Robert Gessner's Response to the Questions for the Record
April 23, 2018

Attachment—Additional Questions for the Record

The Honorable Marsha Blackburn

1. **On March 22, 2018, the FCC passed a Wireless Infrastructure Streamlining Order that provides exemptions from certain environmental and historical reviews. How useful is this effort to closing the digital divide?**

    a. **To what degree are the FCC's efforts and this Subcommittee's efforts on streamlined infrastructure complimentary?**

A: MCTV and most other American Cable Association members do not provide licensed wireless service, and so the FCC's Wireless Infrastructure Streamlining Order is less relevant for us. That said, this decision marks another step toward providing incentives for providers to accelerate their network investments and deployments so they can provide advanced broadband services to all Americans. We applaud these actions by the FCC, as well as the many pieces of "infrastructure" legislation that your Subcommittee is considering. Building networks is expensive, and efforts to remove or reduce barriers will not only expedite our builds but enable us to extend our networks into unserved areas, closing the digital divide.

The Honorable John Shimkus

1. **Some of your competitors have offices here in DC with hallways full of lawyers to handle FCC regulation. On the other hand, I know that some of ACA's member companies are very small, some of them run with just a handful of employees. Can you expand on the burdens your companies face in navigating and complying with FCC regulation?**

A: You are absolutely right – ACA's membership largely consists of very small companies largely serving smaller communities. For example, ACA members only have seven percent of the video market share in your state of Illinois. More generally, as I indicated in my testimony, over eighty percent of ACA's 700-plus member companies serve fewer than 5,000 subscribers and around half serve fewer than 1,000 subscribers. These are company-wide figures. In many instances, ACA members operate individual systems that have only a few hundred subscribers each.

With a small number of customers, ACA member companies are "lean and mean" – half have fewer than 10 employees. ACA's members do not have the ability to have a team of in-house lawyers or to even spend significant sums on outside legal counsel. They do not have Washington offices. With every new proposed regulation, an ACA member must determine whether its limited resources would be better spent seeking regulatory relief where they feel it is merited, but the outcome is uncertain and costly to pursue, or to

maintain and upgrade their facilities and services. And without larger operators' ability to spread their costs over a vastly larger base of customers, the cost of regulation for ACA members can be significant and onerous.

The Honorable Robert E. Latta

1. **Ranking Member Doyle suggested that SERRO would open a "huge regulatory hole" at the FCC. Moreover, in response to a question from Ranking Member Doyle, Ms. Morris testified that SERRO presented a "high risk of harm" to all types of entities, including consumers and small businesses. How do you respond to these comments?**

A: While I appreciate the need to be concerned about the impact of any legislation on consumers and small businesses and any unintended consequences, I believe the concerns raised by Ranking Member Doyle and Ms. Morris are not intended by the language in SERRO and would support ensuring that is actually the case.

SERRO's objective is simply to reduce the administrative and related costs that currently deter small entities from seeking regulatory relief to which they would otherwise be entitled. That is something that everyone should support. Furthermore, SERRO does not lower the bar for deciding whether relief is appropriate – the FCC will still have to determine whether there is "good cause" to relieve a small entity, typically on a temporary basis, of specific regulatory obligations whose costs or burdens outweigh the benefits to the public.

2. **According to Representative Eshoo, SERRO is a "Trojan Horse" whose true intent is to "waive everything" so that small companies don't have to play by the rules. You obviously disagree. What in SERRO prevents it from becoming a vehicle that disenfranchises small entities' customers of larger companies?**

A: SERRO is a modest bill that has been carefully crafted not to alter the existing standard of protection for consumers. It is simply designed to make it easier for small entities to deal with the regulatory procedures involved in seeking waivers or exemptions that they may be entitled to receive.

