Testimony of

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on

"Compulsory Video Licenses of Title 17"

before the

United States House of Representatives Committee on the Judiciary,
Subcommittee on Courts, Intellectual Property and the Internet

May 8, 2014

Chairmen Goodlatte and Coble, Ranking Members Conyers and Nadler, and Members of the Committee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the Executive Vice President and General Counsel for DISH Network, the nation's third largest pay-TV provider and the only provider of local television service in all 210 markets.

In addition to reauthorizing STELA and the Section 119 compulsory license, we believe that Congress should take this opportunity to fix an escalating problem that negatively impacts consumers across the United States: local channel blackouts during retransmission consent disputes. Failing to end blackouts as part of STELA will only harm consumers, and this problem is on the rise: there were 12 blackouts in 2010 and a record-setting 127 blackouts in 2013.

We suggest two possible solutions to end blackouts and ensure that consumers have continuous access to network programming from the pay-TV provider of their choice.

First – during a retransmission consent impasse, a mandatory "standstill" should be in place to ensure that the broadcast signal stays up. If the parties are unable to agree upon carriage terms, they should proceed to so-called "baseball" arbitration, where a neutral arbitrator chosen by the parties will evaluate each party's best offer and select the one that most accurately reflects a fair market price. In all cases, the final agreed-upon rate would apply retroactively, ensuring

that the broadcaster is fairly compensated. Most important: the consumer would remain unharmed.

Second – a more limited solution would allow pay-TV providers to import a distant network station when the local network affiliate withholds its signal during a retransmission consent dispute. This solution would still leave consumers without access to certain local programming, including local news, sports and weather information, but it would at least provide network programming content.

For more details on these proposed solutions, as well as other input on today's video marketplace, including a discussion of the Title 17 compulsory video licenses, please find attached as Appendix A our March 17, 2014 response to the Senate Committee on Commerce, Science and Transportation's February 24, 2014 letter regarding STELA reauthorization.

The television landscape has changed dramatically since the Cable Act of 1992 was enacted, establishing the current system of retransmission consent. In those early days, the playing field was closer to level. The broadcaster negotiated with a single cable company that was likely the only pay-TV provider in the same market. Not reaching a retransmission consent agreement was mutually assured destruction for both sides of the negotiating table. Today, by contrast, cable operators no longer enjoy local monopolies. Unlike 1992, broadcasters can now

pit potential suitors against one another, all to the detriment of consumers. This is *not* a free market.

Meanwhile, "mom and pop" local broadcasters continue to disappear, as broadcaster conglomeration grows more common. The last few months of 2013 alone saw Gannett's acquisition of Belo, Tribune's acquisition of Local TV, and Sinclair Broadcasting's emergence as the nation's largest local broadcaster, with 167 broadcast stations under its empire. And just last month, Media General announced that it would acquire LIN Media, creating the second largest local television broadcasting company and further consolidating the industry. The remaining separately-owned broadcasters increasingly use "sidecar" agreements under which they jointly negotiate retransmission consent. Pay-TV providers are frequently dealing with a single entity coordinating retransmission consent negotiations for multiple separately-owned broadcasters in the *same* local market.

Not surprisingly, these market developments have coincided with the exponential increase in blackouts as the broadcasters attempt to leverage this market imbalance into higher retransmission consent fees. In the words of industry analyst Craig Moffett, retransmission consent disputes, "… pit what is essentially a government-sanctioned monopoly content provider against a distributor for which there are readily identifiable substitutes. Of course the broadcaster will eventually win."

Should STELA be reauthorized? Of course. If not, over 1.5 million customers, mostly in rural areas, will lose one or more of the Big 4 network channels. But merely extending the Act for another five years is not enough. A so-called "clean" reauthorization of the satellite home viewer law would ignore the satellite home viewer's number one problem – the increasing threat of blackouts. The legislation developed by Chairmen Upton and Walden in the Energy and Commerce Committee is an excellent start. But more is necessary to accomplish the fundamental goal of ensuring that broadcast programming fulfills its public interest mandate and always stays up for consumers.

On behalf of DISH's 22,000 employees and more than 14 million subscribers across the nation, I strongly encourage the Committee to seize this opportunity and update the law to reflect marketplace realities and better protect the consumer.

Thank you and I look forward to answering any questions you may have.

APPENDIX A

March 17, 2014

United States Senate
Committee on Commerce, Science, and Transportation
Washington, DC 20510-6125

Delivered by email to: STELA_Comments@commerce.senate.gov

Dear Chairman Rockefeller, Ranking Member Thune, Chairman Pryor, and Ranking Member Wicker:

On behalf of our two companies, attached please find responses to the Committee's questions concerning STELA reauthorization. Should you have any questions concerning this document, please do not hesitate to contact us.

