STATEMENT OF MATTHEW M. POLKA
PRESIDENT AND CHIEF EXECUTIVE OFFICER
AMERICAN CABLE ASSOCIATION

BEFORE THE
SUBCOMMITEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON
COMPULSORY VIDEO LICENSES OF TITLE 17

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Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee, my name is Matthew M. Polka, President and Chief Executive Office of the American Cable Association (ACA). Thank you for inviting me to speak about compulsory video licenses of Title 17 and other competition related issues in the video distribution and programming markets.

I. Introduction to the American Cable Association

In the U.S., nearly 100 million households are customers of subscription TV. More than 80 million households subscribe to broadband. While big companies like Comcast, TWC, AT&T, Verizon, Cox and Charter serve most of the market, there are nearly 850 small and medium-sized multichannel video programming distributors ("MVPDs") that provide video, broadband Internet access, and voice services in local markets in 50 states to nearly 7 million video subscribers. These are ACA's members. In some instances, these operators provide these same services in markets the big companies have ignored. In other instances, they provide competition to the big operators. ACA members are rarely household names on the national scene. But they are highly valued in the communities they serve.

The small and medium-sized operators of ACA, which include cable operators, rural telephone companies, and municipally-owned service providers, serve a number of important functions in the U.S. communications market and in society at large. ACA members:

Provide broadband in rural areas. As the National Broadband Plan noted in 2010, providing rural broadband is one of the great infrastructure challenges of the 21st century. Despite the high costs of building networks in more sparsely populated areas, ACA members have been building out broadband in rural areas for years. Most of them do so without any government funding, saving taxpayers billions in support for government-funded broadband networks.

Provide competition and choice in urban areas. Several of ACA's biggest members, like WOW!, RCN, Wave Broadband, and Grande Communications, are competitive providers of cable, broadband, and voice services in urban areas. These companies entered markets that are dominated by large cable companies and the incumbent telephone company, bringing choice and price competition in the process. Today, ACA members provide choice to more than five million homes in the U.S.

Provide services to community institutions and business in underserved areas. ACA members make available broadband Internet access, private data networks and multiline voice products to tens of thousands of community institutions in small cities and rural areas. Nearly one million small businesses in rural areas have access to these advanced communications products from ACA members.

II. It's Appropriate for Congress to Periodically Review its Video Market Rules

It's been nearly five years since Congress and this Committee had to consider whether to reauthorize the satellite TV compulsory license, and as part of that process, took an in-depth look at the video marketplace in which DISH Network and DirecTV operate. It was after conducting this evaluation that Congress passed the Satellite Television Extension and Localism Act of 2010, which extended the statutory copyright license until 2014, and made changes to the rules governing the satellite TV industry to reflect the marketplace of 2009. This sort of review of the satellite TV industry and its governing rules by Congress and this Committee happens regularly. It has occurred every five years for the last 20 years.

In the same period of time, the cable TV industry and its rules, such as those included in 1992 Cable Act, have not similarly benefited from such a periodic review. While hearings on cable industry pricing were once an annual affair, and there have been some hearings on the video marketplace with respect to mergers, like Comcast-NBCU, these were no substitute for a comprehensive review of whether the rules governing the industry are protecting consumers and promoting competition. In fact, the last time Congress conducted such a wide-ranging review and made broad legislative changes to the rules governing the cable industry was in the early 1990s.

Even without the benefit of this hearing or what I'll explain next in my testimony, as a consumer, you know a lot has changed in the video marketplace in the last two decades. So as part of your consideration of whether to renew the satellite TV license for another five years, I would also encourage you to simultaneously review the cable industry and its governing rules as part of your process to determine how to benefit consumers and foster competitive markets. If you spend the time, you'll undoubtedly recognize and fully appreciate all of the dramatic changes in the marketplace in the last 20 years. I'll highlight some of these changes later on in my testimony, but leave you with my conclusion now that the video distribution market is no longer the same one that Congress investigated and acted upon in 1992.

