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On behalf of the
National Association of Broadcasters

Good morning, Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, and thank you for inviting me to testify today. My name is David Barrett, and I am President and CEO of Hearst Television, Incorporated, which operates 29 television stations across the U.S. I am testifying today on behalf of the free, local, over-the-air television members of the National Association of Broadcasters.

I. Introduction

In my view, the future of broadcast video services is bright. Recent data show that the number of viewers accessing television over the air (OTA) has increased dramatically in recent years. Results of a survey released last week by GfK Media/Knowledge Networks show that about 21 million households, representing 54 million viewers, now access digital broadcast television exclusively through an antenna.[1] That is a sharp increase – nearly 20 percent – over just a few years ago. And nearly a quarter (24 percent) of homes headed by younger adults, those with a head of household aged 18-34, rely on over-the-air reception for their broadcast television viewing. *Id.*

Who are these viewers? In addition to young people, many are low-income families or minorities. *Id.* The GfK Media report shows that the effects of the economic downturn, increasing subscriber fees for cable and satellite TV, and the plethora of new broadcast options in the digital age have led many consumers to embrace broadcast TV again. This is exciting news for broadcasters and should inform Congress as it oversees

[1] *See* John Eggerton, "Study: Most Cord-Cutters May Be OTA 'Opt-Ins,'" *Broadcasting & Cable*, June 18, 2012; *See also* blog post of David Tice, GfK Media Researcher, explaining that what is commonly thought of as "cord-cutting" because of online video options may be better thought of as "cost-cutting," as consumers cancel expensive pay TV subscriptions and use free OTA television instead, available at http://www.gfkinsights4u.com/insights4u.cfm?articleID=511.

the Federal Communication Commission's (FCC) management of spectrum allocated to free, over-the-air television.

Some of this resurgence can also be attributed to technological advances in broadcast TV. The television industry recently passed the three-year anniversary of the transition to all-digital distribution. By almost any measure, the transition and broadcasters' embrace of digital technology have been a tremendous success and a boon for viewers. Nearly every major television broadcaster now provides its content to viewers in crystal-clear high definition over the air for free. Most stations also offer anywhere from one to up to three additional "multicast channels" – extra channels containing new and diverse program content, and all of which operate in the same 6 MHz of spectrum that previously held just one analog channel. This new, free, digital over-the-air service doubles, and, in some cases, more than triples, the number of channels available. Indeed, broadcasters' ability to multicast has led to the rise of multiple new national networks, including many networks, such as Bounce TV, Estrella, Live Well, and MeTV, that serve more specialized, diverse, and ethnic audiences. This trend will continue as new networks grow their audiences with increasingly diverse and compelling programming.

With these developments in mind, this testimony first addresses spectrum and broadcasting's role in the communications ecosystem. It then focuses on important issues regarding the "rules of the road" for video services.

With regard to spectrum, NAB urges Congress to remain vigilant in its oversight of the process of broadcast incentive auctions. Incentive auctions themselves are unprecedented, and the television spectrum auction specifically will have a direct impact

on millions of viewers, potentially exceeding that of the digital TV transition. It is critical that this Committee ensure the FCC implements incentive auctions consistent with statutory requirements and Congressional intent.

Beyond these auctions, we should also be focused on the future of broadcasting and how it can, and should, play a vital role in our nation's communications system moving forward. Beyond continuing to serve viewing audiences and local communities as we always have, the broadcast industry's evolving technology will be a critical complement to wireless broadband. Just as wireless companies are upgrading their technology, from 3G to LTE and beyond, broadcasters will also be upgrading, and the results could have an extraordinary impact on spectral efficiency.

My testimony today also responds to continuing calls by pay television services to revise the legal framework of video programming distribution. These companies would have Congress change the laws and regulations that have successfully governed the video marketplace for decades. They would turn back the clock to days when broadcasters were essentially forced to subsidize their pay TV competitors. As explained below, such efforts are contrary to the public interest and should be rejected.