Respectfully Submitted,

/s/
Andrew Reinsdorf
Senior Vice President
Government Affairs
DIRECTV, LLC

/s/
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DISH NETWORK L.L.C.

INTRODUCTION AND SUMMARY

DIRECTV, LLC ("DIRECTV") and DISH Network L.L.C. ("DISH") respectfully submit these joint responses to the Committee's written questions. We applaud the Committee's bipartisan efforts to establish a broad and thoughtful discussion of pro-competition, pro-consumer reforms in concert with the reauthorization of the Satellite Television Extension and Localism Act of 2010 ("STELA").

Together, our two companies serve over 34 million pay-TV subscribers and are the second and third-largest pay-TV companies in the U.S. We also are the only respondents that: (1) serve every community in the United States, including those in the most rural areas; (2) in the case of DISH, carry every single eligible local broadcaster in all 210 designated market areas ("DMAs"); and (3) rely directly on STELA to provide service to our subscribers.

In our answers to the Committee's questions, we call upon Congress to:

- Stop local programming blackouts;
- Put an end to drastic retransmission consent rate hikes; and
- Ensure that the most rural households in the U.S. have access to the same network programming as urban and suburban households.

In support of these principles, we advocate specific measures to amend current law, including:

- Authorizing the FCC to impose baseball-style arbitration and a standstill so the programming stays up while the parties arbitrate their dispute; or, alternatively, permitting the importation of distant signals during retransmission consent disputes.
- Stipulating specific, anti-consumer actions that would fail the "good faith" requirement.
- Prohibiting joint sales agreements and other collusive methods used by broadcasters.
- Updating the definition of "unserved household" to reflect how Americans actually receive over-the-air broadcast signals today, as opposed to how they did decades ago.
- Prohibiting broadcaster blocking of online content to the broadband subscribers of a multichannel video programming distributor ("MVPD") during a dispute with that MVPD.
- Encouraging the unbundling of broadcast programming from other programming, both at the wholesale and retail levels.
- Permanently reauthorizing STELA.

The time for action is now. The current system of retransmission consent, established by Congress over 20 years ago in the 1992 Cable Act, gives each "Big Four" broadcast station a monopoly in its local market. While it may have been a fair negotiation when it was one cable company against one broadcaster, today the local broadcaster holds all of the cards and plays multiple MVPDs off of each other in any given market. Ultimately, it is the American consumer who suffers.

Broadcasters abuse their retransmission consent rights during negotiations, using brinksmanship tactics and blackouts to extract ever-greater fees from MVPDs, with no end in sight. Blackouts happen when companies like DIRECTV and DISH try to fight back and reject broadcasters' unreasonable price demands, which often involve rate increases of several hundred percent. Retransmission consent fees raised $758 million for broadcasters in 2009. They hit $3.3 billion in 2013. They are expected to reach $7.6 billion in 2019.

In 2013, there were 127 broadcaster blackouts, compared with 96 blackouts in 2012, 51 blackouts in 2011, and 12 blackouts in 2010. Thus, the number of blackouts increased over *one thousand percent* since Congress passed STELA. These numbers do not even include all of the near-misses, which are equally disruptive to the consumer experience. Compounding the injury, the timing of many blackouts coincides with marquee events like the World Series or the Oscars.

It is time for Congress to act, and STELA reauthorization presents the perfect vehicle. Every five years Congress updates the law to account for changes in the marketplace, technology, and consumer demand. It should continue to make updates and improvements to the law that will benefit consumers.

I. STELA-Specific Issues:

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

Yes, permanently.

More than 1.5 million satellite subscribers—many of them in the most rural areas of the country—depend on these provisions in order to receive distant signals. Were Congress not to reauthorize STELA, these subscribers would lose access to TV service that most Americans take for granted.

Some have suggested that private licensing could take the place of STELA. That may be true under the comprehensive deregulatory approach championed in the Senate last Congress by then-Senator Jim DeMint (R-SC) and Rep. Scalise (R-LA), which would eliminate nearly all regulation of broadcast television, including the enormous regulatory benefits enjoyed by broadcasters. But nobody seriously contends that, if Congress were to eliminate STELA's *distant signal*

provisions only, private licensing would replace them. Even NAB, which has opposed these provisions for decades, does not believe this.[1]

The distant signal provisions must be renewed by Congress in order for a largely rural segment of the American population to receive the same broadcast network programming as the rest of the American populace. In other words, were Congress not to renew STELA, distant signals would disappear, depriving rural Americans of a lifeline to broadcast network programming and eliminating any chance of watching a network station in "short" markets, which do not have a station affiliated with that network.

A permanent reauthorization would establish parity between satellite and cable, since the cable statutory license does not expire. We see no reason why satellite subscribers should live with the threat of losing their service when cable subscribers do not. Barring permanent reauthorization, however, Congress should extend STELA for as long as possible.

