



CONSUMER INTERESTS SHOULD FORM THE BASIS FOR A 21ST CENTURY VIDEO REFORM FRAMEWORK

INTRODUCTION

The United States Telecom Association (“USTelecom”) appreciates this opportunity to provide the Committee on Energy and Commerce (“the Committee”) with our views on updating the nation’s communications laws as they apply to the market for video content and distribution. The competitive and technological characteristics of the video marketplace have changed very substantially since the current statutory scheme was enacted more than 20 years ago, and so the time is ripe for a thoughtful reexamination of the 1992 Cable Act and the relatively minor tweaks that Congress has made to the law since then. We commend the Committee for examining how this and related statutes can be modernized so that the communications industry continues to serve as a vibrant engine for growth and job creation for the U.S. economy. In our view, a new pro-consumer framework reflecting today’s much more competitive and complex video market – as contrasted to the simpler and monopolistic MVPD market of two decades past – should form the basis for reform of both the access and distribution ends of the video business.

USTelecom is particularly well-positioned to analyze and discuss the video reform issue. Our association is the nation’s oldest and largest association of communications providers. The association represents some of the largest employers in the U.S., as well as some of the smallest cooperatives and family-owned telecom businesses in rural America. Although it originally represented traditional voice telephone companies, the overwhelming majority of our members now use a wide variety of technologies and platforms to provide voice, data, *and video* services to residential customers, small businesses, large corporations, and governments at all levels.

While AT&T’s U-Verse™, Verizon’s FiOS™, and CenturyLink’s Prism™ TV may be familiar brand names in the markets served by our large company members, the vast majority of our midsize and small company members are also delivering or seeking to deliver video service to their customers via broadband fiber and/or coaxial cable, in competition with traditional cable companies, satellite providers, and broadcasters. Some of our members have partnered with satellite providers to offer a video service in order to retain their existing broadband customers or attract new ones. But as this paper will outline, the increasingly harsh terms and conditions being demanded by broadcasters and content owners alike for obtaining the programming necessary to serve consumers have been facilitated by the outdated legal obstacles to competing for consumers’ video business (and the related absence of consumer protections) in all markets – urban, suburban, and rural.

THE STARTING POINT

The Committee’s white paper proceeds along familiar lines. The paper discusses the history of various video distribution systems, the emergence of over-the-top (OTT) video as a programming option for consumers. It treats the “infrastructure challenges faced by prospective

video service providers” distinctly from the legal barriers placed before those providers’ ability to access and exhibit broadcast signals and video content to current or prospective customers. Similarly, the Committee’s questions are posed largely in terms of the respective industry players: broadcasters, cable services, wireline (or “fiber”) providers, satellite television providers, content creators and distributors, and OTT video services.

This approach may be familiar, and video policy debates have proceeded along these sectoral lines for more than two decades, but it no longer reflects market and technological realities. USTelecom would like to propose a paradigm shift here – and yet one that appears fully consistent with the underlying thrust of the Committee’s questions. Rather than looking backwards and examining current law from an increasingly irrelevant and siloed perspective, we recommend that the Committee instead look forward, recognizing that video services are increasingly part of a broader marketplace that includes all forms of digital communication. In USTelecom’s view, a new statutory framework should reflect and enable a video marketplace in which consumers continue to benefit from competition among video platforms with broad access to content sources, fueled by the robust broadband deployment necessary to deliver those options to consumers, thus rendering heavy-handed regulation at the federal, state, and local levels unnecessary.

From that starting point, it quickly becomes evident what direction an updated Communications Act should take in the video arena. A forward looking video policy framework starts with a broadband policy framework that promotes investment in broadband networks. Wireline broadband providers, big and small, have committed a considerable amount of resources to improve and expand their fiber offerings across the nation – including with gigabit networks in both major metropolitan areas and rural communities.¹ Recently, with “consumer demand for ever-more increasing speeds to support high-bandwidth services such as live and streaming video [growing] as fast as, or faster than, enhancements to broadband networks,”² Federal Communications Commission (FCC) Chairman Tom Wheeler has been outspoken in calling on the telecom sector to respond to consumer demand for faster broadband service.³ But even while Chairman Wheeler repeats his mantra of “competition, competition, competition,” he has also acknowledged that “[t]hose seeking to deploy new competitive broadband networks tell us that it’s hard to provide new high-speed Internet access without also being able to offer a

¹ USTelecom Blog, “*Broadband in America: Improving Speeds & Access*” by Mary Schulz, Oct. 9, 2014, accessed at <http://www.ustelecom.org/blog/broadband-america-improving-speeds-access>. The Obama Administration has acknowledged this enormous private sector investment. “In June 2013, the White House publication *Four Years of Broadband Growth* stated that ‘[b]y nearly any metric the last four years have been a period of tremendous growth in broadband infrastructure, access, and the digital economy upon which they rely.’ While the federal government has provided some financial support to stimulate broadband deployment, private investment is responsible for the lion’s share of this growth. Indeed, over the past six years, industry has invested more than \$300 billion in U.S. wired and wireless broadband networks. As a result, national average broadband speeds have increased substantially for both wired and wireless broadband.” *Letter from Assistant Secretary for Communications and Information Lawrence E. Strickling to The Honorable Tom Wheeler, FCC Chairman*, Jan. 14, 2005, at 1-2.

² *Id.* at 2.

³ Prepared Remarks of FCC Chairman Tom Wheeler, “*The Facts and Future of Broadband Competition*,” 1776 Headquarters, Washington DC, Sept. 4, 2014, accessed at <http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition>.

competitive video package as well.”⁴ If consumers are going to enjoy truly competitive choices among video providers, broadband providers, and content providers, driven primarily by the marketplace rather than regulation, it will be necessary for the Committee to consider – as a whole – all of the policies necessary to enable competitive video offerings.

COMPETITION, SCALE, AND THE CHALLENGE OF NEGOTIATING WITH LITTLE LEVERAGE

More competition in the video marketplace requires more MVPDs and high-speed broadband providers being willing and able to challenge entrenched incumbents with new services or business models. But under current legal and economic conditions, it has become increasingly difficult to do that. USTelecom has member companies who have chosen deliberately not to advertise or extend their current video offerings, or to scale back what they were previously offering, or to delay entering the business at all.

There are several reasons for this. First, building broadband networks is hard enough with current barriers, including regulations at all levels of government. When video service is proposed to be added to the mix, state and local franchise laws complicate matters further. Then, without a sufficiently large number of customers to provide even a modicum of bargaining leverage with broadcasters and non-broadcast content owners, the costs of obtaining desirable programming have grown so high, so fast – aided and abetted by regulations like retransmission consent that give unnecessary and material advantages to one party over the other – that trying to compete in the video business has become a difficult business proposition. Even the larger telecom companies, which outside observers might incorrectly assume possess the scale that would enable bargaining on a level playing field, have but a fraction of the number of video subscribers as the large cable incumbents and face challenges in obtaining content on reasonable terms.

Whether negotiating with a broadcast station for the right to retransmit its signal, or with a non-broadcast content owner for the ability to exhibit its programming, competitive MVPDs have faced a variety of aggressive bargaining tactics on the part of “sellers.” At one extreme, for example, Cablevision a few years ago simply denied Verizon and AT&T access to its regional sports network’s (RSN) high-definition (HD) programming for several professional and college teams in various Northeast markets. Both companies complained to the FCC that, among other things, Cablevision’s withholding of programming was an unfair act in violation of the agency’s program access rules. The FCC agreed, holding that Cablevision’s withholding of the HD signal was an “unfair act” which had “the ‘effect’ of ‘significantly hindering’” the companies from competing with Cablevision in AT&T’s Connecticut market and Verizon’s New York markets. In its 2010 Program Access Order, the FCC concluded that withholding RSN programming by vertically integrated cable providers is presumptively anti-competitive. Similarly, the FCC concluded that withholding the HD feed of an RSN is also presumptively anti-competitive, and in a complaint proceeding the burden shifts to the cable incumbent to prove that it is not.

⁴ Official FCC Blog, “*Tech Transitions, Video, and the Future*” by Tom Wheeler, FCC Chairman, Oct. 28, 2014, accessed at <http://www.fcc.gov/blog/tech-transitions-video-and-future>.

Still, a content owner or broadcaster need not be as brazen as Cablevision in order to extract extreme terms and conditions from a competing or new MVPD. Such tactics can take many forms, such as demanding compensation that far exceeds the reasonable value of a station's signal or the programming being sought, insisting on bundling valuable or desirable channels with less valuable or even undesirable ones, prolonging retransmission consent negotiations to coincide with a marquee sporting event so that an MVPD is met with the eleventh-hour choice of either meeting the demanded terms or facing a blackout, cutting off broadband consumers' ability to access content over the Internet (even if the consumer was not also a video subscriber), etc.⁵ All these tactics and others have been employed in such negotiations. Depending on the particular circumstances, these tactics may fall along a continuum ranging from simple tough bargaining to downright anticompetitive behavior and bad faith. But in virtually all cases, the biggest loser is the consumer, and neither the consumer nor the service provider has any timely, viable recourse under current law.

Incremental progress was made on the retransmission consent issue at the end of the 113th Congress with the passage of the Satellite Television Extension and Localism Act Reauthorization (STELAR). Regrettably, however, the current statutory scheme still leaves broadcasters in a position to abuse their bargaining position with the constant threat of station blackouts, particularly at inopportune times for the viewing audience. And wholly apart from the enormous rise in retransmission consent fees, the rise in the cost of programming content continues unabated.

THE DILEMMA OF “MUST-HAVE” CONTENT

The situation is particularly acute with regard to so-called “must-have” content, of which live sports programming is the most profoundly troubling exemplar of the problems and gaps in current law. Sports channels, or the rights to televise major sporting events to mass audiences, are typically owned by either broadcast networks or vertically integrated cable companies that also own other video content – some of which may be highly desirable to consumers, and much of which may be of negligible value. Through a variety of negotiating strategies (some of which have been discussed above), these content owners have found themselves able to extract from MVPDs – and in some cases, an MVPD with which the vertically integrated cable operator competes – prices and other terms for content that render the investment in new video or high-speed broadband plant barely (if at all) profitable.

That twisted result has turned out to be a disincentive to further broadband investment for those telecom companies who several years ago foresaw an opportunity to deliver video service to consumers over a new high-speed broadband platform. These service providers now find it increasingly expensive to raise capital to finance the heavy up-front costs of new plant and equipment,⁶ while consumers' monthly bills must rise to pay for the increased programming

⁵ In 2014, broadcasters' retransmission consent revenues were expected to reach \$3.3 billion and are projected to be \$7.6 billion in 2019. SNL Kagan estimated that in 2010 they were \$1.14 billion. The number of blackouts has also grown, from 12 in 2010 to 127 in 2013.

⁶ In its December 9, 2014 Research Investment Committee (RIC) Report, Bank of America/Merrill Lynch recommended weighting the telecom sector lowest among the ten sectors it advises investors to hold in their U.S. equity core portfolio, with 2.4% allocated to telecom as contrasted to 20.0% to information technology, 16.3% to

costs. It is no wonder that fewer new entrants seek to break into or expand in their respective local markets. Under these circumstances, there is often no business case that can justify competing with the local incumbent.

In an ironic yet illustrative instance, Cablevision found itself the subject of an extreme negotiating strategy when three million of its customers lost access to their local FOX broadcasting signal during failed retransmission consent negotiations in 2010. The impasse resulted in Cablevision's customers being unable to watch the opening game of the National League Championship Series between the Philadelphia Phillies and the San Francisco Giants. Not surprisingly, many smaller MVPDs see instances such as this – and numerous others – and quickly realize that given their significant absence of scale, they have no realistic negotiating ability to challenge such entrenched incumbents.

DISH Network's recent announcement of a new OTT service that for a \$20 monthly subscription fee combines ESPN with several other Disney-owned networks for streaming *on a single device* offers a glimpse into potentially innovative approaches to delivering content that some consumers want at a lower price point. However, together with similar OTT plans being hatched by others, not to mention those already in operation such as Netflix and Hulu, an OTT future raises interesting and to some extent troubling questions that get back to the heart of the issue raised above. As more cord-cutters or "cord-nevers" come to rely on their broadband connections to watch the video programming they desire, as more seniors age out of the traditional TV-viewing audience, as more millennials and youngsters age into the OTT-viewing population, and as more and richer video content becomes available online, who will pay the costs of upgrading the existing broadband infrastructure and building out even higher capacity infrastructure to accommodate the bandwidth and speeds necessary to handle that increased demand? Who will pay to bring those services to rural and other underserved communities? And from where will competition among broadband providers come if those broadband providers cannot earn a reasonable return on their heavy fixed-cost investments, especially when it appears that some of those investments have shorter and shorter life-cycles as the demand increases for higher and higher speeds? Several pending proceedings before the FCC implicate these questions and issues, and it would be appropriate for the Congress to consider them as well in addressing a new statutory approach to the video issue.

financials, 14.3% to health care, 12.0% to consumer discretionary, 10.4% to industrials, 9.9% to consumer staples, and energy, materials, and utilities also in the single digits. The RIC Report commented that the telecom sector has the "[w]orst risk-reward tradeoff of all ten sectors" and that it "should underperform as interest rates rise." While that might explain why telecom offers the highest dividend yield of all the sectors, the necessity of paying that yield to attract investment raises the cost of capital, and the RIC Report noted that as interest rates rise, there will be "little room to raise dividends." This does not bode well for the future and suggests that perhaps some other sectors are not sharing appropriately in the costs of the network relative to the benefits they are and will be deriving from it.

Merrill Lynch is not alone in this view of the sector. Jennifer M. Fritzsche, Senior Analyst for Wells Fargo Securities, wrote on January 16, 2015 in her weekly report on telecommunications equities that among investors,

sentiment remains quite heavy. The fear is there is not a lot of good news to come out of earnings and then a big cloud of regulatory uncertainty in late February with Title II. While it seems legislation could be proposed which would offer a more neutral solution, going back to our grade school constitution test, the President (who has made his views on the issue very clear) can easily veto this - pushing us into further "regulatory purgatory" and it seems like this could remain in the courts for a long time. General sentiment is, why own the group? Investors may pick the plays - such as fiber and towers - which help support the group's clear trends but are reluctant to own the stocks given the haziness down the road.

FOCUSING ON CONSUMER HARM AND COMPETITION SHOULD GUIDE THE PROCESS

Current law encourages the FCC to occupy itself primarily with promulgating ex ante regulations to govern these matters, and then trying over extended periods to resolve highly technical disputes that end up centering less on the implications of the parties' conduct for consumer welfare and competition than on definitions and terms in a statute that was written for another era – one which was long ago bypassed by both technology and the marketplace.

Rather than continuing down that path and replicating the same problem we now face – i.e., writing a statute that tries to predict the direction of both technology and consumer choices several years hence, only to find out we may have been wrong on either or both counts – would it not be wiser to frame a new statute based on broader, albeit more timeless, standards?

Traditional competition law and principles can and should play a larger role in the handling of complaints over negotiations for both retransmission consent and access to content more generally. Instead of allowing broadcasters to exploit their government-granted spectrum to extract higher and higher retransmission consent fees using the tactics described above, or allowing non-broadcast content owners to use those tactics to mask what in traditional antitrust law would be examined more closely as unreasonable refusals to deal, questionable exclusive dealing arrangements, illegal tying, and related anticompetitive ploys, an updated Communications Act should focus instead on ensuring that competitive video providers have reasonable access to programming, regardless of its source, to avoid harm to competition and consumers. USTelecom proposes that the FCC serve as more of an enforcement agency, adjudicating disputes in the video arena based on those standards.

Some stakeholders will of course attempt to safeguard the favored – albeit outdated – positions that current laws and regulations grant them, rather than pursue a true 21st century video policy. By contrast, USTelecom believes that all of the subjects addressed in the Committee's white paper – and most especially, the retransmission consent/must-carry regime, the treatment of non-broadcast content on MVPD platforms, the future of OTT video services and their relationship to traditional video services, and the role of local and state franchise authorities – should be examined with these fundamental questions in mind:

- Does current law encourage competition among video platforms? How could new legislation improve on the current situation?
- Does current law encourage high-speed broadband deployment to every corner of America? How could new legislation improve on the current situation?
- Does current law give consumers truly competitive video options? How could new legislation improve on the current situation?
- Does current law minimize the need for heavy-handed video regulation and discourage regulatory arbitrage? How could new legislation improve on the current situation?

January 23, 2015

[REDACTED]

From: Robert Rothgery [REDACTED]
Sent: Friday, January 16, 2015 8:04 PM
To: CommActUpdate
Cc: [REDACTED]
Subject: House Energy Subcommittee comment from RFrothgery regarding PEG

I am offering my personal comment as a board member of Vallejo Community Access Television (VCAT) is a community media service organization that provides access to facilities, equipment and training to enable residents of Vallejo and beyond to produce their own content. VCAT is a non-profit organization in partnership with the City of Vallejo, California, the Vallejo City Unified School District and Solano Community College. The mission of VCAT is to provide public access television to Vallejo residents to increase community awareness and pride, enhance our educational opportunities and showcase our talent. VCAT provides training for city residents and employees of Vallejo businesses in video production and provides technical advice to help you create content for television and the web. For the purposes of this comment I am speaking solely for myself.

The House Energy & Commerce Committee has been issuing a series of white papers as part of its process for a possible update to the Communications Act. Its latest paper (number six) focuses on the regulation of the market for video content and distribution and poses a number of related questions for comment. We wish to focus **one** question: "Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the internet?"

There have been many critics of PEG television who proclaim that public access has been eclipsed by the internet and the wide variety of video platforms available such as YouTube. Put succinctly, a lot of people use the internet and studies have shown that video platforms are used as well as television instead of supplanting it. Furthermore, successful use of internet platforms depends on a fast, well maintained computer which many people cannot afford. This renders media from the internet much less effective than legacy television which has not significantly dropped in use and is easily accessible even with poorly working equipment.

Vallejo Community Access Television provides a place for people to produce non commercial programs that improve and edify our community. **The City of Vallejo** is on the rebound from a bankruptcy and is determined to rise from this with renewed strength. PEG programming **helps this community and allows each** to know what the other is doing and thus facilitating recovery and growth. If any of these provisions were to be removed there would be irreparable void in local communication. The San Francisco and Oakland broadcasters rarely cover events or issues in Vallejo unless violence is a factor.

Vallejo Community Access Television, through its content providers supports localism in unique ways. VCAT often combines coverage with special events in the city with a depth and detail never to be found in the ten second sound bites of commercial television. When the big cameras have come and gone VCAT producers are still present fleshing out the details of our community stories. This naturally leads to better understanding and a mirroring effect that binds the community by being a mirror to its constituents. Simply put, VCAT helps the community tell its story.

Robert Rothgery
Vallejo, California

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

Re: Regulation of the Market for Video Content and Distribution – Response to White Paper #6

While I have been the Production Manager of a County-run Government Access operation for the last 21 years, I am more interested in sharing my personal experiences rather than those of the Board of Supervisors.

My career began in 1982 at a small cable company-run channel, where, on day-one I was told that our department was the “bastard child” of the company. We were supported because we had to be.

Now, years later, there is no longer the requirement for the cable operator to manage and operate the channels, they must simply carry them. The County and a number of the cities in the county are formulating plans to operate them and in fact, improve them- not as a “bastard child” but as a valuable part of the community’s information ecosystem. This is especially critical now, given the dwindling local news resources.

Q: “Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the Internet?”

A: Yes, and I would suggest that the capacity allocated to these channels be put on par with broadcast and satellite programming services in terms of high definition channel allocation, video on demand allowances, Electronic Program Guide inclusion and online subscriber reference sources. Further, since the cable plants deliver more than just TV over the very same cable and rights-of- way, their obligations for community benefit should extend to their internet bandwidth. And further still, I would encourage action to see that these channels are carried via Direct Broadcast Satellite service under the same rules that ensure local-to-local broadcast channel carriage.

A story that illustrates the importance of the community TV channels is that of a Vietnam-era veteran that came into our office after the first re-run of “Veterans’ Voices of Contra Costa,” a call-in show produced in association with our County Veteran Services Office.

He came in to pick up a DVD copy of the show while our production team was meeting to discuss the lessons learned from the first show and what we might do differently for the next episode. I asked him to join us. I knew we could learn a lot about our target audience.

We learned that he came across the show while channel surfing and that he doesn't use the internet. He wanted to share the show with other Veterans after learning about the local resources that were featured in the show.

Eliminating Access channel obligations would put a significant number of people in the dark when it comes to learning about the services- community and government- that are available to them and their loved ones.

Any change in regulations that increases the information divide, let alone the digital divide, would be a great disservice to our Veterans, seniors, and many others, whether or not they use the internet.

Even if the numbers of Americans that got their news and information from the internet was equal, there would be a skew toward younger users of the internet.

These channels and their facilities enable the community to create the content that can be published and distributed in other traditional ways, such as DVDs, as well as new ways: internet and mobile.

Do we want to eliminate a valuable, familiar information resource, that has matured and flourished in many areas of the country? Or, do we want to cut these channels off at the knees, adding to the problems created when there are information "haves" and "have-nots"?

Sincerely,

Chris Verdugo

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**Comments of Verizon to the House Energy & Commerce Committee
on Reforms to Legislation
Regulating the Market for Video Content and Distribution**

Verizon welcomes the opportunity to comment on the Committee's consideration of laws governing video programming and distribution services and whether reforms should be made to protect consumers and promote competition.

