THE SATELLITE TELEVISION LAW: REPEAL, REAUTHORIZE, OR REVISE?''
WEDNESDAY, JUNE 12, 2013
House of Representatives,
Subcommittee on Communications and Technology
Committee on Energy and Commerce
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:35 a.m.,
in Room 2123 of the Rayburn House Office Building, Hon. Greg Walden [Chairman of the Subcommittee] presiding.
Members present: Representatives Walden, Latta,
Blackburn, Scalise, Gardner, Barton, Eshoo, Doyle, Welch,
Lujan, Dingell, Matheson, and Waxman (ex officio).
This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

Staff present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Sean Bonyun, Communications Director; Andy Duberstein, Deputy Press Secretary; Neil Fried, Chief Counsel, Communications and Technology; Kelsey Guyselman, Counsel, Telecom; David Redl, Counsel, Telecom; Charlotte Savercool, Executive Assistant, Legislative Clerk; Shawn Chang, Democratic Senior Counsel; Patrick Donovan, Democratic FCC Detail; Margaret McCarthy, Democratic Staff; Roger Sherman, Democratic Chief Counsel; and Kara Van Stralen, Democratic Policy Analyst.
Mr. {Walden.} Good morning to everyone. I want to call to order the Subcommittee on Communications and Technology for ``The Satellite Television Law: Repeal, Reauthorize, or Revise?'' hearing. This is our second hearing on this issue, and I want to welcome our witnesses today and thank you all for agreeing to come and share your knowledge and opinions with us. I want to especially welcome Amy Tykeson, who is the CEO of Bend Broadband, a constituent of mine, and to congratulate her on her award last night. She was inducted into the Cable Industry Hall of Fame. Congratulations, Amy, to you. She is a dynamic leader in the cable industry and in the Central Oregon community, and we are delighted she made the trip out here and is willing to testify.

The hearing will examine today whether the law authorizing satellite television providers to redistribute broadcast programming still serves an important function, or is out of step with today’s video marketplace. The law is now 25 years old, and aspects of it sunset on December 31, 2014. So the question is, should Congress repeal the law, reauthorize it as it is, or revise it, possibly even tackling
Congress passed the original law in 1988 to give the then-nascent satellite industry a leg up in providing distant broadcast signals to viewers out of range of local over-the-air signals. Today, however, DIRECTV and Dish control 1/3 of the pay-television market and are the second and third largest pay-tv providers behind Comcast. And by some estimates only 1 to 1.5 million of the 115.9 million U.S. television households still receive distant signals. That is about 1 percent. DISH also now carries the local signals of broadcasters in all 210 markets and DIRECTV carries them in 197 markets.

On the other hand, a million viewers still represent a lot of potentially angry letters and calls reminding those of us in Congress about that, as I say, that clause in the Constitution that gives Americans the right to watch whatever they want, whenever they want, wherever and however they want on whatever device they have.

Some stakeholders argue we should use the reauthorization to revisit retransmission consent. They also argue we should take another look at cable regulations, such
as the must-carry, basic-tier, buy through, program carriage, program access, and set-top box rules. Those regulations date to 1992 and '96, when cable had 98 and 89 percent of the pay-television market. As of 2010, cable television's share had dropped to 59.3 percent of pay-tv households and 51.6 percent of all TV households.

So I am open to debate on a whole host of these issues and all options remain on the table. I believe in good process, and one of our responsibilities is to make sure we operate publicly and transparently, giving the American people and stakeholders an opportunity to see what is happening and to contribute to this dialogue. The video market is changing rapidly. Phone companies are in the video business now, both over wires and wireless. Netflix is offering original programming over the Internet. And Aereo, for better or for worse, could turn everything upside down.

Ultimately, the question is can we better ensure viewers have access to the programming they want while respecting the investments of the networks that create it and the broadcasters and pay-tv companies that deliver it? Today the government intervenes in various ways in that relationship
between viewers, broadcast affiliates, network programmers and pay-tv distributors. Sometime it does so to the benefit of one; other times to the benefit of another. Should it be intervening at all in the current marketplace? And if the answer is yes in some cases but not others, what is the justification?

[The prepared statement of Mr. Walden follows:]

*************** COMMITTEE INSERT ***************
Mr. {Walden.} With that, I yield the balance of my time to the vice chair of the subcommittee, the gentleman from Ohio, Mr. Latta.

Mr. {Latta.} Thank you, Mr. Chairman, and I appreciate you holding this hearing today, and I also thank all of our witnesses for their testimony that they are going to be giving, and the expertise that they have as this committee--subcommittee considers the satellite television law.

I am glad, Mr. Chairman, that we have started the process of examining STELA early on in this Congress. We all know that December, 2014, will be here before we know it. It is important to have the opportunity to have a robust discussion about the satellite TV marketplace and determining if the law needs to be reauthorized, revised, or repealed.

I believe it is extremely worthwhile that Congress has the obligation every 5 years to review this law. As we all know, the communications and video marketplace has changed dramatically and is constantly evolving, and I hope that this hearing and others are the continuation of a thoughtful public debate surrounding the video marketplace. I look
forward to hearing from our witnesses today, Mr. Chairman, and I yield back.

[The prepared statement of Mr. Latta follows:]

*************** COMMITTEE INSERT ******************
Mr. {Walden.} Gentleman yields back the balance of his time--balance of my time, and with that, I will yield back the balance of my time and recognize the ranking member from California, Ms. Eshoo, for 5 minutes.

Ms. {Eshoo.} Thank you, Mr. Chairman, for holding this hearing, and welcome to our witnesses and many distinguished representatives from the many sectors that are in the audience this morning.

Today begins, obviously, the second in the subcommittee’s series of hearings on the Satellite Television Extension and Localism Act, STELA, a law allowing consumers across our country who subscribe to satellite TV to receive local broadcast programming. Following today’s hearing, we will have had and heard from a total of 11 witnesses in the first 6 months of this Congress, plus countless others who have individually visited our offices to provide their perspective on STELA. These voices include representatives of the satellite, broadcast, cable, and motion picture industries, but I think that we need to now look forward to taking action.
Mr. Chairman, I think that following today’s hearing, we should instruct our respective staffs to work expeditiously on drafting legislative text so we can pass a bill long before the December 31, 2014, deadline. We have both stated publically that we want a clean bill. We know that Judiciary has some jurisdiction in this, so it will take some time for them to do their work. So I think that we need to get going with this.

So much has changed since the 1992 Cable Act, the process by which broadcasters and pay-tv providers negotiated or how they negotiate retrans, the proliferation of blackouts, and now the emerging online video marketplace, and I think that we need to be examining all of these aspects. So we have a lot of work to do beyond STELA. I am struck—on the broader video market, I am struck by the rapid transformation underway. In particular, three statistics highlight how consumer behavior is changing. By 2017, which is not that far away, 58 billion hours of TV and video is expected to be viewed on tablets per year. That is a remarkable statistic. Online video will account for 69 percent of consumer Internet traffic by 2017, up from 57
percent in 2012. The number of web-enabled TVs in consumers’ homes will grow from close to 180 million in 2012 to 827 million in 2017.

So what do all of these statistics mean for our work here at the subcommittee? In addition to freeing up more spectrum and expanding the deployment of high speed broadband to all Americans, we need to recognize that a shift is occurring where the primary means of video distribution might be radically different than the options available to consumers today. Consumers, as the chairman said, want greater choice in programming and how they receive it, and I think this subcommittee should not ever be viewed as a barrier to exciting innovation. So a video marketplace with vibrant competition among the services consumers most desire is really a very, very healthy one.

So again, I welcome each one of the witnesses. Congratulations to you, Ms. Tykeson, for the wonderful award that you have received from the cable industry. Thank you all for being here and for how instructive your testimony will be to us.

I would be happy to yield the remainder of my time to
anyone. Anyone? Any takers on my side? No? With that, I
will yield back. Thank you.

[The prepared statement of Ms. Eshoo follows:]

*************** COMMITTEE INSERT ******************
Mr. {Walden.} Gentlelady yields back. Chairman now recognizes the vice chair of the full committee, Ms. Blackburn.

Mrs. {Blackburn.} Thank you, Mr. Chairman. Welcome to all of our witnesses. We thank you for your time and for being here. This is an important opportunity for us to learn how we can continue to give TV consumers the best value, the very best value in terms of price, content, quality, and delivery. In this subcommittee last June, members of both parties acknowledged that the 20-year-old video regulations on the books are obsolete. I don’t think there is any disagreement on that point at all. Technology has changed dramatically, but the law hasn’t kept up. Today’s cable, satellite, broadcast, telecom, and online video providers offer competing delivery services and packages, and they are governed by different rules.

The question before us is how can we fix a really complex web of regulations that is limiting consumer benefits, restricting content choices, leading to blackouts, and contributing to rising prices? How do we rationalize old
rules for the dynamic innovation that is happening before us?
Are disruptive technologies ones that can provide broadcast
content without paying a performance right? Everybody knows
that is one of my issues, a byproduct of this outdated video
framework.

We should have a vibrant debate and welcome input from
everyone as we review STELA, but most importantly, we need to
look at what the proper role of government is and refocus on
the best interests of our constituents, who are the consumers
of video content. They do expect a level playing field.

Mr. Chairman, I thank you and I yield back.

[The prepared statement of Mrs. Blackburn follows:]

*************** COMMITTEE INSERT ***************
Mr. {Walden.} The chair now recognizes the gentleman from Louisiana, Mr. Scalise.

Mr. {Scalise.} Thank you, Mr. Chairman. Thank you for holding this hearing. I want to thank our panelists. I look forward to hearing from you all as well.

When we look at the title of the hearing today, "The Satellite Television Law: Repeal, Reauthorize, or Revise?" I would think the subcommittee would be wise to revise and expand the STELA debate by addressing the other intertwined video issues. Many of these issues are government-created imbalances that have arisen over the past 2 decades as the marketplace underwent dramatic transformation. As the gentlelady from Tennessee just mentioned, we take for granted that as we are having this hearing today, many of us have handheld devices that can actually pull video and do so many other things that make our life very convenient, but when these laws were written, the device of the day was more like this device. And so when you think that we are currently governed by laws that were written based on the technology of this device, it shows us, I think, that when we think of the
new technologies that we have the ability to have access to,
the laws dramatically need revision and updating. And for
anyone who seeks further evidence of the marketplace
transformation, look no further than the ongoing Aereo court
case that is moving through the courts right now, just to
show you where the imbalance can occur.

Instead of allowing vast web of government regulations
to influence the carriage of programming, we should trust the
consumer demand that it is strong enough a tool to ensure
that quality programming is carried by pay-tv providers at a
rate that both willing buyers and willing sellers can agree
upon, without the government thumbing the scale for one
industry or another. That is all I am after in this debate,
which I believe we can accomplish by reverting back to the
basic tenets of property rights and consumer demand to guide
the video marketplace forward.

I encourage my colleagues to join me in this pursuit,
and again, I look forward to the testimony and the
questioning from our witnesses, and I thank the chairman and
I yield back the balance of my time.

[The prepared statement of Mr. Scalise follows:]
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Mr. {Walden.} Is there anyone else on the Republican side that wants the remaining minute? If not, we will yield back the time and I now recognize the former chairman of the committee, the gentleman from California, Mr. Waxman, for 5 minutes.

Mr. {Waxman.} Thank you very much, Mr. Chairman. Today’s hearing is the second time this year that this subcommittee has convened to examine issues surrounding the upcoming expiration of the Satellite Television Extension and Localism Act of 2010, or what we call STELA. The reauthorization of STELA involves interlocking communications and copyright law provisions that must be jointly addressed by our committee and the Judiciary Committee, and as I stated at our hearing in February, because of the complexity of this task, I start from the presumption that we should pursue a clean reauthorization. Congress must complete its work before the law expires so consumers do not inadvertently lose access to programming. At the same time, I believe that reauthorization provides us an opportunity for members to learn more about today’s video marketplace and assess whether
laws and regulations are keeping pace.

As we begin this conversation, we need to consider how we can continue to ensure diversity, localism, and competition, which are the principles that undergird our Nation’s media policy. Congress has recognized the need to protect many of these values, especially when the market might not. New avenues for online video distribution are creating exciting new opportunities for consumers and content creators alike, but to realize these opportunities, competitors may need access to must-have content and independent creators may need the opportunity for their program to reach audiences far and wide.