III. Some Video Marketplace Laws Work as Intended and Others Need Updating

Not surprisingly, while many of the cable laws passed by Congress continue to serve their intended purpose, others now fail to properly govern today's video market. In what follows, I will discuss in more detail rules that continue to work and need no change except perhaps for a tweak, such as the cable copyright license and the program access rules. I will also highlight a few rules that have grown noticeably stale and are ripe for updating, such as the retransmission consent rules. To start, I'm going to discuss the cable compulsory license – a statutory regime that works, and has stood the test of time.

<u>Section 111 Cable Statutory License</u>

Copyright holders and cable operators have been operating under the Section 111 statutory license since 1976, and throughout that time, it has served its goal in compensating copyright holders for the retransmission of their work in a way that is fair and minimally burdensome for multiple stakeholders.

The Section 111 license arose in the 1970s from a compromise reached by the stakeholders after the Supreme Court declared that cable was under no obligation to pay copyright royalties for its retransmission of certain over-the-air broadcast signals under the copyright laws. Copyright holders, whose content airs on the over-the-air signals of broadcast stations, felt they should be compensated by cable operators who retransmit these signals. Cable operators disagreed, but felt if they were to pay, that it was essential for there to be an efficient means to clear rights from potentially thousands of copyright holders in advance of the copyrighted works airing on the broadcast stations. Although not perfect, the Section 111 license addressed the concerns of both groups, and has proven to be an efficient and effective means of clearing copyrights to this day. In fact, Congress thought well enough about the statutory license to provide the satellite industry a similar one for the retransmission of distant signals (Section 119) in 1988, and local signals (Section 122) in 1999.

If Congress were now to repeal in whole or part Sections 111, 119, and 122, clearing the rights to all of the copyrighted works on retransmitted broadcast signals would still impose heavy burdens, both logistically and financially, for all parties in the marketplace. For example, cable operators and other MVPDs would still be required to clear copyright for all works that air on their retransmitted broadcast stations, but without the copyright license, these subscription TV providers would need to know in advance what copyrighted works each retransmitted broadcast station will be airing. Faced with the threat of potential copyright liability for not pre-clearing copyrighted works, subscription TV operators would be forced to blackout all programming aired by broadcasters without notice, or drop stations altogether, where able, and would face an unsolvable problem with respect to must-carry stations that cannot be dropped. Without the existing copyright license, it is likely that pay TV customers would also lose access to programming from broadcast stations that they have historically received. Moreover, these customers may end up paying more money for the same content due to the imposition of transaction costs of clearing copyright that are not incurred today. For some smaller MVPDs and broadcasters, the harms could threaten their viability. For rural consumers, the proposals could result in fewer choices and higher costs. Maintaining the status quo avoids these rough consequences.

Under these circumstances, it is not at all surprising that a wide range of stakeholders – including representatives of broadcast stations, copyright users and even some copyright owners – agree that it is appropriate for the statutory license to remain unchanged.

Powerful rights holders argue that the license should be eliminated because they are underpaid. ACA believes that rights holders are at least fully compensated for their works today through a broken retransmission consent regime that is tilted in their favor. Outdated retransmission consent rules that distort the market allow broadcasters to extract soaring retransmission consent fees from MVPDs. A significant portion of this revenue is not kept by local broadcast stations, but is returned to the programming rights holders, who are predominately the major national broadcast networks and sports leagues. In this manner, retransmission consent fees result in additional indirect payments from MVPDs to copyright owners that supplement the royalties these rights holders receive through the statutory license. Taking these supplemental payments into account, which are supra-competitive due to the broken nature of the retransmission consent market, rights holders' claim that they are undercompensated just doesn't add up. In fact, they may be overpaid.

Should Congress reach a different conclusion about the need to maintain the copyright license, changes to the compulsory license cannot be done in isolation. As the Copyright Office and the Federal Communications Commission (FCC) have long recognized, the license is intertwined with key broadcast regulations, such as retransmission consent, must carry, and the FCC's broadcast exclusivity rules. Any proposed changes to the license must coincide with reform of this bundle of broadcast signal carriage rules. It is also critical that two policies that are essential to smaller and rural MVPDs be preserved:

- Clear access to distribute "distant" signals; and
- Special considerations for smaller MVPDs.