I understand Rep. Eshoo's concerns might have merit if SERRO changed the test by which the FCC decides whether a waiver, exemption or delay of its rules is appropriate. That standard, known as the "good cause" test, requires a particularized determination that the public interest would be better served by relieving a regulated entity from a particular regulatory obligation than by requiring immediate and strict compliance. <u>But SERRO does not change the "good cause" standard</u>. SERRO will not result in a small entity getting regulatory relief to which it would not have been entitled before SERRO was enacted. Depending on the FCC's assessment of the facts before it in a waiver proceeding or in a triennial review proceeding, a small entity might get the relief it desires or it might be denied that relief. A small entity with ten employees might get

relief while a small entity with 1,000 employees might not. However, because of SERRO, in both instances, the small entity will have had the playing field leveled vis-à-vis larger entities that do not face the same obstacles to seeking relief. In other words, contrary to what some members and Ms. Morris have suggested, SERRO does not preordain the outcome of a small entity's request for relief or otherwise put a small entity's customers at greater risk than a large entity's customers.

And because SERRO focuses on reducing a small entity's costs, its enactment will produce benefits for consumers. Large companies with their own legal departments and sizable budgets for legal and engineering advice can spread the cost of the filings they make at the FCC so that it is barely noticeable to their customers. But small entities do not have that ability. Even where the cost of compliance clearly outweighs the benefits to consumers, small entities have to determine whether they – and their customers – can afford the cost of seeking relief. Streamlined waiver processes, routine triennial reviews under the good faith test, and automatic deferral of certain rules will make it more likely that an entity that can make the showing needed to get relief is able to do so.

3. In responding to a question from Representative Engel, Ms. Morris asserted there already are "sufficient avenues" for the needs of small entities for regulatory relief to be "accommodated." Isn't she right?

A: She is correct that there are avenues, such as case-by-case waiver requests, by which small entities can seek regulatory relief. But those "avenues" are actually blocked for most small entities that lack the resources and expertise to use them. Ms. Morris expressed support for "surgical solutions" to specific problems. That is exactly what SERRO presents: a narrowly drawn set of solutions to the barriers that prevent small entities from seeking and obtaining regulatory relief to which they are entitled under the existing "good cause" standard. These solutions include streamlined procedures for seeking case-by-case waivers, a triennial review that will relieve small entities from having to make case-by-case filings, and an automatic deferral of certain rules for small entities.

4. Ms. Morris testified that SERRO's definition of a "small entity" was vague and overly inclusive – statements that were echoed by Ranking Member Doyle, Representative Pallone, and Representative Eshoo. For example, Ranking Member Doyle indicated that SERRO would apply to companies with over $1 billion in revenue and Representative Pallone stated that it was his understanding that SERRO would give relief to companies with as many as 6.5 million subscribers. Are these accurate descriptions of the types of entities that would be covered by SERRO?

A: No. SERRO carefully defines a small entity by reference to existing statutory and regulatory definitions found in the Small Business Act, Regulatory Flexibility Act, and the FCC's rules. Those definitions are clear and precise and, to my knowledge, have never been interpreted to cover large service providers with billions in revenue or millions of subscribers. Today's communications marketplace is characterized by very

large companies and small companies – there is not much left in the middle. For example, the largest telephone and cable companies each have tens of thousands of employees, annual revenues in the tens of billions of dollars and millions of subscribers. In the wireless industry, the four largest companies control over 98.5 percent of the market. The remaining companies in these industry sectors almost all fall well below the standards that are incorporated into SERRO and that have long been accepted as appropriate measures for defining a small entity: 1500 or fewer employees, $38.5 million or less in annual revenues, or less than two percent of the subscribers to a service nationwide.

5. **What is your reaction to Ms. Morris' contention, echoed by Representative McNerney, that by requiring the FCC to review its rules every three years to determine whether there is good cause to modify or repeal particular requirements as applied to some or all small entities would complicate the regulatory process and result in more legal challenges to the FCC's decisions?**

A: There is no reason for SERRO to result in more litigation. The standard for relief – "good cause" – is not changing. The definition of a small entity is based on existing standards that are familiar to both the FCC and industry.