I represent many interested parties in today’s debate in my congressional district. Many of my constituents are the artists, writers, producers, and directors whose creativity drives consumer demand for video and deserve to be compensated fairly. Many of my constituents work at the studios and media companies like Disney that make desirable content available to consumers. I also represent companies like Santa Monica-based Tennis Channel. The Tennis Channel is an independent cable channel that offers consumers unique
tennis and tennis-related programming. Congress sought to protect the diversity offered by independent channels like the Tennis Channel in the 1992 Cable Act by adopting provisions to guard against discrimination by vertically integrated distributors. The CEO of the Tennis Channel, Ken Solomon, sent the committee a letter today outlining his perspective on the effectiveness of the FCC’s so-called program carriage rules, and Mr. Chairman, I ask unanimous consent that Mr. Solomon’s letter be entered into the record.

Mr. {Walden.} Without objection.

[The information follows:]

*************** COMMITTEE INSERT ***************
Mr. {Waxman.} I hope our discussion today will include consideration of whether today’s video marketplace is making diverse and independent content available to all Americans. I am proud that my congressional district also includes the headquarters of DIRECTV, the second largest TV--the second largest video distributor in the United States, now serving over 20 million subscribers. Not only does DIRECTV have approximately 3,000 employees based in El Segundo, California, the company operates 100 percent California-made satellites, some of which were also produced in my congressional district. As one of the satellite providers that this legislation was originally designed to assist, DIRECTV can educate the subcommittee about why it believes the Act should be reauthorized, what aspects of STELA are working well, what parts of the law might need to be modified. And I want to extend a special welcome to our witness from DIRECTV, Mr. Palkovic.

Thank you to all the panel members who are here today. We look forward to you testimony, your continued engagement as we move forward with this reauthorization.
Mr. Chairman, since I have 35 seconds, I will be pleased to offer it, although there didn’t seem to be takers when other time was available, but anybody that wants it can have it. If not, I will yield it back.

[The prepared statement of Mr. Waxman follows:]
Mr. {Walden.} Gentleman yields back the balance of his
time, and that takes care of our opening statements, and we
will move on now to the testimony from our distinguished
panel of witnesses.

We will start first with Mr. Mike Palkovic, who is the
Executive Vice President for Services and Operations at
DIRECTV. Thank you for being here this morning. Again, pull
those microphones up close, turn them on, and the time is
yours, sir. You have to turn it on. This is not a retrans
issue.
Mr. {Palkovic.}  Sorry about that.

Mr. {Walden.}  There you go.

Mr. {Palkovic.}  Okay.  Chairman Walden, Ranking Member Eshoo, and members of the committee, thank you for inviting DIRECTV to discuss reauthorizing the Satellite Television Extension and Localism Act, STELA.

As we speak, millions of Americans are leaving for vacation.  Packing lists include grills, sunblock, and summer reading.  Increasingly, they also include television.  The very idea that someone could take TV to the beach would have
been unimaginable when Congress passed the 1992 Cable Act. Viewers today expect the content they want, when they want it, where they want it, on the device of their choosing, and at prices they can afford. And for the most part, they get it, but there is one exception to this good news: broadcast television.

Unlike other forms of television, broadcasting remains governed by antiquated laws designed to favor the broadcaster over the viewing public. We hear more complaints about broadcast-related issues than almost anything else. Our subscribers complain about high prices, lack of choice, and blackouts. Much of this results from the outdated retransmission consent regime created in the ’92 Cable Act.

There are three major problems with this broken system. First, retransmission consent raises prices. Between 2010 and 2015, DIRECTV’s retrans costs will increase 600 percent per subscriber. These cash payments are on top of the enormous fees we already pay the broadcasters for cable channels that were tied to the retrans negotiations, otherwise referred to as bundling.

Second, retransmission consent limits choice. The
retrans regime has led to the consolidation and bundling of
cable channels by broadcast owned media conglomerates. In
1992, the broadcasters owned four cable channels. Today,
they own over 104 cable channels, a 2,500 percent ownership
increase. For example, in 1992 NBC owned one channel, CNBC.
Today, Comcast NBC Universal owns 22 cable channels, plus 11
regional sports networks. These corporations use the retrans
process to force our customers to take and pay for all of
their channels, regardless of whether they watch them or not.

The third major problem and the most frustrating for
consumers is retrans related blackouts. Broadcasters use
blackouts to drive price increases and deny consumers access
to what was once free programming. Last year alone,
broadcasters pulled the plug in 91 markets.

We see two paths ahead as Congress considers STELA
reauthorization. One path is to eliminate these laws
entirely. Representative Scalise’s bill, the Next Generation
Television Marketplace Act, does this. We believe this
approach is better than today’s hodgepodge of aging
regulation.

The other possibility would be to make existing laws
To do so, we strongly believe Congress should address blackouts. First, in light of the fact that broadcasters use the public spectrum, an outright ban on local blackouts should be considered. Alternatively, Congress could allow us to provide our customers with distant network signals during a blackout. If the broadcaster’s local content is as important to consumers as they claim, then distant networks would be a poor substitute, and then we would have every incentive to negotiate a carriage deal. Finally, Congress could allow broadcasters to negotiate directly with consumers. Broadcasters would simply set their rates, publish them, and we in turn would charge customers the price the broadcaster set. A consumer could, for example, choose ABC and NBC but opt out of CBS and FOX, as they do today with HBO and Showtime. This would end blackouts, allow for consumer choice, and allow the networks to charge as much as they think their content is worth.

Let me also address Senator McCain’s à la carte legislation. This bill demonstrates the growing frustration over the rising cost of content and the inability of consumers to make programming choices. Over the years, we
have tried in vain to negotiate more choice and packaging flexibility for our customers. The broadcast corporations either outright refuse or make offers that could best be described as hollow. The result, though, is always the same. Higher prices for consumers and forced bundles of channels they don’t want or can’t afford. We believe the marketplace is best suited to resolve this conflict. Ideally, we would like to work with the broadcast companies to give consumers what they want, more choice over their programming. However, if these media companies continue to reject calls for packaging flexibility, they leave us no option but to support government intervention.

In closing, I cannot emphasize enough that the status quo no longer works for the American viewing public. We speak with over 300,000 of our subscribers every day, and they tell us they want change. While DIRECTV is not wedded to any particular approach, we do believe congressional action is needed. We stand ready to work with you to explore all proposals. Thank you, and I look forward to your questions.

[The prepared statement of Mr. Palkovic follows:]
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30

Mr. {Walden.} Appreciate your testimony, sir. Thank you for being here.

Now we will turn to Marci Burdick, who is the Senior Vice President of Broadcasting for Schurz Communications, Incorporated. We welcome you back to the committee and we look forward to your testimony.
Ms. {Burdick.} Thank you. Thank you, Chairman Walden, and good morning. Ranking Member Eshoo, good morning. Members of the subcommittee, hello. My name is Marci Burdick. I am Senior Vice President, as you heard, of Schurz Communications, where I oversee eight television stations, three cable companies, and thirteen radio stations. I am also the television board chair for the NAB, on whose behalf I testify today.

Local broadcast television remains unique because it is free, it is local, and it is always on, even when other forms of communication fail. Television is the most watched media for high quality entertainment, sports, local news, emergency weather warnings, and disaster coverage. Schurz has television stations in tornado-prone places like Wichita, Kansas and Springfield, Missouri, and I can tell you from my own personal experience our viewers rely on us to stay informed during times of whether emergencies, not unlike the terrible storms we have seen this year.
With that backdrop, thank you for the opportunity to be here today to discuss reauthorization of the Satellite Television Extension and Localism Act, or STELA. As broadcasters, we approach this debate asking a simple question: is satellite’s distant signal compulsory license still in the public interest? We know the universe of distant signals is shrinking, and more and more viewers are receiving their local programming through satellite. Today, DISH provides local into local service in all 210 television markets and DIRECTV in 196. To justify the extension of this law, however, we need more specific information. For instance, how many subscribers rely on the distant signal? How many subscribers are grandfathered, but also receive local into local service? And what is the number of subscribers that receive the distant signal only for use in an RV or a boat? Unfortunately, this information resides only in the hands of DISH and DIRECTV. By digging into these facts, we can have an honest debate about whether the law is still needed.

At a minimum, NAB asks this committee to embrace a clean reauthorization that does not include unrelated and highly
controversial provisions that undermine the ability of broadcasters to provide high quality and locally focused content. For example, some would like to use STELA’s reauthorization to make drastic changes in a free marketplace negotiation called retransmission consent. I believe such changes would harm consumers.

I have been with Schurz Communications for 25 years, and I come to this hearing with a very unique perspective on the video marketplace. My company is a member of both NAB and ACA. We are a broadcaster and we are a small cable operator. I can tell you from our vantage point as a small company that has been on both sides of the negotiating table, the current system works. So I ask the subcommittee, if the system isn’t broken, why fix it? The retransmission consent system in place today has a success rate of 99 percent. Only in Washington, D.C., could something that works 99 percent of the time, providing for thousands of deals every year, be called broken. This success rate trumps the effectiveness of the best medicines, the free throw percentage of the most accurate basketball player, and the approval ratings of the Dali Llama and the Pope, yet no one would doubt whether they
are effective.

The false fixes being suggested by my friends in the cable and satellite industry would not only harm consumers, but would do nothing to improve on the system that we have today. In fact, just the opposite would be true. One proposal would allow the importation of distant, out of market signals in the event of a contractual impasse. In the real world, that means that Congress would negate existing contracts between broadcast networks like ABC and their local affiliates like KOHD in Bend, Oregon, or KGO in the Bay area. If Congress were to allow distant signals to come into local markets, will have gutted my affiliation contract while leaving viewers in Bend or in the Bay area to receive, perhaps, Los Angeles or Denver news and sports. Additionally, by allowing distant signal importation Congress would be placing its thumb on the bargaining scale by fundamentally skewing the negotiating leverage of the parties. The resulting effect would be more contractual impasses, not less. With fewer viewers and less advertising dollars, the localism that TV broadcasters provide would be compromised. This would ultimately leave your viewers with
35 less local community programming, your local businesses with fewer places to reach local customers through TV advertising, and politicians with no effective medium to reach their constituents. None of this is good for the consumer.

In conclusion, as television broadcasters, we aren’t coming to Congress asking for a leg up in our negotiation or for changes to a law to benefit one side or the other. We will fight our own fights, we will make our own deals, and we only ask that Congress not tip the scales in favor of any one industry.

I thank you for inviting me here today, and I look forward to your questions.

[The prepared statement of Ms. Burdick follows:]

*************** INSERT 2 ***************
Mr. {Walden.}  Ms. Burdick, thank you very much for your testimony. We appreciate your comments.

We will now turn to the President for Global Distribution of the Disney Media Networks, Mr. Ben Pyne. We are delighted to have you here, sir, and please go ahead.
STATEMENT OF BEN PYNE

Mr. Pyne. Thank you, Chairman Walden and Ranking Member Eshoo, and other members of this subcommittee--

Mr. Walden. I am not sure your microphone is on, maybe. There you go.

Mr. Pyne. Thank you, Chairman Walden, Ranking Member Eshoo, and other members of this subcommittee. I had the opportunity to appear before you 6 years ago at a hearing entitled "The Future of Video." At that hearing, I promised we, the Walt Disney Company, will continue to find ways to get our content to any screen consumers use: computers, PDAs, mobile phones, iPods, and of course, TV sets. You may have noticed that I did not use the word iPad in 2007. Of course, it was introduced 3 years after that hearing.

What I am proud to tell you today is that we continue our commitment to developing and using new technology to improve the consumer experience. In cooperation with MVPDs, that is cable, satellite and telco distributors, we now make
live streaming of many of our channels available to subscribers under tablets and smartphones. ESPN’s Watch ESPN app, downloaded more than 18 million times, was the first application to provide live streaming of a cable channel. Likewise, our line of Watch Disney apps, downloaded now 15 million times since last year, offers the same convenience to subscribers of Disney Channel, Disney XD, and Disney Junior. In fact, just last month we were the first broadcaster to launch a streaming service. Our Watch ABC service allows users to watch their local ABC stations online and on smart devices in their hometowns. We hope the service will soon be available in markets across the country.