The video marketplace has experienced significant shifts over the last several years as advances in technology, introduction of new distribution platforms, and the emergence of competitive alternatives to the cable incumbents are changing how consumers access and watch video programming. Consumers increasingly rely on the Internet and on mobile platforms to access the video programming of their choice, and these trends are likely to accelerate if consumers have their way. Yet much of the existing statutory framework for the video distribution marketplace was crafted to address the concerns of a very different time. While the traditional cable companies and broadcasters that are the focus of the current statutory framework continue to significantly shape today's video marketplace – particularly by virtue of their control over much of the most popular programming – the video marketplace is moving away from the broadcast TV-cable paradigm of 1984 and 1992 into a broadband-based environment that offers the promise of allowing consumers to access and watch the programming of their choice when, where, and how they want it.

Congress must ensure that a framework is in place that promotes these emerging forms of video competition and effectively addresses any continuing obstacles, such as reasonable access to programming, for existing or newly emerging competitors. Reform of the policy framework for video also should ensure that regulation appropriately reflects – and does not overburden – today's video marketplace, particularly in the case of competitive or emerging providers. The statute's existing program access protections have proven invaluable in allowing competitive video providers access to some of the programming they need in order to offer meaningful competitive alternatives to consumers. But access to programming consumers demand on reasonable terms will continue to be important for existing and emerging competitors alike.

Congress also should address some of the more badly broken parts of the current video regulatory regime – including the retransmission consent process and technology mandates that apply to aspects of some providers' services and equipment. Such regulations are increasingly distorting the marketplace and harming consumers through programming blackouts, higher costs, and diminished innovation. Additionally, Congress has the opportunity to further encourage investment and competition by confirming that legacy regulation will not apply to or burden emerging sources of video competition and by streamlining or eliminating some legacy regulations that are out-of-step with the emerging video marketplace.

Competition in the Video Programming Market

The current regulatory framework for the market for video programming services arises from two acts passed decades ago, the Cable Communications Policy Act of 1984 and the Cable Television and Consumer Protection Act of 1992. In the intervening two decades, the video

marketplace has changed dramatically with the introduction of new competitors and new distribution platforms while access to must-have programming becomes increasingly important. As result, even the more recent 1992 Cable Act was enacted at a time when the video programming market looked totally different than the video marketplace that is starting to take shape.

The Increasingly Diverse Participants in Today's Video Distribution Marketplace. In 1992, consumers generally had access to one cable provider, and the principal programming provided by that cable service derived from three commercial television networks (ABC, CBS and NBC) plus a handful of independent and public broadcasting stations. Today's video marketplace increasingly provides consumers with more choices than they had in 1992, and reflects substantial changes not anticipated by the 1984 and 1992 statutes. For example, in some geographic areas, consumers now have access to facilities-based video services such as Verizon's FiOS. These are the areas where competition is most intense, with competitive video providers like Verizon almost always facing competition from the cable incumbent and two Direct Broadcast Satellite ("DBS") providers.

Further, today's consumers increasingly opt for online video programming services offering a variety of content, including Netflix, Hulu, iTunes, Amazon Video, YouTube, Vuze and Vimeo. Verizon has likewise stated our intention to launch an online video service in 2015. Today, many of these online video services focus on on-demand programming, although the amount of live, linear programming available online also is increasing. Most of these online video services are available on mobile platforms – an increasingly popular option for consumers – with very similar user experiences. Consumer use of these online services is growing rapidly. For example, Netflix recently reported over 37 million U.S. subscribers to its streaming service. And, Netflix's subscribership has been steadily increasing. If barriers to fielding a competitive service are low, these trends in online video are likely to continue in the future, as millennials (consumers ages 16-34) already watch three times as much online video as non-millennials (ages 35 and over) and are much more likely to use online viewing platforms rather than traditional linear programming delivered to TVs. Such services generally have not been subject to legacy video regulation, such as franchising or technology mandates, and so have enjoyed flexibility in innovating and responding to consumers' demands.

At the same time, these services do not currently have access to the same rights – such as program access rules or the good faith protections for retransmission consent negotiation – that other providers have. As a result, online video services have often had difficulty getting access to some of the programming that consumers value, or getting such programming on reasonable terms.

The Evolution of Video Distribution Technology. The video programming marketplace is rapidly evolving from a technology perspective as well. Emerging competition from broadband mobile video distribution platforms, in particular, is changing the video distribution market to the benefit of consumers and competition. Consumers today increasingly can choose how and where they will receive and watch video programming and other content. Consumers can untether themselves from their TVs and the traditional set-top box/navigation devices, which were the

centerpiece of the consumer experience in the video distribution market of 1984 and 1992, and are viewing and interacting with content on any device, anytime, anywhere.

Today, competitive video distributors are deploying a wide and growing variety of solutions for access to video programming without the need for each device to be connected to a TV or traditional set-top box. For example, subscribers to Verizon's FiOS TV service can access FiOS TV programming on their own equipment, including Xbox game consoles and smart TVs, through the FiOS TV application. Also, FiOS TV customers can access over a hundred linear channels in the home with the FiOS mobile TV application on tablets and smartphones as well as dozens of channels outside the home. Online video providers likewise are delivering their content to a wide range of Internet-connected devices, ranging from smartphones to Roku boxes to gaming systems to smart TVs. And viewing time on mobile platforms is growing at a faster rate than on fixed, such that the availability of content over-the-top increasingly will define the viewing experience rather than linear programming to the living room TV.

The number of online video programmers continues to grow, and they have started distributing their own unique content, as evidenced by the popularity of Netflix's *House of Cards* and Amazon Studios' *Alpha House*. As a result, consumers are watching more video content, reportedly accounting for nearly 70% of Internet download traffic during peak times on fixed broadband lines in North America. Netflix and YouTube together account for about 50% of peak download traffic on fixed broadband lines. The growth of these online programmers may ultimately draw dollars and viewers away from traditional Multichannel Video Programming Distributors ("MVPDs") as consumers cut the cord or mix and match platforms to choose the most convenient way to view desired content.

Video Reform Legislation Can Increase Competition and Benefit Consumers

Given the substantial shifts in the video marketplace since the last comprehensive legislation – and the challenges facing existing and emerging video competitors – Congress should create a new policy framework both to encourage emerging video competition and to ensure that outdated legacy regulation does not undermine future competition or outlive its usefulness.

Reasonable Access to Programming for Competitive Providers. Competitive video providers – whether offering facilities-based services like FiOS TV or over-the-top services – face a number of challenges in gaining access to programming that are not adequately addressed by existing program access rules. While the amount of video content being produced continues to increase, much of the most popular content remains under the control of a few large content providers. Today, almost all popular programming in the United States is sourced from just a half dozen program vendors, most of whom control both some broadcast network programming as well as cable channel programming.

While existing program access rules have served an important role in enabling competitive entrants to obtain some of the programming they need to compete, their limited reach has kept them from effectively addressing many of the practices affecting competitive providers. For example, the existing rules generally only apply in the case of cable-affiliated

programming, with little or no protection against restrictive practices by other significant content owners that may limit consumer choice or discourage innovative new business models. And, the protections offered by the program access statutes do not currently cover emerging competitors such as over-the-top video distributors.

The control that video programmers – both cable-affiliated and independent programmers – have over the content that distributors need in order to field meaningful competitive sources gives them substantial negotiating power over competitive MVPDs. As an initial matter, competitive and start-up video distributors begin with a disadvantage as compared to their entrenched competitors because programming costs are usually related to subscriber volumes, and incumbent cable operators can offer program owners large subscriber volumes that newer entrants cannot.

Content providers with high-value programming also often make their programming available in ways that may make it more difficult for competitive video distributors to access the most desirable programming or to offer it in innovative new ways with appealing new options for consumers. For example, program owners usually offer desired programming with demands to bundle that programming with other less desired channels. This practice results in higher rates for distribution rights for desired programming and carriage of programming that may be of little interest to many consumers. Seeking only the desired channels is frequently not a realistic option because a program owner may require, directly or indirectly through the economics of pricing (*i.e.*, one desired channel is more expensive than a bundle) that providers purchase a bundle of programming that includes both desired and unwanted channels. While offering a large and diverse array of programming is generally important for competitive video providers, this “bundle inflation” limits their discretion in selecting what they feel is the best lineup or package of channels for their subscribers.

Similarly, a program owner may demand that certain channels be carried on a competitive distributor’s basic tier of programming – the one all or almost all subscribers receive – thereby raising the per-subscriber cost of the programming. Such placement demands force a competitive distributor to require all its subscribers to pay for programming they may not want. In these situations, alternative pricing arrangements – such as basing costs on viewership rather than subscribership – are often rejected. And, as online distribution services proliferate, a content owner may choose to limit access to online distribution rights, helping to pick winners and losers in the video distribution marketplace.

Sports programming in particular has been a frequent source of problems for competitive providers. This programming is highly desired and significantly expensive in the current video marketplace. An increasing number of regional sports networks (“RSNs”), affiliated with the same handful of program producers and/or incumbent cable operators, control access to both professional and collegiate sports programming and demand substantial per-subscriber rates for distribution by non-affiliated providers. Time Warner Cable was asking such high per-subscriber rates for distribution of the Sports Net LA, which carried the Los Angeles Dodgers’ games, that many providers simply declined to carry the network, thereby shrinking the number of video choices available to consumers interested in watching Dodgers’ baseball.

These types of practices have the potential to harm consumers and competition. They generally make it more difficult for emerging competitors to offer a package of programming that may appeal to existing or new subscribers, or to offer specialized packages or services to attract consumers who would not otherwise subscribe to the larger programming offer. As a result, these barriers to program access harm consumers and competition by restricting the availability of competitive distribution options with the program lineups that most consumers want and demand.

A More Effective Approach to Program Access. To address these real concerns and facilitate greater choice for consumers, a new approach to program access is warranted. The starting point for such reform should be providing a more effective backstop that ensures reasonable access to programming by competitive providers and that targets practices that harm competition or consumers, without engaging in burdensome or prescriptive regulation.

Congress has recognized the need for reasonable access to content and has already taken several steps to facilitate development of a robust market for distribution of video programming – although these provisions of the Act do not now reflect the changing landscape of the video marketplace. Pursuant to Section 325(b) of the Communications Act, enacted in the 1992 Cable Act, broadcast stations are required to negotiate in good faith if they opt for carriage of their programming on cable and other MVPD systems through retransmission consent, rather than must carry. Similarly, program owners affiliated with incumbent cable systems are required to provide reasonable access to programming pursuant to Section 628, also enacted in the 1992 Cable Act. These protections – while important – are increasingly inadequate. For example, they do not currently provide protection to the full range of video distributors – including online video distributors – nor do they reach all of the programmers capable of engaging in acts that have the potential to harm competition or consumers.

Even with the current protections, content blackouts and program withholding happen often in the video distribution marketplace – to the dismay of regulators and the harm of consumers. For that reason, Verizon believes the centerpiece of video reform legislation should be new statutory protections to ensure reasonable access to content for competitive video programming distributors.

To address these problems, Congress could enact legislation that ensures reasonable access to video programming for all video distributors, based on well-known standards for prohibiting unfair methods of competition or unfair practices that harm competition or consumers. Rather than limiting this statutory protection to carriage of broadcast signals or cable-affiliated programming, the protection should apply to any situation in which a video programming distributor is seeking access to programming from the programming's owner or other source. As with the existing protections for cable-affiliated and broadcast station programming, this approach should rely on competition and negotiation in the first instance, but provide an effective backstop for parties seeking to distribute desirable programming to address actions that unreasonably harm consumers and/or competition.

Reform for a Modern Statutory Framework. In addition to more effectively addressing access to programming issues, Congress should take several additional steps to address aspects

of the statutory framework that are out of step with the current and future video marketplace. These reforms will help encourage more choice for video consumers while addressing broken, ill-fitting, and outdated regulation for all providers.

Ensuring That Legacy Requirements Do Not Inhibit Emerging Competition. Legacy cable requirements – if applied to competitive video providers or emerging sources of video competition – would create barriers to competitive new services and innovations that could jeopardize the availability of new choices in video for consumers. Dragging competitive providers, including online providers, into the world of legacy regulation would slow their ability to rollout new choices for consumers, and would inhibit flexibility in quickly responding to consumer demands. For example, cable companies have already suggested to the FCC that, in order to gain the protections of existing program access regulations, online services should be treated similarly to traditional regulated distribution services, thus potentially subjecting them to the panoply of outdated regulation, such as franchising, that could make the rollout of these services more challenging, if not impossible. Policymakers must ensure that the statutory framework does not create any such regulatory barriers to entry that limit consumers’ access to innovative, new alternatives for video services. This should be true regardless of whether the entities rolling out competitive alternatives have been around for a while, or were formed just yesterday in a garage.

As traditional distributors become subject to more competition from these online sources, Congress and the FCC could promote competition by ensuring that they likewise are subjected to less regulation. For example, competitive providers of facilities-based video services, like FiOS TV, face intense competition both from entrenched incumbents and from the full range of emerging sources of video distribution. In this context, Congress should consider ways to minimize or streamline regulation to reflect this competition. For example, the shift to national or statewide franchising regimes or other similar efforts to minimize regulatory burdens where there is competition would benefit consumers and encourage competition. Leveling the playing field when possible will ensure that consumers have access to varied and robust options for viewing video programming.

Reform of the Broken Retransmission Consent Regime. One of the more badly broken aspects of the existing regulatory framework is the retransmission consent regime. This regime was put in place to protect broadcasters at a very different time when there was concern that cable threatened the viability of broadcasters. Now, the shield of these regulations has evolved into a sword harming consumers through rising costs and more frequent programming blackouts. Retransmission consent and other regulatory preferences give preferential carriage rights to broadcasters and increase their leverage in negotiations with MVPDs.

Congress should consider a more market-based and consumer-friendly approach to broadcast signal carriage, replacing the regulatory mandates of both “must carry” and “retransmission consent” with a “local choice” regime. Under this approach, the unique role of broadcasters would continue to be recognized, and their legitimate interests would be protected while addressing some of the broken parts of today’s system that are leading to more frequent blackouts, skyrocketing costs, and more bloated video packages. With the local choice framework, each broadcast station could decide for itself what to charge those consumers who

choose to watch its programming over an MVPD's network, relieving MVPDs of any obligation to negotiate and pay exorbitant retransmission consent fees. Local choice would get government out of the business of regulating signal carriage to pay TV consumers, and allow consumers to choose what signals to pay to watch. Local choice would thus let broadcasters offer their programming at market-based rates of their choosing, while MVPDs would collect and remit the fees to broadcasters.

Removal of Technology Mandates. Another way in which today's laws are out of step with the emerging video marketplace is their reliance on a variety of technology mandates. Such mandates, like the CableCARD regime, have a poor track record of benefiting consumers, but often add costs and distort competition. This is particularly true for providers who rely on innovative technological approaches to serve consumers. For example, both incumbent cable operators and competitive providers like Verizon have been subject to a wide range of technology mandates that apply to their services and equipment, such as the FCC's ban on integrating cable security elements with navigation functions (which will sunset in December 2015), the CableCARD rules, and IP networking requirements. Many competing video distributors, including satellite providers and online video providers, have been exempt from much of this regulation. While these regulations were intended to promote consumer choice in certain types of equipment, they never succeeded, and have tended toward the opposite effect resulting in an uneven playing field among those subject or not subject to the rules that hampers innovation and distorts competition. Plus, given the array of customer-owned equipment over which consumers can view video programming, and over-the-top platforms, these technology mandates have outlived their usefulness and the equipment paradigm for which they were designed. Emerging competitors in the video marketplace are not, and should not be, subject to these requirements. The time has come to likewise remove such mandates from traditional providers, given their costs and tendency to inhibit innovation.

Targeted Regulation to Address Public Interest Concerns. In addition to the important issues discussed above that affect competitors' ability to enter the market and field a competitive offering, certain other issues, such as accessibility and public safety, also deserve continued regulatory focus and attention. As Congress' recent efforts in these areas demonstrate, however, such issues can and should be addressed in a way that allows space for innovation and that applies in an even-handed way across all relevant market participants. For example, Congress improved access to video programming for consumers with hearing and/or visual disabilities through the Twenty-First Century Communications and Video Accessibility Act of 2010. And, for many years, the FCC has had in place the Emergency Alert System, through which federal and state governments can communicate with citizens through broadcast stations and MVPDs during emergencies.

Conclusion

In 1984 and 1992, Congress sought to ensure that the laws governing the market for video programming protected consumers and encouraged investment and competition. Given the substantial shifts in the video marketplace, Congress should now update its framework to encourage the continued emergence of video competition and to put in place standards that will work best for consumers and competition as the video marketplace continues to evolve.

January 23, 2015

Viacom, Inc.
Response to House Energy and Commerce Committee’s
Communications Act Update White Paper 6:
Regulation of the Market for Video Content and Distribution
(“Video Market White Paper”)

January 23, 2015

Viacom, Inc. (“Viacom”) is pleased to submit these comments to assist the Committee in its evaluation of potential revisions to the Communications Act’s video provisions. In particular, these comments address the Committee’s inquiries regarding so-called “bundling” arrangements between content providers and Multichannel Video Programming Distributors (“MVPDs”). These arrangements, pursuant to which an MVPD may agree to carry more than one of a programmer’s services, benefit programmers, MVPDs, and consumers alike by helping to sustain the production and widespread availability of a diverse array of high quality programming.

As the Committee’s white paper recognizes, “[b]undling is a time-tested business strategy for many businesses in the communications industry.”¹ And as economic expert Dr. Bruce M. Owen of Stanford University has explained, “bundling” in fact is a common, generally beneficial practice in many sectors of the economy.² Many products “are bundled together into a single sale in order to provide variety to buyers at low cost,” as with a box of crayons.³ Although few consumers will find each color in the box equally useful — and some consumers will have little

¹ Video Market White Paper at 5.

² See Bruce M. Owen, *Wholesale Packaging of Video Programming*, FCC MB Docket No. 07-198, at Attachment 2 pp. 3-4 (filed Jan. 4, 2008) (“Owen 2008”). A copy of this report is available through the FCC’s Electronic Comment Filing System at <http://apps.fcc.gov/ecfs/document/view?id=6519821924>. For ease of reference, a copy of the report with the attachments cited herein also is attached to these comments as Attachment A.

³ *Id.* at Attachment 2 p. 3.

or no use for certain colors — consumers as a whole are better off having access to a variety of options.⁴

The same is true of cable channels. Though it may seem counterintuitive, the components of a bundle — whether a box of crayons or a set of cable channels — often cost more individually than the bundle itself.⁵ Programmers rely upon two interconnected sources of revenue to support the production of high quality programming: license fees from MVPDs and advertising revenue. As networks reach larger numbers of viewers, they can generate additional revenue from advertisers.

The ability to freely negotiate distribution arrangements is critical to programmers' ability to develop diverse, innovative channels. For instance, the development and launch of new channels often is facilitated by a programmer's ability to package the channel with other networks, and the programmers' ability to negotiate packaging arrangements for multiple channels allows many more niche channels to launch and thrive in the market than would be possible if every channel had to be immediately viable entirely on its own.

In short, programmers' ability to negotiate bundled carriage gives consumers access to a wider variety of channels at a lower price per channel than they would receive for the same price under an *a la carte* system. Conversely, market analysts estimate that about half “of total TV

⁴ *Id.* at Attachment 2 pp. 3-5.

⁵ *See id.* at Attachment 1 p. 53.

ecosystem revenue (about \$70 billion) would evaporate” under a mandatory a la carte system in which “consumers are required to bear 100% of the cost of the channel.”⁶ Moreover, under mandatory unbundling “\$80-113 billion of U.S. consumer value would be destroyed” by the resulting loss in channel choice, in addition to the loss of the intangible value consumers receive from having access to a wider variety of channels and programs.⁷ These harms are compounded by the fact that, as economist Dr. Jeffrey Eisenach has explained, bundling prohibitions “cannot be meaningfully implemented without the imposition ... of wholesale price controls on television programming,” and such controls “would inevitably introduce significant distortions into the market for television programming” that would “prevent economic resources from flowing to their highest-valued uses.”⁸

Bundling prohibitions also would be highly suspect under the First Amendment, which permits the regulation of cable content only if the regulation advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.⁹ The evidence shows no substantial governmental interest would be advanced by regulating the highly competitive wholesale

⁶ Laura Martin and Dan Medina, “The Future of TV,” Needham Insights, at 1 (July 11, 2013).

⁷ Laura Martin and Dan Medina, “Valuing Consumers’ TV Choices,” Needham Insights, at 1-2 (December 1, 2013).

⁸ Jeffrey A. Eisenach, *Why The FCC Should Not Increase Regulation of Wholesale TV Programming*, FCC MB Docket No. 07-198, at 13, 16 (filed Feb. 12, 2008). A copy of this report is available through the FCC’s Electronic Comment Filing System at <http://apps.fcc.gov/ecfs/document/view?id=6519840921>

⁹ See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

programming market. Even if such an interest could be identified, it could not justify the speech burdens imposed by broad restrictions on the sale of programming in packages.