II. Congress Should Ensure That Incentive Auctions Are Implemented As Intended

A. Transparency Is Critical to Incentive Auction Success

Earlier this year, as part of the Middle Class Tax Relief and Job Creation Act of 2012 (Public Law 112-96) ("Incentive Auction Act"), Congress gave the FCC the authority, for the first time, to conduct incentive auctions, including auctions of broadcast spectrum. While we dispute some of the underlying orthodoxy behind the push for incentive auctions – namely, that repurposing large amounts of broadcast spectrum is

necessary to solve a looming spectrum “crisis” – we nonetheless supported the legislation after this Committee and Congress included several appropriate viewer safeguards in the legislation. These provisions ensure that the auctions are completely voluntary and that the Commission must make every effort, after the television auction and the repacking of stations into a smaller band, to replicate the service areas of the many stations that will remain on the air serving their local communities. With digital broadcasting, even a seemingly slight reduction in television stations’ service areas could result in a loss of service for millions of viewers. And this could have a particularly big impact on rural viewers. I encourage this Committee to ensure that the FCC follows the intent of Congress in this important respect.

The success of incentive auctions ultimately will be defined by their results for the American people. The Commission must maintain a robust broadcasting system that continues to provide free and local television service to millions of viewers, while moving to provide a strong and fast wireless broadband system. To achieve this result, the Commission must fully engage all the affected industries. For broadcasters, that includes not just those stations that may choose to participate in the auction, but also those stations that do not – yet will nonetheless be moved, or “repacked,” to a new channel.

Broadcasters are understandably apprehensive about this process. Their concerns include how many stations will be moved and whether there will be enough remaining channels to accommodate those stations that wish to continue to serve the public. To ease that apprehension, the Commission should be as transparent as possible about how it plans to conduct incentive auctions and how it plans to repack

stations. NAB is concerned that some well-intended language in the Incentive Auction Act ensuring confidentiality for broadcasters that submit offers to sell in the reverse auction could be interpreted in a way that would undermine this goal.[2] Careful implementation of this provision is important.

While in some respects confidentiality is a good idea, that confidentiality should not extend to the operational mechanisms of the incentive auction and the repacking process. Broadcasters should know, for example, what modeling and service area assumptions the Commission makes as it lays out a repacking plan, how the Commission will coordinate with Canada and Mexico (which potentially affects hundreds of stations near the borders), and what impact the repacking process will have on existing station coverage areas. Transparency benefits broadcasters, potential bidders in the auction, and the FCC. Broadcasters are more likely to submit an offer to sell in the reverse auction or to consider the channel-sharing option if they understand fully how the process will work *before the incentive auction begins.* Limiting the release of information about the mechanics of the incentive auction process will increase the likelihood that the incentive auction will not be successful.

B. The One-to-Many Broadcasting Model Is a Necessary Complement to the One-to-One Broadband Model, Now and in the Future

One of the most important, but least understood, reasons for maintaining a robust broadcasting system is the critical role that broadcasters play in the wider communications ecosystem. Broadcasting's one-to-many video and data service, plainly, is the most spectrally efficient wireless delivery system for high demand content.

[2] Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96, § 6403(a)(3).

As consumers rely on handheld devices – including mobile phones and tablets – to access content like video, the one-to-many broadcasting model will become increasingly *more important*, not less important. For example, mobile digital TV, which is currently being rolled out by broadcast stations around the country, can alleviate pressure on wireless networks when viewers using mobile devices access popular television programming, such as sporting events, because consumers will not have to access that content through the cellular network. More importantly, as evidenced by the lifesaving role the technology played in the Japanese earthquake last year, mobile digital TV is the best way to reach on-the-go viewers with critical information. Future broadcast distribution standards being developed now will be able to deliver not just high-demand video, but also high-demand data of all types, in the most spectrally efficient manner, greatly reducing the burden on over-taxed cellular networks.

In considering what our nation's communications system should look like in 10 or 20 years, it is critical that we avoid any policy relying too heavily on a one-to-one architecture to the detriment of the diverse broadcast model. The point-to-point architecture of wireless broadband networks essentially means that each user has his or her own path in the cellular network. This type of design allows two people standing next to each other using the same type of device and operating on the same wireless network to access totally different types of information. The first person can be watching a video and the second person can be looking up directions to the closest restaurant. But, if those two people and hundreds or thousands of other people near them are trying to access the same information at the same time – which occurs during emergencies – the wireless network will quickly be overwhelmed.

In contrast, television and radio broadcasting creates one or just a few data streams and transmits that data over a specific geographic area using a high-powered transmitter. This data can be received by anyone who has a receiver located within the transmission range of that broadcaster. Adding more users to the broadcast distribution network has no impact on its ability to deliver information. For high demand information, this is the ideal distribution method. As broadcast technology continues to evolve, we expect that the broadcasting model will work cooperatively and seamlessly with cellular networks to deliver information to wireless devices, delivering, as broadcasters do today, the content that consumers seek the most. In addition, broadcast licenses are held by many diverse licensees. The broadcast model permits a diversity of ownership and control that does not exist in wireless services.