In addition to our Watch services, Disney has recognized the value of using online video distributors to reach consumers who want to enjoy our content in many other ways. We are a part owner of Hulu, and we have negotiated agreements to distribute our content on a host of other online platforms, including Netflix, Amazon, Streampix, and even X-Box.

While all of these new forms of distribution are critical to our future, we continue to place a very high
value on distributing content through MVPDs. We believe that monthly video subscriptions purchased by the overwhelming majority of American households continue to be of a tremendous value. We remain committed to delivering outstanding programming to these viewers at all times. As evidence of that, in the last few years we have reached long-term deals with many of the largest MVPDs.

The common thread that runs through our use of all these technologies, old and new, is that each allows us to provide additional value to consumers and customers, while achieving a return on our investment in quality programming. Quality content is expensive to produce. Last year, we spent approximately $3 billion producing programming for ABC and our own stations. As a policy matter, given the significant risk and expense inherent in producing great content, it is critical that we continue to be permitted to negotiate freely for compensation of the distribution of our content.

In this context, we believe the current regime requiring MVPDs to negotiate for the right to carry a broadcast signal, the process known as retransmission consent, is working well. Ultimately, this is a process that ensures that MVPDs
compensate broadcasters for the value inherent in the carriage of that signal. Thousands of privately negotiated agreements for retransmission consent have been reached with few interruptions of service.

The model of compensating local broadcasters for carriage is working for American consumers. The lion’s share of the most watched programs on television are consistently found on broadcast TV. Local stations are able to provide outstanding local news and coverage for emergency events. With the launch of our Watch ABC services, we will be working with our broadcast affiliates to offer even more value for MVPDs to make available to their customers.

I recognize that this committee has heard pleas for changes to retransmission consent. We believe the current system provides the appropriate incentives to reach agreements. We want our local and network programming carried by MVPDs. They want to carry our programming because their customers want to watch it. These mutual incentives encourage the successful resolution of negotiations. Additional government action is not necessary.

Finally, I would like to turn to satellite legislation.
The original law adopted by Congress 25 years ago eased the way for the technology available at that time to be used to distribute distant network programming to many households, especially in rural areas, that would otherwise not be able to receive the network programming at all. To their great credit, the satellite companies have made significant investments in their technology and today, they are able to deliver local broadcast stations to more households than ever. As a result, the necessity of the satellite legislation to ensure the availability of network programming is simply not as great as it once was. In fact, we believe Congress could give serious consideration to letting the legislation sunset. We realize, however, that you may be concerned by uncertainty regarding what would happen to rural viewers if the legislation was not reauthorized. In the face of that uncertainty, we understand if you choose to extend it, but would ask that you do so simply by extending the current expiration date.

Thank you very much.

[The prepared statement of Mr. Pyne follows:]
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Mr. {Walden.} Thank you, Mr. Pyne. We appreciate your testimony.

I would now turn to Amy Tykeson, who is the CEO of BendBroadband. We appreciate your being here, as I said earlier, and welcome your comments.
Ms. {Tykeson.} Thank you. Good morning, Chairman Walden and Congresswoman Eshoo, and members of the subcommittee. I am Amy Tykeson, President and CEO of BendBroadband, a family-owned independent operator--cable operator that serves about 50,000 residential and commercial customers in Central Oregon. Thank you for inviting me here to testify this morning.

My goal is to highlight the challenges facing cable operators, particularly smaller operators like BendBroadband. It is time for Congress to update the law to meet consumers’ needs and interests.

Let me tell you a little bit more about my company. Our tag line says it all: `'We are the local dog. We better be good.'" We have invested about $100 million to upgrade our network and bring people in Bend the best services available. We employ 270 associates, and we are the 14th largest employer in Central Oregon. We are a first mover, and we are recognized as an industry leader.
I want to discuss three examples of how the outdated video rules are hurting my customers and should be addressed in STELA.

First, I can’t create the programming packages my customers want. Second, the retransmission consent process is broken, and third, technology mandates for set top boxes should be repealed.

First, let me tell you why I can’t give my customers the packages they want. The major programmers each control a dozen or more channels. When I negotiate with them, they tell me I have to take all of those channels and that I have to package them the way the programmers want, not the way my customers want. These bundling arrangements are resulting in significant fee increases for my customers. Program bundling is particularly harmful to smaller operators like BendBroadband, who are often presented with a take it or leave it offer.

Second, my customers are being hurt by the broken retransmission consent process. I have been through a retransmission consent blackout, and my customers don’t want it to happen again. But I fear it will, unless the rules are
updated. For example, Congress intended for retransmission consent to support local stations, not to subsidize the operations of big national broadcast networks. But the networks are demanding an increasing share of their affiliates’ retransmission consent fees. This harms localism by diverting revenues from the local stations. It also drives up the cost of retransmission consent and makes the negotiations more contentious. For the MVPDs, the cost of retransmission consent has grown from about $216 million to nearly $2.4 billion in just 6 years, and fees are estimated to top $6 billion by 2018. In my market alone, retransmission consent demands have nearly tripled over the last 3-year negotiating cycle.

My final example concerns Section 629 of the Communications Act. That rule resulted in technology mandates for set top boxes that have cost the industry more than $1 billion and have not benefitted customers. Today, consumers watch programming on a plethora of devices, some of which we have talked about this morning. This rule should be repealed.

These three examples illustrate how a regulated
marketplace can be detrimental to consumers when government
does not routinely review and update applicable laws. The
time has come for a comprehensive review of the existing
video framework. At a minimum, I would urge Congress to
amend STELA to address issues like the ones I have identified
today, to yield more choice, lower prices, and a healthy
marketplace to benefit consumers.

Finally, I want to acknowledge Representative Scalise
and other members of this subcommittee who have advanced the
debate on video reform. I look forward to working with you
to examine these important issues and welcome your questions.

Thank you.

[The prepared statement of Ms. Tykeson follows:]

*************** INSERT 4 ******************
Mr. {Walden.} Thank you, Ms. Tykeson. We appreciate your comments and testimony. We look forward to continuing the dialog.

We will turn now to the managing director of Navigant Economics, Mr. Hal Singer, for your comments, sir. Thank you for joining us, and please go ahead.
STATEMENT OF HAL SINGER

Mr. Singer. Thank you for having me. I have served as an economic expert in several program carriage complaints, including as an expert for the NFL Network, Tennis Channel, and Masson. The focus of my testimony is the proper regulatory oversight of vertically integrated cable operators, and the role of the FCC in that oversight process.

To design the proper regulatory framework, one must first understand the nature of the potential harm presented by vertical integration in the cable industry, namely a reduction in innovation among independent content providers.

Why do we care about that potential harm? Because some of the best content has sprung and will likely continue to spring from independents who are free from the strictures of a clumsy conglomerate when creating artistic expressions. Without any protection against discrimination, independents would be forced to surrender equity in exchange for carriage, and thus would be less willing to take risks, which would result in fewer programming choices and less programming
There are two schools of thought on how best to deal with this problem of vertical integration. The first, advocated by Professor Tim Wu of Columbia Law School, in his best-selling book "The Master Switch", is to ban vertical integration entirely. The second, which was embraced by Congress in the 1992 Cable Act, is to permit vertical integration but to police discriminatory acts on a case-by-case basis. The downside of an outright ban is that it sacrifices potential efficiencies related to vertical integration. The downside of a case-by-case approach is that if relief from discrimination does not come swiftly, or if the evidentiary burden imposed on an independent cannot be satisfied under any fact pattern, then after-the-fact adjudication affords no protection at all.

Assuming that case-by-case review is the best solution to the problem of vertical integration, the policy question turns to which legal framework is best suited for the task. Should the FCC adjudicate these disputes under its public interest standard, or should complaints of discrimination by a vertically integrated cable operator be addressed under the
antitrust laws? The problem with the latter approach is that a reduction in innovation by independents may not be cognizable under the antitrust laws, which were designed primarily to prevent the exercise of pricing power. Because discrimination in program carriage often does not produce price effects, antitrust is the wrong framework to address discrimination by a vertically integrated cable operator.

The lack of price effects in these cases is also why it makes no sense to interpret the non-discrimination protections of the Cable Act in an antitrust context, even if Congress used the word "unreasonably" in the statute. By seeking to identify harm to an independent programmer rather than harm to competition, Congress meant to fill a gap in antitrust laws, namely, the preservation of diversity in the video-programming marketplace. How do we know this? At the time the Cable Act was passed, the largest cable operator in the country, TCI, controlled less than 20 percent of national video subscribers. If Congress meant to import antitrust concepts into the Cable Act, as some now argue, then Congress also intended to immunize all vertically integrated cable operators, including TCI, from the non-discrimination
protections of the Act, as none would have sufficiently high
market shares to constitute monopoly power under the
antitrust laws. The absurdity of this conclusion, that
Congress passed redundant antitrust regulation that was
applicable to no one, proves that the Cable Act has nothing
to do with antitrust enforcement.

Finally, I would like to speak briefly about the
appropriate evidentiary burden on complainants under the FCC-
administered approach. The purpose of the non-discrimination
protections in the Cable Act is to ensure that a vertically
integrated cable operator does not consider the benefit to an
upstream programming affiliate when deciding whether to carry
a similarly situated independent network. There are two
primary ways to establish evidence of this kind of ``biased''
decision-making. Complainants could show direct evidence
that benefits to an upstream network were inappropriately
considered. In the absence of such direct evidence,
complainants could in theory establish that the downstream
cable division incurred a loss by carrying the independent
network narrowly. This finding would create a presumption
that there was an offsetting benefit to the affiliated
upstream network. However, with the exception of a handful of networks such as ESPN, most independent networks lack "must-have" status and thus would be hard-pressed to demonstrate any forgone benefit from broader carriage. Cable operators generally create value for their customers by offering a buffet of choices, rather than granting access to any particular network. Requiring an independent to estimate forgone benefits with precision would be tantamount to asking a leading columnist for the New York Times to estimate what fraction of subscribers would switch to another newspaper if the editorial page excluded that columnist. That the answer might be none, due to the costs of switching newspapers or due to customer loyalty attributable to the Times in general, does not imply that that columnist adds no value to the Times. Accordingly, complainants should not be required to estimate forgone benefits from broader carriage to prevail in a program-carriage complaint, as the current law now demands.

Thank you.

[The prepared statement of Mr. Singer follows:]

*************** INSERT 5 ***************
Mr. {Walden.} We appreciate your testimony. Thank you.

And now we will go to our final witness, a senior fellow at Tech Freedom, Mr. Jeffrey Manne. Thank you for being here, and we look forward to your testimony.
Mr. Manne.] Thank you, Mr. Chairman, Ranking Member, members of the subcommittee. In addition to being senior fellow at Tech Freedom, I am also Executive Director of the International Center for Law and Economics, and a lecturer in law at Lewis and Clark Law School in Portland.

If you remember three words from my testimony today, remember these: House of Cards. Netflix’s hit show encapsulates how fundamentally the video marketplace has changed since Congress enacted the special regulations that now govern that market. It represents the work of a new distribution—a new form of distribution, a new source of content creation. It is based on new technology. It is rapidly innovating. Those regulations are themselves a house of cards as well.

In the face of technological change, shifting consumer preferences, and evolving policy aims, the complex fragile structure that shapes conduct by consumers, content owners, distribution networks, and regulators is bound to fall down.
Its purpose is frustrated, unintended consequences its legacy.

To start, STELA should be allowed to sunset the compulsory license limit on copyright protection for video content repealed. Congress should also repeal the related provisions of the Cable Act, retransmission consent, program access and carriage, must carry, among others, and Congress shouldn’t extend this regime to--regulatory regime online. This isn’t deregulation; this is smarter regulation. Because behind all of these special outdated regulations are laws of general application that govern the rest of the economy, antitrust and copyright. These are better, more resilient rules. They are simple rules for a complex world. They will stand up better as video technology evolves, and they don’t need to be sunsetted.

The FCC’s numbers say that video prices went up 20 percent--cable prices went up 20 percent between 2006 and 2010, but adjusting for inflation, they went up only 10 percent. Meanwhile, the number of channels increased 42 percent. Spending on programming went up 30 percent. Americans spent 20 percent more time watching video, and then
there is an endless range of quality improvements that went along with it. To say that the current market is in any way constrained, anti-competitive, or crabbed, seems very difficult to sustain.