Indeed, Congress itself historically has recognized the public interest benefits that derive from affording programmers and distributors wide latitude in structuring their carriage arrangements. Thus, the Communications Act expressly permits carriage agreements to contain “different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor.”¹⁰ Clearly, Congress intended programmers to have the right to negotiate freely with distributors for carriage of individual networks or packages of program channels. Consistent with this policy objective programmers offer their networks in packages that are tailored to meet the needs of individual cable operators, both large and small. The wide array of packages is responsive to the needs of particular distributors and frequently includes volume discounts and other incentives to encourage wider distribution of networks.

The ability to negotiate for packages that combine mass-audience programming with channels targeting niche and underserved (and often minority) audiences is essential to ensure that consumers continue to enjoy affordable access to diverse programming options. Free-market negotiations between programmers and MVPDs, against the backdrop of fierce competition among programmers and between traditional and emerging video platforms, have given consumers an

¹⁰ 47 U.S.C. § 548(c)(2)(B)(iii).

unprecedented level of access to a wide variety of affordable programming. Accordingly, there is no basis for the government to impose restrictions on this well-functioning market.

Attachment A

Bruce M. Owen, *Wholesale Packaging of Video Programming*,
FCC MB Docket No. 07-198 (filed Jan. 4, 2008) (“Owen 2008”)

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Review of the Commission's Program
Access Rules and Examination of Pro-
gramming Tying Arrangements

MB Docket No. 07-198

Wholesale Packaging of Video Programming

Bruce M. Owen

January 4, 2008

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(Attachments follow page 71)

Attachment 1: Cable Networks: Bundling, Unbundling, and the Costs of Intervention, 2004.

Attachment 2: Why a Box of Crayons Has Many Colors, and the “Cable Tax” is not a Tax;...,
2004.

Attachment 3: Re MB Docket No. 04-207, joint letter to Chief, Media Bureau, FCC, 2004.

Attachment 4: The FCC “Further Report” on the Retail Marketing of Video Programming
Services: An Economic Review, 2006.

Attachment 5: Benefits of Bundling and Costs of Unbundling Cable Networks, 2004.

Wholesale Packaging of Video Programming

Executive Summary

Federal Communications Commission regulation of the wholesale packaging of video programming services sold to “small” cable television companies would be unwarranted and imprudent. The alleged conduct that is at issue appears to be rare, if it exists at all. Even if the conduct did exist, there is no assurance that eliminating it would make any cable operators, direct satellite broadcasters, and other retail distributors (“MVPDs”) or consumers better off. On the other hand, a regulatory intervention has clear costs and risks. The same conclusions apply to regulation of wholesale packages sold to “large” MVPDs. In the United States, markets are allowed to work free from regulation, absent clear evidence of market failure or abuse of market power, neither of which is present in the diverse and competitive market for video programming.

Here, briefly, are the reasons for my conclusions.

- 1. Facts.** The most obvious reason not to regulate wholesale packaging of video programming, in the form described by the Commission, is that it apparently occurs in the marketplace rarely, if at all. The program suppliers explain that while they frequently offer packages of networks to both large and small MVPDs, they also negotiate deals for variations on those packages, including the addition and deletion of individual networks with corresponding changes in prices, and stand-alone pricing for their networks. My own empirical investigation, described herein, produced results consistent with this claim. It follows that there is no “take-it-or-leave-it’ tying.” (And even if there *were* “take-it-or-leave-it’ tying,” or what the formal economic literature calls “pure bundling,” economic analysis would not support regulatory intervention.)
- 2. Suppliers lack market power.** The industry that supplies video content at wholesale to MVPDs has a competitive structure—it is not concentrated, and the largest supplier has less than 25% of the business. An enormous body of legal and economic policy analysis takes the view that a regulatory intervention aimed at correcting a potential market failure (in this case, the supposition that wholesale packaging is a potentially inefficient marketing practice) is misguided when sellers lack market power. While antitrust analysis certainly is fallible and sometimes controversial, antitrust courts and scholars have far more experience dealing with “tying” and “bundling” than does the Commission. The Commission lacks sound reasons to reject this learning.

3. **The concept of “must have” programming is economic nonsense.** If “must have” programming has any meaning, it means “essential” to the ability to compete. But a “must have” network, as the Commission appears to use that term, is simply a network that makes a cable operator or other MVPD more profitable than otherwise, given its remaining carriage choices and the price it would like to pay for the network. It does not follow that such networks are essential for the survival of an MVPD as a viable competitor. Few, if any, MVPDs are likely to go out of business for lack of a particular network; instead, they will simply adjust other programming choices, prices, and marketing strategy. The econometric results on which the Commission relies do not even address the question of whether some networks are essential.

4. **Retail bundling is not caused by wholesale packaging.** Retail packaging of video content into “tiers” has been the subject of recent policy debate, to which my colleagues and I have made contributions. (See Attachments 1-5.) Although the Commission does not say so in its Notice, its otherwise puzzling concern with wholesale packaging apparently is related to the possibility that wholesale packaging of networks (if it existed in the form the Commission describes, which it apparently does not) might be the cause of *retail* “bundling.”¹ If so, the Commission is mistaken. Even if wholesale “take-it-or-leave-it’ tying” took place, it would not preclude MVPDs from unbundling content at the retail level. Even if wholesale packaging were banned, it would not necessarily affect MVPDs’ packaging to consumers.

5. **Video economics explains transactions patterns.** Understanding the economics of video distribution requires attention to both customer (whether MVPD or subscriber) demand for content and advertiser demand for viewers. Because of the prospect of advertising revenue, content providers have an incentive to offer lower prices to content customers in return for higher penetration and larger audiences. The prices and contract terms (including carriage commitments) observed in the marketplace necessarily reflect *both* sources of demand. Any given content made available to fewer subscribers will produce less advertising revenue. Faced with a reduction in potential distribution, a

¹ The term “bundling” often has a special meaning in economics (and antitrust analysis) that is not fully congruent with its use in ordinary conversation. I have tried to use the term “packaging” here to approximate the informal usage, and “bundling” when referring to the economic usage.

competitive supplier of such content, in order to avoid losses, must either increase the price of the content or lower the quality of the content to the cable operator and thus, ultimately, to the consumer. For this reason, program suppliers offer the lowest content prices to MVPDs who agree to make the content available to as many subscribers as possible. The resulting contract necessarily must specify both a price and a carriage commitment. Perhaps observing this natural competitive market outcome creates the false impression that the MVPD is “forced” to carry particular content on particular tiers. But the only compulsion involved is the desire of both parties to make the most economically efficient, and therefore profitable, bargain, in a competitive market where failure to do so could ultimately prove fatal.

6. Competitive stand-alone prices may exceed competitive package prices.

Because cable networks apparently can already be purchased in the wholesale market both as packages and individually, it is possible that buyers are complaining because they perceive that the sum of the prices at which individual networks are offered compares unfavorably with the prices of various packages. This misperception, while perhaps understandable, betrays a fundamental misunderstanding of the video programming marketplace.

Program suppliers offer both established content with relatively high demand and newer or less popular content that requires additional penetration in order to succeed in attracting advertising revenue. The stand-alone competitive price for the new or less popular content may well be negative. In other words, the program supplier would be willing to pay the MVPD for higher penetration for certain channels, both because that lowers unit costs per viewer and because it increases advertising revenue. The payment to carry less desirable content may take the form of a price discount on the more popular content if the MVPD agrees to take both. As a result, the competitive price for a package of content may be less than the competitive price for a stand-alone unit of content—whether a popular program or a popular channel—by itself. This can lead to the erroneous conclusion that the supplier is “forcing” the buyer to carry the less popular network.

7. Regulation of “mixed bundle” packaging is impractical. “Mixed bundling” refers to offering products both as packages and on a stand-alone basis, and this appears to be the way in which programming is sold to MVPDs. Effective regulation of mixed bundling, even if it were desirable, would require imprac-

tical cost-based rate regulation. Suppose that the Commission sought to achieve an outcome in which every “small” cable operator was presented with a set of “reasonably priced” stand-alone alternatives to packaged video programming options. The Commission could not expect such a regulation to be self-enforcing. Disputes would arise. Predictably, some cable operator would claim that some particular network was “unreasonably” overpriced. The Commission would have to assure itself that any proposed lower package price was compensatory. Neither the traditional tools of utility regulation nor more modern tools such as rate caps offer a practical solution to such disputes.

8. Bundling can increase welfare and diversity. Even in the extreme case of bundling by a monopolist, obviously absent here, bundling may either increase or decrease economic efficiency and consumer welfare. Whether increase or decrease can be predicted to occur depends on which of many candidate abstract economic models one has in mind and on the validity of specific assumptions in that model. There is no economic model clearly applicable to the special features of wholesale provision of video programming (non-rivalrous services, two-sided markets, multiple temporal and geographic releases, etc.). Even aside from these special features, there are intrinsic economic characteristics of the business that make bundling likely to be efficient: complementarities in production and marketing (e.g., cross-promotion) and savings in transaction and bargaining costs. Similarly imponderable are the potential effects on diversity, however defined. The Commission is not likely through this proceeding or otherwise to uncover empirical evidence sufficient to avoid a very substantial risk that a regulatory intervention will reduce efficiency and welfare.

9. No “bright lines” delineate program package components. *All* video products are packages, or packages of packages. This simple fact undermines the conceptual basis of any proposal to regulate packaging or bundling. Regulating the extent of packaging necessarily implies that the Commission can reasonably determine the “legitimate” economic boundaries of the regulated services. But the Commission lacks a foundation for establishing such boundaries, especially for the range of services called video programming.

The most basic component of video programming service is an apparently unitary but highly variable package of services called by such names as episode, segment, special, game or movie. Such a basic unit itself is not well-defined,

made up of varying proportions of other services, such as content, promotion, and embedded advertising. But very few wholesale video programming transactions involve even such relatively basic units. Video programming is instead almost always packaged when it is sold to retail distributors. For example, episodes are packaged into series. Series are bundled into daily, weekly, and seasonal schedules, or “channels.” Channels, or networks, are packaged into multichannel groups. There is no economic basis for an assumption that consumers are better off by preserving the opportunity of retailers to purchase individual wholesale “channels” of programming, even if that option appeared to be threatened.

10. **Regulation of packaging threatens other FCC objectives.** Virtually all economists and economic models agree that bundling brings benefits to some customers, even in cases where other customers are worse off. But which ones? While the demand characteristics of the customers who gain or lose from bundling can be described in technical terms, it is seldom possible to identify those customers' other characteristics, such as their economic or social status. Even if the Commission were persuaded that aggregate consumer welfare would increase if bundling were restricted, the Commission would risk violating other policy objectives it favors.

At the retail level, for example, this implies that even if aggregate welfare were increased this would be achieved only by making some unknown group of viewers worse off. Before such a decision could be made, it is important for the Commission to assess the risk that the worse-off consumers may be those whom the Commission wishes to favor (the poor, the elderly, the young, or minority groups, for example.) The Commission lacks information on such effects. Regulatory intervention at the wholesale level presents similar issues. First, the downstream effects on particular consumers are even more difficult to predict. Second, why should the Commission favor one set of “small” cable operators at the expense of other “small” cable operators?

11. **Packages often save time and money for smaller buyers.** Even if program suppliers did offer “take-it-or-leave-it” packages to small cable operators, contrary to the representations of the suppliers and the empirical evidence, that could be an entirely normal and efficient competitive market outcome. In every industry, smaller customers have fewer choices than larger ones, because smaller buyers and sellers alike do not find it worthwhile to bear the

considerable costs of bargaining over the details of complex transactions. Consumers who want to purchase only 11 eggs rather than a dozen do not bargain either with the producer or the retailer about the issue. They either discard (or save) the extra egg or do not buy eggs. Communication lawyers specializing in broadcasting may purchase volume 47 of the Code of Federal Regulations, which combines Parts 70 through 79, even though their interest is limited to Part 73 (broadcast). Bargaining would simply increase enormously the cost (and price) of the transaction, disadvantaging both buyer and seller. Negotiation and related costs tend to be a larger percentage of small transactions than larger ones. In this circumstance, what may appear to be the exercise of market power is nothing but the commonplace phenomenon of small buyers being offered standardized products at list prices, while large customers and their suppliers find it worthwhile to negotiate off-list, non-standard deals. This is not economically inefficient. A regulation requiring individualized negotiation over arbitrarily-defined components of product packages for all customers, regardless of size, likely would reduce welfare.

12. **Unintended side effects are a likely result of regulation.** Unpredictable unintended side effects are a likely result of any regulation of wholesale packaging the Commission might attempt. Viewer welfare is related not only to the quantity of programming, but also to its quality. Attractive programming costs more to produce than less attractive programming. Advertiser demand is related to the size of the audience delivered by the programming. Advertising revenue, given competition, affects viewer welfare because competing programmers exhaust any disequilibrium rents in expenditures on increased program quality. The point of unbundling wholesale video programming, presumably, is to respond to the claim that “small” cable operators would choose networks different from those they now carry, not merely to permit them to carry the same networks at a lower total price. But a change in the program choices of “small” operators will change the size of the audience for each affected network. These changes, even though individually small, can have a magnified effect on program quality.

I. Introduction

A. Background

I am the Gordon Cain Senior Fellow at the Stanford (University) Institute for Economic Policy Research, the Morris M. Doyle Centennial Professor in Public Policy, and by courtesy, Professor of Economics, in the Stanford School of Humanities and Sciences, and Director of the Stanford Graduate and Undergraduate Public Policy Programs. Earlier, I was president of Economists Incorporated, an economic consulting firm that specializes in antitrust and regulatory policy analysis. Prior to that, I was at different times chief economist of, respectively, the Antitrust Division of the U.S. Department of Justice and the White House Office of Telecommunications Policy. My PhD in economics was conferred by Stanford in 1970. I have written extensively about mass media economics and policy, including broadcasting, cable television, and program supply. My most recent book was *The Internet Challenge to Television* (Harvard University Press, 1999).

In a recent Notice of Proposed Rulemaking, the Commission seeks information about the methods used by firms producing programming to sell their programming to MVPDs.² In particular, the Commission is concerned about assertions by “small and rural MVPDs as well as program access complainants” that programmers offer their programming as a bundle with no alternative to purchase alternative bundles or to purchase networks individually. The Commission describes the alleged practice as “take-it-or-leave-it’ tying.” (NPRM, ¶¶ 129-132). The Commission expresses concern that tying “hinders significantly or prevents MVPDs from providing satellite cable programming to subscribers.” (NPRM, ¶ 130)

Fox, NBC Universal (“NBCU”) and Viacom MTVN have asked me to provide an economic analysis of these and related issues. My Economists Incorporated colleagues Michael Baumann, John Gale, and Kent Mikkelsen have assisted me in this work.

² *In the Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, MB Docket No. 07-198, Released Oct. 1, 2007; Adopted Sept. 11, 2007 (“NPRM”).

B. Standard of Review for Economic Assessment of Proposed Regulations

U.S. economic policy exhibits a longstanding presumption in favor of competitive market solutions, where feasible. The presumption is not merely ideological, it is pragmatic. Competitive markets create incentives for private actors to change their behavior in response to opportunities to better serve consumers. Such incentives are absent or distorted in many regulated markets. Even when a regulatory intervention is welfare-enhancing in a particular circumstance, circumstances change, but often regulations do not.

As recently as 1996, Congress opted for increased reliance on competition and deregulation in the communications industries, including those at issue in this proceeding. In the years following the Telecommunications Act of 1996, there was a substantial increase in video competition and output, especially from new technologies, such as satellite broadcasting and broadband internet service. This competition continues to grow. Despite this highly competitive marketplace, deregulation has made little progress. Indeed, in this and related proceedings, the Commission proposes to increase the extent of its cable regulation.

Given the presumption in favor of letting competition determine market outcomes and the difficulty of reforming welfare-reducing regulatory policy, proponents of any regulatory intervention seeking to mandate outcomes different from those emerging from competitive markets should carry the burden of demonstrating:

- ❖ the existence of a market failure with economic harm to consumers and
- ❖ the likelihood that the regulatory intervention will remedy that failure, improving consumer welfare.

A market failure lowers welfare by reducing aggregate output, measured by the value placed on that output by consumers, compared to what is potentially achievable given available resources. While market failures are not uncommon, measuring the extent of their harm often is challenging. Empirical evidence of harm to consumer welfare is key, not only because of the presumption in favor of nonintervention, but because almost any remedy will have costs which must be weighed against the potential benefits of intervention. Experience shows that regulatory failure is at least as common as market failure.

After demonstrating the existence and extent of harm to consumers, it must be shown that the proposed intervention will either benefit some consumers individually and leave no consumers worse off, or benefit consumers as a group. If the latter, it must be further demonstrated that the benefits to those consumers who gain from the in-

intervention outweigh, from a social policy perspective, the losses to those harmed by intervention. Doing so requires that the relevant characteristics of the two groups of consumers can be identified—for example, poor versus non-poor.

None of the costs or benefits of a regulatory intervention, or for that matter the underlying problem to which the intervention is addressed, can be determined with certainty. It is quite common to find in retrospect that a regulatory intervention has unintended and unanticipated consequences, such as changes in the behavior of suppliers as they adapt to new incentive structures. Nevertheless, even regulations that are generally agreed to be harmful to consumer welfare can be very hard to change, as the experience with the 1996 Telecommunications Act demonstrates. The implication of these risks and uncertainties, together with the presumption in favor of competitive market solutions, is that the Commission should exercise considerable caution when considering new constraints on market outcomes.

It is this concern with prudence that has led antitrust prosecutors and courts to adopt the specific screening criteria commonly applied to unilateral vertical restraints, the general category of economic behavior alleged here. The most important screen is the insistence that market power be present before any proposed intervention is considered. A second applicable screen is the idea that harm to competition (i.e., to the process that promotes consumer welfare) is a key requirement for intervention, whereas harm to competitors is not. Specifically, any remedy must not protect inefficient suppliers from efficient suppliers.

II. Facts

The most obvious reason to refrain from federal regulation precluding wholesale packaging of video programming, in the form described by the Commission, is that it rarely, if ever, occurs in the marketplace. The program suppliers explain that while they frequently offer MVPD customers, large and small, choices that include packages of networks, they also negotiate deals for variations on those packages, including the addition and deletion of individual networks with corresponding changes in prices, and offer networks individually outside of any package.

My own empirical investigation, described in this section, produced results consistent with this claim. It follows that there is little or no “take-it-or-leave-it” tying.” But even if there *were* “take-it-or-leave-it” tying” economic analysis would not support regulatory intervention.

I have reviewed information provided by Fox, NBCU and Viacom describing the way in which each of these programmers reaches agreements with MVPDs on which networks will be purchased and what fees will be paid. My colleagues and I have also interviewed personnel at each of these programmers regarding these practices. Based on this information, it is my understanding that none of these program suppliers offers MVPDs fixed bundles of networks on a “take-it-or-leave-it” basis. All MVPDs are given the opportunity to purchase networks outside of any bundle on a stand-alone basis. In addition, when MVPDs purchase multiple networks, these programmers are willing to—and commonly do— negotiate over how many and which networks will be purchased and which systems will carry which networks.

Clearly, what is happening currently in the wholesale marketplace is not “bundling” in the sense in which that word is used in the economics literature. There is not a fixed bundle of networks that every MVPD purchases from any given program supplier; rather, different MVPDs buy different packages of networks. The Commission’s view—though this is not explicit—apparently is that there is a set bundle.

The economic consensus on retail bundling is that the Commission should not require “pure bundles” to be replaced, either by mixed bundles or by pure stand-alone pricing.³ Applied to wholesale programming, the economic argument would be that the FCC should not intervene in private programming negotiations just to outlaw something programmers apparently don’t do. If the Commission simply misapprehends the facts, perhaps the debate should end.

Still, it may be helpful to state as clearly as possible the economic motivation behind the behavior observed in what to all appearances is a competitive wholesale market for video programming. Each individual MVPD is typically offered, by a given multi-network program supplier, one or more network packages at particular prices and a series of stand-alone prices for individual networks. The MVPD is not required to take a package that includes a less desirable network, but the price of the package containing that network may be more attractive—it may even be lower than the price without the less desirable network (reflecting an implicit negative price for the less desirable network). The program supplier offers alternative price incentives designed to

³ In the literature, a seller who offers a set bundle of goods, but none of its components, is said to engage in “pure bundling.” If the seller offers individual components, but no bundle, it engages in *la carte* pricing. If both alternatives are offered, there is said to be “mixed bundling.” For further discussion of the economic consensus regarding retail bundling by MVPDs, see Attachment 3.

induce the MVPD to take as much programming as possible and to distribute the programming to as wide a subscriber base as possible.

Viewed in this light, what MVPD complainants may really object to is that the price offered for the “desirable” programming is not available without the “less desirable” programming.

I have analyzed data showing the cable networks carried by individual cable systems to see whether they support the allegation that programmers give MVPDs “take-it-or-leave-it” offers that require them to take all their networks. For my analysis, I have focused on nationally-distributed basic cable networks⁴ launched prior to 2004.⁵ Non-English language networks owned by programmers also offering English language networks were not included in the study.⁶

Viacom provided data on the carriage of 18 Viacom networks by 205 small⁷ U.S. cable systems with fewer than 10,000 subscribers that contract for network carriage directly with Viacom, not through the NCTC.⁸ Figure 1 shows the percentage of these

⁴ On-demand, premium, pay-per-view, and regional channels are not included.