(2) Members of the Committee have heard from constituents who are unable to watch instate broadcast TV programming. Under Section 614(h) of the Communications Act, the Federal Communications Commission (FCC) has the power to modify Designated Market Areas (DMAs) for broadcast TV carriage on cable systems. Should the FCC have a similar power with respect to satellite pay TV providers to address DMA issues? Are there other ways to address these issues?

Congress should consider this solution along with others.

Satellite subscribers tell DIRECTV and DISH the same things they tell Members of Congress. They do not want to be told which "local" stations they must watch. They want choices. They also want to be able to watch news and sports that originate from within their own states.

Congress could address this issue in many ways. One legislative approach would be to permit satellite carriers to provide in-state stations to so-called "orphan

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[1] United States Copyright Office, *"Section 302" Report* at 71-72 (2011), *available at* http://www.copyright.gov/reports/section302-report.pdf ("NAB concluded that given the overwhelming economic importance to the station of appealing to viewers in its own market as opposed to cable or satellite subscribers in some distant market, there is little likelihood that stations would adjust their existing licensing models for broadcast programming specifically to accommodate the programming preferences of a distant cable operator or satellite carrier. NAB also stated that there is no incentive for a broadcaster to undertake the additional cost and administrative burden of negotiating for additional rights in order to be able to sublicense all of its station's programs to cable operators or satellite carriers serving subscribers in distant markets.") (internal citations omitted).

counties," which are counties that receive no in-state broadcasting. Permitting the FCC to modify DMAs holds some promise as well.

Broadcasters occasionally suggest that they can "solve" the in-state local news problem by offering private copyright licenses for local news. This, however, results in a product that consumers do not want—a "channel" that offers a blank screen for as many as 23 hours a day. We know this because DIRECTV offers such a product in Arkansas. Very few people watch it. People want to watch channels with around-the-clock programming, not blank screens.

That said, we must present two notes of caution. First, DIRECTV and DISH have each spent hundreds of millions of dollars on spot-beam satellites and ground equipment based on the Nielsen DMA boundaries. We may not be able to adjust our channel offerings to implement changes that Congress or the FCC might enact, and some of this costly capacity might have to fall into disuse.

Second, for this reason, DIRECTV and DISH urge Congress to avoid single market "fixes," as it did when it passed STELA five years ago. We can comply more easily with systematic changes than with one-off changes to individual local markets.

A general remedy proposed by DIRECTV and DISH would give subscribers the option to purchase station signals from an in-state DMA if they first receive local service. We would compensate the in-state broadcaster pursuant to the Section 119 distant signal license. To the claims from broadcasters that this would reduce local station viewership, we would note that (a) a subscriber's local stations still would be on the channel lineup, and (b) if local programming is as important and compelling as local broadcasters claim, then no material decrease in viewership should result.

(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?

Yes. Congress should clarify and expand the "good faith" rules.

Congress has already instructed the FCC to adopt and enforce rules that "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith."[2] Such rules are supposed to provide that a broadcaster violates its good faith duty when its demands include terms or conditions not

[2] 47 U.S.C. § 325(b)(3)(C)(ii).

based on competitive marketplace considerations.[3] In implementing this mandate, the FCC has created a two-prong standard: a list of specific acts and practices that are *per se* a violation of good faith, and a totality of the circumstances test.[4] While the second prong—the totality of the circumstances—gives the agency some flexibility to consider broader types of anti-competitive conduct that we have observed, to date it has not been used in this way. Moreover, the FCC has interpreted the law as not contemplating an "intrusive role" for the agency.[5] As a result, the FCC has never found a violation of the good faith requirement.

Broadcasters plainly do not consider the good faith rules an impediment to their behavior. In such circumstances, it should surprise no one that broadcaster blackouts are accelerating and retransmission consent fees are increasing at an alarming rate, driving up consumer prices.

Congress should thus clarify and expand the good faith requirement. At a minimum, the requirement should prohibit the following:

- Brinkmanship tactics, such as threatening programming blackouts designed to exploit a network-affiliated broadcast station's already substantial market power. (We discuss ideas for "blackout relief" below in response to Question II.1.b.1.)

- Withholding of retransmission consent from an MVPD without granting that provider relief to permit importation of same-network distant signals throughout the market until a carriage agreement has been reached.[6] (This also falls within our discussion of "blackout relief.")

- Giving a network the right to negotiate or approve a station's retransmission consent agreements or any major term in such agreements. (We discuss joint retransmission consent negotiation in more detail below in response to Question II.1.b.ii.)

- Granting another non-commonly owned station or station group the right to negotiate or approve a station's retransmission consent agreements. (We

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3 *Id.*

4 47 C.F.R. § 76.65(b)(1)-(2).