In short, consumers are getting more for their money, more content, more choices, and higher quality.

If Netflix were regulated like a cable network, it is not likely that the law would allow it offer exclusive programs like House of Cards. Why invest $100 million in a franchise if it doesn’t offer you a leg up on your rivals? Exclusive programming helps drive competition.

The key to promoting competition in both video and broadband isn’t restricting programming innovation, if we are looking for rules to change, it is removing local regulatory impediments to competitive infrastructure, like franchise licensing and access to rights of way. Allowing more towers to be built would mean faster 4G wireless service, making 4G wireless yet another established competitor to legacy cable and satellite.

An intense competition in some markets can benefit consumers everywhere. I would just point out when we are
looking at potential problems of the absence of localized competition, it turns out, of course, that these are all networks. Competition from Verizon’s FIOS in New York City, for example, has driven Cablevision to enter into peering agreement with Netflix’s CDN. That means better Netflix streaming for customers outside New York as well.

Competition need not be local to have local benefits.

So what should Congress do? Again, let STELA sunset. A clean reauthorization of STELA isn’t clean at all. STELA is a mess. We need rules that minimize error costs but affects policy goals in a fashion that is least likely to outlaw by default that which we actually want to encourage, only haven’t discovered yet; that is, regulatory mistakes discovered only in retrospect, and mistakes have been made. Aereo exploits imprecise language in the definition of copyrights performance right to navigate around the overly complex effort to use compulsory licensing, must carry, et cetera, aimed at bolstering cable’s competitiveness and promoting localism. But arguably, a simple copyright rule of general applicability, full performance right protection retained and enforced by the copyright holder, would have
avoided the problem entirely.

While the interest of the dwindling percentage of Americans who view television programming on-the-air shouldn’t be—only on-the-air shouldn’t be ignored, we really have to take seriously the possibility that serving this segment under the current regulatory regime carries with it enormous costs that outweigh the benefits. These cost include, most significantly, retransmission fees passed on to MVPD viewers, technological and business model constraints, and most importantly, the enormous opportunity costs, perhaps as much as $1 trillion of more efficiently deploying spectrum currently used for broadcasting.

I want to address quickly also the program access and program carriage rules. These rules eschew antitrust rules to promote program diversity and competition among providers. By focusing on the program carriage and program access rules as they are constructed, we have shifted the terms of the analysis to a starting point that sort of assumes that all content should be available everywhere, but that not all content is available from all distribution channels is not proof of market failure. Similarly, equating diversity with
independence is inappropriate. If independence means not
affiliated with the distribution network, this amounts to a
preference for ABC’s The Bachelor over NBC’s The Biggest
Loser. Program carriage rules, in contrast to antitrust,
problematically prescribe an undesirable effect— not an
undesirable effect, but a particular business model, and it
is a mistake to try to prescribe a particular business model
when we don’t know in the future what the optimal business
model will look like.

Ending the current regulations won’t leave consumers
unprotected. There is a role for the law here, but the role
for the right law, which is antitrust and copyright.

Thank you.

[The prepared statement of Mr. Manne follows:]
Mr. {Walden.} Thank you very much for your testimony.

We thank all the witnesses for your testimony, and will now go into our question phase.

Mr. Palkovic, in deciding whether to repeal, reauthorize, or revise the current satellite law, it is important, I think, that we understand what the impact of each of these decisions really would be on the current satellite television subscribers. How many viewers today actually receive a distant signal, because that was one of the underlying reasons for this Act—how many of those viewers would receive a local signal from their satellite provider, and how many would have no way of receiving broadcast programming over the air, over satellite, or from any other source without distant signal? So who is in that pool today?

Mr. {Palkovic.} I think the entire pool between us and DISH is roughly a million and a half customers who are receiving that. I do not have the breakdown of how many people are grandfathered. I think it is a fraction of that, maybe a couple hundred thousand, and I think those are
largely on the DIRECTV side. So it is in that range. It is a small piece of the million and a half, but if we were to lose that right through this process, you would basically be taking broadcast programming not only away from the million and a half customers, but there would be absolutely no substitute for it. Because honestly, if they had a substitute, they wouldn’t be paying us to get the distant signals, they would be getting it a different way.

Mr. {Walden.} Okay. If we could work with you a little bit going forward just so we get an understanding what that pool looks like in terms of grandfathering, that would be terrific.

Ms. Burdick and Mr. Pyne, I am interested in helping, obviously, constituents get the programming they consider truly local. How can we ensure that getting programming from their State, not out of State programming, merely because they fall in a DMA assigned to another State? We obviously have that situation—

Ms. {Burdick.} I am a living example of that, Mr. Chairman. I actually live in Niles, Michigan. My front yard is in Michigan and my back yard is Indiana, and I am part of
the South Bend DMA, but I vote in Chairman Upton’s district.

Mr. {Walden.} And you are, what, in five time zones, too? That used to be an issue.

Ms. {Burdick.} We changed that a couple years ago, although my lawn mower did used to change when I go around the lawn—my cell phone would change when I go around the lawn.

At any rate, I happen to receive Comcast’s Michigan signal from its Michigan head end, and what Comcast does in that case is they reserve Channel 3 for—I am a CBS affiliate in South Bend and I have network non-dup and syndicated exclusivity protections across the market, but Comcast reserves Channel 3 for the local broadcast of the CBS station in Grand Rapids, so its programming, local news, and information can be broadcast in that area.

My point of telling you that is there are ways to resolve those situations and we have resolved them in the market today.

Mr. {Walden.} I know we have that problem in Umatilla County. There is a certain former senator that is really aware of that, and anyway, it is an issue elsewhere in my
Ms. Tykeson, when Congress passed the ’92 Cable Act and the ’96 Telecom Act, cable had 98 percent and 89 percent of the pay-tv market respectively. As of 2010, cable’s share dropped to 59.3 percent as I mentioned in my opening statement of the pay-tv households, and 51.6 percent of all TV households. Is there still a justification for imposing on the cable industry regulations such as must carry, basic tier, buy through, program carriage, program access, and set top box requirements?

Ms. {Tykeson.} Chairman Walden--

Mr. {Walden.} Go ahead and push that microphone, yeah.

Ms. {Tykeson.} Thank you for the question. I think when we described earlier the shift in how things have changed and unfolded since 1992, it is a completely different marketplace today then it was then. Many of the rules that you have just mentioned are outdated and they need to be repealed. So my suggestion would be to consider sunsetting the ’92 Act and potentially some of the other requirements in the ’96 Act so there is a way to go back and revisit some of those rules. In the STELA bill, there is an opportunity for
reexamination because of the sunset clause. We don’t have that in the ’92 Act and as a result, we are stuck with a lot of outdated rules that are harming consumers.

Mr. {Walden.} All right. Mr. Pyne, do you have any comment on that issue of these rules that are put on the cable industry? Should they stay or go?

Mr. {Pyne.} In terms of STELA?

Mr. {Walden.} Well no, in terms of the must carry, the basic tier, the buy through program, carriage program access, set top box programs from your perspective. We are just trying to get different perspectives here.

Mr. {Pyne.} In terms of the broadcast basic buy through, I think the marketplace in essence has spoken in terms of the value of local broadcast. For instance, one of the reasons satellite has shown tremendous growth over the past 12 years especially is because of their investment in satellite space to drive local into local, and it is a huge investment on their part. But clearly, it is because of the value of the local--each local broadcast community or each community in this country that has allowed their investment. So in essence, even though they did have the option to just
have national programming, they actually decided as a matter of course to deliver local programming.

Ms. {Tykeson.} If I may just add one quick point, though.

Mr. {Walden.} Sure.

Ms. {Tykeson.} I think the problem now is that we have competitors in markets like Mike’s company, and say, BendBroadband, that have different rules, and so the playing field isn’t level. So I think we need to—for example, on the must buy, that has got to go.

Mr. {Walden.} Yes, Marci, go ahead.

Ms. {Burdick.} Mr. Chairman, could I speak about must carry for just a second? I think many members of this committee have rightly been concerned about diversity. One of the values of must carry is that these are stations in a local community that are sprung up by service to that local community. Of the stations that are must carry stations today, 69 percent of them carry some religious broadcasting. Thirty-nine percent of them carry some directed ethnic program to those communities they serve, and must carry—as a result of must carry today, networks like--channels like FOX,
Mr. {Walden.} Thank you. I actually have gone like a
minute 41 over my time and the committee has been indulgent,
so I will now defer to the ranking member of the
subcommittee, Ms. Eshoo, for 5 minutes.

Ms. {Eshoo.} Thank you, Mr. Chairman. I never mind
listening to you, so that is fine. Thank you.

Well, the title of today’s hearing is ```The Satellite
Television Law: Repeal, Reauthorize, or Revise?'' and in some
way, shape, or form each one of you have taken up one of
those words, so it really fits with what the title of the
hearing is. I am also mindful that, you know, as you make
your recommendations to us, that these are really some huge
rewrites of business plans, and those are gigantic lobbies,
most frankly, around here but we are going to do our best to
come up with the best, and I thank you, because we really
have a mix of views which is very healthy here today.

The questions that I want to ask, and I am going to have
to submit some for the record for you to respond to because I
won’t have enough time to ask all of them, are a little beyond, I think, what—you know, just STELA, but since you are here, I still want to ask them.

Mr. Palkovic, I now understand why it is called DIRECTV, because you are very direct in your approach. In Ms. Burdick’s testimony, she stated that the retransmission consent system under which local broadcast stations negotiate with pay television providers for the retransmission of their signal is working just as Congress intended. Do you agree with the assertion, and if not, what would you propose changing? Try to be as brief as possible.

Mr. {Palkovic.} Yeah, I will make a quick distinction is working as intended versus working well, because I think from the broadcaster’s standpoint it is working fantastic, because they have all the protection and the rights of the laws that were in place in the ’92 Cable Act. What I don’t think was intended is that they would go from four cable channels to 104 with regional sports networks and use the retrans process to leverage us paying exorbitant amounts on the cable channels because we risk them blacking out channels as part of the renegotiation.
So what we want to address here is the unintended part of the combination of those laws, okay, and that is what is different today than was there in 1992 was we were in a situation where we were dealing directly with broadcasters. Now we are dealing with huge conglomerates that own both sides of the equation, including cable MSOs that if they raise the rates exorbitantly, a lot of cases they are just paying themselves.

Ms. {Eshoo.} Great, thank you.

Mr. Pyne, welcome. Nice to have you here. Should Aereo prevail in court, some network executives have been quoted as saying there would be a radical shift away from the free over-the-air broadcast signal that consumers have enjoyed for more than half a century. If broadcasters began offering programming on a subscription only basis, do you think they would still be in compliance with the public interest terms of their FCC licenses?

Mr. {Pyne.} As it relates to the Aereo case, I mean, I know there are other network executives who have said certain things. Our company’s position is that—and as I think is evident, we are in pending litigation with Aereo. We will
always do everything we can to protect our content and the
copyright and the illegal appropriation of our content.

Ms. {Eshoo.} Very carefully crafted response. Very
good.

Mr. {Pyne.} Our focus is on the prevailing litigation.

Ms. {Eshoo.} I understand. Thank you.

To Mr. Singer, do you think our current law is
sufficient in ensuring the availability of diverse
independent programming like Ovation, Hallmark, and the
Tennis Channel, and if not, why do you think the Cable Act is
failing to accomplish its intended goal? Should we modernize
the program access in the carriage laws, and if so, how? Now
many if so, how, is too--and I don’t have very much time, but
you have 36 seconds for a big question.

Mr. {Singer.} I think that the laws as written with
respect to program carriage, program access are fine. The
problem is in the details of the implementation, and I
actually think that the FCC has done a nice job here in
implementing the rules, but of course, once they come to a
decision, their decisions can be--well, the judge’s decision
can be overturned by the FCC and then there is a period again
where the decision by the FCC can be overturned by the
district court--D.C. Court of Appeals. And I think the
problem now, very shortly, is that they have--the court has
layered on certain burdens that will make it all but
impossible for complainants to prevail. And so I do fear
that at the current moment, we are in a position where there
might not be any future program carriage complaints brought,
and that would be certainly inconsistent with the interests
of Congress.

Ms. {Eshoo.} Thank you very much.