The Honorable Adam Kinzinger

1. **In your testimony, you describe the need for the FCC to provide regulatory relief to small telecommunications companies that cannot reasonably be expected to comply with expansive rules. Would you say that the customer base for the majority of these small companies is largely rural populations?**

A: While I am more intimately familiar with ACA's membership, my knowledge of the communities where ACA's members provide service suggests that the customer base for all smaller telecommunications companies tends to be more rural than the customer base of the larger companies. For example, 28 percent of the US population lives in small cities and rural areas; however, 42 percent of the people in the service areas of ACA's members live in these areas. Furthermore, the areas served by ACA's members are significantly less densely populated than the areas served by larger companies. The average population density for the four largest cable television operators (i.e., Comcast, Charter, Cox, and Altice) is more than 709 persons per mile. ACA's member companies operate in areas with an average population density of under 150. The mostly rural character of the areas served by ACA also is reflected in the size of the other businesses operating in these communities: In ACA territories with a population density of under 1,000 people per square mile, nearly 90 percent of the businesses have fewer than 10 employees.

Information published by the FCC as part of its regulatory flexibility analyses confirms that the situation in most other sectors of the telecommunications industry is similar to that found in cable: most consumers are served by a few large, often national, companies

that concentrate on urban and densely populated suburban areas, while hundreds of much smaller companies focused on providing service to rural and exurban customers.

The Honorable Kurt Schrader

1. **Do you think that your members require less regulatory oversight – and your customers require less protection – than larger businesses and their customers?**

A: In some instances, small entities do not require the same level of regulatory oversight as large businesses because small entities do not have the ability or incentive to create the harm that a regulation is intended to address. But more importantly, SERRO itself does not guarantee small entities a lower level of regulatory oversight. It merely reduces the burdens that might otherwise prevent a small entity from seeking regulatory relief that they are likely to merit under existing law. The cost of seeking relief is the same for a small entity as for a large one. But on a per customer basis, the cost is much higher for small entities, which can make it infeasible to pursue relief. SERRO merely would give small operators the "opportunity" to obtain regulatory relief that large entities already have. It would not make it more likely that the requested relief is granted.

2. **Ms. Morris and several members are quite concerned that SERRO will harm consumers. Why are those concerns unwarranted?**

A: Most importantly, SERRO does not change any standard of protection for consumers. It does not alter the "good cause" standard nor do we intend for it to do so in any way. Furthermore, small entities rarely lack scale to create market power issues that are often the root of many policies. That is why we are often aligned with the concerns of consumers when it comes to issues of mergers and other issues of concentration of market power. In addition, in many of our markets, small entities provide a competitive check on larger companies. Resources that these small entities have to devote to the legal and administrative costs of obtaining waivers or other forms of regulatory relief are resources not available to upgrade and improve the services offered by these small companies.

3. **Ms. Morris and several members were particularly critical of the automatic one-year deferral provision in SERRO. How will that provision benefit small entities and their customers?**

A: The costs of regulatory compliance are, on a per-subscriber basis, much higher for small entities than large ones. For example, large entities can purchase the equipment needed to comply with new technical mandates in volume at a lower per-device cost than small entities. Indeed, small entities often cannot get the necessary equipment at any price, because manufacturers commit their limited supplies to the larger companies ahead of small entities. Deferring compliance not only will ensure the equipment is available, but it is likely that the cost will come down. Deferral also can reduce the need for a case-by-case waiver request for a delay or exemption. Other benefits include the greater certainty

that comes with having waited a year to see if the rules are reconsidered or otherwise modified and the ability to take advantage of the compliance plans implemented by larger operators who have greater resources for determining exactly what is required by a new rule. That said, we appreciate her concerns and are willing to work with the Committee to address that issue.