This basic broadcast-broadband wireless model will clearly benefit consumers, who will face higher wireless bills and caps on data usage in the next few years. Already, most major wireless companies are eliminating their unlimited data plans. And as the transition to 4G wireless technology has shown, consumers quickly exceed their data limits, and pay exorbitant overage fees, when accessing video through cellular networks.[3] Coupling a high-powered one-to-many broadcast transmission with those cellular networks would eliminate this concern for consumers accessing popular video content.

[3] *See* Anton Troianovski, "Video Speed Traps Lurks in New iPad, Users Find the Superfast 4G Link Carries a Big Cost: Churning Through Data Limits in Mere Hours," *The Wall Street Journal*, March 22, 2012 (available at http://online.wsj.com/article/SB10001424052702303812904577293882009811556.html?mod=WSJ_Tech_LEADTop).

C. There Is Still a Need for a Comprehensive Spectrum Inventory

I would also like to thank Chairman Walden and this Committee for initiating a new spectrum task force, focused on finding ways to analyze and optimize use of the vast quantities of spectrum under federal government control. To that end, it is critical for the task force to have a complete picture of how all spectrum, both federally controlled and commercial, is being used, including a clear understanding of who currently holds spectrum, how they are using it, and the intensity and effectiveness of their use. Such an inventory of spectrum deployment should not delay the incentive auction process, but an inventory is prudent and necessary for Congress, the National Telecommunications and Information Administration (NTIA), and the FCC to make informed decisions on U.S. spectrum policy.

The wireless industry claims there is a looming spectrum crisis, yet the industry appears to be warehousing vast quantities of unused spectrum.[4] If the wireless industry were truly running out of bandwidth, it already would have developed more of the spectrum that it currently controls. There have been a number of industry analysts who have cast doubt on the claims of a spectrum crisis. Martin Cooper, the father of the cell phone, was recently quoted in a *New York Times* article claiming that available

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[4] *See, e.g.,* Deborah D. McAdams, *McAdams On: Tangentially, Spectrum Policy Reform*, TVTechnology (June 8, 2012) available at http://www.tvtechnology.com/mcadams-on/0117/mcadams-on-tangentially-spectrum-policy-reform/213823 (discussing cable, satellite and telephone companies' "hedging" of prime spectrum, and quoting FCC Commissioner Robert McDowell as stating that the federal government occupies about 60 percent of the best spectrum and has no incentive to move off that space or to provide accurate information about the costs associated with moving); *See also* Randall Stephenson, *Spectrum and the Wireless Revolution*, Wall St. J., (June 10, 2012) available at http://online.wsj.com/article/SB10001424052702303665904577450222319683932.html (stating that much spectrum is held by "speculators" interested in making a profitable investment rather than building mobile networks, and arguing that such speculation should be discouraged and that regulations should be put in place to ensure that spectrum be used within a "reasonable" timeframe).

technologies, which could greatly increase spectrum efficiency, are not being implemented by the wireless industry.[5]

In short, NAB supports Congress' decision to grant the FCC authority to conduct voluntary incentive auctions of broadcast spectrum as long as the Commission fully implements the Incentive Auction Act's viewer safeguards and protects the millions of Americans who rely on free, over-the-air local broadcast stations.

III. The Current Legal Framework Governing Broadcaster-Pay TV Relationships Serves the Public Interest

Turning to the challenges facing broadcast video services, television broadcasters offer a high quality, free, over-the-air, locally-oriented service that competes head-to-head with nationally-oriented pay TV platforms, hundreds of non-broadcast subscription networks, and other numerous programming sources. Congress already has in place laws that successfully govern the relationship between pay TV providers and broadcasters. These laws have a single purpose. They are designed to assure fair competition in a highly competitive media market and maximize the diversity, quality, and affordability of television service to the American people. This legal framework works because it serves the needs of television viewers and reflects the actual business relationships between broadcasters and pay TV providers.