Mr. Chairman, I am going to submit my other questions to
the witnesses, and I am especially interested in the whole
issue of copyrighted material deserving competition--I mean,
compensation. I think it is a very important area for us to
explore, especially when it comes to radio fairly
compensating artists for their copyrighted materials.

So with that, I yield back.

Mr. {Walden.} Thank the gentlelady, and we will now go
to the vice chair of the full committee, the gentlewoman from
Tennessee, Ms. Blackburn, for 5 minutes.

Mrs. {Blackburn.} Thank you, Mr. Chairman, and Ms.
Eshoo and I, I think, have some of the same questions. I am going to go right to the copyright issue.

Ms. Burdick, let me come to you. I appreciate your comments, and how you express for property rights and I am quoting, "recognizing local broadcaster’s property interest in their over-the-air signal, permitting them seek compensation", and I agree. Content deserves to be paid for and incentivized, but I am curious if you think the position the broadcasters have taken on the radio side, refusing to recognize a performance right for sound recordings, if that undermines your position before us as we look at the video framework and the retransmission rights, because as you know, radio broadcasters say that they shouldn’t have to pay performance royalties, because they help distribute an artist’s music. So square that up for me. Where is the contradiction in that?

Ms. Burdick. Sure. Just by way of background, our company has been in the radio business for 90 years, 18 months after the first commercial station was launched. We have been at it for a long time.

Mrs. Blackburn. That is fine. Quickly.
Ms. {Burdick.} There has been a symbiotic relationship between radio and artists—I think I am on--radio and artists during that period of time, and the substantive difference is that when my radio stations play the artist’s music, the listeners are getting it for free. In this case, we are talking about providers who are taking the local television broadcast signal, repackaging it, and selling it to consumers, and in that case, I am saying, in the latter case, if you are charging for it I should be compensated, but on the radio side--and I recognize this is a healthy debate in the industry--we are providing that as broadcasters for free.

Mrs. {Blackburn.} Okay, but you know, you can look at it and say that they are helping to distribute your signal which helps to increase your ad revenues, and so maybe broadcasters--radio broadcasters should be distributing or should be paying that performance right for those entertainers.

Mr. Manne, you had a little bit to say about this. Do you want to weigh in on this side?

Mr. {Manne.} Just briefly, I would just say I think the distinction is a distinction without a difference. I don’t
think that you can really square the rejection of the compulsory right in one case and not in the other, except other than to recognize that the broadcasters are net beneficiaries in one regime and they are net payers in the other, and so it makes perfect sense that they would prefer one over the other, but I don’t think that squares with the public interest.

Mrs. {Blackburn.} Okay, thank you for that.

I think that this is one of those points that we will continue to look at, because content does deserve to be compensated and the creator and the holder of that content deserves to be compensated.

Ms. Tykeson, given how government granted retransmission consent fees have grown from $216 million in ’06 to what will be over $3 billion this year, who is benefitting and what is driving that growth?

Ms. {Tykeson.} Congresswoman, thank you for the question. There are two groups that are benefitting from the retransmission consent fees. Originally those fees were designed to allow—to help level the playing field between the local broadcaster and the cable company, and of course,
back in 1992 it was a very different circumstance than it is today. What is happening now is the national broadcasters are requiring fees be paid through the local affiliates, and that is increasing the fees at huge rates, as you mentioned. So that all those fees are going to--they are accruing to the large conglomerate broadcast companies that control 60 percent of the top 50 networks to on the backs of my customers.

Mrs. {Blackburn.} Okay. You also stated in your testimony that there exist barriers to creating programming packages that are responsive to consumer need, so what has led to your business’s hands being tied in meeting the needs of your consumers?

Ms. {Tykeson.} Congresswoman, there are three things that are happening that affect my customers in Bend, Oregon. The first is the size of the increases that we are asked to pay by all of these programming channels on an annual basis, which range between 8 and 10 percent, roughly, for every channel. In addition, with these large bundles of programming there is always a must-have channel in there, but there are a lot of other channels that maybe my customers
wouldn’t want, and what is happening is the large programming companies are forcing those channels into certain packages. I used to be able to have a special sports package that could meet the needs of customers that wanted sports, but now in many cases those expensive channels are being pushed down into the more popular packages that is increasing the prices for my customers.

Mrs. {Blackburn.} Okay, my time is expired. Mr. Chairman, I have got a question I will submit to all witnesses and ask for their response in writing, and I yield back.

Mr. {Walden.} Thank the gentlelady from Tennessee, the vice chair of the committee. We will now go to the former chairman of the committee, the gentleman from Michigan, Mr. Dingell, for 5 minutes.

Mr. {Dingell.} Thank you, Mr. Chairman, and I commend you for this hearing. I appreciate your kindness and courtesy to me.

To the surprise of all, I probably won’t be asking questions today, but I have got some brief cautionary remarks.
I am somewhat alarmed by the prevalence of comments in the testimony of our witnesses today that are extraneous to the basic issue that we seek to address. Successive iterations of the 1988 Satellite Home Viewer Act, SHVA, were enacted by Congress in order to extend the principle of localism to the greatest degree possible to unserved viewers. I note that thanks to SHVA and with subsequent reauthorization, DIRECTV and DISH are now the second and third largest pay television providers in the country and are able to compete on a more level footing with the traditionally dominant cable companies. These facts tell me that SHVA and its successor legislation have well nigh fulfilled their intended effect.

Now the committee last considered the satellite television reauthorization legislation in October of 2009. That bill was comprised of nine titles, but it had only 30 pages or thereabouts. Its main provisions extended Section 325(b) of the Communications Act with respect to distant signal carriage and good faith negotiations, as well as addressed problems related to significantly viewed stations, and the after effects of the transition to digital
television. Now to put this in simple terms, the committee’s work on satellite television legislation has been predicated on the simple principle of localism, and it should continue to do so.

In closing, I recognize the landscape for video has changed significantly in the past 25 years. If the Cable Act or other laws related to the video marketplace are to be amended, they should be amended on the sound basis of a thorough record established by the committee’s diligent efforts to achieve such record. At present, the committee has not established such record, and I have to confess that I don’t think that most of my colleagues, including me, understand full well what the situation is or what it is we should do about these matters. And so without those kinds of things and without a record to define what are efforts should be, I think we would be well served to confine our efforts here to a clean reauthorization of the Satellite Television Extension and Localism Act. I would observe that to fail to do this is probably going to project the committee into one of the doggonest donnybrooks in recent history and I would hope that for the benefit of all of us and for the need
to do other things that we would keep that thought in mind.

With that, Mr. Chairman, I return with my thanks and
gratitude a minute and 44 seconds, and I appreciate your
courtesy toward me. Thank you.

Ms. {Eshoo.} Would the gentleman yield?

Mr. {Dingell.} If I have some time, of course.

Mr. {Walden.} Gentleman yields.

Ms. {Eshoo.} Thank you, Mr. Dingell.

I can’t help but jump in here, given what the gentleman
from Michigan has said. I think everyone here knows, and if
you don’t, you are going to be reading about it, that Mr.
Dingell is now the single longest serving member of the
United States Congress in the history of our Nation, and he
has spoken again very, very wisely and prudently today. So
we not only congratulate him and celebrate the work that he
has done at this committee. Every major law that we can
point to has his imprimatur on it. So thank you, Mr.
Dingell, and thank you for what you said today, and bravo.

Mr. {Dingell.} Mr. Chairman, I want to express my
respect for the gentlewoman from California, and my thanks to
her for those kind words. My old daddy used to say to me,
son, he would say, it ain’t how long you took, but how well you did and how hard you tried. I have tried to concentrate on the second part of that comment. Thank you very much, Ms. Eshoo, and Mr. Chairman, I thank you for your courtesy again.

Mr. {Latta.} [Presiding] The chairman emeritus yields back, and at this time, the chairman recognizes himself for 5 minutes. Again, I want to thank all of the panelists for appearing before us today, and it is a very important hearing and where we are going to be going in the next year and a half with the reauthorization.

If I could start with Ms. Tykeson, if I could start with you and ask you a couple questions. First, again, congratulations on your award. I represent a very interesting area, one that is south of Mr. Dingell’s area in Ohio, and it goes from an urban area to a very rural area. And so it is served by very many smaller operators like BendBroadband. I want to ask you about set top boxes, if I could. You have called on Congress to repeal the band on integrated security on these set top boxes, but you note in your written testimony that your company was granted a waiver of that rule. Why is this rule relevant in today’s role,
given all the devices that folks out there are able to get video programming from? And do we still need the 629 rule as a follow up?

Ms. {Tykeson.} Thank you for your question, Congressman.

We were successful in receiving a waiver from the separable security ban back in 2008, so we were able to go all digital. We were the first company in a traditional cable company to go all digital and reclaim all of our analog spectrum. What has changed even since then is the plethora of devices that are available and so determining how people receive their signals using hardware in today’s world where applications or software can do the job is a much more efficient way to do that. A lot of companies can’t do--put together a waiver because they are too small, and having this rule on the books that is outdated and no longer relevant is costing billions of dollars and preventing technology from moving forward. Thank you.

Mr. {Latta.} Let me just follow up. You just said some of the companies out there can’t do it because they are too small. How small is too small?
Ms. {Tykeson.} Well, I am a member of the ACA, which represents small operators, and there are companies out there with a couple of hundred cable customers.

Mr. {Latta.} Okay. Let me follow up with you on that. I understand that the FCC has admitted that their cable card rules have not been successful at ensuring a retail market for set top boxes as Section 629 of the ’96 Act intended. However, the FCC has been encouraged to adopt all bid rules that apply to all pay-tv providers to remedy this situation.

What is your position on that?

Ms. {Tykeson.} Well, I think the problem with the rules that— with regards to the— excuse me, I am a little bit nervous.

Mr. {Latta.} Go right ahead.

Ms. {Tykeson.} Some of these rules are only applying to cable companies, and they are only applying in the United States. And so we are artificially impacting the cost of hardware, and I am not in favor of trying to regulate who should be doing what with technology that is changing fast and rules like we have in the ’92 Act become outdated and they are impacting the marketplace and how it unfolds.
Mr. {Latta.} Thank you very much.

Mr. Pyne, if I could ask you just a couple questions. I find it kind of interesting in your testimony you stated that in cooperation with our MVPDs, for example, cable, satellite, and telco distributors, you now have--you make live streaming of many of our channels available to subscribers on their tablets and smartphones, and having heard, you know, through the testimony today and we hear all the time is how things are really changing out there, how people from, you know, across the country are getting their information.

I am just kind of curious, when you talk about, you know, making that live streaming available, you know, on all these different channels of subscribers, do you have any breakdown of like the ages of individuals or the regions? Is it particular or is this across the Nation on the age groups, just out of curiosity, for one?

Mr. {Pyne.} On the specific--with our Watch services, I don’t have the breakdown. We can certainly look into that. Just to be clear, part of the reason we call this TV Everywhere, the industry calls it TV Everywhere, and it is really--it is part of the industry’s effort to continue to
find ways to provide an incredible value package to consumers. Just quickly, this week, Michael Powell, who is the head of the NCTA, said on stage, you know, the average cost per hour of viewing entertainment content is 23 cents. So 23 cents is the average cost of viewing, which in terms of entertainment options, he was saying is a very great bargain. I mean, I commend companies like Bend, DIRECTV, and others for the great job that they have done in creating that value. I will tell you that ABC.com, you know, in 2004 when we had such great hits as Lost, Desperate Housewives, and Grey’s Anatomy, we found that 15 minutes they were off the air, they were pirated around the world, so we created a service called ABC.com, which is live streaming at that point, and the statistics we found in that is that the average age of a linear television was in the earlier 40s, but the average age of someone who watched ABC.com was in his or her early 30s. So I think that that may give you some indication.

Mr. {Latta.} Well thank you very much, and my time has expired. At this time, I recognize the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. {Doyle.} Thank you, Mr. Chairman.
Ms. Burdick and Ms. Tykeson, both of your companies deal with retransmission consent as small cable providers, yet you seem to have a disagreement on the effectiveness of the regime. Why do you think that is?