First, for over 35 years, Section 111 has cleared copyright for cable carriage of what are considered "distant" broadcast signals because they are transmitted from another designated market area (DMA). In adopting this license, Congress recognized that many cable systems in rural areas, especially those on the outskirts of DMAs, offered "distant" signals because "local" signals were unavailable or limited. Rural consumers benefited then, and still do today.

For some consumers, the stations considered "local" by virtue of DMA demarcations are actually located out-of-state, and only through the importation of "distant" stations can they receive in-state news, sports, and political coverage. For others, "distant" signals provide vital weather warnings that come prior to, rather than during or after, the event. For these reasons and others, any changes to the compulsory license must also include a provision that smaller and rural MVPDs can continue to be permitted to provide "distant" signals.

Second, the special consideration that smaller MVPDs have historically received through the Section 111 license must also continue. Since 1976, Congress has allowed smaller MVPDs to pay lower copyright license fees. This policy recognized that smaller MVPDs provided needed services, and operate under economic constraints that are vastly different from those affecting larger operators. This remains true today. Congress has maintained the small system provisions throughout every amendment to the license, validating their importance.

Elimination of the license would undoubtedly expose smaller MVPDs to rampant price discrimination, leading these operators to pay higher copyright license fees than larger MVPDs. ACA has documented to Congress and the FCC that many top-rated broadcasters and programmers routinely charge smaller operators substantially higher programming fees. The reasons are easy to understand. A copyright holder has a financial incentive to enter into a deal with a large cable operator that provides service to tens of millions of subscribers because not reaching an agreement means losing out on a big payout. Therefore, the price agreed upon in a negotiation between copyright holders of "must carry" programming and a large cable operator is far more likely to be closer to the fair market value of the content than the price reached in a negotiation with a small cable operator. A copyright holder doesn't have the same incentive to reach individual deals with hundreds of small cable operators who each serve only a few thousand subscribers. The cost of conducting all of these transactions is far greater, and the amount of money that would be lost as a result of not entering each deal is significantly lower. In fact, for many larger copyright holders the amount of money paid by a single small cable operator is materially insignificant. Not surprisingly, in these instances, the copyright holder would set the price much higher than the price it charges large cable operators, and tell the small cable operator, "take-it-or-leave-it," knowing the cable operator needs the rights to its programming more than the copyright holder needs to be paid by the cable operator. This type of price discrimination has no basis in cost; rather, the basis is unconstrained market power, and customers of smaller MVPDs will ultimately pay the price.

The Section 111 license protects smaller MVPDs from this sort of price discrimination by establishing uniform license fees based on gross revenues and other variables. With no compulsory license, powerful rights holders would simply "stick it to the small guy" – conduct that would threaten smaller operators and their customers who rely on their service. Accordingly, any change to the compulsory license must ensure smaller operators not pay more per customer than larger operators.

There are some parties that suggest that the copyright licenses should be eliminated and propose alternative market oriented solutions to take their place. We urge the Committee, in evaluating these proposals, to take into account the success of the copyright license regime, and the potential impact that changes to the license would have on smaller cable operators and their customers. In sum, we believe that the public will be best served by maintaining rather than eliminating or replacing the license.

Retransmission Consent
A Regime in Need of Change

Last year's retransmission consent impasse between Time Warner Cable (TWC) and CBS Corp. (CBS) is one of the latest and most visible signs of serious flaws in the rules governing the retransmission consent market. Another sign of the broken retransmission consent regime is the current negotiation impasse between Buckeye CableSystem and Sinclair Broadcast Group, which has left Buckeye customers in the Toledo, OH, market without their local NBC station for nearly *150 days and counting*. The main problem is that Congress passed a law in 1992 based on a set of marketplace conditions and while those conditions no longer exist, the law presumes they do.

In the last 20 years, we've seen satellite TV providers and telephone companies successfully launch MVPD services that directly compete with cable. In fact, the satellite TV providers have more than 60% of the video market in many areas ACA members serve. Moreover, other types of video distributors, such as over-the-top video distributors, like Netflix, Amazon, and Hulu, have entered the market and have obtained 40 million customers. In addition, the video programming market has largely consolidated into five media conglomerates that control the "Big 4" television networks (ABC, NBC, CBS, and FOX) and dozens of the most popular cable networks. This is not the marketplace of 1992.