⁵ At any given time, cable systems may be under multi-year agreements with programmers. Even if it were true that programmers “coerced” cable systems to carry all their programming, it could take several years after launch before all cable systems entered new agreements that required such carriage. Hence, evidence that systems do not carry a newly-launched network was not considered useful in testing the “coercion” hypothesis. For this reason, networks launched within the last four calendar years were excluded from the analysis.

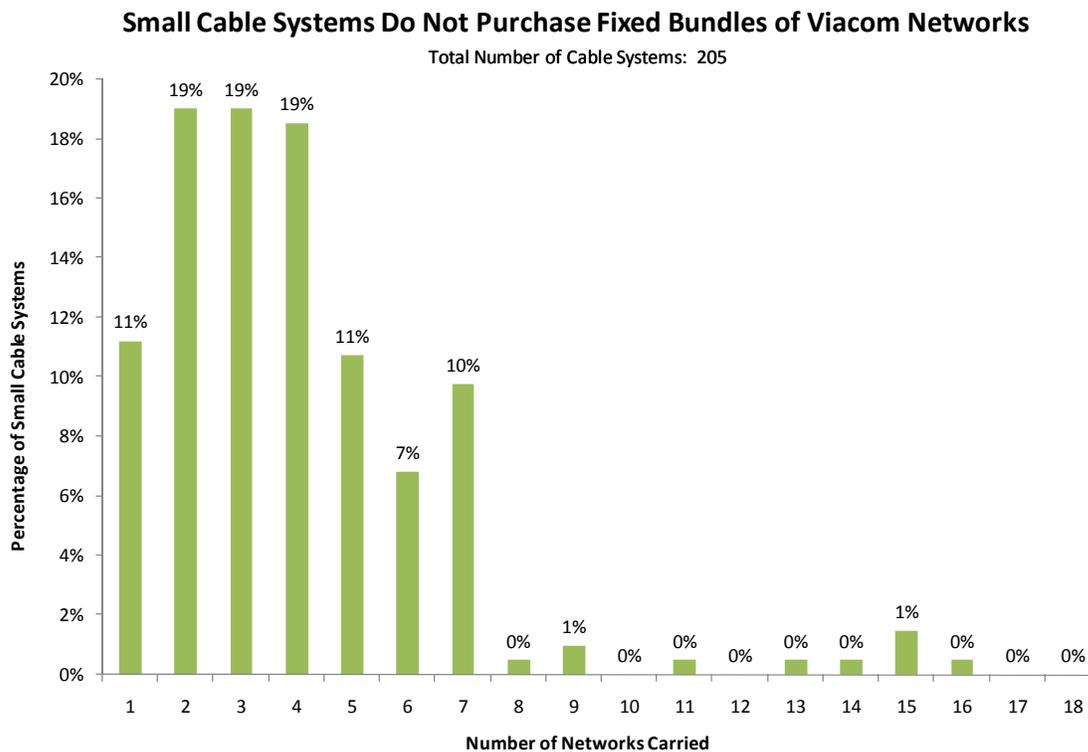
⁶ The “coercion” hypothesis was interpreted not to imply that all cable systems, even those with very low Spanish-speaking population, are required to carry Spanish-language programming. Hence, Spanish-language networks were excluded except for Univision. Univision carries only Spanish-language networks and, under the hypothesis, could require that all systems carrying any of their networks carry all their networks. The networks included in the study are listed in Appendix 1.

⁷ Because of data limitations, the definition of “small cable system” in Figures 1 and 2 differs from that used in the balance of this paper. See n. 10 *infra*. The 18 networks are listed in Figure 2.

⁸ NCTC is a buying cooperative made up of small and medium-size cable operators. According to its web site (<http://www.cabletvcoop.org/abouts.asp>), “NCTC is a not-for-profit, member-operated purchasing organization. ... NCTC negotiates and administers master affiliation agreements with cable television programming networks, cable hardware and equipment manufacturers and other service providers on behalf of our member companies. Through joint purchasing and negotiation, NCTC functions similar to a multi-system operator (MSO), taking advantage of volume discounts offered by programming networks, hardware manufacturers, and other providers. This results in significant cost savings for members on the purchase of these products and services. ... Today, continued ...”

small systems carrying just one of these Viacom networks, two networks, etc. About 10 percent of the systems take only a single Viacom network. More than half the systems take two, three or four networks. None of the systems take all, or even 17 of 18, of the Viacom networks studied. These data show that small systems are not required to take all Viacom networks, and that different systems reach different agreements about the number of Viacom networks they will carry.

Figure 1



Note: Does not include systems outside of the U.S.
Source: Viacom.

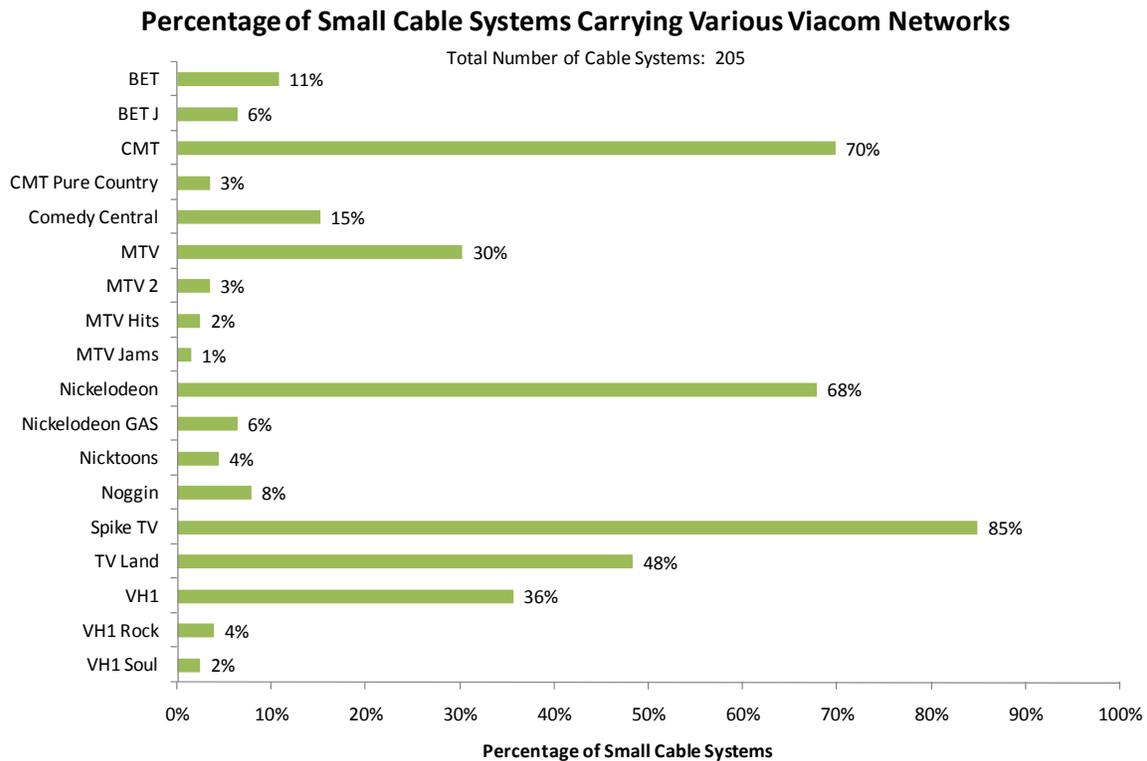
Figure 2 shows the percentage of these small systems carrying each of the 18 Viacom networks. *None* of the small systems carried all the networks. Spike was carried on more systems than any other network, but even so 15 percent of the systems did not carry Spike. No other network was carried by as many as 70 percent of the systems. The systems not carrying MTV or VH1 vastly outnumbered those that did carry MTV or VH1. These results agree with Viacom’s representations that systems are free to,

NCTC has more than 1,000 member companies that serve more than 12 million subscribers. ... Our member companies range in size from fewer than 100 subscribers to more than 1 million.

and do, accept or reject individual networks. There is no evidence here of a “take-it-or-leave-it” package.

Figure 2 actually understates the diversity of network packages that systems carry. For instance, the systems carrying four Viacom networks carried 12 different combinations of networks. Less than half of the systems taking four Viacom networks carry the most common combination. See Appendix 2.

Figure 2



Note: Does not include systems outside of the U.S.

Source: Viacom.

Similarly, Fox supplied data identifying each of the cable systems carrying its networks. I focused on eight nationally distributed networks launched before 2004.⁹ See Figure 3. A minority of all cable systems (19 percent) take all eight networks. More than twelve percent take only one network. Clearly, cable systems are not required to

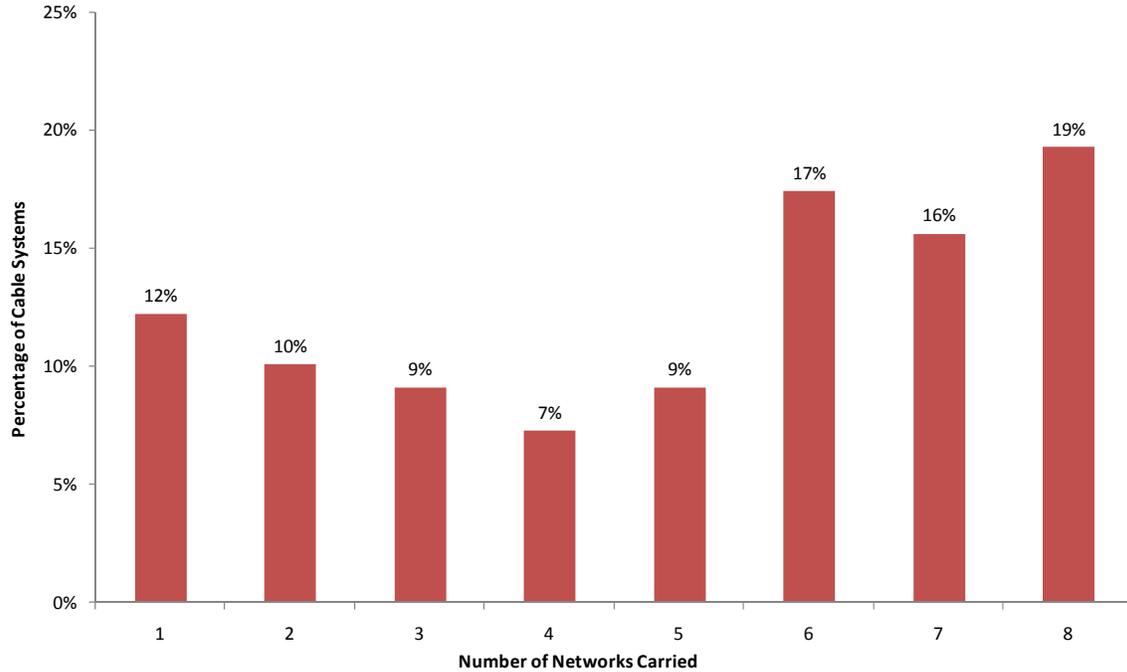
⁹ The eight networks studied were Fox College Sports, Fox Movie Channel, Fox News Channel, Fox Soccer Channel, FUEL, FX, National Geographic and Speed Channel.

take, and do not carry, all Fox networks. Different operators reach different agreements about the number of Fox networks they will carry.

Figure 3

Cable Systems Do Not Purchase Fixed Bundles of Fox Networks

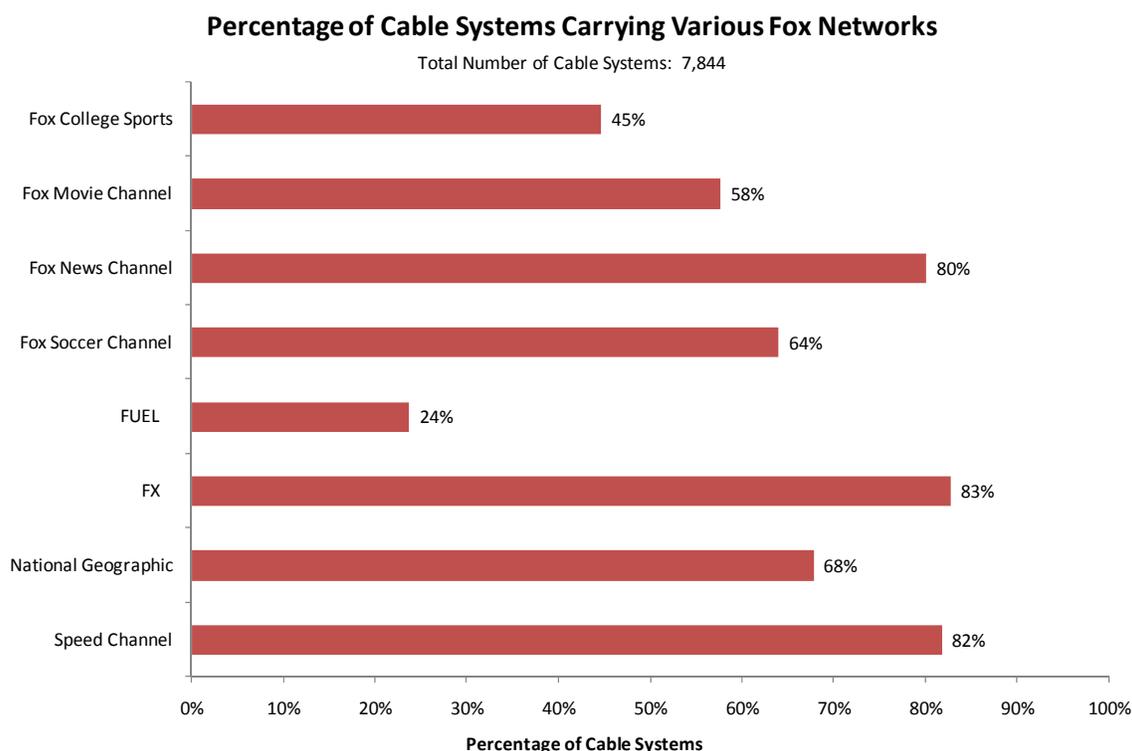
Total Number of Cable Systems: 7,844



Source: Fox.

Figure 4 shows the percentage of cable systems carrying each of the eight Fox networks. None of the networks is carried by all the systems. FUEL was carried by less than 25 percent of systems. These data are not consistent with the allegation that cable systems are presented with a “take-it-or-leave-it” package for all Fox’s nationally distributed programming. The data are consistent with Fox’s representation that systems are free to accept or reject individual networks.

Figure 4



Source: Fox.

The NPRM focuses particularly on small MVPDs. For this reason, I repeated the analysis of Fox networks reflected in Figures 3 and 4, restricting the data to include only systems owned by MSOs with fewer than 400,000 subscribers.¹⁰ This restriction eliminated the systems owned by the ten largest MSOs.¹¹ Among small operators, it is even less common for systems to carry all eight Fox networks. About one in five of these small operators' systems takes only a single Fox network, as shown in Figure 5. Further, systems taking the same number of Fox networks do not necessarily take the

¹⁰ The Commission has elsewhere used this definition to delineate small cable systems. See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266; MM Docket No. 93-215, Released June 5, 1995; Adopted May 5, 1995, ¶ 3. Except where otherwise indicated, this "FCC definition" is used throughout this paper.

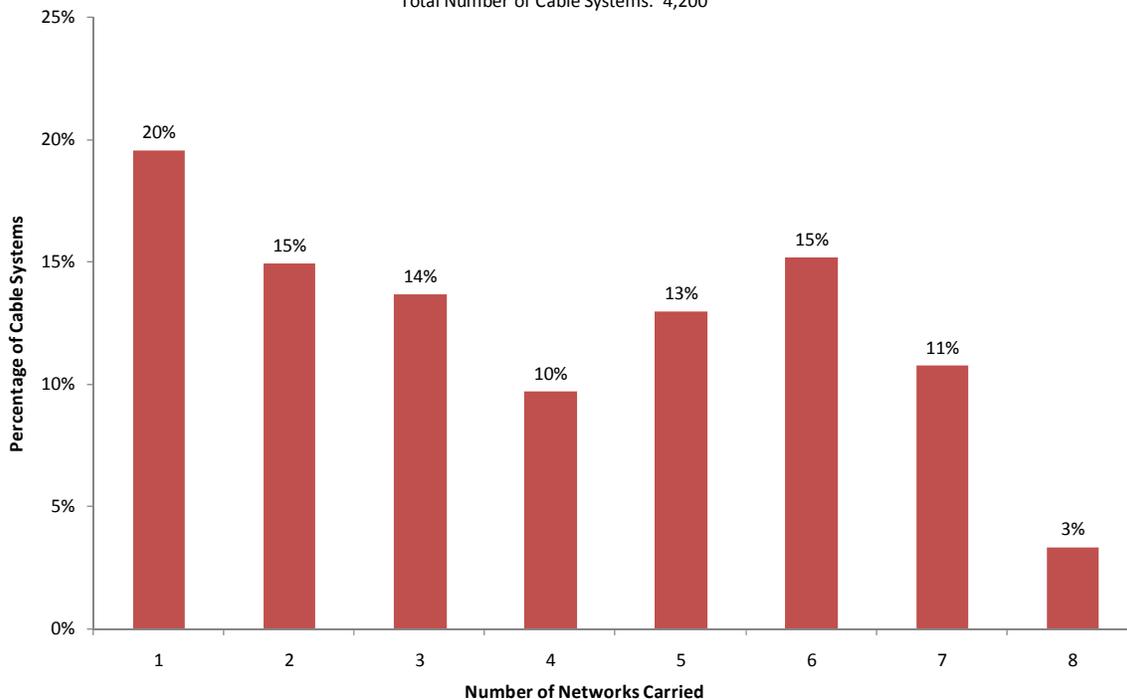
¹¹ The largest 25 MSOs and their total subscriber counts are available from the NCTA (citing Kagan data) at <http://www.ncta.com/ContentView.aspx?contentId=73> (visited November 15, 2007). The MSOs eliminated from the analysis in Figures 5 and 6 are Comcast, Time Warner, Cox, Charter, Cablevision, Bright House, Suddenlink, Mediacom, Insight and CableOne.

same networks. For instance, systems taking four Fox networks carried 29 different combinations of networks, and no combination accounted for as many as half the systems. See Appendix 2. Figure 6 shows that none of the Fox networks included in this analysis is carried by all the small operators' cable systems.

Figure 5

Small Cable Systems Do Not Purchase Fixed Bundles of Fox Networks

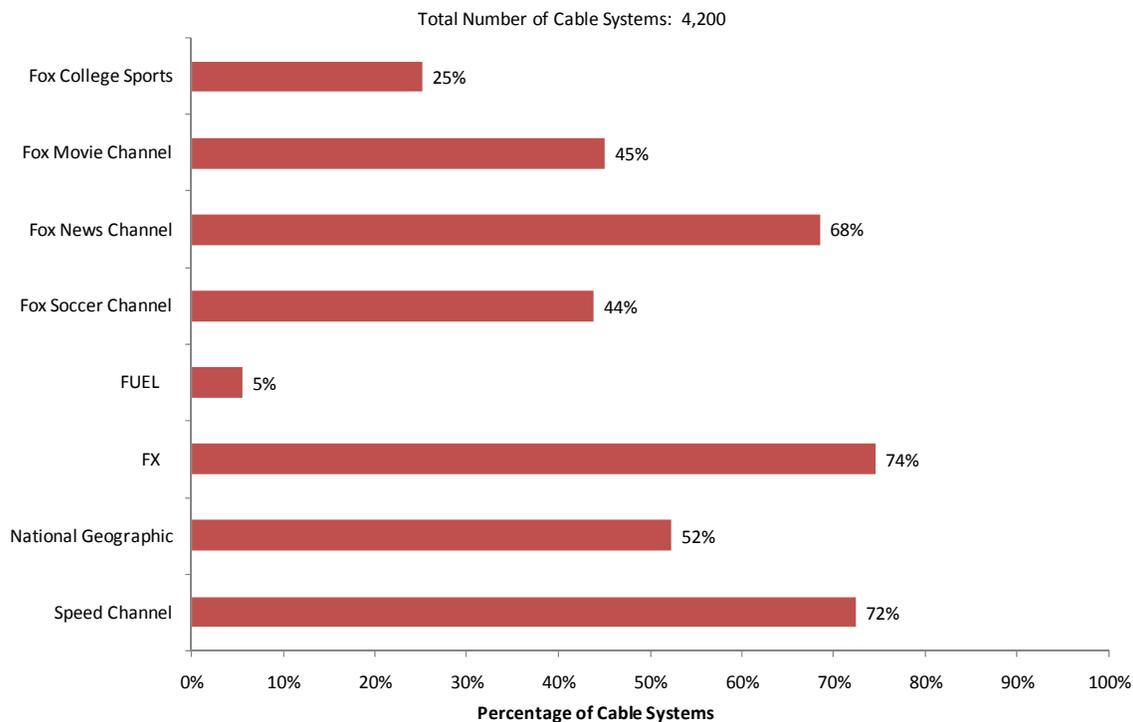
Total Number of Cable Systems: 4,200



Source: Fox.

Figure 6

Percentage of Small Cable Systems Carrying Various Fox Networks



Source: Fox.