Ms. {Burdick.} Well as I said, I am the small broadcaster, small cable company at either side of the table. There have been some remarks today about consolidation of broadcasters. We are small fries compared to the consolidation of video provider world. The top four video providers control 62 percent of the market. The top 10 control 91 percent, so in my negotiations as a broadcaster, I will start with a major MVPD with millions of subscribers that says you cover in your six markets 1.8 percent of the country. I can afford that churn. So it is a tough business negotiation either way. If I spoke as a cable operator, which I am not today, I am speaking on behalf of NAB, but the negotiation is equally as tough on that side of the table and I think what it proves is that the marketplace works. There are thousands--

Mr. {Doyle.} So as a small cable operator, though, you think it works?
Ms. {Burdick.} Yeah, we made it work.

Mr. {Doyle.} Ms. Tykeson, you have a different view?

Ms. {Tykeson.} I don’t think it works because it is not a free market, so I have a choice of one affiliate in my market, you know, and in some cases it is a great affiliate because they provide local news. But if we have an impasse, for example, I am given a price I have to pay, I don’t have any recourse. I can maybe negotiate a little bit, but at the end of the day, that broadcaster can take the channel off of my system. So my customers either have to pay the price or we go--have to go black with the channel. We can’t bring in another signal during that interim period.

The other point I wanted to make, in some markets, about 48 markets around the country, there are broadcasters working together to negotiate with the MVPD or the local operator, and that collusion is driving up prices by about 20 percent and making it very challenging to negotiate. I don’t think there is any other industry where competitors could work together to collude to come up with a solution. I know Ms. Burdick in her testimony said that in her market she is not doing that, but my smaller cable constituents around the
country have had those circumstances that are very disruptive to their customers.

Mr. {Doyle.} Thank you.

Mr. Pyne, has Disney ever commissioned the purchase of your most popular channels on the purchase of your least popular channels?

Mr. {Pyne.} No, we have not. In fact, I have signed three affidavits attesting to that fact that we do not employ what is commonly known as tying.

Mr. {Doyle.} So has anyone ever requested price quotes from you for just your most popular channels only?

Mr. {Pyne.} Excuse me?

Mr. {Doyle.} Has anyone ever requested price quotes from you for just your most popular channels?

Mr. {Pyne.} Yes, they have, and in fact, ESPN and ESPN-2, which are two of our most popular channels, 15 percent of our cable systems out there only carry ESPN and ESPN-2.

Mr. {Doyle.} Very good, thank you.

Ms. Tykeson and Mr. Palkovic, how does channel bundling affect the types of packages that your companies can offer, and how does it affect the prices you charge your consumers?
Mr. {Palkovic.} Well, with DIRECTV, it is simple. We are offered a price for all of the channels with a particular program, including retrans. Any offers that would break that down into individual pieces are just economic. I think that is intended, so that usually doesn’t go anywhere, and you know, you end up with situations where even if we could create a package for consumers that was affordable that only had in that package enough programming to support a price point that they would want, will run afoul of penetration obligations in those agreements. So you can do it, but you end up either having to stop selling that package or you have to pay through the nose to the programmers for violating those terms. So it is not just a tie-in involving channels, there are penetration obligations on the more popular channels that accrue to the rest of the suite of services. So it is a tough situation today to deal with.

Mr. {Doyle.} Thank you. Ms. Tykeson?

Ms. {Tykeson.} So what that means is if we wanted to have a channel down in a lower level--well, usually we don’t, but if say, for example, with the basic cable, limited cable, we would be prevented from moving those channels to a higher
tier if they are too expensive. So we are forcing our
customers through--unfortunately, the programmers are--to put
these channel in tiers where customers don’t want them, and
if we pierce the floor, and I think that is what Mike is
saying, now we are in breach of contract. So I have to put
these channels in these wide penetrated tiers and customers
don’t want them. My packages are becoming way too expensive,
and it is just not fair for my customers.

Mr. {Doyle.} Thank you, Mr. Chairman. I see my time is
up so I will submit the rest of my questions for the record.

Mr. {Latta.} Thank you very much. The gentleman yields
back, and the chair now recognizes the chairman emeritus, Mr.
Barton from Texas, for 5 minutes.

Mr. {Barton.} Thank you, Mr. Chairman.

Before I go into my questions, I have a commercial.

Tomorrow night at I think 7 o’clock, Mr. Doyle’s behemoth of
a team, the Ragtag Republicans, and I am scrounging a team
together this afternoon to make sure that we can get nine
folks to show up, but the game is at 7 o’clock and there are
a lot of Energy and Commerce members. Mr. Doyle is the
manager on the Democrats and I am the manager on the
Republicans. Mr. Scalise here is our second baseman, so we are hoping--

Mr. {Doyle.}  We will be gentle, Mr. Chairman.

Mr. {Barton.}  You what?

Mr. {Doyle.}  I said we will be gentle.

Mr. {Barton.}  Yeah, well we want you to be very gentle.

Now if you will start the clock I will get into my comments.

I have three homes, which is unusual, two in Texas and one up here. One of them is covered by DIRECTV, one is covered by Comcast, and one is covered by Charter Communications. The two that are covered by cable, you know, also includes an internet package. DIRECTV is just TV. All of those I am paying in the neighborhood of $200 a month each. I am really looking at going back to the old free TV. I mean, I think it is illustrative when you are having commercials show up on cable television that you can get an antenna and the government requires free over-the-air broadcast. You know, we have got a whole generation Americans who don’t realize that they can get free over-the-air TV. It is like it is a new product, and I am about to rejoin going back to the future, because of the cost.
Now the last time we did major cable bill, there was a Republican Congressman named Nathan Deal, and he was hot to trot on ala carte pricing. And I discouraged him and--but anyway, we got him--we let him have a vote on his amendment. I think he got two or three votes. Well he is now Governor of Georgia, but if he were still a member of this committee, I think he would get a lot more votes. I am not real happy--I understand that I can get 1,000 channels, but I only watch two or three, and my friends at DIRECTV--I know it is not fair to pick on you, but one of the channels that I really, really like to watch is FOX Southwest. It is the regional sports channel in Texas. In order to get it, I had to pay about 70 bucks for a package, a tiered package of which all of those the really only one I want to watch is FOX Southwest.

So I am not sure--I haven’t talked to Mr. Walden or Mr. Upton. I don’t know what their personal views are on reauthorization, whether they want to reopen it or they just want a so-called clean bill. But if they want to go beyond a clean reauthorization, I am very willing to look at the basic tenets and revisit it, because to the average American
family, 200 bucks a month is a significant amount of money and it is--that is about--in three locations. Now that does, in two of the three, includes an internet package. It doesn’t in the TV package for DIRECTV. So that is just something as an observation.

My question I am going to go to Mr. Singer here, because he seems to be the economist neutral man here. Retransmission consent was meant to be a level playing negotiation between a local broadcaster and a local cable operator. And in many cases, the local cable operator was a national cable operator. It wasn’t somebody like Mrs. Tykeson, who has a local system. But apparently now, retransmission is becoming a national negotiation between a broadcast network where the local affiliate yields to the national network, who then gets a fair amount of the retransmission package if there is compensation. That was not the intent of the Congress, at least, that is not my recollection. So I would like Mr. Singer’s comments on this, how retransmission has evolved and if he has a solution, if he thinks it needs to be changed, what would he go to?

Mr. {Singer.} Sure. Thanks for putting that to me, and
I will try to be fairer than them all. But the point is that economics or the way that economists think about things, is there a market problem? Is there, say, vertical integration that can distort incentives relative to an independent in this situation? When I look at this problem, I see two behemoths on both sides of the bargaining table. And in this situation, you will get some failures in a sense that deals won’t be struck. But there isn’t a very solid basis, at least in economics, for regulatory intervention in those circumstances. It seems to me that—and this is an important caveat—so long as the copyright is protected on the broadcaster’s side, we should just let those guys basically beat each other over the heads until they come to the right price.

Mr. {Barton.} So you don’t see a problem with the current law?

Mr. {Singer.} I think that there is—again, what I have seen put on the table, I think, in Mr. Manne’s testimony is that if we fix the copyright issue we can repeal the law and let market forces dictate the outcomes.

I do see problems, I just want to say, in terms of the
size of the package that you mentioned before and I am sympathetic to that, but on this issue of whether or not government should lean in and put their hand on the scale of a negotiation between two large players on both sides of the equation, that doesn’t have a very strong basis in economics.

Mr. {Barton.} Okay. Thank you, Mr. Chairman.

Mr. {Latta.} Thank you very much. The gentleman yields back, and at this time the chair recognizes the gentleman from New Mexico, Mr. Lujan, for 5 minutes.

Mr. {Lujan.} Thank you very much, Mr. Chairman.

Mr. Barton, I almost want to yield you more time to get to some of those questions as well, sharing some of those concerns, especially with the rural district that I represent.

I guess a question to Mr. Palkovic, Mr. Pyne, and Ms. Tykeson, along the same lines, last year the FCC released its annual survey of cable industry rates and found that prices from 1995 to 2011 time period increased by an annual rate of 6.1 percent, compared to only 2.4 percent increases in the overall consumer price index. To what factors do you attribute those causes, especially as we talk about the
Mr. {Palkovic.} Sure. I think DIRECTV in recent years has been going up annually about 4 percent with our customers all in, and just to kind of put it in some context, over 40 percent of our costs are costs paid directly to the programmers, to the content holders, and their prices have gone up double digit, so you know, when 40 percent of your costs are going up 10 percent and we can only get 4 percent from our consumers, because we still have to operate in a competitive environment, we are not making any money on this. So all the other operating costs we have for satellite and broadcast centers and overhead and customer service--and we are a huge believer in providing, you know, the best customer experience, we are eating those costs because all the money that we are getting annually is going directly to the content holders. So if people think that we are, you know, out there making money on these increases, we are not.

Mr. {Pyne.} I think--

Mr. {Tykeson.} So in our case, programming is the number one cost for my company. Our expenses for programming are going up twice as fast as our revenue from video product.
I wanted to also just comment on Congressman Barton’s point, because what we have now is this shifting in the power. We are negotiating—MVPDs like Mike’s company and my company are negotiating with a single broadcaster in a market, so this is the only example I can think of where you have more competition and higher prices, and it is because I don’t have any place to go besides to those broadcasters or programmers to get that particular content.

Mr. {Lujan.} Mr. Pyne?

Mr. {Pyne.} If I may just say something on programming costs. First of all, I want to make one point clear is that at the Walt Disney Company, we only own eight television stations so when we negotiate retransmission consent, we only negotiate for those eight stations. It sounds like there is a belief that all the local broadcasters are puppets in some way. Believe me, there is a great exchange of dialog between local broadcasters who are affiliates and us in terms of whatever the appropriate exchange of value, but you know, they are the ones that drive that local decision and that local negotiation.

You know, we at the Walt Disney Company spend billions
of dollars every year in creating great content. I said earlier that, you know, for ABC alone it is $3 billion a year, but we always--whatever the service, we always are looking to make our networks must-have. I wish it were as easy to call down to the local store and say here, I would like to order two hits, but the investment and the risk in developing that content is huge for us, and ultimately, we are looking, in terms of our negotiations, to find, you know, a fair way of reaching terms with whomever our distributor is.

You know, one of the advantages that small rural cable systems have is something called the National Cable Television Cooperative, or NCTC, and in that case for all of our cable networks, ESPN, Disney Channel, ABC Family, we negotiate--and BendBroadband is a member, you may be a member, too--we negotiate as if they are the fifth--eight million subs, they represent eight million subscribers, and we negotiate as if they are the fifth largest MVPD.

Mr. {Lujan.} Mr. Pyne, I am sorry, I am going to have to just jump in here because I am going to lose all my time here.
Mr. {Pyne.} Sorry.

Mr. {Lujan.} But I would love to get that maybe in a written way and we will get that resubmitted.

Ms. Burdick, I am sympathetic to a comment that you made in your prepared testimony that you are concerned that local communities could lose access to local programming. I think that we would both agree that access to local news, local programming is critically important. But I want to talk to you about something that is broken. I represent a district where many of my constituents can’t receive local programming because of the DMA that they are in, and I would like your opinion on what we can do to make sure that we are including orphan counties to get this done, because if not, I want to work with my colleagues to find a way to fix this. Since I have been in Congress I have been asking for help in this area and I have not found anyone willing to help me out to get this fixed.

Ms. {Burdick.} Well, I can tell you the head of the NAB, former Senator Smith, was successful on the Senate side in finding some fixes there, and we will be glad to work with you. Broadcasters want local citizens to have local
programming, and we would be glad to work with you.