As a result of the outdated rules and regulations, consumers are being harmed. Before describing some retransmission consent-related issues that require Congress' attention, I want to highlight that the FCC recently took an important step toward fixing the broken retransmission consent market. On March 31, the FCC adopted an order that bans separately owned, same-market top four-rated broadcast stations from colluding in the sale of retransmission consent. For four years, ACA and its members urged the FCC to take action against this widespread and increasingly common practice by broadcasters. As the FCC recognized, ACA members documented more than two dozen broadcasters engaging in this practice with 98 Big 4-affiliated stations in more than 20% of all television markets. Moreover, available evidence showed that TV station collusion increases the average price of retransmission consent by at least 18%, leading to higher prices for consumers – an economic reality that the FCC understands quite well.

Because the FCC has acted to ban retransmission consent collusion, further Congressional action on this specific retransmission consent matter is not necessary. However, there remain other retransmission consent-related issues that need to be addressed, and I will describe three of them here. First, existing rules fail to protect consumers from broadcasters who pull their signals during retransmission consent negotiation impasses. Second, current rules do not prevent a broadcaster and its affiliated broadcast network from blocking access to their online content to an MVPD's broadband subscribers while that MVPD and station/network are engaged in a retransmission consent impasse. Third, current rules require consumers who subscribe to cable service to also subscribe to the broadcast stations that elect retransmission consent, even if they don't want to receive those broadcast stations via their subscription service. Each of these issues can be addressed through narrowly tailored amendments, and I encourage the Committee to consider addressing them as part of the reauthorization of the satellite copyright license.

Promoting Retransmission Consent Negotiations Without Harmful Blackouts

Last year's retransmission consent dispute between TWC and CBS highlighted how consumers lack a reliable safety net under existing rules in cases where broadcasters and MVPDs cannot reach mutual agreement. For 32 days in August and September, more than three million TWC and Bright House Networks (BHN) subscribers were without access to CBS network programming, and local news and weather from their local CBS stations through their cable operator because of a dispute over prices, terms and conditions of retransmission consent in the eight large television markets where CBS owns and operates broadcast stations.

The TWC/CBS blackout was not an isolated incident. As discussed, Buckeye CableSystem's subscribers in Toledo, Ohio, have been without their local NBC station for nearly five months. Over the last few years, consumers have increasingly suffered when a cable or satellite TV provider and a broadcaster reach an impasse in their retransmission consent negotiations that results in a signal blackout. In 2013, millions of cable and satellite TV subscribers went without access to their local broadcast signals from their service provider after station owners cut off programming 127 times. This was a nearly 40% increase over 2012, a nearly 250% increase over 2011, and a more than 1000% increase over 2010. These blackouts can last weeks or months.

Existing law prevents a cable operator from dropping a broadcast station during the sweeps period if its retransmission consent agreement expires during "sweeps." Such periods are the quarterly national four-week ratings periods – generally including February, May, July and November. While cable operators are prohibited from pulling broadcast signals during periods of time financially important to broadcasters, there is no constraint on broadcasters' pulling signals from cable operators.

Congress should prevent broadcasters from pulling signals from cable operators if retransmission consent agreements expire before new agreements have been signed. ACA has proposed adoption of a rule mandating that broadcasters and MVPDs continue to offer a broadcast station's signal to consumers after an existing retransmission consent agreement expires and while terms of a new agreement are pending resolution of a negotiating dispute. Under this approach, the parties' existing retransmission consent agreement would automatically be extended past its expiration date, and an MVPD would continue to pay the broadcaster for retransmission consent rights per such contract. At the time that the dispute is resolved and a new agreement is signed, the prices and terms of the new agreement would retroactively apply to begin immediately after the previous agreement's expiration date and any required true-up of prices would be applied. This proposal does not call for Congress to side with a broadcaster or MVPD on the appropriate prices, terms, and conditions of carriage for the broadcaster's signal. It also does not give MVPDs the right to carry the broadcaster's signal indefinitely. In the event that various forms of voluntary mediation fail, commercial baseball style arbitration would provide final resolution. This proposal focuses on the narrow need to ensure consumers have continued access to broadcast stations while parties continue to negotiate. The FCC has adopted this type of standstill relief on numerous occasions.

