

Attachment—Additional Questions for the Record

**Subcommittee on Communications and Technology
Hearing on
“STELAR Review: Protecting Consumers in an Evolving Media Marketplace”
June 4, 2019**

Mr. John Bergmayer, Senior Counsel, Public Knowledge

The Honorable Billy Long (R-MO)

- 1. Ms. Boyers stated that she is paying 47% more for broadcaster content than her competitors – like DirecTV. Can you each explain to me why that is happening?**

Response: It boils down to bargaining imbalances. Companies with must-have content can demand ever-higher prices from all distributors, but they have the most leverage against smaller ones, who often end up paying much more than larger distributors on a per-customer basis. This is because, quite simply, large content providers can afford to walk away from smaller distributors, but the distributors cannot survive without the content. While large content providers also have leverage over large distributors, they also need to reach those distributor’s customers, which can balance things out. A similar dynamic is at play with respect to small programmers and large distributors, where the distributor has much more leverage than the programmer and thus can pay very low prices. An unfortunate effect of this dynamic is a drive toward consolidation in both content and distribution, which might help with some negotiations but typically does not work out well for the consumer.

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The Honorable Bill Flores (R-TX)

1. The video marketplace is decidedly different from when the 1992 Cable Act and the first Satellite Home Viewer Act of 1988 were signed into law. As we look to the landscape of the video marketplace of tomorrow, Congress needs to evaluate the appropriate government role in the marketplace to ensure consumers benefit from innovation.

a. In today’s marketplace, how much is the government involved in the retransmission consent process?

Response: The government sets the rules of the road—retransmission consent itself is an artificial construct designed to serve certain public policy goals. It is appropriate for the government to reconsider its rules from time to time in light of those goals, and either change the rules or monitor the marketplace more closely to ensure that negotiations are occurring in good faith and without abuse.

b. What should the government’s role be in the video marketplace to encourage future innovation?

Response: The government should ensure that competition and innovation are possible. New competitors should not be locked out of content, and should be able to access programming on fair terms. This model successfully promoted the DBS industry. New video distributors also should be able to reach customers, which means that they should not be blocked from competing from ISPs through policies such as unfair zero-rating or data caps that benefit an ISP’s own video services, or those of its partners, over those available in the marketplace at large.

c. Is what we have today a pure free market?

Response: Market transactions occur in the framework set by Congress, and over rights that were granted to serve public interest goals. It is difficult to know what a “free market” in this space would look like absent government rules concerning intellectual property, antitrust, signal rights (i.e. retransmission consent), spectrum licenses, public interest and public safety obligations, contract enforcement, access to public rights-of-way, and any number of other baseline assumptions. Within this framework, Congress should ensure that markets are working effectively to promote public interest ends and, if not, revisit the rules under which the market operates.

i. If not, what policy changes would help it achieve free market status?

Response: Markets can be designed well or designed poorly. The current video marketplace is designed poorly, and in many respects is simply too complex. Congress should consider eliminating the duplicative and unnecessary concept of retransmission consent altogether, and phase out the copyright compulsory licenses, allowing rights holders to negotiate for carriage with distributors in a more straightforward fashion that mirrors other content industries. While there can be no guarantee that any legal changes will necessarily lead to more competition or better consumer outcomes a change like this would be an important first step that “clears the decks” in a number of respects. Short of changes of this kind Congress should at least make STELAR permanent, or consider tying its expiration to the expiration of other video marketplace rules. Our written testimony has a variety of technical suggestions of rule changes that could improve the functioning of the marketplace in the short term.