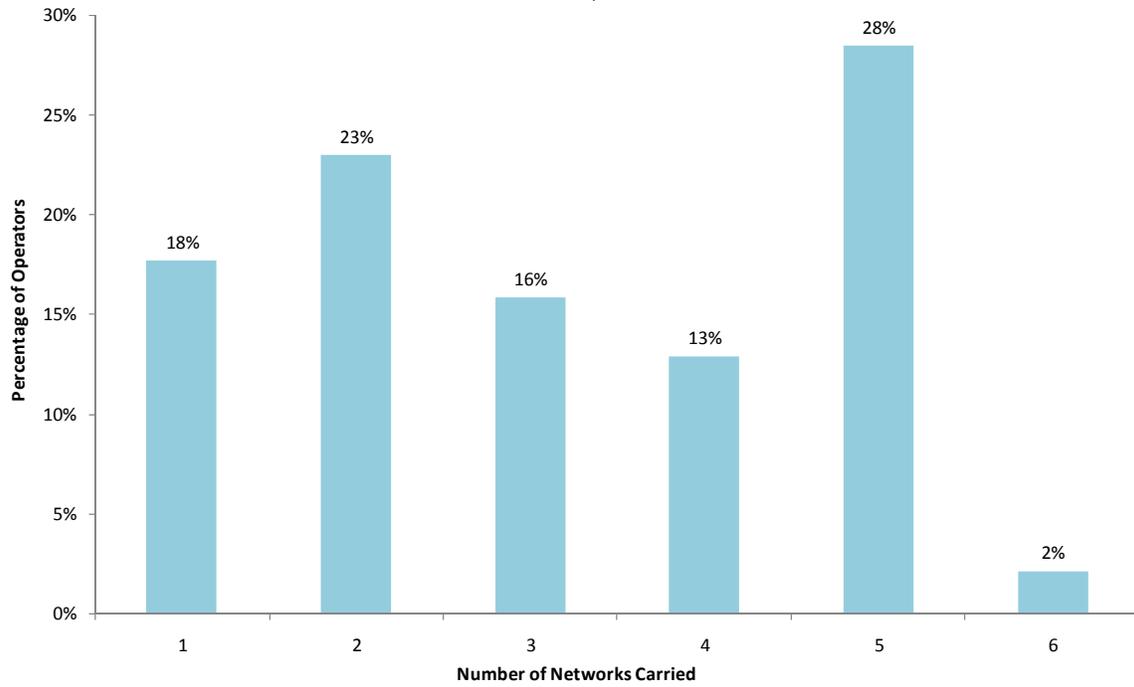
NBCU does not maintain data in a form such that *system*-level carriage information could readily be extracted for a large number of systems. Instead, I analyzed data supplied by NBCU showing each cable *operator* (including MSOs) taking any NBCU network on any of its systems and specifying which networks were carried. Data on six NBCU networks were included.¹² Figure 7 shows that more than one in six operators taking any NBCU network takes only a single NBCU network. Only 2 percent of the operators took all six of the networks studied. Figure 8 shows that no network was carried by all the operators, and that one network (CNBC World) was carried by only a small percentage of operators. These data support NBCU’s representation that operators negotiate with respect to the networks they wish to carry and are not required to take networks they do not wish to take.

¹² The six networks studied were Bravo, CNBC, CNBC World, MSNBC, Sci Fi Channel and USA.

Figure 7

Cable Operators Do Not Purchase Fixed Bundles of NBC Universal Networks

Total Number of Operators: 1,402

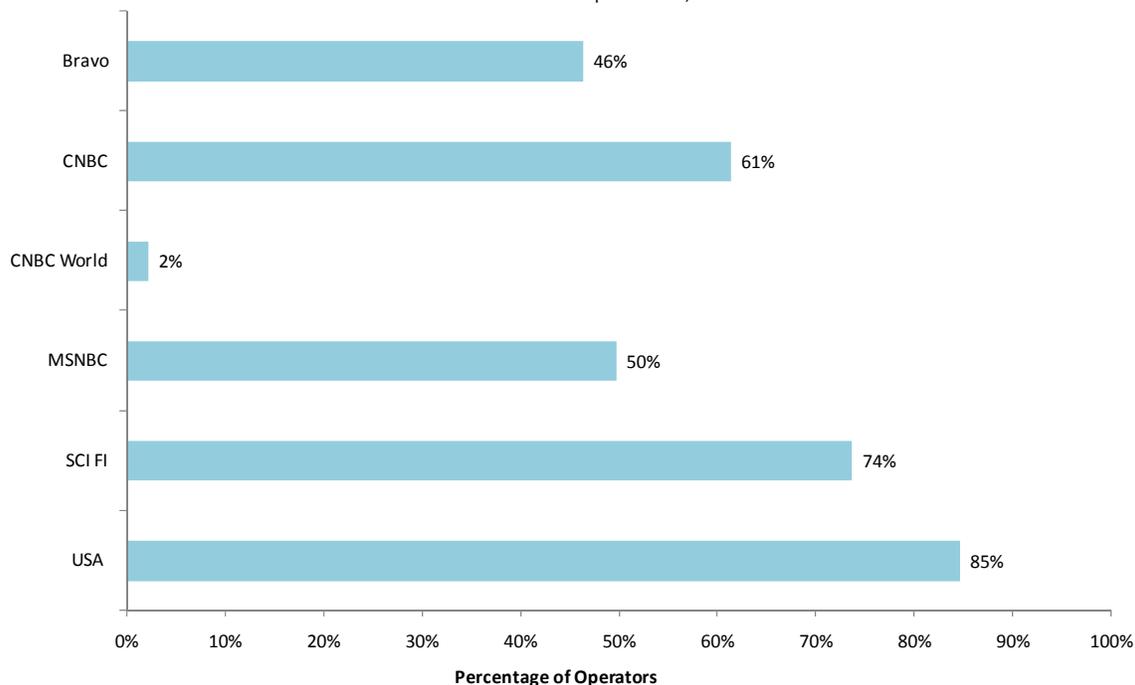


Source: NBC Universal.

Figure 8

Percentage of Operators Carrying Various NBC Universal Networks

Total Number of Operators: 1,402



Source: NBC Universal.

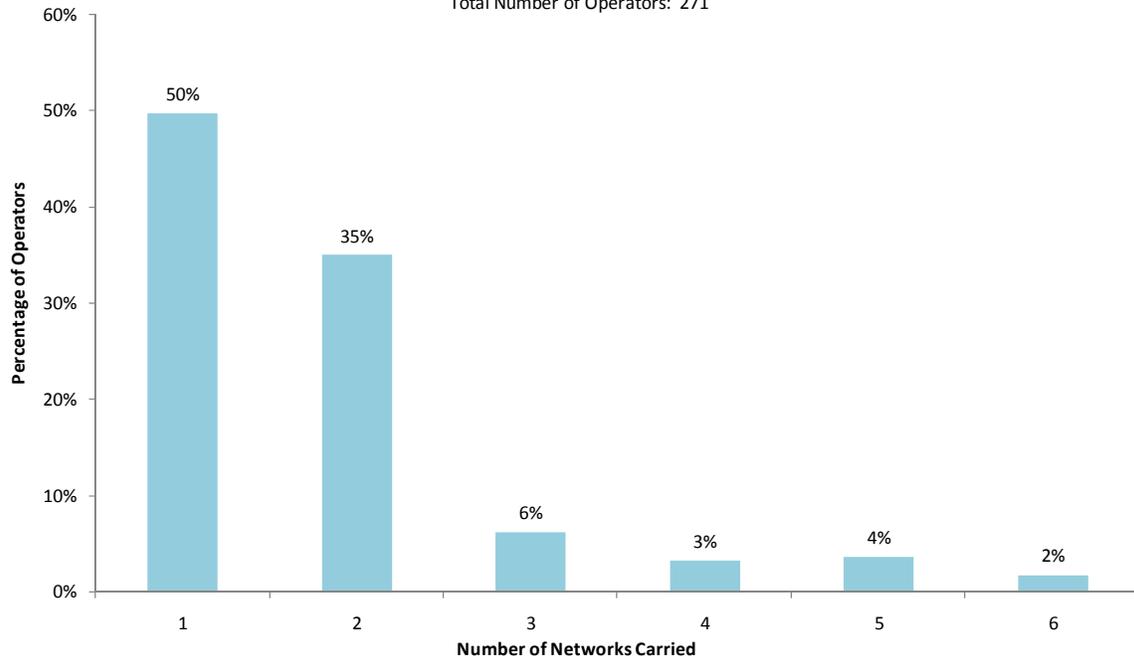
Again, because the NPRM focuses particularly on small MVPDs, I repeated the analysis of NBCU networks reflected in Figures 7 and 8, restricting the data to include only 271 small cable operators that carry at least one NBCU network but that do not contract for any NBCU networks through NCTC.¹³ As shown in Figure 9, it is uncommon for any of these operators to take more than one or two of the six NBCU networks studied. Almost 50 percent take only one network and an additional 35 percent only take two. Figure 10 shows that none of the NBCU networks included in this analysis is carried by all of these operators, with the highest carriage rate being slightly under sixty percent for the USA network. Further, when operators carry multiple NBCU networks they do not all take the same NBCU networks. For instance, among operators taking three NBCU networks there were seven different combinations of networks, and no combination was carried by as many as half the operators. See Appendix 2.

¹³ Figures 9-10 use the FCC definition of “small cable system;” see n. 10 supra. The NBCU data in Figures 7-10 are organized by operator.

Figure 9

Small Non-NCTC Cable Operators Do Not Purchase Fixed Bundles of NBC Universal Networks

Total Number of Operators: 271

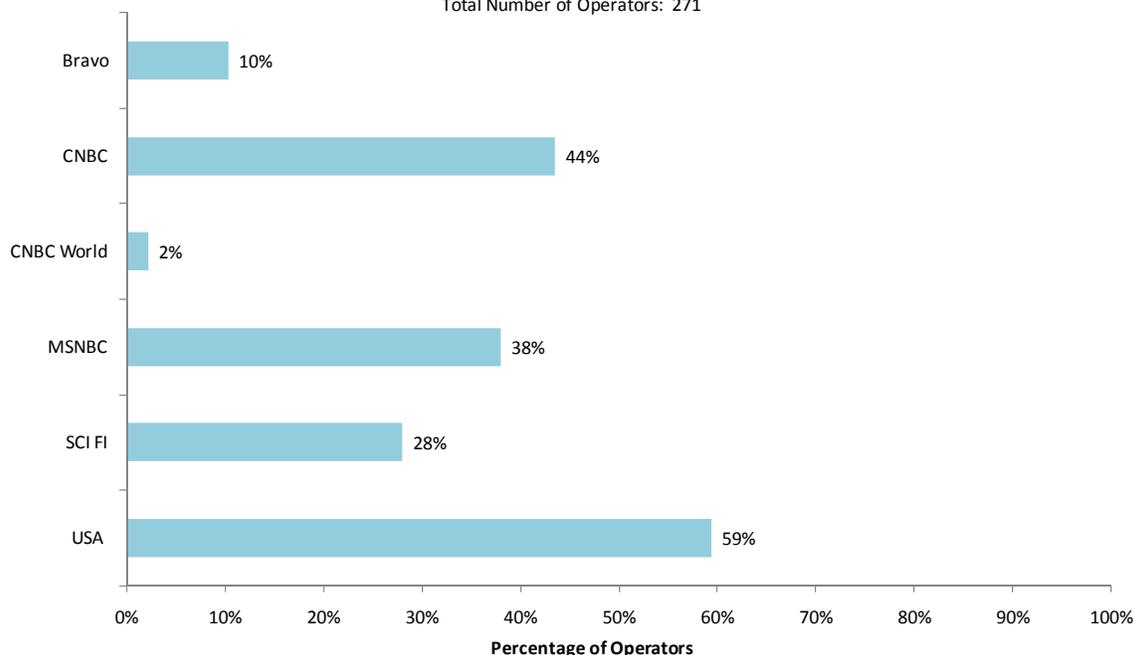


Source: NBC Universal.

Figure 10

Percentage of Small Non-NCTC Operators Carrying Various NBC Universal Networks

Total Number of Operators: 271



Source: NBC Universal.

I had direct access to carriage data only for Fox, NBCU and Viacom. However, Warren Communications maintains data on the networks carried by a large number of cable systems. I performed analyses similar to those described above for 14 different network suppliers.¹⁴ The number of networks included in the study is shown for each supplier in Figure 11. For each programmer, I determined how many of its networks were carried by each cable system. For each programmer, I then analyzed all systems carrying any of the programmer's networks and computed the percentage of those

¹⁴ Networks included in the analysis are shown in Appendix 1. As explained above, the objective was to include basic networks distributed nationally and launched before 2004. Spanish-language networks offered by programmers also offering English-language networks were excluded. Note that networks in digital suites offered by Viacom and Discovery were excluded because the Warren Publishing data do not reliably show how many networks within these suites were carried by individual systems. Channels appearing in the Warren Publishing data but which no longer exist were excluded. HD networks offering substantially the same programming as standard definition networks were not counted separately.

systems carrying 25 percent or more, half or more, 75 percent or more, and all of that supplier’s networks.

Figure 11: Percentage of all cable systems carrying at least one-quarter, half, three-quarters, or all the basic cable networks, by program provider

	Networks included	25% or more	50% or more	75% or more	All
A&E	4	100%	81%	49%	46%
Cablevision	4	100%	66%	51%	28%
Comcast	6	86%	78%	44%	11%
Discovery	9	64%	7%	1%	0%
Disney	11	92%	56%	31%	4%
E.W. Scripps Co.	6	74%	45%	12%	1%
Fox	9	77%	53%	18%	0%
Liberty Media	6	69%	45%	4%	1%
NBC Universal	7	79%	49%	20%	4%
The Media Group	3	100%	32%	23%	23%
Time Warner	9	95%	66%	33%	2%
Trinity Broadcast. Net.	3	100%	1%	0%	0%
Univision	4	100%	16%	1%	0%
Viacom	10	85%	66%	30%	4%

Note: Each line includes only those systems carrying at least one of that supplier’s networks.

Sources: Broadcasting & Cable, NCTA, FCC, SNL Kagan, Warren Communications News.

Figure 11 shows that it is relatively uncommon for cable systems to carry all the networks offered by a programmer. The highest percentage of systems taking all the networks from a programmer was for the four channels (A&E, Biography, History, and History International) offered by A&E, a Disney-Hearst-NBC joint venture, where it reached only 46 percent. With the exception of Cablevision’s four networks (at 51 percent), no programmer had as much as half of its cable system affiliates carrying as many as 75 percent of its networks. Put another way, half or more of systems carried less than 75 percent of the networks of any given programmer. Figure 11 is striking evidence that programmers do not make “take-it-or-leave-it” offers requiring cable systems to take all or none of their networks.

Figure 11 also shows that programmers sell their networks in many different combinations and on a stand-alone basis. Take as an example Fox, which owns nine networks included in the study. Of sample systems carrying any Fox network, 77 percent carried three or more Fox networks (25 percent of the networks), 53 percent carried half or more of the Fox networks, 18 percent carried seven or more of the Fox networks, and none carried all the Fox networks. A similar pattern holds for the other

programmers. For each of the programmers in Figure 11, some systems carried only one network included in the study.

This pattern understates the diversity of purchased “bundles,” because systems that carried the same number of networks from a particular programmer do not necessarily take the same networks. I will use Fox networks to illustrate this point. I examined the systems taking four Fox networks to see what combinations of networks made up the four that were carried. All 12 Fox networks were found in one or more of the 4-network “bundles.”

Figure 12 uses the Warren Communications data again, but excludes the operators with 400,000 or more subscribers in order to focus on “small” operators. Figure 12 shows, of the small systems taking any networks from a given supplier, what portion take 25 percent or more of that supplier’s networks, etc. Among small operators’ systems, it is even more uncommon for a system to carry all of the networks offered by a programmer than for larger cable operators. Aside from A&E (33 percent) and Cablevision (17 percent), no programmer has all its networks carried by as many as 5 percent of small operators’ systems.

Figure 12: Percentage of small cable systems carrying at least one-quarter, half, three-quarters, or all the basic cable networks, by program provider

	Networks included	25% or more	50% or more	75% or more	All
A&E	4	100%	73%	36%	33%
Cablevision	4	100%	54%	36%	17%
Comcast	6	77%	68%	26%	4%
Discovery	9	50%	4%	0%	0%
Disney	11	87%	40%	18%	1%
E.W. Scripps Co.	6	65%	34%	5%	0%
Fox	9	68%	41%	10%	0%
Liberty Media	6	55%	27%	0%	0%
NBC Universal	7	70%	30%	4%	0%
The Media Group	3	100%	8%	0%	0%
Time Warner	9	93%	54%	18%	1%
Trinity Broadcast. Net.	3	100%	2%	1%	1%
Univision	4	100%	21%	3%	0%
Viacom	10	78%	51%	13%	0%

Note: Each line includes only those systems carrying at least one of that supplier’s networks. Uses FCC definition of small cable system.

Sources: Broadcasting & Cable, NCTA, FCC, SNL Kagan, Warren Communications News.

It might be argued that the only reason that some systems do not take all the networks sold by a programming group is that these systems do not have sufficient channel capacity to accommodate them. To test this argument, I performed the same analysis on systems owned by “small” operators, but restricted the analysis to systems that offer a digital tier and receive at least 60 satellite-delivered networks according to Warren Communications. See Figure 13. Not surprisingly, these high-capacity systems tend to take a larger percentage of programmers’ offerings. Even so, there was only one programmer from which over 50 percent of these systems took all the networks. With the exception of two programmers, over two-thirds of these cable systems took less than 75 percent of the networks.

Figure 13: Percentage of small cable systems carrying at least one-quarter, half, three-quarters, or all the basic cable networks, by program provider

Limited to systems with digital capability and at least 60 satellite-delivered channels

	Networks Included	25% or more	50% or more	75% or more	All
A&E	4	100%	100%	90%	86%
Cablevision	4	100%	93%	75%	38%
Comcast	6	99%	98%	48%	8%
Discovery	9	97%	14%	2%	0%
Disney	11	100%	99%	64%	4%
E.W. Scripps Co.	6	91%	64%	12%	1%
Fox	9	98%	80%	23%	0%
Liberty Media	6	96%	64%	0%	0%
NBC Universal	7	99%	83%	16%	1%
The Media Group	3	100%	14%	0%	0%
Time Warner	9	100%	98%	58%	3%
Trinity Broadcast. Net.	3	100%	4%	2%	2%
Univision	4	100%	23%	3%	0%
Viacom	10	98%	95%	45%	1%

Note: Each line includes only those systems carrying at least one of that supplier’s networks. Uses FCC definition of small cable system.

Sources: Broadcasting & Cable, NCTA, FCC, SNL Kagan, Warren Communications News.

Small operators’ systems with substantial channel capacity likewise show a lot of diversity in their carriage patterns. I conclude that the diversity of carriage patterns among small operators is consistent with the conclusion that wholesalers do not engage in “all or nothing tying.”

In summary, the evidence here supports the statements made by Fox, NBCU and Viacom that they do not offer MVPDs bundles of networks on a “take-it-or-leave-it” basis. There is no evidence here that MVPDs are unable to purchase individual networks or a variety of network combinations. I also find that the number and mix of networks that cable systems purchase differ considerably across systems. This is evidence that the other programmers studied do not require MVPDs to purchase a particular combination of networks.

III. Program suppliers lack market power

The industry that supplies programming services at wholesale to MVPDs has a competitive structure. There is consensus within an enormous body of legal and economic policy analysis that a regulatory intervention aimed at correcting a potential market failure (in this case, a potentially inefficient vertical restraint or marketing practice) is misguided when sellers lack market power. While antitrust analysis certainly is fallible and sometimes controversial, antitrust courts and scholars have far more experience dealing with “tying” and “bundling” than does the Commission. The Commission lacks sound reasons to reject this learning. Equally significant, perhaps, is the Commission’s use of emotive language to imply the existence of market power where there is none. In a business where market power is absent, customers cannot be “coerced” or “forced” by a supplier to purchase anything, or things in any form. The transactions that do take place are voluntary, not coercive. The basis for this contention is the decades-long academic and judicial examination of the behavior of firms in an antitrust context, where there are more meaningful and relatively objective definitions of “coercive” and like economic behavior.

As I noted above, a necessary (but not sufficient) condition in antitrust analysis for bundling to be regarded as potentially harmful to consumer welfare is that the seller have “market power,” usually defined in terms of market share. No supplier of wholesale video programming to MVPDs has as much as 25 percent of that business. There is ample evidence of entry and exit from the business. Even if video programming supplied to MVPDs is not too narrow to be a “market” in the antitrust sense, this business lacks a necessary condition for there to be a likelihood that its marketing practices are harmful to economic efficiency and consumer welfare.¹⁵ Programming is

¹⁵ Video content not currently purchased by MVPDs, as well as content in other than standard video formats, may belong in the same relevant market as video programming content purchased by continued ...

sold to MVPDs by a large number of firms, none of which has a large share. Figure 14 summarizes share information for eight programmers.¹⁶ Appendix 3 presents data for individual networks from which Figure 14 is drawn.