Congress should adopt this type of standstill relief now to make sure that the blackout that affected millions of TWC and BHN subscribers, and the longstanding blackout now affecting customers of Buckeye CableSystem, are the last of their kind.

Ensuring Consumers Have Access To Freely Available Online Content During Retransmission Consent Disputes

For years, the primary consumer harms associated with the broken retransmission consent regime were blackouts and higher subscription-TV fees. However, more recently, there are indications that the broken retransmission consent regime is spreading onto the Internet. During last year's TWC/CBS dispute, CBS not only pulled its owned and operated stations from TWC's customers, CBS additionally prevented all Internet subscribers of TWC and BHN (TWC's negotiating partner) from accessing CBS online content that is otherwise freely available. CBS's action even harmed TWC-BHN Internet customers who take video service from another provider, such as DISH Network or DIRECTV. Earlier, in a retransmission consent dispute with Cablevision, News Corp. (now called 21st Century Fox) had employed this same tactic, by extending its blackout of the Fox owned-and-operated station to include freely available Fox content on Fox.com and Hulu for just Cablevision's Internet customers. To protect consumers from experiencing this harm in the future, Congress should specify that a broadcast station blocking access to its freely available Internet content during a retransmission consent impasse is a *per se* violation of the good faith rules governing retransmission consent negotiations.

Providing Cable Customers Flexibility To Receive Video Packages Without Paying For Over-the-Air Stations

Cable operators are required by regulation to have a basic service tier that includes all local broadcast television stations offered by the cable operator. Moreover, all subscribers to cable operators must purchase the basic service tier in order to receive additional video programming. This means cable operators must include both stations that seek carriage for no compensation, like must-carry stations and PEG channels, and stations that elect retransmission consent and demand payment for carriage in a tier that every subscriber must purchase.

These rules create two problems. First, consumers who wish to subscribe to a cable operator must pay for the broadcast stations that elect retransmission consent whether they want to pay to receive these stations or not. Consumers who do not want these broadcast stations from their cable operator either may not want them at all, or may wish to receive them through an alternative source, such as using an over-the-air antenna that allows them to get the channels for free. Current law prevents cable operators from putting the retransmission consent stations on a separate tier, and allowing its customers to choose whether they want to pay to receive this broadcast tier or not.

Second, tier placement and subscriber penetration levels are critical terms of negotiation between cable operators and non-broadcast programmers. Non-broadcast programmers highly value lower tier placement and higher subscriber penetration, and cable operators who provide lower tier placement and higher subscriber penetration pay lower carriage fees. By providing broadcasters that elect retransmission consent an automatic right to appear on the basic service tier and obtain 100% cable subscriber penetration, Congress has taken off the table a critical term of negotiation that cable operators could leverage with broadcasters to obtain lower rates for themselves and their customers.

Congress should not require inclusion of broadcast stations that elect retransmission consent on the cable basic service tier. Moreover, Congress should ensure that consumers who wish to receive cable television service without subscribing to the retransmission consent stations may do so. Such a modification to existing rules would impact only how broadcast stations that elect retransmission consent are sold. It would not affect the right of broadcast stations that elect must carry and other channels, such as PEG channels, to be on the basic service tier and included with the purchase of any other cable television service.

In the following, I will discuss two non-retransmission consent related matters that also deserve the attention of policymakers.

<u>The Program Access Rules</u>
Ensuring that Smaller Cable Operators Have Access to the Program Access Protections Congress Intended

Congress sought to ensure that smaller operators were protected from discriminatory and unfair behavior by cable operators and vertically integrated programmers by extending "program access" protections to their buying groups. However, the regulations adopted by the FCC, particularly its definition of a "buying group," prevent the nation's largest programming buying group, the National Cable Television Cooperative (NCTC), from availing itself of the protections Congress intended. This means that more than 900 MVPDs, who obtain most of their national programming through this organization, are effectively denied the protection of the program access rules. The FCC is now considering the adoption of new rules that would allow a buying group, like the NCTC, to file program access complaints and also contain safeguards to prevent programmers from evading the protections of the rules. It is vital that the FCC act now by updating its definition of a buying group, making clear programmers must treat buying groups comparably to other MVPDs, and not arbitrarily excluding certain buying group members from joining a master agreement signed by the buying group.