May I take just a minute to address a couple of the comments here? I think you raised something that was really important where you quoted cable rates from 1995 on. The fact of the matter is broadcast retransmission consent has only existed since 1992, and from a practical basis, it was really not until the late ’90s or 2000 that most broadcasters began successfully negotiating for pennies of every programming dollar to support local news and information. The cable rates have been going up in a larger percentage long before broadcasters were being paid for the most popular content on cable systems.

Mr. {Lujan.} Mr. Chairman, I know my time is right now, but as I look for some assistance to get this done, some of my savvy consumers, all they do is they go and get a post office box out of a metropolitan area in the middle part of the State, the largest city of Albuquerque and then once they send that bill to their satellite provider, then I will be darned, they get local programming. You know, if it is not against the law, we need to make this work somehow. This is just ridiculous. These are farmers and ranchers that are in
isolated areas that want local programming, want to know what is happening in the State that they are proud to belong to, and we got to get this thing fixed.

Thank you very much, Mr. Chairman.

Mr. {Latta.} The gentleman yields back his time, and at this time the chair recognizes the gentleman from Louisiana, Mr. Scalise, for 5 minutes.

Mr. {Scalise.} Thank you, Mr. Chairman. I appreciate that and enjoy the testimony.

I want to start with Mr. Palkovic. In your testimony you had stated that competition normally drives down prices, but here the Congressional Research Service recently put it that "Ironically the market consequence of greater competition in the distribution of video programming appears to be greater negotiating leverage for the programmers with popular and especially must-have programming, resulting in higher programming prices that MVPDs tend to pass through at least partially to subscribers.''

How do you believe government regulation has contributed, if at all, to the findings that we saw from the Congressional Research Service?

Mr. {Palkovic.} Well, I think it gets back to the tying
and bundling of the retransmission consent rights that broadcasters have that are tied to the 1992 Cable Act, coupled with the consolidation of programming that has taken place since that time. Right now, there are six major companies that control the majority of programming. They are not all broadcasters, but four of them are broadcasters, and they behave somewhat differently depending on who they are. But when they bundle all of their content together, even the content that is less desirable that people should be allowed to choose in more niche packages, in exchange for a very much high in demand programming, they really just point the gun at your head and say you got to take it or leave it. What makes it even worse is when they throw blackouts on top of that, so it sounds like it is a free market situation, but underlying that are all the protections they have for the local broadcast channels. And it may not be the smaller mom and pops, that may be a more direct kind of traditionally fair discussion, but these large conglomerates are basically using all the rights they have with the Cable Act and leveraging that against distributors and driving the prices up.

Mr. {Scalise.} Let me ask Mr. Pyne, I know when you
This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

1834 talk about the different services that your company provides, you know, my kids would probably have a revolt if the Disney Channel or Disney Junior went off the air. I would probably have a revolt if ESPN went off the air. If there was a repeal of retransmission consent, but also tied in with the repeal of compulsory copyright license, which I know legislation I brought forward would do—and usually the compulsory copyright components are often left out of the conversation. Wouldn’t you just revert back to a normal, as Mr. Manne described it, a normal copyright negotiation where you would have two parties that would still be sitting at a table negotiating, but in this case the consumer demand would be driving a negotiation that would still be based on a mutually agreed upon price?

1848 Mr. {Pyne.} You know, I think—you know, we don’t support the repeal of both the retrans and compulsory copyright. Clearly in that discussion there are some things of interest to us in terms of the economic discussion, but we don’t support the repeal of retransmission consent for the reasons I cited. I think in full candor, one of the reasons is the potential uncertainty we view that could take place in

102
the marketplace. You know, from our perspective and
certainly from other broadcast perspective, we believe the
system is working in terms of the negotiations. Yes, there
are disruptions. There are not officially blackouts because
broadcasters are still broadcasting their signal, and as in
any negotiation in the current system--I have personally been
involved in two. One is when Time Warner dropped ABC in
2000, and then in 2010 when we dropped Cablevision. In the
first case it was resolved in 36 hours, in the latter--and
that was just ABC, by the way, it was not other networks--and
the latter resulted in 20 hours of ABC being off the air and
we reached a resolution.

Mr. {Scalise.} Thanks. You know, one of the earlier--
when I did my opening, the reason I held up the brick phone,
you know, you can find these on the Internet still, which we
were able to do--it doesn’t work. I can’t get it to work.
But the laws that were written during the time when this was
the technology--and I brought up the Aereo case earlier and I
appreciate that there is ongoing litigation, you can’t talk
about it here. But if you look just a few weeks ago, the
head of CBS actually did chime in on his and indicated that
they are right now in talks with pulling CBS down and going
to a cable format. Now, probably unlikely that it gets to
that, but the fact that CBS, one of the major broadcasters,
is right now talking about the possibility that if this court
case goes a different way, that they could pull down their
local broadcast signals and just go to a pure cable format
tells you the marketplace has changed dramatically because of
technology, and yet the laws don’t cover that. So I want to
finish with a question to Mr. Manne, how do you view this
marketplace as it is evolving in the context of laws that
were written in 1992 that really haven’t been updated, though
the technology has changed dramatically?

Mr. {Manne.} We had amazing progress in this market,
despite the fact, as I pointed out in my testimony, but
clearly suboptimal rules here. I think in particular when I
hear all this discussion about high prices for must-have
content and all the talk about bundles, I think Hal and I
seem to substantially disagree about this. What I hear is
that there are pieces of the existing regime--we have talked
about them, starting as you and I both agree with the
compulsory license, but going through all of the many we have
mentioned today, that do dramatically, I think, impair the free contracting among the various parties here and probably do affect price, but it is also really important that at the end of the day, you do have to pay a price for things like things that you must have. If you really want something, you usually have to pay more for it, and especially when it comes to the availability of content, and that means both the production of the content and the distribution of it, you know, I see this incredibly vibrant market with more content than we have ever had, more avenues of distribution than are imaginable, and the fact that the particular business model by which they are distributed, in some cases, for example, bundled, that doesn’t foreclose access to all of this wonderful content. That is not how it works. And because it doesn’t work that way, I see it as a valid business decision that these content owners and the distributors that they negotiate with have made to actually maximize the production of that content. That may cost a little bit more—seem like it costs more, because you have to pay more, for example, the bundle, but that has generated such a proliferation of content and again, distribution mechanisms for it that we
have this really remarkable market that could be even better, because there are such easily identifiable problems with the regulation of it that we could dispense with it.

Mr. {Scalise.} Thank you. Appreciate it, Mr. Chairman, and I yield back the balance of my time.

Mr. {Latta.} Thank you very much. The gentleman yields back. At this time now, the chair recognizes the gentleman from Utah, Mr. Matheson, for 5 minutes.

Mr. {Matheson.} Thanks, Mr. Chairman, and I do appreciate the panel today. I find this to be a rather thoughtful and informative hearing, which I wish that was always the case, but this is a really good one today. So I appreciate all of your input.

I had a couple of questions. There are so many issues out there, but Ms. Burdick, I wanted to ask you, there is a suggestion that has been put out by some folks that there is a situation where out-of-market programming could be allowed during retransmission consent disputes. If that happened, could you tell me what the impact would be on your company if that happened during a retransmission dispute?

Ms. {Burdick.} Sure. I will give you one line and then
I will elaborate. Imagine what it would have been like in Moore, Oklahoma, had distant signals been broadcast the day of the tornadoes. Imagine what it would have been like.

We as local broadcasters are providing local news, weather, and sports services that are not duplicated by anyone else, and the fact of the matter, as the panelists have alluded to us is must-have programming because it is watched more on their cable systems or satellite systems than any of the channels that they provide. You have to go to a CW, a My Network station, over-the-air that even gets close to the top-rated cable network, so we are providing important content. If a local signal--if a distant signal was allowed to be imported, a couple things would happen. There will be more disputes, not less, that will last longer because there is no incentive for the cable or satellite operator to solve that dispute. They are bringing in a signal they are not paying for, so why would you reach a resolution with a local content provider to pay for that content, number one. At the second time, they would be shrinking my market area. I would be losing eyeballs. When I lose eyeballs, I lose advertisers. When I lose advertisers, I lose dollars. The
1960 only place, as Ms. Tykeson rightly refers to, cable’s highest
1961 programming cost--cable’s highest cost is programming. Mine,
1962 as a local broadcaster, is people doing news and local
1963 information. When I lose revenue, that is the only place I
1964 have to go to control my cost, and that would be the impact.
1965 Less news, less local information.
1966 Mr. {Matheson.} Thank you.
1967 Ms. Tykeson, you talked about in your testimony how your
1968 costs for your consent fees have gone up over the last few
1969 years. Roughly how much of your--what is your breakdown of
1970 how much your programming dollar breaks down between what is
1971 broadcast and what is not?
1972 Ms. {Tykeson.} So the--I would say--
1973 Mr. {Matheson.} Sorry, could you turn your mike on?
1974 Ms. {Tykeson.} Sorry.
1975 Mr. {Matheson.} Thank you.
1976 Ms. {Tykeson.} The prices for retransmission consent
1977 are growing at a faster rate than the costs for my other
1978 kinds of programming, but both are going up by significant
1979 amounts. I would say with these recent rounds of
1980 retransmission consent negotiation, probably doubling and
1981 tripling each cycle. And then in addition, with the large
1982 bundles of programming that I am required to offer because
1983 there is not a system that allows me to offer smaller
1984 packages to my customers, each time those negotiations come
1985 around, my costs are going up, in some cases, by 20 to 30 or
1986 even more, depending on what is being required of me in terms
1987 of moving some of those channels down, offering more
1988 channels, and then also taking the double or triple the cost
1989 of inflation increases on each one of those channels that we
1990 provide to our customers, and we have to, in accordance with
1991 those agreements.

Mr. {Pyne.} Can I make one clarification, please, and I
1992 have heard this several times. I think I stated earlier that
1993 we don’t employ tying. Like other businesses, we do offer
1994 packages of programming, but I guess I will say three things.
1995 Number one, clearly we spend an inordinate amount of time,
1996 energy and money in developing must-have programming, and
1997 that is from the very top of our company, creative
1998 excellence. Two is, you know, when a channel doesn’t do very
1999 well, we, in fact, change it, so recently Soapnet, great
2000 channel in the 2000s, its popularity has waned, so we could
have just tacked on another channel and added more, but in fact, we are switching out Soapnet and launching Disney Junior, which has incredible programming, and third, if I may finish, you know, we would love all of our channels to be 100 percent penetrated. We have a portfolio. We love them. But in fact, even on BendBroadband, our ESPN news channel is only penetrated 18 percent, Disney Junior 49 percent, and on DIRECTV, ESPN deportes is only penetrated 6 percent. And finally, we have--and we understand that. That was a negotiated deal through fair market terms. And finally, you know, we have done as a company over the last little over 2-1/2 years seven of the top ten deals with major companies, with smaller companies, ranging from Cox Communications to Cablevision, to AT&T, and certainly Comcast. We have done deals that after 30 years of negotiating in the marketplace--and I have been doing this for 21 years--I think we have established standard rates and standard terms.

Ms. {Tykeson.} If I may just add, because my neighbor here mentioned the National Co-op, which is an opportunity for companies like BendBroadband to participate, but some of the problems with the rules that we currently are operating
under is the co-op is not really treated truly like a large
distributor, so the prices that are offered to the co-op
members, and terms in particular, are different and in most
cases, it costs more or there is more stipulations and terms
that are not attractive or as attractive as a large
distributor might be able to get. Thank you.

Mr. {Matheson.} Thank you. I appreciate everyone’s
comments. Mr. Chairman, I yield back.

Mr. {Latta.} Thank you very much. The gentleman yields
back, and the chair now recognizes the gentleman from
Vermont, Mr. Welch, for 5 minutes.

Mr. {Welch.} Thank you very much, Mr. Chairman. This
is a great hearing. I was on the committee two Congresses
ago and then I was off last committee, and I am back. And
things are pretty confusing for consumers, anyway. You know,
I find this to be a very excellent hearing and really
appreciated your testimony, and Mr. Chairman and ranking
member, it is fabulous to be here.