Two bills currently before Congress, H.R.3675 and S.2008, both known as "The Next Generation Television Marketplace Act of 2011," will harm local stations and television viewers in at least three ways. *First*, they would turn back the clock to a time

[5] Brian X. Chen, *Q.&A.: Martin Cooper, Father of the Cell Phone, on Spectrum Sharing*, New York Times Blog (May 31, 2012), available at http://bits.blogs.nytimes.com/2012/05/31/qa-marty-cooper-spectrum-sharing/.

when cable and satellite providers confiscated and resold broadcast signals to their subscribers without obtaining broadcasters' consent — a time when broadcasters were forced to subsidize their pay TV competitors. Aside from being fundamentally unfair, a return to this system would seriously threaten broadcasters' ability to invest in high quality informational and entertainment programming to serve viewers and to compete effectively for audiences and advertisers. *Second*, the bills would eliminate the ability of the FCC to enforce privately negotiated contracts between program distributors and stations for the distribution of network and syndicated programming on an exclusive basis. *Finally*, these bills would further compound the harm to consumers by eliminating statutory provisions that promote fair competition between pay TV providers and the free, over-the-air broadcast service. And they would impair the ability of *any* regulatory body to protect consumers from escalating pay TV bills.

A. Congress Should Not Change Its Well-Functioning System of Retransmission Consent by Tilting the Marketplace in Pay TV Providers' Favor

One point that is sometimes lost in discussions of retransmission consent is why Congress granted broadcasters retransmission rights in the first instance. In short, Congress adopted retransmission consent in 1992 to ensure that broadcasters had the opportunity to negotiate at arm's length in the marketplace for compensation in exchange for the right of cable and other multichannel video programming distributors to resell their broadcast signals. This law promotes fair competition in the video marketplace, is pro-consumer, and enhances the vibrancy of the nation's free, over-the-air broadcast service, as Congress intended. It also benefits television viewers – your constituents – in markets across the country by assuring free access to vital news, emergency and weather information, public service programming, and a variety of

entertainment and sports programming. This service is of special significance and importance to your constituents who cannot afford an expensive pay TV subscription service. These policy goals remain just as important today as when they were enacted.

Prior to the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"), cable operators were not required to seek the permission of a station before retransmitting and reselling its signal, nor were they required to negotiate with the station for that privilege. At a time when cable systems had few channels and were limited to an antenna function of improving the reception of certain local broadcast signals, this lack of recognition for the rights broadcasters possess in their signals had limited practical significance. However, the video marketplace changed dramatically in the 1970s and 1980s. Cable systems began to include not only local signals, but also distant, duplicating broadcast signals and the programming of vertically-integrated cable networks and premium services. Cable systems began to compete head-to-head with broadcasters for viewers and for national and local advertising revenues, but they were still allowed to resell local broadcast signals to their paying subscribers without the permission or consent of the station.

By the early 1990s, Congress concluded that this failure to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace" that "threaten[ed] the future of over-the-air broadcasting." S. Rep. No. 92, 102d Cong., 1st Sess. at 35 (1991) (*Senate Report*). Using the revenues they obtained from reselling broadcast signals, cable systems had supported the creation of cable programming (including program networks vertically integrated with cable system operators) and were able to sell advertising on these cable channels in direct competition with broadcasters.

Given this dramatic change in the nature of cable systems, program services and advertising practices, Congress determined that the then-existing law was not only unfair to local broadcast stations, it was anticompetitive.

Specifically, Congress concluded that public policy should not support "a system under which broadcasters in effect subsidize the establishment of their chief competitors." *Id*. Noting the continued popularity of broadcast programming, Congress also found that a very substantial portion of the fees that consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. *Id*. To remedy this "distortion," Congress in the 1992 Act gave broadcasters control over the use of their signals and permitted broadcasters to seek compensation from cable operators and other multichannel video programming distributors (MVPDs) for carriage of their signals. *See* 47 U.S.C. § 325(b). Congress specifically noted that cable operators pay for the cable programming they offer to customers and that programming services originating on broadcast channels and resold by MVPDs should be treated no differently. *Senate Report* at 35.

In establishing retransmission consent, Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals." *Id*. at 36. Congress emphasized that it did not intend "to dictate the outcome of the ensuing marketplace negotiations" between broadcasters and MVPDs. *Id*. Retransmission consent does not guarantee that a broadcaster will receive fair compensation from an MVPD for retransmission of its signal; it only provides a broadcaster with an opportunity to negotiate for compensation of various types.