<u>The Set-Top Box Integration Ban</u>
Lowering Smaller Cable Operators' Costs of Deploying Set-Top Boxes through Deregulation

As discussed, many aspects of the video marketplace have changed yet the governing rules and regulations have not been updated to reflect current marketplace conditions. This isn't only true with regard to the programming market, but also in the market for set-top boxes. In 1996, Congress was concerned that consumers had no option to obtain a cable step top box, other than to lease it from their cable operator and passed legislation to give the FCC authority to adopt rules that would promote the development of a retail set-top box marketplace.

In furtherance of this purpose, the FCC's "integration ban" went into effect in 2007, and since then all new set-top boxes acquired by cable operators were obligated to have separable security. The purpose of the integration ban was to compel cable operators and equipment manufacturers to rely on a "common" separated security solution that could be used by subscribers to access encrypted cable services through a retail device, like a TiVo box. In the time since the integration ban was implemented, large and small cable operators have fully complied with the integration ban and deployed more than 30 million set-top boxes with CableCARDs, the form of separable security agreed upon by the cable and consumer electronics industries. Despite the FCC's success in establishing "common reliance" on the

CableCARD, the retail market for devices that employ this form of separable security has not developed. By the FCC's own admission, the integration ban has been ineffective in creating a retail market for cable set-top boxes as hoped. This unsuccessful government effort came at a cost. Smaller cable operators and their customers suffered because the cost of obtaining and deploying set-top boxes with CableCARDs was higher than the cost before the integration ban. These costs were passed through to customers. Moreover, no such integration ban mandate applied to satellite TV companies, which put smaller operators at a competitive disadvantage.

Today, the marketplace is vastly different from 1996. The marketplace has responded to consumer interest in getting content on different types of devices, such as Internet connected TVs, streaming to tablets, mobile telephones and other "smart" video devices. Given the changes in the marketplace and the burden that the integration ban has caused on the industry, particularly smaller operators and their customers, the time has come to eliminate the ban. Such an action need not eliminate the obligation on cable operators to support set-top boxes manufactured by a third-party such as TiVo so that consumers can continue using these devices they purchased at retail outlets for use with their cable service, as well as acquire new devices brought to market. Congress can simply eliminate from the FCC's regulations the provision that restricts cable operators from placing into service new set-top boxes with integrated security, while leaving in place the requirement that cable operators support third-party devices.

IV. Looking to the Future – The Online Video Marketplace

As we've just discussed, there are many problems today with the existing MVPD market that requires Congress' immediate attention and resolution. However, with consumers increasingly watching video content online and a growing number of consumers choosing online video over an MVPD service, Congress also needs to begin thinking about, and having a separate discussion regarding the future of the online video marketplace. It is an important and complex subject, and one that cannot be ignored.

Consumers are watching more video content online than ever. According to SNL Kagan, of the 118.6 million occupied households in the United States, 52.8 million or 40% regularly view television shows or movies using Internet or over-the-top (OTT) delivery. By 2017, the number of occupied U.S. households will grow to 124.7 million, and the number of online video viewing households is expected to shoot up to 74.1 million (59%). During this same period the number of households receiving MVPD service expects to remain flat at 99 million, which means the percentage of occupied homes receiving MVPD service will slightly decrease from 83% in 2013 to 79% in 2017. SNL Kagan, estimates that the number of households that rely on Internet or OTT delivery to view television shows or movies in lieu of a traditional MVPD service is 5.8 million or 4.9% of all occupied households in 2013, and will increase to 12.9 million or 10.3% by 2017.

