David Rozzelle
[redacted]

Ms. Charlotte Savercool
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

January 6, 2014

Dear Ms. Savercool:

Attached are my answers to the questions for the record sent to me by letter of December 20, 2013. The questions pertain to the hearing of September 11, 2013 on AInnovation Versus Regulation in the Video Marketplace@ held by the Subcommittee on Communications and Technology.

Please note that as of January 1, 2014, I have retired from Suddenlink Communications. If there are additional questions that should be directed to Suddenlink, they should be addressed to: Mike Zarrilli, Vice President for Government Relations, Suddenlink Communications, [redacted] If there are additional questions addressed to me, they should be sent to the addresses above.

Respectfully submitted,

David Rozzelle

Question from The Honorable Henry Waxman:

Advocates for retransmission consent reform have proposed a standstill during disputes, so consumers don't experience blackouts. Just last week, the cable industry won a case in the Second Circuit overturning an FCC rule requiring a standstill during program carriage disputes. Why is a standstill to preserve consumer access to programming appropriate in the retransmission consent context but not during program carriage disputes?

Answer:

Viewed from a consumer's position in the programming distribution process, television broadcasters have long been required to produce programming serving the broader public interest given their status as public trustees of the broadcast spectrum, which belongs to the people of the United States. That historical obligation has led to a reliance by television viewers on broadcasters to provide news and public interest programming on a daily and regular basis. The often cited examples are local news and weather, including breaking news stories that may have high local importance and local weather alerts. Broadcasters have been steadily moving away from this obligation, but the relationship persists and references to the public trustee nature of the broadcasters' role continue.

Again, from a consumer's perspective, no such relationship exists with national network programming like MTV, ESPN, Comedy Central, Spike, USA, Cartoon Network, etc. While there are networks that provide very valuable news and weather information, they are a small portion of the overall national network inventory.

Having said the above, it should be noted that outside the Big Four network affiliates, there is virtually no vestige of the public trustee obligation evident. Perhaps that is one reason that almost all those stations, if they elect retransmission consent ("RTC") status on their own, select must carry. Among the Big Four, the quality of local programming efforts has become very inconsistent since the amount and quality of public interest programming is no longer measured in any meaningful way by the FCC. Nevertheless, in most markets there is a news and public affairs leader that truly should be available to consumers at all times.

Thus, the loss of local television broadcast programming has a much higher probability of causing public harm than the loss of national entertainment networks.

As explained above, I believe there is logical reason to treat RTC disputes and program carriage disputes differently. One should have public interest values to protect, at least among the Big Four stations; the other usually does not.

Finally, I would note that in the Time Warner v. FCC case, the standstill argument was a secondary argument in a much larger discussion of the First Amendment rights of distributors of video programming in the context of a broad federal policy with the stated goal of promoting

greater programming diversity by granting special carriage rights to a select group of content providers.

Questions from The Honorable Bobby Rush:

Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, multichannel video programming distributor (MVPD) in the Communications Act.

Answer:

I believe the technologies are changing rapidly. I believe the programming distribution model is changing in a slower, but evolutionary way. Traditionally, MVPD status has meant a video program distributor that owns and operates a facilities based network which is used in whole (as in the case of satellite), or in part (as is the case with cable and telephone) to provide video service to the end user. At least one on-line video distributor (OVD) has legally claimed to be an MVPD for copyright purposes, but not for other obligations, such as must carry. Its argument did not prevail.

To make matters more complex, the rights and obligations are not uniform across MVPDs. Satellite has certain obligations peculiar to the nature of its technology as does cable. Indeed, as an MVPD, cable has more obligations than any other form of video distribution.

Therefore, I believe that the entire structure of the MVPD regulatory scheme should be considered if there is an effort to change any part of it. If there is an effort to examine the Communications Act as a whole in the future, this topic should be included.

Question:

If the DC Circuit were to VACATE or to order the Commission to revise its [net neutrality] rules substantially, how might that affect parties' abilities to negotiate retransmission consent agreements in good faith and at arms-length?