Figure 14: Measures of share and concentration in the sale of video programming networks

Programmer	Share of Networks	Share of Subscribers	Share of Full Day Audience	Share of Prime Time Audience	Share of Revenue
Viacom	8.0%	14.0%	20.0%	17.2%	17.9%
Disney	4.7%	10.5%	18.2%	19.2%	23.3%
Discovery	4.7%	7.7%	6.5%	6.8%	5.2%
NBC Universal	4.0%	7.6%	9.8%	11.3%	9.4%
Time Warner	4.0%	7.3%	16.5%	16.2%	14.2%
Fox	4.0%	6.9%	6.5%	7.0%	12.2%
Liberty Media	4.0%	2.3%	1.3%	1.1%	0.4%
The Media Group	3.7%	1.4%	0.0%	0.0%	0.1%
HHI	235	619	1,260	1,223	1,372

Sources: Appendix 3, SNL Kagan.

A simple way to illustrate the relatively small size of competing programming companies is to count the number of networks each sells. Drawing on the Commission's Twelfth Annual report on competition in the delivery of video programming and other sources, I identified 301 basic national programming networks now being carried by MVPDs. Viacom, the programmer with the largest number of networks, has only 24 networks or about 8 percent of the total.

This simple count of networks does not reflect that some networks are larger than others. Three other ways to measure network size are the number of subscribers, the average number of viewers, and network revenues. Shares for each programmer are presented in Figure 14 based on the networks they own. None of these measures indicates that any programmer has as much as 25 percent of programming sales.¹⁷

MVPDs, because it is possible that MVPDs could and would substitute some such content in the event that video prices increased.

¹⁶ I included all currently-available nationally-distributed cable networks for which suitable data were available. The list of networks was not restricted as was the case for Figures 1-13.

¹⁷ Note that even the low shares in Figure 14 tend to be overstated. Audience and revenue data were not available for all basic cable networks, particularly among the networks not owned by the programmers in Figure 14. Audience information was available for 43 percent of the basic networks continued ...

None has a share that is even close to the levels that are commonly associated with market power.

The last row in Figure 14 reports the Herfindahl-Hirshman Index (HHI) associated with each of these measures.¹⁸ HHI is often used as a summary measure of the degree of concentration among sellers. The highest degree of concentration—one single seller—would have an HHI of 10,000. In their Horizontal Merger Guidelines, the U.S. Department of Justice and Federal Trade Commission characterize industries with HHIs below 1,000 as unconcentrated and those with HHIs between 1,000 and 1,800 as moderately concentrated.¹⁹ Using this standard, concentration in video programming networks measured with the number of networks or with subscribers would be considered to be unconcentrated. If measured using revenue or viewers, the sale of video programming networks would be in the middle to low end of the moderately concentrated range. These measures probably exaggerate the degree of concentration because they exclude video content not currently purchased by MVPDs—such as the growing body of broadband video content on platforms such as YouTube and other Internet providers of video. Nevertheless, each of these measures shows an industry structure consistent with a high degree of competition.

Another feature indicating the competitive nature of video programming network sales is the frequency with which new programmers enter and new networks are introduced. Figure 15 shows the number of currently offered networks that were introduced in each year, 2000-2007. A total of 134 new networks were identified as introduced in this period, accounting for 45 percent of the total 301 available networks identified. Of the 134 new networks, 69 were introduced by “unaffiliated” programmers, i.e., programmers with no other networks. (Again, this does not take into account new Internet or other non-traditional sources of video programming.) Figure

owned by the programmers in Figure 14 but only for 12 percent of the networks outside this group. This means that a disproportionate number of the networks not owned by a programmer in Figure 14 were implicitly counted as zero. Similarly, revenue estimates were available for 80 percent of the networks owned by a programmer in Figure 14 but only 39 percent of the networks outside this group.

¹⁸ HHI is calculated by squaring the share of each firm and then summing the squared shares. For instance, for firms with shares of 40, 30, 20 and 10 percent, respectively, the HHI would be $(1,600 + 900 + 400 + 100) = 3,000$.

¹⁹ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, (revised April 8, 1997), Section 1.5.

15 demonstrates that there is active entry of new providers into video programming network sales and active expansion of the number and variety of networks offered to MVPDs.

Figure 15: Launches of video programming networks by unaffiliated and other programmers, 2000-2007

Year launched	Unaffiliated programmers	Other programmers	Total
2000	8	2	10
2001	5	10	15
2002	4	13	17
2003	15	8	23
2004	18	12	30
2005	10	15	25
2006	8	3	11
2007	1	2	3
Total Channels Launched	69	65	134

Note: Unaffiliated programmers are those which currently own only one network.

Source: Appendix 3.

The effects of competition on the price of goods or services in a market are widely acknowledged. Outside of a small (and shrinking) number of industries, in the U.S. economy, competition is relied upon to see that customers receive the products, quality, price and terms they desire, consistent with the costs of the firms that supply them. Where competition is present, any firm that might attempt to charge a price that is higher than the quality of its products warrants would find that its customers turn to alternative products supplied by rival firms. Such price increases are not attempted (or soon abandoned) because competition makes them unprofitable.

Competition imposes the same kind of discipline on all aspects of what firms bring to the market. Competition forces firms to provide quality that will attract customers who would otherwise purchase from rivals. Another dimension of competition is the terms on which products are sold. When competition is present, a firm is constrained not to require terms of sale that purchasers do not like, because other firms are free to attract customers by offering terms of sale that are more attractive to purchasers.

The marketplace in which video programmers attempt to sell their programming to MVPDs is highly competitive. Given the intense competition among video programmers seeking carriage from MVPDs—and the obvious self-interest of such programmers in obtaining carriage—there is no apparent reason for the Commission to depart from a market solution in the sale of video programming networks.

IV. The concept of “must have” programming is misleading and inaccurate

In addition to alleged tying of networks in negotiations with MVPDs for carriage, the Commission affirms its belief in “must have” networks. (NPRM, ¶ 38). When discussing the sale of video programming in bundles, the Commission refers only to “desirable or marquee” channels. Nonetheless, the Commission may believe, erroneously, that programmers use “must have” programming to induce MVPDs to carry unwanted programming. This concept is not useful—indeed, it is misleading—in understanding the sale of cable programming.

Effective competition is not like golf, where poor players get handicaps. The Commission’s finding that “must have” programming is “essential” for viable competition among MVPDs is based on no appropriate empirical evidence or economic analysis, and it defies common sense. Few if any MVPDs are likely to go out of business as effective competitors for lack of a particular network; instead, they will simply adjust other programming choices, prices, and marketing strategy. Effective competition is a *process* that benefits consumers as firms struggle to gain advantages over one another, not a welfare program to produce equality of outcomes among the competing firms. A “marquee” or “must have” network, as that term appears to be used, is simply a network that makes an MVPD more profitable than otherwise, given its other carriage choices and the price it would like to pay for the network. It is quite unlikely that the second-most-profitable set of carriage and pricing decisions is strikingly less profitable.

Much of the Commission’s discussion of “must have” programming centers on whether or not, from the standpoint of a consumer, two networks would be considered close substitutes. One can easily imagine a consumer who prefers to watch only a single channel within a specialized programming niche and may find no other channel to be a satisfactory substitute. However, saying that a subscriber may not have a suitable substitute for a particular network is quite a different matter than saying an MVPD does not have a suitable substitute for a network or that an MVPD cannot compete without a particular network.

Most households watch multiple video programming channels. It seems implausible that the loss of a single channel that is part of a multi-channel line-up would make an MVPD completely undesirable to a large number of consumers. Even if that were the case, the MVPD has an opportunity to add alternative programming in place of the network that was dropped. It does not matter whether or not this alternative programming is a “close substitute” that will attract the same subscribers who were in-

clined to leave. The MVPD is just as well off having new subscribers who are attracted by the alternative programming or by the lower subscription fees that the MVPD is able to offer by eliminating the programming fee to the dropped network.

The Commission's bizarre notion of what might constitute a "must have" network—one that offers "The Sopranos"—would make virtually every differentiated product in the economy a "must have" essential facility:

We doubt, for example, that fans of one of the most popular cable programs, such as HBO's "The Sopranos," had their competitive MVPD been denied access to the cable-affiliated HBO network, would have regarded the original programming on other premium networks, such as Showtime, an adequate substitute for their favorite show. ...We find that access to this non-substitutable programming is necessary for competition in the video distribution market to remain viable. (NPRM, ¶¶ 38-39)

It is true that "The Sopranos" had some of the highest ratings on cable television—averaging over 8 million viewers, for example, during its 2007 season.²⁰ The finale of the series, with 11.9 million viewers or roughly 10 percent of the total US television households, got higher ratings than most broadcast network programs that week. However, all that means is that more than 90 percent of the television audience, and over two-thirds of those who subscribe to HBO, did *not* watch "The Sopranos." For the week of April 9, 2007, "The Sopranos" was the highest rated show on cable with 7.42 million viewers. The *second* and *third* most popular shows were episodes of "Sponge-Bob" on Nickelodeon and "WWE Raw" on USA, with 5.9 million and 5.7 million viewers, respectively. The next three most popular were episodes of "Charm School," "I Love New York – Reunion," both on VH1, and another episode of "WWE Raw," each with about 5 million viewers.²¹ Literally hundreds of other shows had ratings too small to measure accurately.

The programming available to an MVPD is best viewed as a continuum running from most effective to least effective in attracting subscribers, per dollar of expenditure by the MVPD at prevailing prices. Each programmer has channels that are currently highly desired and other programming that is less highly desired by MVPDs. This de-

²⁰ *Mediaweek*, "The Programming Insider," June 13, 2007, viewed at http://www.mediaweek.com/mw/search/article_display.jsp?vnu_content_id=1003598083.

²¹ *Mediaweek*, "The Programming Insider," April 19, 2007, viewed at http://www.mediaweek.com/mw/search/article_display.jsp?vnu_content_id=1003573870.

sirable programming has a place in the continuum, but is substitutable with other programming of similar effectiveness. None of these desirable networks constitutes a separate relevant market (to use an antitrust concept) because MVPDs can substitute other programming of lesser effectiveness in attracting subscribers, adjusting their own prices accordingly, and this serves as a competitive constraint on the price that can be charged for the most desirable programming.

None of the cable networks that might be classified as especially “desirable” has a substantial share of viewing. See Figure 16. No basic cable network is viewed by as much as 2 percent of households with televisions. It is hard to believe that if an MVPD decided not to carry one or more of these “desirable” networks, its subscribers would stampede for the exits.

Figure 16: Prime time ratings of most viewed broadcast and cable networks, 2006-2007

Network Type	Network	HH Rating
Broadcast	CBS	6.90
Broadcast	FOX	5.50
Broadcast	ABC	5.40
Broadcast	NBC	5.10
Broadcast	Univision	1.90
Broadcast	CW	1.80
Cable	Disney	1.79
Cable	USA	1.76
Cable	TNT	1.52
Cable	ESPN	1.39
Cable	Adult Swim	1.29
Cable	Nickelodeon/Nick at Nite	1.24
Cable	TBS	1.12
Cable	Lifetime	1.07
Cable	Fox News	1.03

Source: Appendix 3.

By way of empirical analysis of the issue, the Commission offers an econometric study of the effect of exclusivity in the licensing of regional sports networks to independent MVPDs in two cities. The study has been criticized by others on methodological grounds, but the major drawback of the study is that it does not offer a test of the correct hypothesis. The question examined (whether not having a particular RSN reduces market share) is quite different from the question whether RSNs or any other programming is essential. The issue is whether competitors can *compete*, not whether they can get the same market share. The DBS providers that are the subject of the study did not go out of business.

The Commission's mistaken view of "must have" programming may be coloring its consideration of alleged tying in the sale of programming to MVPDs. The Commission may believe that a programmer with "must have" networks would threaten to deny such networks to MVPDs that do not agree to take other, less desirable, networks. Even if there were a network so unique in attracting subscribers that an MVPD without it would have to charge much lower prices and earn substantially lower profits, the implication simply is that the programmer would be able to command a high price for the network. If such a programmer wanted to require an MVPD to carry less desirable networks as a condition for carrying the unique network, it could do so only by charging a lower price for the unique programming (as a means of offsetting the perceived "negative value" of the additional networks). A programmer trying to induce MVPDs to carry less desirable networks could as easily do so by offering a discount (possibly even a negative effective price) on less desirable networks directly. Tying with a "must have" network would be pointless because there are other ways for programmers to achieve the same ends.

V. The welfare effects of bundling defy generalization

Before exploring the possible connection between wholesale and retail packaging, it is important to understand the economic analysis of product packaging, including bundling, nearly all of which is equally applicable to retail and wholesale packaging of video programming. Because I attach earlier papers describing this analysis as it applies in the retail context (see Attachments 1-5), I offer here only a brief summary of the chief economic principles. These are developed in greater detail in Appendix 4.

Bundling is extremely common, and by no means sinister. As the variety of applicable economic models suggests, bundling occurs for more than one reason. Not all these reasons are fully understood by economists. At a very fundamental level, bundling defines the boundary between what is, and what is not, a commercial product. I develop this idea at greater length below because any rule constraining bundling is, in effect, a rule defending the economic legitimacy of certain product definitions. Unfortunately, once a product is defined by a government decree, rather than by a competitive market outcome, it ceases to have any economic legitimacy—i.e., no longer is it presumptively efficient.

Most products are bundles. An automobile is typically sold as a bundle of components including the chassis, power train, steering, brakes, tires, etc. When retailers purchase a product with components that are *physically* connected together by the manufacturer, one would expect the retailer to sell its customers the same bundle that was

purchased from the manufacturer. However, when there is no physical connection among bundle components, there is no reason in general to expect a relationship between the form in which a retailer purchases products (individually or as a bundle) and how the retailer sells the products (individually or as a bundle).

A common form of bundling is a requirements agreement. A purchaser obtains favorable pricing from a supplier on the condition that the purchaser buy all of some class of products from that supplier. For example, a steel manufacturer may offer a lower price to a customer fabricating filing cabinets on the condition that the customer purchase all its steel from that steel manufacturer. In another form of requirements contract, a restaurant franchisee may agree to buy all of certain inputs from the franchisor. Each of these agreements can promote economic efficiency, and indeed is generally presumed to do so if the seller does not have market power. Even though the buyer purchases products in a bundle, however, the buyer does not necessarily sell bundled products to its customers. The firm fabricating file cabinets need not require that an office supply retailer purchase all its file cabinets from that fabricator. Similarly, a franchise restaurant will not require that its patrons purchase everything on its menu.

Looking downstream from firms that bundle illustrates that upstream bundling does not necessarily cause downstream bundling. A similar lesson can be drawn looking upstream from firms that bundle. There is no reason to suppose that a firm that sells its products as bundles purchased those products, or inputs to those products, in bundles. Returning to the examples cited above, one cannot infer that the steel manufacturer that chooses to offer requirements contracts to its customers purchased its inputs under requirements contracts. A restaurant franchisor requiring that franchisees purchase all of certain products from the franchisor probably obtained those products from multiple sources. In other words, there is no general rule that firms that sell bundles also purchase bundles, much less that such firms sell in bundles *because* they purchase bundles.

Perhaps the least intuitive lesson of the economic analysis of bundling is that it is possible to construct examples in which customers gain more from purchasing a bundle of goods than they would from buying the goods individually. There are many reasons why this may happen, related to the underlying basis for the decision to bundle. One simple reason is that it may be cheaper to produce and market a bundle than the individual components, which implies that the components will cost more, in the aggregate, than the price of the bundle. Given higher prices, customers will demand less. A second reason why this may happen is the effect of heterogeneity in the rela-

tive valuations of individual components by different customers, illustrated in Appendix 4.

Intuition can also lead one astray in another respect. As discussed later in this report, video products are supported both by customers (MVPDs or retail customers) and by advertisers. Any change that reduces audience penetration will reduce advertising revenue. That leads to a negative feedback effect on customer pricing and program quality expenditures, which further reduces advertising demand. To avoid this downward spiral, program suppliers typically offer lower per-subscriber prices from MVPDs willing to commit to carry programming to greater percentages of subscribers. The result may falsely *appear* to be an “all or nothing” bundle. But in fact, the (inaccurate) assumption that programmers engage in wholesale bundling does not imply anything about retail tiers.

The most common economic models of bundling explain bundling as a means for producers to sort out customers according to how much they value a product. These models have common characteristics—economic efficiency may either increase or decrease, and some customers may benefit, even when overall welfare decreases. As this characterization suggests, bundling tends to make some purchasers better off and some purchasers worse off.

Some models with particular assumptions can be used to show that purchasers as a whole are made better off by bundling than they would be with stand-alone pricing. Other models with other assumptions can be used to show the opposite. There is no obviously appropriate model that permits one to characterize the outcome for wholesale or retail video programming. Hence, the welfare effect is indeterminate. It follows that regulatory intervention is little more than a stab in the dark.

Applied to wholesale video programming, the economic learning suggests that pure wholesale bundling (assuming, contrary to the evidence, that it takes place!) makes some MVPDs better off and some worse off than if they were offered stand-alone pricing of the same networks, with no predictable overall effect on welfare. Further, in a market with stand-alone network marketing, the identity of the networks carried by an MVPD will not be the same as with pure bundling. This implies that the Commission’s economic regulation will distort programming content. If, as the Commission may believe, all MVPDs that are offered a package of networks on a “take-it-or-leave-it” basis accept the offer, then eliminating such offers could well cause the audience penetration of the average network to be lower, and hence reduce advertising revenue, and either the sum of the stand-alone prices of the current set of networks will

be higher than the corresponding bundle price, or program quality will be less, or both.

How does this affect retail customers? The effect of wholesale unbundling on consumers (again, assuming that bundling now takes place) is that their MVPDs will be offering different items in their tiers, possibly at different (aggregate) prices to reflect different wholesale programming costs and advertising revenues. As discussed in the next section, there is no reason to suppose that the extent of bundling at retail would change. In the end, some consumers would be worse off and others might be better off. To illustrate: Compare a \$20 bundle with 10 networks and an \$18 bundle with 9 networks. Those consumers who value the 10th network at more than \$2 are net worse off; those who value the 10th network at less than \$2 are net better off. Appendix 4 describes these possible outcomes in greater detail.

We simply don't have the facts needed to determine whether changes in the mix of networks in tiers will make consumers as a whole better off or worse off. Assuming the MVPD just stops purchasing some networks, which networks would no longer be purchased and included in the MVPD's bundle/tier; how much less would the MVPD pay for the programming; how much would the MVPD's retail price for the bundle/tier be reduced; and how would various consumers value the networks no longer included in the MVPD's bundle/tier? If the MVPD were to add other networks in place of the networks that were dropped when the programmer no longer offered a bundle, this would expand the number of unknowns.

Welfare analysis also requires knowing what types of individuals are harmed or benefited, because marginal changes may not have an equal value to all consumers. For example, if it turned out that relatively well-off people would benefit from an intervention that required stand-alone pricing by programmers, while less well-off families would fare better if their MVPDs purchased under pure bundling, the intervention would harm the poorest Americans. A more complete evaluation would have to take into account the appeal to poorer consumers of any networks that would or would not be carried by MVPDs because of a regulation on wholesale bundling. For all these reasons, the Commission cannot conclude that eliminating pure bundling in wholesale programming, assuming that it exists, would improve consumer welfare.

VI. Retail bundling is not caused by wholesale packaging

Retail packaging of video content into "tiers" has been the subject of much recent policy debate. Although the Commission does not say so, it may be that its otherwise

puzzling concern with wholesale packaging is related to the possibility that wholesale bundling (if it existed in the form the Commission describes) might be the cause of retail bundling. If so, the Commission is mistaken. Not only does “‘take-it-or-leave-it’ tying” not take place, but even if it did, its elimination would not force MVPDs to unbundle content in any particular way, or at all. Even if wholesale video offerings were bundled, contrary to the evidence, it would not be necessary to eliminate wholesale bundling to permit retail unbundling.

The practice of cable operators’ providing programming to subscribers on a bundled basis certainly did not arise as a result of purchasing networks as packages. Cable operators offered bundled service from the very beginning. Cable television got its start as an antenna service.²² Entrepreneurs erected large antennas in areas where home reception of over-the-air television broadcast signals was poor. The signal from this antenna was then delivered by cable to subscribers. Subscribers had available to them all the broadcast signals—a bundle. Over the course of time, non-broadcast programming emerged that cable operators could offer to their subscribers. Some of these networks were “premium” channels provided to subscribers on a stand-alone basis. Other networks were “basic” and were provided to all subscribers as part of a bundled service.

A look back at the basic cable networks available 25 years ago is instructive. *CableVision*, an industry publication, identified 31 basic satellite video programming services available in 1982.²³ In all but seven cases, each of these networks was owned by a programmer with no other basic network. The remaining seven networks were associated with three different ownership groups, each with two or three networks. Bundling of networks by programmers, if it existed at all, cannot have been a significant feature then. Yet cable operators of that era supplying basic networks to consumers offered them as part of a tier or bundle.

Knowing that MVPDs sell their programming as parts of tiers, programmers offer incentives to MVPDs to influence the MVPDs’ decision concerning tier placement. Other

²² See Robert W. Crandall and Harold Furchtgott-Roth, *Cable TV: Regulation or Competition* (Washington: The Brookings Institution, 1996), pp. 1-7; and Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge: Harvard University Press, 1992), pp. 211-218.