If SNL Kagan estimates are accurate, Congress needs to begin discussing the public policy implications of this changing video marketplace for consumers. Currently the online video marketplace is one in which content providers that wish to sell access to their content deal directly with the consumer. Companies such as Netflix or Hulu employ this business model in which the consumer pays for Internet access from their broadband provider and then separately and directly pays the online video distributor for the content of their choosing. However, there's the chance that the online video marketplace might develop over time into one more similar to the MVPD marketplace, where the pay TV provider serves as a middle man between the consumer and the video programmers, and consumers purchase their video programming through their MVPDs instead of directly. As an example of the cable model migrating to the Internet, broadband customers today cannot subscriber directly to ESPN3, an online-streaming service provided by ESPN that delivers both live streams and replays of sports event. Unlike Netflix or Hulu, ESPN3 is only available to broadband subscribers whose broadband Internet Service Provider (ISP) has agreed to pay ESPN for the right to offer the service to its broadband customers. In this instance, ESPN3 is sold to broadband subscribers in a similar way that ESPN and ESPN2 are sold to MVPD subscribers.

ESPN3 is not an outlier. Increasingly, powerful online video content providers are testing the market by charging broadband providers rather than establishing a direct relationship with the consumer. As previously discussed, CBS and News Corp. have temporarily blocked access to their online video content to broadband customers of TWC and Cablevision, respectively, unless the cable operators agreed to meet their financial demands for retransmission consent.

More recently, Viacom has blocked access to its websites by broadband Internet subscribers served by smaller broadband providers who are members of the ACA. So far, we know that all broadband Internet subscribers of two ACA members – Cable ONE and Liberty Cablevision of Puerto Rico – are being blocked by the powerful media conglomerate.

The Internet has always been a bastion of openness for consumers in allowing them to reach the lawful content of their choice. The FCC and the courts have accepted the view that an “open Internet” is critical to maintaining innovation and investment in both Internet content, applications and services and broadband infrastructure investment and deployment. ACA members recognize the importance of an open Internet, and have vowed to operate in conformity with the FCC’s 2005 Open Internet policy principles. In selectively blocking the users of some smaller broadband providers, Viacom is now acting contrary to the principle of Internet openness. This is a very troubling development in the course of the Internet’s development.

ACA fears powerful content companies and edge providers’ incentives to “cable-ize” the Internet will grow in the years ahead. The day may soon arrive when signing up for broadband Internet service is significantly more expensive because the retail price includes paying for access to hundreds of websites, a result that would run counter to national policy initiatives aimed at encouraging broadband adoption. The sites included in this cable-ized version of the Internet might include programming conglomerates like Disney, Viacom, News Corp, and NBCU. It might also include major established online video distributors like Netflix, YouTube, Amazon, and Hulu. It could also include huge social media sites like Facebook and Google Plus, and search platforms, like Google, Yahoo, and Bing. Under this business model, these sites would be compensated by the broadband ISP for each broadband customer that receives the content, and so the sites would have strong incentives to leverage their significant bargaining power to require the ISP to include their services in all of their Internet packages, regardless of whether the customer visits the site or not. Of course, if the broadband ISP refused the content or edge providers’ terms, access to their websites would be blocked for all of the ISP’s users. This might sound implausible, but it is the business model for cable and other MVPDs that many cable customers deem broken, and cord cutters have sought to escape.

If the above scenario sounds troublesome, and ACA believes it does, then Congress should review such issues as whether content and edge providers should be permitted to block access to their freely available content on the Internet to certain users. Congress should ask whether such practices are signs that the cable business model is beginning to migrate to the

Internet, where consumers have traditionally had both unfettered access to all freely available websites and the option of paying to receive online video content or not. These are all important questions for Congress to start considering, and ACA and its members look forward to participating in these discussions.

V. Closing

Because of the five-year term of the Section 119 satellite license, the Judiciary Committee regularly reviews the laws governing the satellite TV industry, and makes changes to ensure that the rules do not fall too far behind the marketplace. It essence, the Committee gives the satellite TV industry a physical. Because the rules governing the cable industry do not expire in the same way, Congress has not conducted a similar type of physical in decades. Given the significant changes in the marketplace, we believe the time has come for Congress to conduct such a review, and we hope that some of the issues addressed above would be under consideration for reform. Thank you again for the opportunity to testify.