Answer:

It might affect the timing of a resolution of an ongoing negotiation while the parties tried to analyze the implications of the decision.

Substantively, retransmission consent involves the MVPD carriage of broadcast video. Net neutrality, when the discussion is focused on video, pertains to video received via the Internet, sometimes referred to as "over the top" video, which is not subject to the RTC rules and regulations. Therefore, I believe there should be no direct impact on RTC negotiations if the net neutrality rules are remanded to the FCC for further work.

Question:

Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

Answer:

The reversal of an existing policy always introduces an element of uncertainty. Uncertainty does not support investment or creative experimentation. I believe consumers could be hurt as a result.

It should be remembered that there have been virtually no formal, public complaints about network operations under the existing net neutrality policy, which is not surprising given the vigorous competition for consumers' broadband business by the telephone and cable companies in almost all markets. Many members of the public may well wonder why a change is necessary.

Question:

Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.

I know the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?

Answer:

I am not a practicing lawyer, so I will let those more qualified argue which decision is a better legal conclusion.

From a public policy perspective, I believe the Second Circuit decision is far better for consumers. Aereo, Inc. has fashioned a service to deliver broadcast television programming that was cleverly designed to fit in a crevice formed by the interaction of copyright law and the Communications Act (not to mention the old Sony Betamax case). Viewed from the consumer's perspective, the business model gives each customer her own DVR-like functionality to use as she wishes to consume local video products. Each technical component of the Aereo system is dedicated to only one consumer each time the consumer logs on the service just like a home DVR. I believe this viewpoint, sort of a bottoms up analysis, fits nicely under the Second Circuit opinion.

The DC Circuit, on the other hand, seems to support the viewpoint of the broadcast owners. They look at the Aereo service from the top down as a business structure solely designed to

sidestep traditional distribution methods. Since the consumer occupies the bottom of the distribution chain in the facts of the case, the DC decision is not a favorable one for the end user in my opinion.

Question:

If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.

Answer:

I am not a practicing lawyer, so I will let those more qualified opine as to the better decision.

Question:

Mr. Munson pointed out in his testimony that added regulations on broadcasters stem from what some have characterized as a social contract between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers.

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Not withstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?

Answer:

I do not. Moreover, I have no reason to believe that minority owners would not be as responsive to the needs of all their viewers, regardless of their characteristics.

As discussed further below, I believe that creating an environment that would foster investment in minority owned broadcast stations is important because it will make it more likely that a wider divergence in viewpoints is made available to the public.

Question:

Other than the reinstitution of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of

minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?

Answer:

I believe that the more robust an investment environment we create, the greater the opportunity for new voices we create. Money will flow toward new content producers more easily if the overall investment environment in the industry is viewed as safe from regulatory uncertainty and is viewed as growing new audiences. Audience growth may come from the nature of the new content or from the new devices being used by the new customers. New devices often encourage users to seek some content forms over others, often at the expense of traditional offerings. For instance, shorter program lengths and content designed to be viewed easily on small screens has created opportunities for new speakers, including minority group members.

Question:

Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiations over retransmission consent agreements?

Answer:

I believe the reference to sensitive pricing information relates to the requirement that a broadcaster's political file contain pricing information that enables legally qualified candidates to assess whether they are getting the lowest unit rate. If so, it obviously has nothing to do with RTC.

The idea, however, of placing RTC agreements in the public files of TV broadcast stations is a good one, including the pricing information. Multiple station owners have been quite open about the fact that RTC renewal cycles start with smaller cable operators who have a weak market position and end up paying more per customer than larger operators, including satellite providers. The price achieved in the smaller markets sets the baseline for later negotiations with larger MSOs who have greater market power.

Since smaller operators own systems in small markets, the result is that consumers in small towns pay significantly more for a broadcast station than viewers in larger markets. A public record of this uneven application of a government created fee might engender discussion about establishing a more even negotiating platform. It would certainly shed light on how free a TV broadcast signal is under the RTC regime.