5 *Amendment of the Commission's Rules Related to Retransmission Consent*, 26 FCC Rcd. 2718, ¶ 20 (2011).

6 For satellite carriers, such relief would take the form of waivers to the "no-distant-where-local" and "unserved household" rules. 47 U.S.C. §§ 339(a)(2)(E), (c)(2). For cable operators, such relief would take the form of waivers of the network nonduplication and syndicated exclusivity rules. 47 C.F.R. § 76.92 *et seq.*

discuss joint retransmission consent negotiation in more detail below in response to Question II.1.b.ii.).

- Demanding that an MVPD not carry legally available out-of-market stations (*e.g.*, distant signals or significantly viewed signals), or substantially burdening such carriage, as a condition of retransmission consent.

- Deauthorizing carriage immediately prior to or during marquee events, such as the Super Bowl, World Series, or Academy Awards. (We discuss the so-called "sweeps provisions" in more detail below in response to Question II.1.b.v.)

- Refusing to give a stand-alone offer for retransmission consent when requested by an MVPD, or giving a stand-alone offer so high as to not constitute a *bona fide* offer. (We discuss stand-alone offers in more detail below in response to Question II.1.b.vi.)

- Imposing a blackout in any DMA where the broadcaster has failed to provide an adequate over-the-air signal to a materially large number of subscribers.

None of these activities ought to be considered consistent with "competitive marketplace considerations." None should be permitted under the good faith standard.

(4) As part of STELA, Congress changed the statutory standard by which households are determined to be "unserved" by broadcast TV signals. Does Congress or the FCC need to take further action to implement this previous legislative amendment?

Yes, further action is necessary. For years, the law specified that households would be considered "served" (and thus ineligible for distant signals) if tested or predicted to receive signals of a specified strength using a "conventional, stationary, outdoor rooftop receiving antenna."[7] (Since the antenna is supposed to be pointed at each station tested, this really means a "rotating" antenna, not a "stationary" one.) But most Americans do not have rooftop antennas and have not for many decades. People today use indoor antennas. We have consistently argued that the relevant standard should reflect the kinds of equipment actually deployed in the marketplace.[8]

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[7] 17 U.S.C. § 119(d)(10)(A) (2004).

[8] *See, e.g.*, Letter from DIRECTV, Inc. and DISH Network, L.L.C., FCC EB Docket No. 06-94, (filed Nov. 4, 2010) (providing CEA figures related to antenna purchases as part of technical submission); *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home*

Moreover, just before the digital transition, the FCC ruled that broadcasters did not have to replicate their analog "Grade B" signal coverage areas with the new, digital broadcast signal contours, increasing the number of households that cannot receive an over-the-air signal using a typical indoor digital antenna.

In response, Congress changed the relevant statutory criteria to refer simply to an "antenna."[9] Congress removed all prior specifications—"conventional," "stationary," "outdoor," and "rooftop."

We believe that Congress intended to permit use of indoor antennas as part of the standard. This certainly was our understanding at the time, based on our conversations with Members of Congress and Congressional staff.

The FCC, however, did not construe the deletions in that manner, and decided to leave the "outdoor rooftop" criteria unchanged in its rules.[10] Thus, the predictive model and test still assume use of equipment that almost nobody uses.

This means that satellite subscribers in rural areas often can be left without access to broadcast network programming. If, for whatever reason, a satellite carrier does not offer a local station, the subscriber often can get no network service at all. She cannot receive local signals because she is too far from the transmitter. And we cannot give her distant signals because the FCC test thinks she can receive local signals.

This occurs far more often than one might think. Last summer, DIRECTV conducted nearly 1,800 signal tests in three local markets, and compared those

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Viewer Act, 14 FCC Rcd. 2654, ¶ 52 (1999) (citing comments of satellite providers urging an indoor antenna standard, but citing to then-current statutory language specifying the use of outdoor rooftop antennas).

9 17 U.S.C. § 119(d)(10)(A).

10 *Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension & Reauthorization Act of 2004*, 25 FCC Rcd. 16471 (2010) ("*2010 Measurement Order*"). The FCC reasoned: "the change in statutory language simply affords that Commission latitude to consider all types of antennas." *Id.*, ¶ 12. It concluded that an outdoor antenna was the more appropriate standard because (1) it "has always assumed" that people who could not receive a signal using an indoor antenna would employ an outdoor one; (2) the stations' service contours themselves were developed assuming the use of outdoor antennas; and (3) it believed that no reliable method for indoor testing had then been developed. *Id.*, ¶ 12-14. We are aware of no evidence to support the FCC's first "assumption." The FCC's latter two arguments have nothing to do with whether subscribers actually use outdoor antennas or not. Indeed, the FCC itself noted: "[W]e remain aware and concerned that using the outdoor measurement procedures may result in instances where a consumer who either cannot use an outdoor antenna or cannot receive service using an outdoor antenna and is not able to receive a station's service with an indoor antenna will be found ineligible for satellite delivery of a distant network signal." *Id.*, ¶ 21.

results to the FCC's predictive model that is intended to predict whether people can receive local signals. As many as *two-thirds* of those predicted to receive local signals could not actually receive a viewable picture—and this was using a rooftop antenna. If it had been able to conduct indoor antenna tests, the figures would undoubtedly have been much worse still.