The reasons for establishing this retransmission marketplace remain as valid and important today as they were in 1992. Congress enacted retransmission consent because it recognized the value of broadcasters' signals, which continue to be highly valued by viewers and advertisers today.[6] It is still the case today that pay TV providers would like to confiscate the signals of local broadcasters – their competitors for viewers and advertisers – and resell those signals to paying subscribers. But it would be as unfair and anticompetitive today to allow pay TV operators to do this without the consent of local stations as when the retransmission consent statute was enacted. Moreover, from the inception of the Radio Act of 1927, one broadcast station has been unable to take the signal of another broadcast station without the originating station's consent. Similarly, a broadcast station cannot intercept a cable system's transmission or a satellite carrier's signal and then rebroadcast it without consent. It would be the height of unfairness to single out broadcast stations for such disparate and anticompetitive treatment by allowing MVPDs – their competitors – to confiscate their signals without authorization.

It is still true today that cable and satellite operators pay for all of the other, non-broadcast programming they offer to attract subscribers (and, in fact, pay *more* for that programming on a per viewer basis). And there is still no reason that broadcasters should be uniquely disfavored and not be allowed to negotiate for others' use of their signals. In sum, Congress's original goals of correcting distortions in the video marketplace, promoting competition, and "ensur[ing] that our system of free

[6] During the 2010-2011 television season, broadcast programming dominated the primetime program rankings, accounting for 95 of the top 100 programs. Source: The Nielsen Company, 9/20/10-5/25/11; Programming under 25 min. excluded; Ranked by AA% (ratings); in the event of a tie, impressions (000's) are used as a tiebreaker.

broadcasting remains vibrant," continue to be served today by the retransmission consent system. S*enate Report* at 36.

While pay TV providers contend that changes in the marketplace since 1992 have somehow undermined the rationale for retransmission consent, they focus exclusively on the advent of limited competition in the MVPD market and disregard other changes that benefit MVPDs in retransmission negotiations. For example, a much larger percentage of television viewers subscribe to pay TV services today than in 1992. Because broadcasters rely very heavily on advertising revenue, and, therefore, seek to reach the largest viewing audience possible, broadcasters today have a stronger incentive than ever to conclude retransmission negotiations successfully and avoid carriage disputes, which result in the immediate loss of both retransmission consent compensation and advertising revenues for local stations. Moreover, the MVPD market also has grown increasingly consolidated over time, with just ten MVPDs serving 90% of pay TV subscribers nationally, and with a majority of cable subscribers served by systems that are part of regional cable system "clusters." As a result, local broadcasters (including small to medium-sized stations and groups) often must deal with powerful, consolidated, and highly-concentrated and vertically-integrated MVPDs in retransmission consent negotiations. These consolidated MVPDs increasingly compete with broadcasters for viewers and for national and local advertising revenues, thereby additionally fragmenting local stations' audiences and advertising revenues. Congress should refrain from intervening in the retransmission consent process at the behest of these pay TV providers.

Beyond tilting the retransmission consent marketplace more in the favor of pay TV providers, changes to the retransmission consent system are entirely unnecessary and would be contrary to the interests of consumers.

Pay TV providers sometimes assert that they are paying retransmission consent fees that represent dramatic increases from one year to the next. Such percentage descriptions of increases may seem significant until you consider that the increase may be from little or no compensation to a small amount of compensation (e.g., an increase from one cent per subscriber per month to two cents per subscriber per month is a 100% increase, but is a very small amount). Retransmission consent compensation to broadcasters represents but a tiny fraction of what MVPDs spend on other programming and what they earn in revenues. For example, in 2010, retransmission consent fees were only about six-tenths of one percent of cable industry revenues.[7] Data recently published by SNL Kagan show that, in 2011, retransmission consent fees represented a total of 1.46 billion dollars, compared to 26.66 billion dollars paid for basic cable networks.[8] Most of these networks have considerably lower ratings than broadcast television stations.[9]

In addition, the vast majority of retransmission consent agreements are successfully negotiated without disruption of any kind to customers of pay TV providers.

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[7] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 22 (May 27, 2011), attached to NAB Comments in MB Docket No. 10-71 (filed May 27, 2011).

[8] *See* Dave Seyler, *Broadcast Is Not Busting the MVPD Bank*, TV BUSINESS REPORT (June 8, 2012), available at: http://rbr.com/broadcast-is-not-busting-the-mpvd-bank/.

