazon, and Netflix. Concerns about the increasing cost of video programming due to bundling may decrease over time as online services become even more popular.

Further, concerns over bundling as a source of harm are overblown. Congress should approach this question as courts do under antitrust law, by balancing the pro-consumer aspects of bundling against possible anticompetitive effects. Often, bundling will actually lead to lower prices and/or increased content availability and diversity. This is why the Supreme Court has recognized that "there is nothing inherently anticompetitive about packaged sales."[11]

Bundling itself has nuanced effects on businesses and consumers. The practice can be pro-competitive because it allows for economies of scope in production for businesses and lower consumer search costs. Programmers often bundle more popular content with less popular content to distributors. Distributors usually then sell bundles of channels to consumers. In a

[11] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 25 (1984).

high fixed-cost industry like cable, bundles reduce transaction costs and these savings often outweigh the costs of providing the less valued commodity to the consumer. For instance, the savings gained by a cable distributor in providing a basic tier of channels to the consumer is greater than the cost of providing "wasted" channels that the consumer may not watch. Further, this is not necessarily bad for the consumer. In the context of cable channels, for instance, consumers can obtain many extra channels at an overall lower price.

Mandating *à la carte* channel provision would dramatically increase transaction costs as video distributors would have to provide customized lineups to each household instead of the current choice between a few tiered plans plus premium channels. And consumers must currently value the channel bundles more than the money they spend on their cable and satellite bills, or they would not continue under their current plans.

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

Online Video Distributors are taking off. Today, competition for OVDs is truly one click away. While some claim that online video is the "new satellite," the situation today is entirely different from that faced by DBS in the 1990s. Today we have growing intermodal competition, not only among MVPDs but also broadband providers. In such a marketplace, the protections for traditional television would not be ideal. In fact, the application of many of those regulations would reduce investment in the online video space.

In theory, MVPDs that also offer broadband connection might be able to thwart OVD competition if basic data tiers were set low enough, and prices for additional data set high enough, whether or not they exempted their own streaming content from such tiers. But it's hard to see how today's current tiers (*e.g.*, 300GB and $10 for 50GB more) discourage anyone from cutting the cord. Antitrust has likely already encouraged higher tiers and lower prices for additional data.

D.C. Circuit Judge Kavanaugh has persuasively argued that Section 614 of the Communications Act was designed to replicate the antitrust consumer welfare standard in the FCC's administrative process.[12] Congress should affirm that this is the right way to understand the

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[12] *See* Comcast Cable Commn'cs LLC v. Fed. Commnc's Comm'n, No. 12-1337 (DC Cir. May 28, 2013) (Kavanaugh, J., concurring), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/EC6B700AE22F118585257B790052AFB0/$file/12-1337-1438011.pdf.

Act. Under such an understanding, the FCC could protect video programming consumers without deterring pro-competitive behavior.

The market for delivering video content, whether by MVPDs or OVDs that rely on broadband, could certainly be made more competitive, but not by regulating video programming. Congress should focus on removing barriers to building out wireline and wireless infrastructure at the local level, opening up more spectrum for wireless uses, and rationalizing subsidies intended to promote broadband adoption.

The point is not only that 4G wireless might become a far more effective conduit for video programming than is currently imagined, such as through 4G broadcasting, but also that exclusive arrangements may be key to incentivizing the development of such technology and should not be prohibited unless and until any such agreement is demonstrated to have anticompetitive effects that outweigh its procompetitive justifications. The extension of the labyrinth of video programming laws into this space would likely deter the necessary investment and business model experimentation that lead to innovation.

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

S. 1680 is a step in the wrong direction. A better alternative to consider in conjunction with STELA reauthorization would be Representative Scalise's Next Generation Television Marketplace Act, H.R. 3720. All relevant STELA and Cable Act provisions so far discussed should be repealed.

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

Absolutely. Pole attachment regulation should be technology-neutral. Indeed, ensuring non-discriminatory pricing of pole attachments would remove a significant barrier to entry by fiber providers. This, in turn, could facilitate greater competition in the market for video programming (especially by over-the-top providers), faster speeds and lower prices.

Regulation of pole attachments is different from other forms of regulation because it is regulation of a scarce resource granted by governments: the privilege of constructing towers and other equipment on public land and rights of way. It would be inappropriate for government at any level to license a single company to build such infrastructure and to allow that company to discriminate in providing access to it. In other words, the "natural monopoly" arguments for "open access" should be applied to the underlying pole attachments and rights of way needed to construct broadband networks – not to broadband networks themselves, which are clearly not natural monopolies, as Google Fiber has made clear. Indeed, so long as regulation of pole attachments does not discourage investment in constructing and maintaining poles, nor discriminate between broadband technologies, it could play a key role in promoting investment and competition in broadband networks – in the spirit of Section 706 of the Communications Act.

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

Relative to the *status quo*, yes, continuing mandatory carriage rights might well encourage broadcasters to give up their spectrum, and yes, more spectrum is desperately needed to satisfy consumers' exploding demands for wireless broadband service.

But that does not mean extending today's outdated system of video regulation is the *best* way to serve consumers. Indeed, this question obscures two more important questions. First, to what extent does the current system of video regulation create an artificial (and perverse) incentive for broadcasters to hold onto their spectrum, not because sending a broadcast signal received by less than ten percent of Americans makes little economic sense, but simply because doing so entitles broadcasters to the outdated, special legal protections discussed above? Second, would not simply ending this artificial incentive do more to encourage speedy and efficient re-allocation of spectrum towards serving consumer demands (providing wireless broadband service)?

Indeed, why should American consumers and MVPDs (particularly the cable MVPDs who labor under more restrictive rules than their DBS competitors) continue to subsidize broadcasters by awarding them special legal privileges in exchange for giving up their spectrum *over and above* the revenue broadcasters can and should receive for selling their spectrum? In fact, extending the special legal privileges created for broadcasters might well *increase* the net present value calculation of the value of their spectrum, which might actually deter efficient repurposing of spectrum. Regardless, however, it is extremely unlikely that it would increase consumer welfare overall. Rather, it would simply effect a continued and unjustified reallocation of wealth from MVPDs and their customers to broadcasters.

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