We thus believe that Congress should mandate a change to the standard and give the FCC more unequivocal direction than was issued in STELA.

(5) Are there other technical issues in STELA that have arisen since its passage in 2010 that should be addressed in the current reauthorization?

No.

II. 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?

Yes. The retransmission consent rules date from 1992—the same year *Wayne's World* was released, AT&T introduced the first video phone (for $1,500), and the Washington Redskins won their last Super Bowl.

The video marketplace has changed beyond recognition since then. But regulation of the retransmission consent regime has not.

In particular, when Congress created the retransmission consent regime in 1992, it sought to balance the market power of monopoly cable operators against the monopoly power of broadcast network affiliates with exclusive territories. In the ensuing two decades, however, the video programming distribution industry has undergone profound changes. While cable operators still have market power, they are not monopolies in the markets for video distribution. Most consumers can now choose from among three or more distributors—not to mention online video providers. But *broadcasters'* exclusive territories and the Commission's retransmission consent regime have remained largely unchanged.

Moreover, broadcasters have increasingly engaged in conduct designed to enhance their bargaining power even beyond what they possessed in 1992. This includes collusion in the negotiation of retransmission consent (we describe this in more detail below in response to Question II.1.b.ii, regarding joint retransmission consent negotiation) and prohibiting the use of their programming as a distant network or significantly viewed station, even though the law allows it.

Broadcasters have exploited this situation by abusing their retransmission consent rights during negotiations, using the tactics of brinksmanship and blackouts to extract ever-greater fees from MVPDs—this is an escalating problem with no end in sight. SNL Kagan estimates that MVPDs paid $3.3 billion in retransmission consent fees in 2013, and that this figure will soar to a staggering $7.6 billion by 2019.

When MVPDs decline to meet broadcaster's demands, they face the loss of programming for their subscribers. In 2013, there were 127 broadcaster blackouts, compared with 96 blackouts in 2012, 51 blackouts in 2011, and 12 blackouts in 2010.

The result? Consumers are harmed no matter what the MVPD chooses. Either the MVPD acquiesces, in which case subscribers pay higher prices for programming. Or the MVPD resists, in which case the subscriber loses key programming. Consumers also may be forced by blackouts to switch from their first choice provider. This, in turn, can cause the loss of their chosen package, pricing, and DVR recording history, not to mention the hassle of transferring billing, equipment and set up to their second (or third) choice provider. Broadcaster blackouts, moreover, affect all MVPDs. Thus, a consumer who switches MVPDs in order to obtain broadcast programming may find herself needing to do so again within a short time.

As DISH has noted previously, rural households suffer disproportionately from broadcaster blackouts.[11] Moreover, broadcasters in many cases simply have failed to provide an adequate over-the-air signal to reach many rural communities. As discussed above in more detail below in response to Question I.4, DIRECTV has found that as many as two-thirds of those predicted to receive local signals could not actually receive a viewable picture.

[11] *See* Comments of DISH Network, MB Dkt. No. 10-71 at 11-14 (filed May 27, 2011). These comments, along with the Comments of DIRECTV, LLC, MB Dkt. No. 10-71 (filed May 27, 2011) ("DIRECTV Retransmission Consent Comments") are attached hereto as Exhibit B.

Examples of Communities Underserved by Big Four Broadcast Station Signal[12]

DMA	Community Affected	"Big Four" Digital Broadcast Signals Received	Missing "Big Four" Networks
Denver, CO	Steamboat Springs, CO	None	ABC, CBS, FOX, NBC
Fargo-Valley City, ND	Cavalier, ND	WDAZ-TV (ABC); KNRR (FOX)	CBS, NBC
Medford-Klamath Falls, OR	Lakeview, OR	KOTI (NBC)	ABC, CBS, FOX
New York, NY	Ellenville, NY	WRGB (CBS)	ABC, FOX, NBC
Phoenix, AZ	Globe, AZ	KPNX (NBC); KPHO-TV (CBS)	ABC, FOX
Spokane, WA	Lewiston, ID	KLEW-TV (CBS); KHQ-TV (NBC)	ABC, FOX

Clearly, then, Congress should act.

We discuss the six proposals cited by the Committee, along with several others, immediately below. (Please note that we discussed some of these reforms in the context of the FCC's "good faith negotiation" rules above in response to Question I.3.)