[9] As one party observed in comments filed with the FCC, "[c]able operators pay more than 10 times the per-subscriber fee for cable networks that are less than half as popular as the network-affiliated broadcast channels." Comments of the CBS Television Network Affiliates Association, MB Docket No. 10-71 at 14 (filed May 27, 2011).

NAB has repeatedly commissioned studies of negotiating impasses and their impact on television viewers. These studies have shown that consumers are over 20 times more likely to be deprived of television viewing by an electricity outage than by a bargaining impasse between broadcasters and MVPDs. From 2006 - 2011, aggregate service interruptions from retransmission consent negotiating impasses represented approximately *one one-hundredth of one percent* of annual U.S. television viewing hours.[10] Moreover, no broadcaster – not a single one – has ever been found by the FCC to have breached its obligation to negotiate retransmission consent in good faith. The same, however, cannot be said of pay TV companies.[11] Especially in light of pay TV providers' continual increases in the rates they charge consumers – increases consistently above the rate of inflation – policymakers should disregard these providers' factually unsupportable attempts to characterize their attacks on retransmission consent as protecting the interests of consumers.

Economic studies have shown that curtailing local stations' ability to obtain retransmission consent revenues would significantly reduce investment returns in the broadcast industry and reduce the amount of local news, public service, and public safety programming produced by stations.[12] In light of the economic challenges facing all providers of local journalism, Congress should refrain from undermining the

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[10] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 30 (May 27, 2011), attached to NAB Comments in MB Docket No. 10-71 (filed May 27, 2011).

[11] *See,e.g., Letter from Steven Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable T.V.*, 22 FCC Rd 4933 (2007) (cable operator failed to meet good faith standard); *EchoStar Satellite Corp. v. Young Broadcasting, Inc*., Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of FCC processes and lack of candor).

[12] J. Eisenach and K. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 3-4, attached to NAB Reply Comments in MB Docket No. 10-71 (filed June 27, 2011).

retransmission consent system that increasingly supports local broadcast journalism important to viewers who subscribe to pay TV services, as well as to the growing numbers who receive all television over the air.

B. The Program Exclusivity Rules Work in Tandem with Retransmission Consent to Protect Localism, Diversity, and Private Contract Rights

Through arms'-length free market negotiations with program providers (including networks and syndicators), local broadcast stations purchase and pay for the exclusive rights to carry certain programming within a limited geographic area. The FCC's network non-duplication and syndicated exclusivity rules *do not* impose program exclusivity – they simply allow the FCC to enforce privately negotiated program exclusivity agreements between program suppliers and broadcast stations. In fact, the FCC's rules actually limit and restrict the geographic area of exclusivity to assure fair competition between stations and between cable systems. Both H.R.3675 and S.2008 would require the FCC to eliminate its program exclusivity rules.[13] While cable and satellite interests have sought to paint these rules as regulatory "protections," it is useful to take a closer look at what these rules really entail, why they exist, why they are important, and how they, like retransmission consent, promote competition in the creation and distribution of television programming.

A fact often missed in debate over the network non-duplication and syndicated exclusivity rules is that the rules themselves *do not* provide program exclusivity. In fact, the rules actually *limit and restrict* program exclusivity by limiting the geographic area in which television stations may enter into program exclusivity agreements with network

[13] The program exclusivity rules include the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated program exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125.

and syndicated program suppliers.[14] The actual program exclusivity terms for network non-duplication and syndicated program exclusivity are a matter of *private contractual agreement* between the program supplier and the local television station. Neither the FCC nor its rules provide or enforce program exclusivity provisions or arrangements not agreed to by the program supplier and the local station. The reality is that, subject only to antitrust law, in the *absence* of the FCC's network non-duplication and syndicated exclusivity rules, program suppliers and local television stations could enter into exclusivity arrangements covering geographic areas of hundreds of miles.

In attacking the FCC's rules, what cable and satellite operators actually want is the adoption of mandatory "broadcast signal access" rules in abrogation of market-based, freely-negotiated program contracts – all for the single purpose of securing an unfair, government-granted competitive advantage over local television stations. For example, MVPDs complain that they are limited by program exclusivity contracts in obtaining duplicative broadcast programming from other sources outside the local market. In fact, that is the whole point of exclusivity contracts – exclusivity is valued in the marketplace and ultimately induces the provision of greater programming choice and quality for consumers, as further explained below. MVPDs also complain that the program exclusivity rules somehow confer an unfair advantage on broadcast stations, conveniently ignoring the advantage that MVPDs would otherwise have in exercising their *own* freedom to enter into exclusive programming contracts (a notable example being DIRECTV's NFL Sunday Ticket).