²³ These networks were identified in *CableVision*, November 22, 1982, p. 350. *CableVision*’s list of basic satellite-fed programming services included Electronic Program Guide (EPG), but EPG was not included in the count of 31 networks.

things being equal, a programmer prefers for MVPDs to place its networks on a tier where a larger number of subscribers can view its networks. Programmers typically obtain a large portion of their revenues from the sale of advertising. Hence, increasing the number of potential viewers and thereby the size of the audience that can be sold to advertisers is valuable to programmers. Based on interviews with Fox, NBCU and Viacom officials, I understand it to be common for programmers to offer reduced per-subscriber fees when the MVPD agrees to make a network available to a larger number of subscribers, such as by carrying a network on a tier that has more subscribers than an alternative tier.

It would be undesirable to write a contract between a program supplier and an MVPD that specified just the price but provided no assurance regarding the number of subscribers that would view the programming. If the Commission sought to prevent program suppliers and MVPDs from reaching agreements under which programming is carried to specific numbers or percentages of subscribers, the result would be to reduce programmers' advertising revenues and therefore either to increase the per-subscriber prices paid by MVPDs for content, or to reduce program quality, or both. Cable operators, like programmers, derive revenue both from content fees and from advertising, and the effects of regulation are harder to predict for "two-sided" services.²⁴

The mere existence of a single contract between a given buyer and seller covering multiple products obviously is not evidence of bundling. Imagine that the price and carriage commitment with respect to each product were separately negotiated. It would be sensible to then write a single contract, because the vast majority of the other terms would be identical. This contract might well specify a single price (or price per subscriber) covering all the networks being carried, because that could facilitate agreement even when the parties disagreed about the individual product prices.

²⁴ A two-sided service or market is one in which there are two kinds of customers, and demand by one type of customer is greater, the more demand there is of the other type. This is a generalization of the more familiar "network effects" phenomenon. The value of a network to a given user is greater, the greater the number of other users. In video programming, the demand by advertisers is higher, the greater the number of viewers. The demand by viewers is greater, the higher the quality of programming. The two demands are linked through expenditures on program quality, which are driven higher by competition for audiences among program suppliers.

Finally, and assuming *arguendo* that wholesale bundling existed, mandatory wholesale unbundling is unnecessary to permit retail unbundling. Suppliers care about penetration for the reasons discussed above, related to advertising revenue, and operators care because the lower the percentage of subscribers reached, the higher the price they can expect to pay per subscriber for the content, to offset the supplier's lost advertising revenue. Given the business considerations that lie behind currently negotiated network fees, suppliers would not be indifferent if operators proposed to pay network fees previously negotiated but provide a la carte audiences much smaller than the programmers anticipated. If one assumes that operators wanted to offer programming on an a la carte basis and that programmers and operators were to reach agreement on fees that reflect a la carte retail distribution, there is no reason why a supplier could not sell its networks as a package. For instance, the supplier could "require" that an operator offer all of the supplier's networks rather than just a few.

VII. Competitive stand-alone prices exceed competitive package prices

Given the presence already of what the economic literature calls "mixed bundling" (both packages and individual network sales) in the wholesale market, one potential source of buyer complaints is a perception on their parts that the sum of the prices at which they are offered individual networks compares unfavorably with the prices of various packages on offer. This perception, while understandable, betrays a fundamental misunderstanding of the video programming marketplace.

Program suppliers offer both established content with relatively high demand and newer or less popular content that requires additional penetration in order to succeed. The stand-alone competitive price for the new or less popular content may well be negative. In other words, the program supplier would be willing to pay the MVPD for higher penetration for certain channels, both because that lowers unit costs per viewer and because it increases advertising revenue. The payment to carry less desirable content may take the form of a price discount on the more popular content if the MVPD agrees to take both. As a result, the competitive price for a package of content may be less than the competitive price for a stand-alone unit of content—whether a popular program or a popular channel—by itself. This can lead to the erroneous conclusion that the supplier is "forcing" the buyer to carry the less popular network.

VIII. Regulation of “mixed bundle” packaging is impractical

Based on the evidence I have reviewed, Fox, NBCU and Viacom do not offer their networks in “take-it-or-leave-it” bundles. MVPDs are presented with alternative bundles and stand-alone prices for individual networks, and MVPDs can propose their own bundles.

If this is true for programmers generally—something I am not now in a position to confirm—then one wonders what it is that some small cable operators seemingly are complaining about. It is possible that the real complaint of these small operators is as follows: even though networks are offered individually and in various packages, one bundle is so much more desirable than the others that a rational MVPD effectively has only one reasonable choice. In other words, the competitive market prices of stand-alone networks and alternative bundles are so high that they do not provide any practical alternative to the bundle that the MVPD purchases.

If that is their complaint, my first response is that, generally speaking, in any business the price for a product bundle will be less than the sum of the stand-alone prices for the elements of the bundle, as explained above. Second, the behavior of other MVPDs strongly indicates that the prices of stand-alone networks and alternative bundles are not too high to be a realistic alternative. The evidence I have reviewed shows that many small operators purchase their networks using stand-alone prices.

The evidence presented in Section II demonstrates that different cable operators take different bundles of networks from the same program supplier. Among small operators, none takes all of Viacom’s programming and 11 percent take only one network. Among small operators taking NBCU programming outside of NCTC, half carried only one NBCU network, 85 percent carried one or two NBCU networks, and only 2 percent carried all six NBCU networks studied. Similar patterns hold for Fox and other programmers as well. See Figures 1-13. Apparently, there are many combinations of networks that various small operators find attractive.

If the Commission were to take seriously a complaint that stand-alone prices to MVPDs are too high to provide a real alternative, the Commission would be required to determine when rates are “too high” for every cable network at issue, including any change in pricing with regard to such variables as transmission quality, channel placement, minimum subscriber guarantees, and the like. Suppose that the Commission sought to achieve an outcome in which every “small” cable operator was presented with a set of “reasonably priced” a la carte alternatives to packaged video pro-

gramming options. The Commission could not expect such a regulation to be self-enforcing. Disputes would arise. Predictably, some operators would claim that some particular network was “unreasonably” overpriced. The Commission would have to assure itself that any proposed lower package price was compensatory and that the stand-alone prices represented realistic alternatives on a case-by-case basis, taking into account the many variables involved in any carriage negotiation between a programmer and an MVPD. Neither the traditional tools of utility regulation nor more modern tools such as rate caps offers a practical solution to such disputes.

A particular problem in establishing “reasonable” stand-alone network prices would be the difficulty of determining cost. Video programming is largely non-rivalrous. Put differently, virtually all production and many distribution costs are joint and common with respect to individual customers. The Commission would have to develop a set of rules for the allocation of common costs to particular customers. Economically sound rules would result in different prices for each network to each customer, related to that customer's elasticity of demand for each network. Pricing would also have to take into account the feedback effect of distribution on advertising revenues. Clearly, this would be an unworkable regulatory scheme.

IX. There are no “bright lines” separating video package components

All video products are packages, or packages of packages. This simple fact undermines the conceptual basis of any proposal to regulate packaging or bundling. Regulating the extent of packaging necessarily implies that the Commission can reasonably determine the “legitimate” economic boundaries of the regulated services. But the Commission lacks a foundation for establishing such boundaries, especially for the range of services called video programming.

The most basic component of video programming service is an apparently unitary but highly variable bundle of services called by such names as episode, segment, special, game or movie. Such a basic unit itself is not well-defined, made up of varying proportions of other services, such as content, promotion, and embedded advertising. But very few wholesale video programming transactions involve even such relatively basic units. Video programming is instead almost always packaged when it is sold to retail distributors. For example, episodes are bundled into series. Series are bundled

into daily, weekly, and seasonal schedules, or channels. Channels, or networks, are packaged into multichannel groups.²⁵

Further, each basic unit of programming, if one can be said to exist, is also a bundle of services available through time and space. The dimensions of time and space are manifested in the concepts of distribution windows, releases, and runs, and of distribution territories. The shapes and boundaries of all these bundles are fluid. They vary in response to the economics of production and distribution, the circumstances of changing supply and demand. Economies of scope and scale in production and marketing, for example, promote bundling of episodes into series or encourage continuing daily programs, such as newscasts.

It is reasonable for a buyer to prefer to negotiate a single price for a package of video programming, rather than to negotiate for individual units at a lower degree of aggregation, for several reasons, not least being the savings in negotiation costs. For example, potential savings in transaction and search costs, as well as risk management, encourage some buyers to favor package purchases over episode-by-episode purchases. As economic circumstances, market prices, and technologies change, the boundaries of efficient packages also change. For example, television advertisers once purchased sponsorships of particular program series. That is unusual today. Advertisers found that it was less risky to purchase exposure on a portfolio of programs, and suppliers accommodated this demand. In other mass media—newspapers, for example—products corresponding to multichannel bundles without stand-alone or a la carte options are common. One could think of newspaper sections as the World News channel, the Local News channel, the Business channel, the Style channel and the Sports channel. The point is not that one such characterization is correct; instead, defining the product in any particular way is arbitrary.

Similarly, to the extent the Commission seeks, through the present proposal, to constrain retail bundling of programming in the hope of allowing subscribers to avoid

²⁵ Indeed, of all the bundles in which programming is commonly sold, the one least infused with “market outcome” economic legitimacy is the channel or network. This familiar concept is a construct, not of markets, but of engineering assumptions made in the 1920s and frozen ever since in federal spectrum allocation decisions. Given the artificial origins of the single-frequency-through-time “unit” of service, there is no economic basis for an assumption that economic welfare is well-served by preserving the opportunity of retailers to purchase wholesale units of programming in this particular configuration, even if that option appeared to be threatened.

exposure to undesired programming, the dividing line between “networks” is not a useful focus. It is surely true already that most, perhaps all, individual networks contain *some* material that is disliked by *some* subscribers. If retail unbundling results in lower penetration rates for many channels, as seems likely, programmers will continue to seek out the largest potential audiences available to them. Programming decisions and patterns likely will change on all networks. It is entirely possible that the amount of “unwanted” programming on the surviving networks will increase, relative to their present offerings.

X. Regulation of packaging threatens other FCC objectives

Virtually all economists and economic models agree that bundling brings benefits to some customers, even in cases where other customers are worse off. But which ones? While the demand characteristics of the customers who gain or lose from bundling can be described in technical terms, it is seldom possible to identify those customers' other characteristics, such as their economic or social status. Even if the Commission were persuaded that aggregate consumer welfare would increase if bundling were restricted, the Commission would risk violating other policy objectives it favors.

At the retail level, for example, even if aggregate welfare were increased by mixed bundling, this would be achieved only by making some unknown group of viewers worse off. Before such a decision could be made, it is important for the Commission to assess the risk that the worse-off consumers may be those whom the Commission wishes to favor (the poor, the elderly, the young, or minority groups, for example). The Commission lacks information on such effects. Regulatory intervention at the wholesale level presents similar issues. First, the downstream effects on particular consumers are even more difficult to predict. Second, why should the Commission favor one set of “small” cable operators at the expense of other “small” cable operators?

XI. Packages often save time and money for small buyers

Even if program suppliers did offer “take-it-or-leave-it” packages to small cable operators, contrary to the representations of the suppliers, that could be an entirely normal and efficient competitive market outcome. In every industry, smaller customers have fewer choices than larger ones, because smaller buyers and sellers alike do not find it worthwhile to bear the considerable costs of bargaining over the details of complex transactions. To do so would simply increase the cost (and price) of the transaction, disadvantaging both buyer and seller. Negotiation and related costs tend

to be a larger percentage of small transactions than larger ones. In this circumstance, what may appear to be the exercise of market power is nothing but the commonplace phenomenon of small buyers being offered standardized products at list prices, while large customers and their suppliers find it worthwhile to negotiate off-list, non-standard deals. This is not economically inefficient, and it is almost certainly the way in which small operators purchase most of the inputs used in their businesses—from service vehicles to converter boxes to outside plant components. A regulation requiring individualized negotiation over arbitrarily-defined components of standard product bundles for all customers, regardless of size, likely would reduce welfare.

XII. Unintended side effects are a likely result of regulation

Unpredictable unintended side effects are a likely result of any packaging regulation the Commission might attempt. Viewer welfare is related not only to the quantity of programming, but also to its quality. Attractive programming costs more to produce than less attractive programming. Advertiser welfare is related to the size of the audience delivered by the programming. Advertising revenue, given competition, affects viewer welfare because competing programmers exhaust any disequilibrium rents in expenditures on increased program quality. The point of unbundling wholesale video programming, presumably, is to respond to the claim that “small” cable operators would be able to choose networks different from those they now carry, not merely to permit them to carry the same networks at a lower total price. But a change in the program choices of “small” operators will change the size of the audience for each affected network.

These changes, even though individually small, can have a magnified effect on program quality and quantity. In advertising markets even small differences in the sizes of audiences delivered by networks competing for similar audience segments can translate into large differences in advertising revenues. Large differences in advertising revenues imply large changes in program quality, a positive feedback, and changes in subscriber prices, where applicable. In the end, a regulation aimed at making (some) “small” cable operators better off at the expense of program suppliers is likely to have important and unpredictable positive and negative consequences for viewers everywhere. There is no basis to assume that these consequences, individually both positive and negative, add up to a net improvement in welfare, even if we weight every viewer equally. The point is not that the Commission should be required to understand and defend all the general equilibrium effects of its regulatory interventions. However, while it often is reasonable to assume that such effects are negligible, such effects are not *always* negligible, especially when, as here, there are reasons

to expect strong interactions with the interests of other consumers of services produced with common costs, and sold in complex two-sided markets.

Video programming provided to MVPDs frequently is also released in other distribution “windows.” For instance, programming for a cable series may subsequently be released on DVD for home entertainment use. Changes in programming quality will have effects on viewing and the demand for programs beyond what is provided to subscribers by MVPDs. Cable programmers also purchase inputs—e.g., television rights to movies, sporting events. Decreases in cable programming expenses could mean lower payments to such input suppliers.

Appendix 1: Networks Used for Carriage Analyses

Networks Used for Warren Carriage Analysis (Figs. 11, 12, 13)	Owner
A&E (Arts & Entertainment)	A&E
Biography Channel, The	A&E
History Channel	A&E
History International (aka History Channel International)	A&E
American Movie Classics (AMC)	Cablevision
fuse	Cablevision
Independent Film Channel (IFC), The	Cablevision
WE: Women's Entertainment	Cablevision
AZN Television (formerly International Channel Networks)	Comcast
E! Entertainment Television	Comcast
G4 VideogameTV (formerly G4 tech TV)	Comcast
Golf Channel, The	Comcast
Style Network, The	Comcast
Versus (formerly Outdoor Life Network - OLN)	Comcast
Animal Planet	Discovery
Discovery Channel	Discovery
Discovery HD Theatre	Discovery
Discovery Health Channel	Discovery
Discovery Kids Channel	Discovery
Discovery Times Channel	Discovery
FiT TV	Discovery
Learning Channel (TLC), The	Discovery
Military Channel	Discovery
ABC Family	Disney
Disney Channel	Disney
ESPN	Disney
ESPN Classic	Disney
ESPN2	Disney
ESPNEWS	Disney
Lifetime Movie Network	Disney
Lifetime Real Women	Disney
Lifetime Television	Disney
SOAPnet	Disney
Toon Disney	Disney
DIY (Do-It-Yourself Network)	E.W. Scripps Co.
Fine Living	E.W. Scripps Co.
Food Network	E.W. Scripps Co.
Great American Country (GAC)	E.W. Scripps Co.
Home & Garden Television (HGTV)	E.W. Scripps Co.
Shop At Home Network	E.W. Scripps Co.

Networks Used for Warren Carriage Analysis (Figs. 11, 12, 13)	Owner
Fox College Sports	Fox
FOX Movie Channel	Fox
FOX News Channel	Fox
Fox Soccer Channel (formerly Fox Sports World)	Fox
FSN (Fox Sports Net)	Fox
FUEL TV	Fox
FX	Fox
National Geographic Channel	Fox
SPEED Channel	Fox
America's Store	Liberty Media
Encore	Liberty Media
Game Show Network (GSN)	Liberty Media
Home Shopping Network (HSN)	Liberty Media
MoviePlex	Liberty Media
QVC	Liberty Media
Bravo	NBC Universal
CNBC	NBC Universal
CNBC World	NBC Universal
MSNBC	NBC Universal
Sci Fi Channel	NBC Universal
Sundance Channel	NBC Universal
USA Network	NBC Universal
Beauty & Fashion Channel	The Media Group
Healthy Living Channel	The Media Group
Men's Channel	The Media Group
Boomerang	Time Warner
Cartoon Network	Time Warner
CNN (Cable News Network)	Time Warner
CNN Headline News	Time Warner
CNN International	Time Warner
Court TV	Time Warner
TBS Superstation	Time Warner
TNT (Turner Network Television)	Time Warner
Turner Classic Movies (TCM)	Time Warner
Church Channel, The	Trinity Broadcasting Network
JCTV	Trinity Broadcasting Network
TBN - Trinity Broadcasting Network	Trinity Broadcasting Network
Bandamax	Univision
Galavisión	Univision
Telefutura	Univision
Univision	Univision

Networks Used for Warren Carriage Analysis (Figs. 11, 12, 13)	Owner
BET (Black Entertainment Television)	Viacom
BET J	Viacom
Comedy Central	Viacom
Country Music Television (CMT)	Viacom
MTV	Viacom
MTV 2	Viacom
Nickelodeon/Nick at Nite	Viacom
Spike TV	Viacom
TV Land	Viacom
VH1	Viacom

Sources: FCC, Twelfth Annual Report (released March 3, 2006); SNL Kagan, Economics of Basic Cable Networks, 2007 Edition; National Cable and Telecommunications Association (NCTA), <http://www.ncta.com>; Broadcasting & Cable, "Guide to Hispanic TV Networks," (Oct. 2007) <http://www.broadcastingcable.com>; Warren Communications News, Television & Cable Factbook, 2007 Edition; Fox; NBC Universal; Viacom.

Networks (18) used for Viacom analysis (Figs. 1, 2)

BET
BET J
CMT
CMT Pure Country
Comedy Central
MTV
MTV 2
MTV Hits
MTV Jams
Nickelodeon/Nick at Nite
Nickelodeon GAS
Nicktoons
Noggin
Spike TV
TV Land
VH1
VH1 Rock
VH1 Soul

Networks (8) used for Fox analysis (Figs. 3, 4, 5, 6)

Fox College Sports
Fox Movie Channel
Fox News Channel
Fox Soccer Channel
FUEL
FX
National Geographic
Speed Channel

Networks (6) used for NBCU analysis (Figs. 7, 8, 9, 10)

Bravo
CNBC
CNBC World*
MSNBC
Sci Fi Channel
USA Network

*CNBC World not used in "NCTC only" analysis

Appendix 2: Network Packages Carried by Small Systems and Operators Are Diverse

Viacom			
Networks carried	Systems	Unique network packages	Systems carrying most common package
1	23	5	11
2	39	11	14
3	39	7	15
4	38	12	16
5	22	10	7
6	14	7	7
7	20	5	15
8	1	1	1
9	2	2	1
11	1	1	1
13	1	1	1
14	1	1	1
15	3	3	1
16	1	1	1
Total	205	67	

Source: Viacom. **Note:** Includes small systems contracting directly with Viacom.

Fox

Networks carried	Systems	Unique network packages	Systems carrying most common package
1	821	6	312
2	626	16	176
3	574	23	250
4	407	29	144
5	545	19	182
6	636	13	307
7	451	6	398
8	140	1	140
Total	4200	113	

Source: Fox. **Note:** Includes small systems.

NBC Universal

Networks carried	Operators	Unique network packages	Operators carrying most common package
1	135	5	85
2	95	6	54
3	17	7	7
4	9	5	5
5	10	1	10
6	5	1	5
Total	271	25	

Source: NBC Universal. **Note:** Includes small, non-NCTC operators.