(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).

We strongly support this proposal. We think of this idea as one form of "blackout relief" for subscribers. It strikes us as the single most important thing Congress could do in the STELA reauthorization.

One can agree with the MVPD in a particular retransmission consent fight. Or one can agree with the broadcaster. But we should all be able to agree that the *subscriber* should not be put in the middle. Subscribers have done nothing wrong. All they want is to watch television from the MVPD that they have chosen.

[12] *Id.* at 13.

Blackout relief would let them do just that. It would require the FCC to order interim carriage during all blackouts. And it would provide that subsequent agreements will govern carriage back to the date of the blackout, so neither party is advantaged by the interim carriage.

Better yet would be to combine interim carriage with baseball-style arbitration. This would keep the programming up so consumers do not suffer, and ensure that the broadcasters are fairly compensated through a formal arbitration process.

Blackout relief works best if it is mandatory and applies automatically. Asking the FCC to order interim carriage during *some* blackouts would be costly and time consuming, and would inappropriately put the focus on the behavior of MVPDs and broadcasters, when the focus should be on the harm caused to the consumer.

Blackout relief could also take the form of changes to the distant signal rules. Congress should permit (or direct the FCC to permit) pay TV providers to deliver distant signals during blackouts. While less perfect than full interim carriage, this distant signal fix would allow us to provide subscribers with an imperfect substitute during a local broadcaster's blackout, thereby softening the blow to consumers. Subscribers in such circumstances would continue to have access to a network affiliate but would not have local news, weather and sports.

For example, if a broadcaster were to black out the local Charleston-Huntington, West Virginia FOX station, DIRECTV and DISH would be able to temporarily bring in an out-of-market station, such as the Lexington, Kentucky FOX station (with the MVPD paying the compulsory copyright fee for each subscriber). The replacement station would not be a perfect substitute for the blacked-out local station, since consumers would not have their local content, but at least some measure of protection would be extended to affected consumers by providing access to network programming. Additionally, this fix would level the playing field a bit in the negotiating process and make it more likely that the broadcaster would not pull its signal in the first place. Broadcasters would be introduced to some of the same competitive pressures that satellite carriers and cable operators face every day, and consumers would benefit as a result.

These forms of blackout relief would not "interfere" with the "free market," as broadcasters have argued, for the simple reason that

the market is not free; it is skewed by the legal monopolies and regulatory benefits enjoyed by the four networks. The retransmission consent "marketplace" is one littered with invasive government rules that favor broadcasters and disfavor MVPD subscribers. A list of these appears as Exhibit A. Every single one of these rules gives special privileges to broadcasters. These privileges do not apply to pay-TV networks (such as CNN or ESPN), Internet programming, or any other kind of video product other than broadcasting.

In today's highly regulated market, however, broadcasters cannot reasonably object to protecting subscribers through blackout relief.

If Congress truly believes that broadcasters are special, and that there should be a "social contract between the government and broadcasters to serve the 'public interest' (e.g., provide 'local' programming and a 'diversity of voices' to as many Americans as possible),"[13] it should ensure that consumers do not lose the benefit of this bargain.

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

Of all the reforms presented to Congress, this should be the easiest to implement.

Broadcasters should not be able to evade FCC rules through legal tricks. Yet this is exactly what broadcasters are doing today.

The FCC's media ownership rules generally prohibit one entity from owning more than one "big four" network affiliate in a market.[14] And they generally prohibit excessive concentration of broadcast ownership across markets.[15] Thus, collusive joint retransmission consent negotiation should already be prohibited.

Broadcasters, however, increasingly evade these rules through "sidecar" arrangements such as JSAs, SSAs, and similar endeavors. DIRECTV's own internal records show that in nearly

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[13] Phoenix Center, "*An Economic Framework for Retransmission Consent,*" Policy Paper No. 47 at 1 (Dec. 2013).

[14] 47 C.F.R. § 73.3555(b).

[15] *Id.* § 73.3555(e).

half of the markets in which it carries local signals, it must negotiate with a party controlling multiple affiliates of the "Big Four" networks. This does not even count the increasing practice of networks insisting on negotiating or approving retransmission consent on behalf of their allegedly independent affiliates.

Nobody carries more broadcasters than DIRECTV and DISH. We can assure you that these sidecar arrangements harm viewers. They lead to higher prices (as much as 161 percent higher, according to one estimate[16]). And they by definition cause greater harm when blackouts occur.

This is why the Department of Justice recently submitted a filing at the FCC that highlighted the harms of these tactics and urged the FCC to require the broadcast ownership rules to treat any two stations participating in such an arrangement as being under common ownership.[17] DOJ found that, "[g]iven the extensive control over pricing decisions inherent" in such arrangements, they should be attributable under the FCC's ownership rules.[18] And it stated that "failure to treat JSAs and similar arrangements as attributable interests could provide opportunities for parties to circumvent any competitive purposes of the multiple ownership limits."[19]

The FCC Chairman recently proposed to generally prohibit joint retransmission consent negotiations between non-commonly owned stations. The House Commerce Committee's discussion STELA reauthorization draft contains a similar approach.