[14] The FCC's rules only (i) provide a forum for adjudication of program exclusivity disputes; (ii) limit and restrict the geographic scope of a program exclusivity arrangement between a program supplier and a local television station; and (iii) impose certain formal notice requirements on local television stations as a condition to enforcement.

Exclusivity – as Congress and the FCC have consistently recognized – constitutes an essential component of America's unique system of free, over-the-air television stations licensed to serve local communities.[15] Local affiliates always have negotiated with networks and syndicated programming sources for exclusive programming within their markets. Advertisers on local broadcast stations expect and, indeed, pay for that exclusivity; these advertising revenues support stations' local programming, including news, and their ability to serve their communities. Exclusivity, which is limited by FCC rules to narrowly defined geographic zones near stations' home communities, enhances competition by strengthening local stations' ability to compete against the hundreds of non-broadcast and non-local programming networks offered by cable and satellite. As noted above, the FCC's rules do not mandate exclusivity, but merely enable broadcasters to protect the contractual arrangements they have entered into for the very purpose of securing programming content that meets the needs and interests of their communities.

Program exclusivity, and the system of local service it permits, thus is not a weakness of our broadcast system, as MVPDs often claim. It is a unique and highly valued strength. As with retransmission consent, there is no warrant for additional government intrusion into this realm of purely private contractual negotiations. As the FCC concluded when it examined its exclusivity rules in detail, interference into the contractual relations between broadcasters, networks and syndicated programming

[15] *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), at ¶ 114; S. Rep. No. 102-92 (1991), at 38.

suppliers would “contradict our own requirements of broadcast licensees and would hinder our policy goals.”[16]

C. Eliminating Mandatory Carriage Would Further Harm Viewers

As part of the 1992 Act, Congress found that cable operators had the incentive and ability to favor their own programming over the programming of competitors, including local television broadcast stations.[17] The must carry provisions of the 1992 Act were based on a finding that action was necessary to avoid "a reduction in the number of media voices available to consumers."[18] Congress identified a specific interest in "ensuring [the] continuation" of "the local origination of [broadcast] programming,"[19] and found must carry necessary to serve certain broader aims of the Communications Act.[20] To promote localism and diversity in available programming, and to prevent cable operators from using gateway control over their distribution platform to exclude certain broadcast signals, Congress adopted the mandatory carriage provisions of the 1992 Act and later adopted somewhat different must carry requirements for satellite carriers. Since that time, the FCC has acknowledged the

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[16] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005), at ¶ 50 (*FCC Report*).

[17] *See* 47 U.S.C. § 521 note (1992 Act § 2(a)(15)) (finding cable operators have an “economic incentive” to “refuse to carry new signals” from broadcasters, and that absent a must-carry requirement, “additional local broadcast signals will be deleted, repositioned, or not carried”).

[18] *Id.* at 1992 Act §2(a)(4).

[19] *Id.* at 1992 Act §2(a)(10).

[20] *Id.* at 1992 Act §2(a)(9) (must carry is necessary to meet goal of "providing a fair, efficient, and equitable distribution of broadcast services") .

continuing importance of these rules and the growing incentive and ability of cable operators to use their powerful platforms to disfavor unaffiliated content.[21]

These requirements remain important to the nation's highly competitive system of free, over-the-air broadcasting today. Must carry stations tend to be stations that offer niche programming, such as foreign language, religious, or ethnic programming. These stations often target audiences whose needs are not being met by other programming sources. Because these stations serve narrower audiences, the ability to elect mandatory carriage is important to their continued survival. Carriage of these unique stations' signals is important to the diversity of both free over-the-air broadcasting and to the diversity of programming available via MVPD service.[22] I urge you to retain the current must carry requirements, rather than eliminating them as proposed in H.R.3675 and S.2008.

IV. Policies That Support Program Development, Innovation, and Localism Must Apply in the Same Manner to All Those Retransmitting Broadcast Signals

Some have raised questions about the role of Internet video providers in this regulatory landscape. Television broadcasters generally support the deployment of new and innovative Internet services, including broadband video services. Such services have the potential to enhance competition in the MVPD marketplace. Increased

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[21] *See Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007), at ¶¶ 49-52 (finding that because of increasing cable subscribership, rising audience shares for cable networks, cable's increasing share of the advertising market, and other factors, the cable industry was even stronger vis-à-vis broadcasters than in 1992 and that "cable operators have even greater incentives today to withhold carriage of broadcast stations.").