But you know, the work that everyone is doing is so
important, and how you do it and what the market requirements
are in order to have the revenue stream in order to do it
obviously is essential, and we are talking about this in the context of satellite reauthorization, which Congress has successfully done. But the kind of elephant in the room that has been alluded to, but not directly addressed, is the Cable Act of 1992. I mean, the world is totally different. The revenue models are totally different. The consumer needs and opportunities are completely different, and you know, it is raising the question in my mind as to whether or not, in fact, there needs to be a serious revisit of the Cable Act of 1992.

In my office, I have had many of you or people in your sectors of the very challenging industry come in and talk about what they perceive as problems with the status quo, some people saying the status quo is the right way to go, but that is very much in contention, and we are even hearing that amongst you. And the bottom line--and I don’t have any answers--is that somehow, some way we have to figure this out and do it in a coherent approach where there is an acknowledgment that there are new tensions. I mean, just think about the things we have heard tonight--this afternoon. Mr. Lujan talking about the orphan counties and not being
able to make any progress. What I hear about a lot is from
my consumers and the cost of this, and Mr. Latta, I really
appreciate your leadership. We started a rural caucus to try
to figure out how we can help folks in rural America
basically get a fair shake on this. The dilemma here from my
perspective is that the consumers just don’t have any power
to affect the outcome, but they are feeling the pressure of
these high bills. They need the services you provide. They
benefit from the content that you create. They certainly
benefit from local broadcasting. We had Tropical Storm
Irene, and the lifeline for us was local radio and local
television. But on the other hand, they have no control over
what that bill is. They get all these channels that they
never watch, you know. They kind of wonder why these
baseball players are getting $230 million contracts and they
can’t swing a bat anymore. And you have got a revenue model
where basically there is no liability for the general manager
who makes the deal, because they can just pass it on to the
cable subscribers. People are getting kind of fed up with
that, right?

So you know, Mr. Chairman and ranking member, I just
wonder whether it is time for us to not only look at the satellite STELA, but to look at the Cable Act of 1992 and understand that it has got to come out in a way where the competing interests and needs require a solid and stable revenue stream in order to provide the benefits to consumers, but the consumer has to be part of the equation.

So I am just going to go down the line and ask whether a revisit of the Cable Act, in your view, makes some sense, aside from the fact that everyone always fears that whatever can go wrong will go wrong if Congress starts trying to change anything. So I get that part, all right, but let’s start with you, Mr. Palkovic.

Mr. {Palkovic.} Sure. Obviously we came here to address, you know, the topic of STELA, but I think it is safe to say that the common theme here is that the rules are old, they need to be revisited. It can be a little bit overwhelming to think about how difficult that would be. We tried to come up with solutions that were anywhere from, you know, the total deregulation approach where everybody gives up all their rights, and quite honestly, including us, we put the good and bad on the table and start over. Two more
targeted approaches to take care of the things you pointed out that are directly evasive to the consumer, because that is really the problem we have is when you use the consumer with blackouts and other tactics like that to deal with your free marketplace negotiations, that is where we think they have kind of gone over the line. But yeah, I don’t think there is any question of revisiting--

Mr. {Welch.} My time is about up, but I just would be interested in a short reaction to whether revisiting the Cable Act makes some sense. Go ahead.

Mr. {Palkovic.} Pardon me?

Ms. {Burdick.} Do you want us to continue or respond later?

Mr. {Welch.} Well you can respond later, but a yes or no might be helpful now, because I am out of time. We have got a very generous chairman here, but I don’t want to wear out his patience and good will.

Mr. {Latta.} Well, if you just want to go down the line and answer a yes or no question, go right ahead.

Mr. {Welch.} Just yes or no.

Ms. {Burdick.} I can’t answer it yes or no.
Mr. {Pyne.} Me as well.

Ms. {Tykeson.} I would say yes, and also provide a written response, but that will take time, so I would go for some additional fixes now, some of which I have mentioned. Thank you.

Mr. {Singer.} I think that there is still a valid need for the program access and program carriage protections in the Cable Act, but aside from those, I think it would be worthwhile revisiting the larger picture.

Mr. {Manne.} I think absolutely. In fact, I don’t think you can really address STELA without addressing those other parts. I would just say that when you do, the most important thing is--I disagree, of course, with Hal about program access and program carriage, but the most important thing is to understand how your regulations can avoid enshrining, you know, the particular contractual arrangements we may have today as though those are the only possible revenue models or anything else. I think that is what has happened and really fundamentally--

Mr. {Welch.} Okay, thank you very much, and Mr. Chairman, thank you.
Mr. {Latta.} Thank you very much. The gentleman yields back and the chair now recognizes the gentleman from Colorado, Mr. Gardner, for 5 minutes.

Mr. {Gardner.} Thank you, Mr. Chairman, and thank you to the witnesses for your testimony today. Listening to the opening comments, listening to the questions, I think there is no doubt from the members here, the witnesses here today that the rules governing today’s video marketplace were crafted 21 years ago, a very long time ago. In fact, none of the rules currently apply to some of the latest Internet competitors in the video space. So with these dramatic changes that have occurred in the video marketplace, I think we have got a great opportunity before us to examine what has changed and how current laws can help or hinder advancement of the free market and market innovation. I know the broadcast industry believes the system is working, and many others disagree. The rise in programming costs and retransmission consent disputes indicates that there are issues that we need to look at.

So to DIRECTV, I would ask this question. Mr. Palkovic, is that right?
Mr. {Palkovic.} Palkovic, yes.

Mr. {Gardner.} Palkovic. Why do you think STELA is the right vehicle to move forward with the discussion of how to change regulations in the video industry?

Mr. {Palkovic.} Well, I think STELA has proven to be a very, very important and appropriate piece of legislation for us. We obviously have a number of things that benefit consumers in that Act. We certainly wouldn’t want any of that to change, particularly taking away programming from a million and a half customers without really--I don’t see any benefit to the broadcasters of doing that, other than potentially hurting the satellite industry, but it will disenfranchise those customers. So since we are in the process of reauthorizing that to the extent we can have any even minor changes like the blackout issue addressed, and we thought it was appropriate.

Mr. {Gardner.} Ms. Burdick or Mr. Pyne, why do you think STELA is not the right vehicle to move forward with the discussion of how to change regulations in the video industry, and could you address Ms. Burdick’s question--testimony that notes that TV stations are underpaid in terms
of retransmission consent dollars?

Ms. {Burdick.} Well, I thin that was evidenced again today when Representative Matheson asked the question specifically how much of a cable programming dollar goes to local stations? It wasn’t answered. We continually get this percentage on retransmission consent, and math was never my strong suit, but when you start from zero--

Mr. {Gardner.} Don’t work for the IRS.

Ms. {Burdick.} --it always looked pretty big. The fact is that broadcast programming is the single highest viewed programming on any satellite or cable system, yet the compensation we receive for producing that program is miniscule compared to some of the other providers.

I haven’t said anything as the term blackout has continued to be used today, and I would just like to underscore one issue. These are contractual negotiations and relationships, and when we reach an impasse, we are still on television. We never go away. I hope Representative Barton does take a look at what is available now free over-the-air since he last looked. It may be 20 or 30 stations, free over-the-air, different kinds. Cable is not asking you today
with STELA that if they reach an impasse with HBO or AMC to be able to import that from another cable system, so why should it--why should they be allowed to import a broadcaster?

Mr. {Gardner.} Mr. Pyne, do you have anything to add to that?

Mr. {Pyne.} The only thing I would add is in terms of why we are comfortable with sunsetting STELA is that we believe the fraction of affected Americans--and we are trying to understand the exact number--but it is small enough that through private contract or private negotiations we could actually find to solve with the satellite companies.

Mr. {Gardner.} Thank you. Broadcasters referred to retransmission consent negotiations as a free market and asked the government to refrain from intervening, yet many on the panel have argued today in some questions today that there are a number of government mandates that prevent the market from being free, such as retransmission consent, compulsory copyright, basic tier placement, required tier buy through for cable, network non-duplication, and syndicated exclusivity. They further argue that broadcasters can decide
which MVPDs carry their content, but MVPDs can’t choose which
market to get their programming from. And so if I could just
start down the panel at the end—and I am going to run out of
time quickly and I have some other questions here, but please
explain why you think the regime is or is not a free market.

Mr. {Palkovic.} Well, I think to be concise here, I
think the broadcasters are combining their rights to carriage
in a local market and they are leveraging those rights with
all the other cable content that they have acquired over
time, and they know that at the end of the day, using tactics
like blackouts, bring the consumer into play and put the onus
on the distributors to deal with the consumers, because they
don’t deal with the consumers, we do.

Ms. {Burdick.} I will let Mr. Pyne answer one of the
other issues. I will take a small chunk of that, and that is
in all of the regulation, whether it was copyright or the
Cable Act, what Congress wisely recognized is the value of
localism and protecting local markets in a marketplace that
supports local news and information. That still has to be
recognized, because if local broadcasters aren’t providing
those lifeline services and local news, weather, and sports,
who else will do it?

Mr. {Pyne.} In terms of retransmission consent, we view that as a mechanism of actually entering into negotiation, and I think one of the tenets of our business is we spend a lot of money in creating content, and we want to be able to, you know, get an appropriate return on that content. Remember, when you do retransmission consent you only--you enter into negotiation and you can either reach an agreement or not.

And just to be clear--and I have said this before--and I know we are--ABC is one of the big four broadcasters, but when we negotiate retransmission consent, we are not negotiating for the country, we are negotiating for our eight owned stations and those local markets only. I just wanted to be clear about that.

Ms. {Tykeson.} Although those markets represent a huge percentage of the United States.

Mr. {Pyne.} It is actually--to be clear, it is only 23 percent of the United States, which is smaller than any of the other broadcast groups.

Ms. {Tykeson.} So I would--to answer your question, I
would say that it is not a free market. In Bend, Oregon, I have one broadcaster to negotiate with. That is it. If we can’t come to an agreement on the price—and by the way, we have paid in other ways over the years in terms of launching additional channels and meeting other demands. So while it is true that retransmission consent fees have started recently, there were lots of other demands before that. So we don’t have a free market. I don’t consider $6 billion to be miniscule in terms of what consumers are paying for this programming. If we come to an impasse, really I have two choices. One is to take—to pay the price and pass that along to my customers, or the channel is blacked out.

Mr. {Pyne.} Can I just address very quickly--

Mr. {Gardner.} If I could interrupt. Mr. Chairman, I don’t know—I am out of time so I don’t know. It is up to you if you want the--

Mr. {Latta.} If you can finish up in about 30 seconds.

Mr. {Gardner.} Yes, so if I could just ask quickly to run through the rest of the panel members, and Mr. Pyne, we can catch up after this, but let’s finish with the rest, Mr. Singer and Mr. Manne, if you don’t mind quickly? Thank you.
Mr. {Singer.} Sure. I don’t think allowing broadcasters to be compensated for the signals is what is driving higher prices of the cable packages. I think it is bundling, and you put your finger on that. One of the things that you really haven’t put your finger on yet that I just want to draw your attention to is vertical integration. I just released a study on the review of network economics showing that when a regional sports network, an RSN, is owned by a cable operator it charges more than independents, and the premium increases with the downstream market share of the vertically affiliated cable operator. So I just think it is important to focus everyone’s attention on what is driving the prices higher, and the fact that broadcasters are allowed to seek compensation for their signals is not one of them.

Mr. {Gardner.} Mr. Manne?

Mr. {Manne.} It is not vertical integration, either. Vertical integration has been decreasing over the relevant time period, and with all due respect to Hal, we have a pretty substantial disagreement over how much vertical integration can really impact the prices like that. And I don’t think it is nearly as substantial as he thinks. I
think if there were really a free market, all of these
supposed--and very real, actually, benefits from local
broadcasters wouldn’t need to be mandated by law. The
customers and distributors would willingly purchase them, but
that may not happen without a particular mandate suggests
that it is not, indeed, a free market.

Mr. {Gardner.} Mr. Chairman, thank you for your
indulgence.

Mr. {Latta.} Thank you very much. The gentleman’s time
has expired, and I just want to thank on behalf of Chairman
Walden and also Ranking Member Eshoo and myself for all of
your testimony today, and your answers. We really appreciate
it. It is very, very informative, and on behalf of the
committee, I just again say thank you. Seeing no other
questions to come before the committee, this committee stands
adjourned.

[Whereupon, at 12:48 p.m., the Subcommittee was
adjourned.]