We support both of these proposals. Some broadcasters point to instances in which SSAs and JSAs have led to more local news, or joint ownership of a news helicopter, or other public goods. We do not object to such arrangements. Our primary concern is when

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[16] William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market* (May 27, 2011), filed as an attachment to the Comments of American Cable Association, MB Docket No. 10-71 (filed May 27, 2011); William P. Rogerson, *Joint Control or Ownership of Multiple Big Four Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees*, MB Docket No. 10-71 (May 18, 2010), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

[17] *Ex Parte* Submission of the United States Department of Justice, MB Docket Nos. 09-182, 07-294, and 04-256 (filed Feb. 20, 2014).

[18] *Id.* at 15-16.

[19] *Id.* at 16 (internal citations omitted).

broadcasters collude on *external* functions—particularly retransmission consent.

Other broadcasters say that they need to negotiate retransmission consent on behalf of more stations in order to ensure their continued ability to offer local news and information. If they really believe this, they should make the case to Congress and the FCC to relax the ownership limits. Unless and until they do so, they should not be allowed to rely on legal tricks to evade the Commission's rules and harm consumers.

Finally, although the Committee does not ask this question directly, the retransmission consent problems reflect a larger pattern of network dominance over affiliates in the broadcast markets. DIRECTV, for example, has argued that network "rights of refusal" or even outright negotiation on behalf of "independent" affiliates should be considered attributable under the FCC's ownership rules and violations of its good faith rules.[20]

As part of STELA reauthorization, Members of the Committee might ask their local broadcasters:

- Do you think your network has demanded too much control over retransmission consent negotiations and programming time?

- Do you think too much of your station's retransmission consent fees are sent back to network headquarters rather than to your local station to support local news, weather, sports, and public affairs programming?

We believe that candid answers to these questions would stand in contrast to NAB's claim that the current retransmission consent system does not require reform.

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

Mandatory refunds would not be pro-consumer as they might result in the elimination of current consumer benefits and flexibility.

[20] DIRECTV Retransmission Consent Comments at 19.

The proposal stems from broadcast claims that subscribers cannot switch providers during blackouts because long-term satellite service agreements impose "early termination fees." This, however, is only half of the story.

To begin with, DIRECTV and DISH subscribers are never required to enter into a service agreement. They can *choose* to do so if they would like to lower the up-front cost of equipment and installation. Alternatively, they can pay the full cost of equipment and installation when they commence service and enter into no service commitment.

We offer service agreements because we invest as much as $1,000 to provide service to a new residential subscriber. This includes the full-price of installation and equipment. Subscribers choose service agreements because it makes more sense for them to pay these costs over the long term than all at once.

And every service agreement clearly states that programming and channel lineups are subject to change and are not cause for either party to end the agreement.

Were Congress to mandate refunds during blackouts, we would find ourselves less able to offer long-term service agreements. This, in turn, would force subscribers to pay the full price of equipment and installation up front.

Such a measure would only serve to increase broadcaster leverage in retransmission disputes, when the scales are already so tipped in their favor. This would make such disputes more common. And it would lead broadcasters to demand even higher prices.

Perhaps broadcasters would agree to amending the law so that any broadcaster that blacks out its signal during a retransmission consent dispute must credit all impacted subscribers with the amount of retransmission consent fees paid retroactively to the broadcaster during that period. This might: deter the broadcaster from blacking out its programming in the first place; incent the broadcaster to reach an agreement quickly when it does black out a signal; and offer some financial compensation subscribers who lose service through no fault of their own. DIRECTV and DISH would gladly credit the full amount of such restitution to subscribers upon receipt from the broadcaster.

(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.

This, too, is a wise reform, as illustrated by the fact that CBS recently blocked access to online content by Time Warner Cable's broadband subscribers nationwide during the retransmission dispute between the two. Such blocking harms MVPD video subscribers in the same way that blackouts harm them more generally. But it also harms others. Some people have no MVPD video service and rely on the broadband connection to get video content. Others get video from one provider and broadband from another. Yet they can be caught up in a dispute and denied Internet content even though they actually are still paying for a video service that includes the broadcaster's signal.

Congress should prohibit such conduct outright. At a minimum, it should clarify that website blocking against such viewers constitutes a *per se* violation of the good faith rules.

(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.

To begin with, neither DIRECTV nor DISH has ever blacked out broadcast TV channels. Broadcasters black out channels by withholding consent.