[22] *See* George S. Ford & John D. Jackson, *Preserving Free Television? Some Empirical Evidence on the Efficacy of Must-Carry*. JOURNAL OF MEDIA ECONOMICS, *13*(1), 1–14 (2000) (must carry helps preserve free over-the-air television, especially stations not affiliated with the four largest networks).

competition is a long-standing public policy goal, one that can be a positive development for consumers, broadcasters, and other program providers.

Greater platform choice, developed in a manner that respects the rights of content and signal providers, will provide benefits for consumers. For example, it is easy to see that consumers would benefit from the development and deployment of new, competitive distribution platforms capable of customizing programming or bundling different varieties of services, including voice, Internet access, and video services. Such customization may result in cost savings or increased access to programming of particular interest to the viewer.

Video programming providers, including broadcasters, may also benefit from the deployment of new video distribution platforms. The emergence of such additional platforms could provide programmers with additional outlets for reaching viewers and enhance video competition in the marketplace.[23]

Local television broadcasters, specifically, may also benefit from the emergence of new competitive MVPD services. New video distribution platforms represent other outlets for broadcast programming, including local news and information. These platforms could provide new opportunities for local broadcast stations to reach more local viewers and augment and enhance their program services to their communities. The advertising and retransmission consent revenues from these retransmissions would, in turn, be used to enhance news, entertainment, and public service

[23] In economic terms, the emergence of new outlets and distribution platforms will allow broadcasters, by disseminating programming to a wider audience, to take advantage of economies of scale and reduce their average cost per viewer. J. Eisenach and K. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 6, attached to NAB Reply Comments in MB Docket No. 10-71 (filed June 27, 2011).

programming – furthering the objective of localism. The emergence of another video distribution platform for carrying broadcast programming could also encourage greater innovation in digital television programming, including multicast and high definition ("HD") programming.

To achieve these public policy objectives, it is important that new services not be permitted to expropriate broadcast signals at will. Broadcasters must continue to have the right to control the distribution of their signals over the Internet and to obtain compensation from broadband video service providers seeking to retransmit such signals. If new technologies are allowed to evade retransmission consent and erode local viewership by overriding program exclusivity rights of local stations and offering the same programs on stations imported from distant markets, the viability of local TV stations – and their ability to serve their local communities with high quality programming – will be lost. For emerging video platforms that offer services comparable to those of MVPDs, the preservation of a fair, balanced, and symmetrical regulatory scheme would promote competition rather than impair it. No distribution platfrom – new or old – can under existing law (nor should it be permitted under any change in law) retransmit a station's broadcast signal without its consent. As Congress stated when it adopted the 1992 Cable Act, "broadcasters [must be allowed] to control the use of their signals *by anyone engaged in retransmission by whatever means*."[24]

V. Conclusion

It is an exciting time for consumers of video services. Viewers have more options for accessing content today than ever before. And the road ahead promises even better

[24] S. Rep. No. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991) (emphasis added).

options as online video and other services bring innovation and competition to the marketplace. America's broadcasters are prepared to play a major role in the advancement of video services. Our historic transition to digital has vastly increased the amount and diversity of free, over-the-air television programming content available to nearly every home throughout the country and helped free up more than 100 MHz of spectrum that can be used for advanced wireless broadband services.

Yet, there are many challenges ahead. The FCC's planned incentive auction of broadcast spectrum could, if done correctly, ensure that local TV broadcasting remains the bedrock of our communication system. If done incorrectly, however, it could prove a disservice for millions of viewers that rely on over-the-air television as their primary information lifeline to the world. We respectfully encourage the Committee to keep a watchful eye on this process and act, if necessary, to ensure the FCC conducts the incentive auctions as Congress intended.

We also encourage Congress to ignore the threadbare, self-serving arguments from a handful of pay TV companies for changes in the law for the sole purpose of securing a government-granted advantage in a highly competitive marketplace.

As the broadcast industry continues to develop new and exciting ways to deliver more diverse and high quality programming to the American people, my colleagues in the industry and I look forward to working cooperatively with the Members of this Committee.

Thank you for this opportunity to share our views with you.