This fix constitutes a matter of fairness and creates parity between MVPDs and broadcasters. One could imagine a fair set of retransmission consent rules containing no restrictions on the timing of disputes. (The DeMint/Scalise approach does this, as does the House Energy and Commerce Committee discussion draft.)

Even better from a consumer perspective would be a prohibition on blackouts both during sweeps weeks (which are important to broadcasters) and prior to and during marquee events such as the Super Bowl, World Series, or Academy Awards (all of which are important to viewers and have been used at one time or another by broadcasters as leverage to receive higher fees). Such a rule could

be formulated both by referencing a limited number of specific events or in terms of ratings or some other parallel metric.

Under the existing formulation, however, the government protects only one side's economic interests—the broadcasters'. This ultimately harms consumers, and certainly has no place in allegedly "free market" negotiations.

(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.

Congress should prohibit the *forced* tying (whether explicit or *de facto*) of affiliated content as a condition of gaining access to a station's signal. It should not prohibit all *offers* of bundled programming.

Forced tying most often arises in negotiations with the large station groups affiliated with national networks, which use their "must have" broadcast programming as negotiating leverage to gain carriage for new and/or unpopular cable channels affiliated with the corporate parent.

Refusal to even discuss carriage of the station's Big Four network signal separately from carriage of other tied programming introduces an additional element of cost and complexity to the negotiation, and thereby increases the risk that the parties will reach an impasse. Such an outcome does not serve the public interest.

To be clear, we are not saying that Congress should prohibit all offers that bundle retransmission consent with carriage of additional content. Indeed, in many cases, we have found the terms and conditions of a bundled offer attractive. If, however, an MVPD requests an offer for retransmission consent on a stand-alone basis, there is no reason why the broadcaster should refuse to honor that request.

In order to be effective, such a rule would have to distinguish between *bona fide* and sham offers for stand-alone programming. We do not think this would be difficult to police in practice. A demand for significant price increases over the prior agreement if the distributor purchases retransmission on a stand-alone basis would be an example of a sham offer.

> The FCC has a similar remedy with respect to stand-alone broadband offerings by Comcast in connection with the Comcast/NBCU merger. There, the FCC required Comcast to offer stand-alone broadband service "at reasonable market-based prices" and "on equivalent terms and conditions" to the most comparable bundled offering.[21]

(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?

We are not cable operators and are not subject to this requirement.

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

We are not cable operators and are not subject to this requirement.

(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?

We are not cable operators and are not subject to this requirement.

(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?

We are not cable operators and are not subject to this requirement.

(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?

Please see our response to question II.b.ii, in which we discuss such arrangements in the context of joint retransmission consent negotiations.

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[21] *Comcast Corp., General Electric Co., and NBC Universal, Inc*. 26 FCC Rcd. 4238, app. A, § IV.D (2011).

(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?

From our perspective, this question sets forth the very impetus for retransmission consent reform—skyrocketing broadcaster price increases resulting in more and more disputes and blackouts and higher rates for our subscribers. As described in our response to Question II.2.b.vi, moreover, we believe that the very worst instances of tying involve broadcast programming.

Programming costs are the single largest input cost for both DIRECTV and DISH. They cost even more than the satellites we use to provide our services. As such, they have a direct impact on what subscribers pay for service.

Of course, we are concerned about price increases and tying for *all* programming, not just broadcast programming. But, as described above, broadcast prices have increased much faster than those for any other type of programming—even sports programming.

We think broadcast programming has become the most problematic kind of programming because only broadcast programming is subject to a thicket of government rules that favor one side over the other. Moreover, STELA itself relates to broadcast programming. While we welcome Congressional efforts to control runaway programming prices more broadly, it makes sense to focus on the most acute problems in the video marketplace as part of STELA reauthorization.

(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?

We are still analyzing whether Congress should extend existing competitive protections for the traditional television marketplace to the online video marketplace, and have not yet formulated an opinion on this.

(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 contains several provisions helpful to consumers. In particular, provisions prohibiting Internet blocking during retransmission consent disputes

could be beneficial. So would the provisions encouraging broadcasters and upstream copyright holders to provide copyright licensing for online delivery.

On the other hand, several provisions appear to impose additional, unwarranted regulation on MVPDs. One such provision would prohibit many exclusive arrangements—even those between distributors without market power and unaffiliated programmers. Such arrangements have enabled both of our companies to compete against cable operators that still maintain dominant market share in most of America.

(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?

Our two companies do not use pole attachments at this time but, as stated above, we generally support regulatory parity.

(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?

We generally support efforts to facilitate the most spectrum possible made available in the incentive auctions. That said, we think that broadcast carriage rights should not be *expanded* as part of any incentive auction.

(12) Are there other video policy issues that the Congress should take up as part of its discussions about the STELA reauthorization?

We are unaware of any such issues at this time, other than as noted above.