Appendix 3: Nationally Distributed Basic Cable Networks

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
29HD Network	2005	29 HD Network		
A&E (Arts & Entertainment)	1984	A&E	0.59	0.95
ABC Family	1977	Disney	0.45	0.73
Africa Channel, The	2005	Africa Channel, The		
American Movie Classics (AMC)	1984	Cablevision	0.4	0.71
AmericanLife TV (formerly Goodlife Television Network)	1985	Concept Communications		
America's Preview	2004	The Media Group		
America's Store	1986	Liberty Media		
Angel One		Dominion Video Satellite		
Angel Two		Dominion Video Satellite		
Animal Planet	1996	Discovery Holding Co.	0.22	0.39
Anime Network	2002	ADV Films		
Antena 3 International	1996	Antena 3 International		
Auction Network		Auction Network		
AYM Sports	2003	Digital Films		
AZN Television (formerly International Channel Networks)	1990	Comcast		
Azteca America	2004	TV Azteca		
BabyFirstTV	2006	Bellco-Regency		
Bandamax	2003	Univision		
BBC America	1998	BBC Worldwide	0.04	0.06
BBC World News	2006	BBC Worldwide		
Beauty & Fashion Channel	2001	The Media Group		
BET (Black Entertainment Television)	1980	Viacom	0.29	0.47
BET Gospel	2002	Viacom		
BET J	1996	Viacom		
Big Ten Network	2007	Big Ten Network		
Biography Channel, The	1998	A&E	0.07	0.1

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
Black Family Channel	1999	Programming Acquisitions LLC		
Blackbelt TV	2004	Threshold TV Inc.		
Bloomberg Television	1995	Bloomberg Media		
BlueHighways TV	2005	Network Creative Group LLC		
B-Mania	2000	B-Mania		
Boomerang	2000	Time Warner		
Bravo	1980	NBC Universal	0.22	0.42
Bridges TV	2004	Bridges TV		
BYU Television	2000	Church of Jesus Christ of Latter-Day Saints		
Canal 24 Horas	1999	Radio Television Española Internacional		
Canal 52 MX	2005	MVS Television		
Canal Sur	1991	SUR Corp.		
Caracol TV	2003	Caracol Television International Inc.		
Career Entertainment Television	2004	Career Entertainment Television		
Cartoon Network	1992	Time Warner	0.81	0.98
Casa Club TV	2003	MGM-Liberty Global		
Catalog TV		The Media Group		
CCTV-E&F	2004	China Central Television		
Celtic Vision	1995	Celtic Vision Productions Ltd.		
Centroamerica TV	2004	Centroamerica TV		
Chiller	2007	NBC Universal		
Church Channel, The	2002	Trinity Broadcasting Network		
Cine Latino	1994	MVS Television		
Cine Mexicano	2004	Cine Mexicano LLC		
Classic Arts Showcase	1994	Rigler-Deutsch Foundation		
CMT Pure Country (formerly VH1 Country)	1998	Viacom		
CNBC	1989	NBC Universal	0.16	0.16
CNBC World	1989	NBC Universal		
CNC Columbia	1999	CNC Columbia		
CNN (Cable News Network)	1980	Time Warner	0.39	0.58

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
CNN en Español	1997	Time Warner		
CNN Headline News	1982	Time Warner	0.19	0.29
CNN International	1995	Time Warner		
CoLours TV	2001	Black Star Communications		
Comedy Central	1991	Viacom	0.43	0.69
Cornerstone TeleVision	1979	Cornerstone TeleVision		
Country Music Television (CMT)	1983	Viacom	0.15	0.25
Court TV	1991	Time Warner	0.46	0.81
Crime & Investigation Network	2005	A&E		
CRN Networks	1983	CRN Digital Networks		
C-SPAN	1979	C-SPAN		
C-SPAN2	1986	C-SPAN		
C-SPAN3	1997	C-SPAN		
CSTV (College Sports Television)	2003	CBS Corp.		
Current TV (formerly Newsworld International)	1994	Gore-Hyatt		
Daystar Television Network	1998	Daystar Television Network		
De Pelicula	2003	Univision		
De Película Clásico	2003	Univision		
Deep Dish TV	1986	Deep Dish TV		
Discovery Channel	1985	Discovery Holding Co.	0.5	0.81
Discovery en Español	1998	Discovery Holding Co.		
Discovery HD Theatre	2002	Discovery Holding Co.		
Discovery Health Channel	1998	Discovery Holding Co.	0.09	0.15
Discovery Home Channel	1996	Discovery Holding Co.		
Discovery Kids Channel	1996	Discovery Holding Co.		
Discovery Kids en Español	2005	Discovery Holding Co.		
Discovery Times Channel	1996	Discovery Holding Co.	0.06	0.08
Discovery Travel and Living en Español (Viajar y Vivir)	2005	Discovery Holding Co.		
Disney Channel	1983	Disney	1.12	1.79
DIY (Do-It-Yourself Network)	1994	E.W. Scripps Co.		

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
DMX MUSIC	1991	Capstar Partners		
Docu TVE (formerly Grandes Documentales)	1996	Radio Television Española Internacional		
Documentary Channel, The	2006	Documentary Channel		
Dream Network, The	1994	Brohein Group LLC		
E! Entertainment Television	1990	Comcast	0.23	0.36
Ecuavisa Internacional	2004	Corporación Ecuatoriana de Televisión		
Employment Channel, The	2005	The Employment & Career Channel		
Encore	1991	Liberty Media	0.11	0.17
Encore Action	1994	Liberty Media		
Encore Drama	1994	Liberty Media		
Encore Love	1994	Liberty Media		
Encore Mystery	1994	Liberty Media		
Encore WAM!	1994	Liberty Media		
Encore Westerns	1994	Liberty Media		
ESPN	1979	Disney	0.65	1.39
ESPN Classic	1995	Disney	0.05	0.08
ESPN Deportes	2004	Disney		
ESPN2	1993	Disney	0.24	0.46
ESPNEWS	1996	Disney	0.05	0.06
ESPNU	2005	Disney		
EWTN en Espanol	1999	EWTN Global Catholic Network		
EWTN Global Catholic Network	1981	EWTN Global Catholic Network		
Faith Television Network	2002	Faith Television Network		
Family Net	2000	In Touch Ministries		
Familyland Television Network	1999	The Apostolate for Family Consecration		
Fine Living	2002	E.W. Scripps Co.		
FiT TV	1993	Discovery Holding Co.		
Food Network	1993	E.W. Scripps Co.	0.42	0.54
FOX Business Network	2007	Fox		
Fox College Sports	2001	Fox		

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
FOX Movie Channel	1994	Fox		
FOX News Channel	1996	Fox	0.62	1.03
Fox Reality	2005	Fox		
Fox Soccer Channel (formerly Fox Sports World)	1997	Fox		
Fox Sports en Español	1996	HM-Liberty-Fox		
FREE SPEECH TV (FSTV)	1995	Public Communicators Inc.		
FSN (Fox Sports Net)	1997	Fox		
FUEL TV	2003	Fox		
Funimation Channel	2006	Navarre Corp.		
fuse	1994	Cablevision	0.02	0.03
FX	1994	Fox	0.47	0.84
G4 VideogameTV (formerly G4 tech TV)	2002	Comcast	0.06	0.09
Galavisión	1979	Univision		
Game Show Network (GSN)	1994	Liberty Media	0.15	0.18
God TV	1995	God TV		
Golden Eagle Broadcasting	1996	Golden Eagle Broadcasting		
Golf Channel, The	1995	Comcast	0.06	0.1
GolTV	2003	Tenfiela		
Good Samaritan Network	2000	Good Samaritan Network		
Gospel Broadcasting Network (GBN)	2005	GBNTV		
Gospel Music Channel	2004	Gospel Music Channel		
Great American Country (GAC)	1995	E.W. Scripps Co.	0.04	0.06
Guardian Television Network	1976	Guardian Enterprise Group Inc.		
Hallmark Channel	1998	Crown Media Holdings Inc.	0.51	0.82
Hallmark Movie Channel	2004	Crown Media Holdings Inc.		
Havoc Television	2003	Havoc Television Inc.		
HDNet	2001	Cuban-Garvin		
HDNet Movies	2003	Cuban-Garvin		
Healthy Living Channel	2001	The Media Group		
History Channel	1995	A&E	0.46	0.75

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
History Channel en Español	2004	A&E		
History International (History Channel International)	1998	A&E	0.05	0.08
Hispanic Information & Telecommunications Network	1987	HITN		
Home & Garden Television (HGTV)	1994	E.W. Scripps Co.	0.45	0.8
Home Preview Channel		KB-MM-OCA		
Home Shopping Network (HSN)	1985	Liberty Media		
Horror Channel, The	2001	The Horror Channel		
HorseRacing TV	2002	Magna Entertainment Corp.		
HTV Musica (Hispanic TV)	1995	Time Warner		
i Shop TV	2001	The Media Group		
iDrive	2005	The Media Group		
ImaginAsian TV	2004	ImaginAsian Entertainment Inc.		
Independent Film Channel (IFC), The	1994	Cablevision		
Infinito	2002	Time Warner		
Inspiration Network, The (INSP)	1990	The Inspiration Networks Inc.		
Inspirational Life Television (i-Lifetv)	1998	The Inspiration Networks Inc.		
JCTV	2002	Trinity Broadcasting Network		
Jewelry Television	1993	Jewelry Television		
Kids Sports News Network	2005	Kids Sports News Network		
KTV - Kids and Teens Television		Dominion Video Satellite		
La Familia Cosmovision	2002	The Inspiration Networks Inc.		
Latele Novela Network	2005	Latele Novela Network		
Latinoamerica Television	2004	ACS Global TV		
LATV	2001	LATV Networks		
Learning Channel (TLC), The	1980	Discovery Holding Co.	0.35	0.63
Liberty Channel	2001	Liberty University		
Lifetime Movie Network	1998	Disney	0.21	0.3
Lifetime Real Women	2001	Disney		
Lifetime Television	1984	Disney	0.7	1.07
Link TV	1996	Link Media Inc.		

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
LOGO	2005	Viacom		
Mall TV (also called Outlet Mall TV)		The Media Group		
Men's Channel	2001	The Media Group		
Men's Outdoors and Recreation	2004	The Media Group		
MEXICANAL	2005	Cablecom-CC		
Mexico 22	2004	Televisión Metropolitana S.A. de C.V.		
MHD: Music High-Definition	2006	Viacom		
Military Channel	1998	Discovery Holding Co.	0.05	0.07
Military History Channel	2005	A&E		
Moody Broadcasting Network	1982	Moody Bible Institute of Chicago		
MoviePlex	1994	Liberty Media		
MSNBC	1996	NBC Universal	0.24	0.37
MTV	1981	Viacom	0.45	0.68
MTV 2	1996	Viacom	0.09	0.11
MTV Hits	2002	Viacom		
MTV Jams	2002	Viacom		
MTV Tr3s (formerly MTV Español)	1998	Viacom		
mun2	2001	NBC Universal	0.02	0.03
NASA Television	1991	U.S. Government		
National Geographic Channel	2001	Fox	0.15	0.25
National Jewish Television	1981	National Jewish Television		
NBA TV	1999	NBA		
Nexus Dominican Television Color Vision	2004	Nexus International Broadcasting		
NFL Network	2003	National Football League	0.06	0.11
Nick 2 (also called Nick Too)	1998	Viacom		
Nickelodeon/Nick at Nite	1979	Viacom	1.28	1.24
Nickelodeon GAS-Games & Sports For Kids	1999	Viacom		
Nicktoons	2002	Viacom	0.08	0.1
Noah's World International Television	2003	Noah's World International Television		
Noggin/The N	1999	Viacom	0.15	0.11

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
Once Mexico	2004	Instituto Politécnico Nacional		
Outdoor Channel, The	1993	Outdoor Channel Holdings Inc.		
OVATION - The Arts Network	1996	Arcadia, et al.		
Oxygen	2000	NBC Universal	0.14	0.21
PBS Kids Sprout	2005	Comcast		
Pentagon Channel	2004	U.S. Government		
PIN (Product Information Network)	1994	PIN (Product Information Network)		
Praise Television	1996	Christian Network Inc.		
Puma TV	1997	El Puma Television		
QVC	1986	Liberty Media		
Real Hip Hop Network, The	2006	The Real Hip Hop Network Broadcast Corporation		
ReelzChannel	2006	Hubbard Broadcasting Corp.		
ResearchChannel	2000	ResearchChannel		
Resort & Residence TV	2004	The Media Group		
RFD TV	2000	Rural Media Group Inc.		
Ritmoso Latino	2003	Univision		
S Networks	2003	Sovereign New Media Group Ltd		
SafeTV		Total Life Community Educational Foundation		
Science Channel, The	1996	Discovery Holding Co.	0.07	0.11
Sci Fi Channel	1992	NBC Universal	0.37	0.76
Senior Citizens Network	2006	Senior Citizens Network		
Shalom TV	2006	Shalom TV, LLC		
Shop At Home Network	1986	E.W. Scripps Co.		
ShopNBC	1991	Valuevision Media		
Short TV	1999	ShortTV Inc.		
Sí TV	2004	Barshop Ventures, et al.		
Sleuth	2006	NBC Universal		
Smile of a Child	2005	Trinity Broadcasting Network		

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
SOAPnet	2000	Disney	0.13	0.25
¡Sorpresa!	2003	Firestone Communications		
Soundtrack Channel (STC)	2002	Soundtrack Channel LLC		
Southern Entertainment Television (SET)	2004	Southern Entertainment Television		
SET 2: Bluegrass Music Channel	2004	Southern Entertainment Television		
SET 3: Classic Black Gospel	2004	Southern Entertainment Television		
SPEED Channel	1996	Fox	0.1	0.17
Spike TV	1983	Viacom	0.45	0.81
SPIRIT Television	2004	Spirit Communications Inc.		
Sportsman Channel, The	2003	Sportsman Channel, The		
Stuff TV		The Media Group		
Style Network, The	1998	Comcast	0.07	0.09
Sundance Channel	1996	NBC Universal		
Sur Mex	2005	SUR Corp.		
Sur Peru	2005	SUR Corp.		
TBN - Trinity Broadcasting Network	1973	Trinity Broadcasting Network		
TBN Enlace USA	2002	Trinity Broadcasting Network		
TBS Superstation	1976	Time Warner	0.65	1.12
TCT Network	2006	TCT Ministries, Inc		
Telefe Internacional	1990	Television Federal S.A.		
Telefuturo	2002	Univision		
Telehit	2003	Univision		
Television Española Internacional (TVE)	1989	Radio Television Española Internacional		
Tempo	2005	Tempo		
Tennis Channel, The	2003	Tennis Channel, The		
Three Angels Broadcasting Network (3ABN)	1986	Three Angels Broadcasting Network		
TNT (Turner Network Television)	1988	Time Warner	0.91	1.52
Toon Disney	1998	Disney	0.15	0.18
Toon Disney en Español (SAP)	1998	Disney		
Total Living Network	1998	Christian Communications of Chicagoland		

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
Travel Channel	1987	Cox Communications	0.14	0.31
Turner Classic Movies (TCM)	1994	Time Warner		
TV Chile	1999	Television Nacional de Chile		
TV Colombia	2003	LatinAmerican Television LLC		
TV Games Network - Interactive Horse Racing	1994	TV Guide		
TV Guide Channel	1988	TV Guide	0.1	0.19
TV Guide Interactive	1996	TV Guide		
TV Internacional	2003	TV Internacional		
TV Land	1996	Viacom	0.43	0.62
TV One	2004	Comcast-Radio1-DirecTV	0.07	0.1
TV Venezuela	2005	SUR Corp.		
TVU/TVU Live	2001	Spirit Communications Inc.		
TyC Sports International Channel	2003	Grupo Clarin - TyC		
Universal HD (formerly Bravo HD+)	2004	NBC Universal		
Univision	1996	Univision		
USA Network	1980	NBC Universal	0.87	1.76
Utilísima Televisión	1996	Fox		
Versus (formerly Outdoor Life Network - OLN)	1995	Comcast	0.06	0.14
VH1	1985	Viacom	0.31	0.54
VH1 Classic	1999	Viacom	0.02	0.03
VH1 Soul	1999	Viacom		
VHUno	1999	Viacom		
Video Rola	2001	MegaCable		
VOOM HD Networks	2005	Cablevision		
VTV (Varsity Television)	2003	Varsity Media Group Inc.		
WAPA America	2004	LIN TV Corp.		
Water Channel	2005	MCE Television Networks		
WE: Women's Entertainment	1997	Cablevision	0.09	0.14
Wealth TV	2004	Wealth TV		
Weather Channel, The	1982	Landmark Communications Inc.	0.21	0.21

Network	Launch Year	Attributable Owner*	Full Day Household Rating**	Prime Time Household Rating**
Weatherscan Local	1999	Landmark Communications Inc.		
WGN Superstation	1978	Tribune Company	0.16	0.23
Word Network, The	2000	The Word Network		
World Harvest Television	1992	LeSea Broadcasting		
Worship Network, The	1992	Christian Network Inc.		
Yesterday USA	1985	National Museum Of Communications Inc.		

Sources: FCC, Twelfth Annual Report (released March 3, 2006); SNL Kagan, Economics of Basic Cable Networks, 2007 Edition; National Cable and Telecommunications Association (NCTA), <http://www.ncta.com>; Broadcasting & Cable, "Guide to Hispanic TV Networks," (October 1, 2007) <http://www.broadcastingcable.com>; Warren Communications News, Television & Cable Factbook, 2007 Edition; Fox; NBC Universal; Viacom.

* Each network was "attributed" to a single owner. Most often, the attributed owner had a majority ownership in the network. In some cases, one owner was chosen from two owners with 50 percent shares. In such cases, ownership was attributed to the owner with the larger number of other networks. Networks for which no ownership information could be determined, and networks with no owner above 49 percent, were assumed to be owned independently.

** Ratings data from Nielsen Media Research cover September 25, 2006 through September 30, 2007.

Appendix 4: Economic Analysis of Product Bundling

Firms often choose to sell related products together in packages. Bundling is used to achieve cost savings or may arise from complementarities among the products involved. Bundling can also be a form of price discrimination, allowing a firm to take into account the dispersion of buyer valuations. This appendix provides an overview of the economic analysis of product bundling, nearly all of which is equally applicable to retail and wholesale packaging of video programming. I also attach earlier papers I and others submitted to the Commission describing this analysis as it applies in the retail context (see Attachments 1-4), along with a related paper my colleagues submitted to the Commission (see Attachment 5).

In the following discussion of bundling, the consumer or purchaser can be thought of as an individual with a willingness to pay for various products (e.g., cable networks), or can be thought of as an MVPD with a reservation price for each network based on its beliefs regarding how the addition of each network will affect its profits (through increased subscribers, increased subscriber fees and increased local advertising revenues). While the MVPD as purchaser is most immediately relevant for present purposes, the broad economic results also apply to retail bundling of networks to consumers.

1. Bundling is common and can result in cost savings

Bundling is an extremely common phenomenon in the American economy. Indeed, it is more the rule than the exception. Almost every product and service purchased by consumers is bundled by sellers from various components that could each, at least in principle, be sold or priced separately. Bundling presents no presumptive threat to consumer welfare. In fact, bundling generally promotes consumer welfare and increases efficiency by lowering the prices of goods and services. Exploitation of market power is not a common reason for bundling. As Professor Bruce Kobayashi notes:

Bundling, or the selling of two separate goods in a package, is a ubiquitous phenomenon. Bundling is used by firms producing a wide variety of products and services, and is used to sell products at both the retail and wholesale level. Bundling is used by established firms and by new entrants, by dominant firms and by firms with many competitors, and by firms in both regulated and unregulated industries. The widespread and ubiquitous use of bundling by firms,

especially by those in highly competitive markets, suggests bundling yields widespread benefits for both firms and consumers.²⁶

Whether, and how, to bundle components is an important aspect of the competitive strategies of individual firms. A seller decides what components to bundle, and which components to offer for sale individually or in other bundles, in light of its costs, its understanding of what will appeal to customers and the current and expected future marketing strategies of competing sellers. Pure bundling describes a marketing strategy in which two or more products are sold only together in fixed proportions when they could be (but are not) sold separately.²⁷ Everyday examples of pure bundles include a frozen dinner with meat and vegetables, a newspaper with all sections, a reference book with all chapters, and shoes with laces. Pure bundling is a commonplace and efficient method for delivering a wide range of products to consumers.

There are a variety of reasons why competing firms find it efficient to bundle potentially distinct products. Products may be bundled to reduce the transaction and information costs involved in purchasing, distributing, and selling goods and services. Bundling can enable firms to exploit economies of scale and scope in production and distribution. Bundling can enhance the attractiveness or convenience of the product to consumers and serve to reduce consumers' search costs by allowing firms to market integrated and compatible products. For example, shoes are sold with laces because it is more efficient (i.e., it has lower transaction costs) than selling the shoes and shoelaces separately. Otherwise, consumers would have to search for, and shoe stores would have to stock, matching laces.

Oftentimes bundling occurs because sellers can assemble parts into bundled units more cheaply and efficiently than can customers. Even though a self-assembled or tailored-made product might more closely match their own special tastes, customers frequently prefer a bundled product because it has a lower all-in price. For example, a television consists of many individual components and can be regarded as a bundle including a screen, a tuner, speakers, etc. Obviously, each of these components could be sold separately, but they come as a bundle because consumers desire assembled

²⁶ Bruce H. Kobayashi, "Two Tales of Bundling: Implications for the Applications of Antitrust Law to Bundled Discounts," in *Antitrust Policy and Vertical Restraints*, R. W. Hahn, ed., AEI-Brookings Joint Center (2006), pp. 10-37, at 10.

²⁷ In "pure bundling" the products are only offered for sale together, whereas in "mixed bundling" the products are available individually as well as together.

products. These cost savings can also explain the use of standardized option packages for various products.

Newspapers are a familiar example of an efficient bundle. In order to buy the sports section of the *Washington Post*, one must buy the whole paper. Not everyone who purchases a daily newspaper reads each section, and each section could be sold separately. But it is efficient to sell the sections in a bundle for at least three reasons. First, there are economies in having all of the sections delivered at once, rather than having separate deliveries (and transactions) for each section. Second, subscribers receive some value by having the *option* to look at all of the sections, even if they usually do not read all of the sections. For example, subscribers who typically do not read the sports section may read it during special events, such as the Olympics. Subscribers can avoid the cost and inconvenience of having to order this section when they want it. Also, by scanning the entire paper subscribers may find an article of interest, which they would not see if the sections were sold separately. This option has value to subscribers. Third, by expanding the potential readership of the entire paper and by eliminating the need for duplicative advertisements, bundling also makes advertising more valuable and more efficient. Hence, for advertisers there is a synergistic effect from bundling. An increase in advertisers' willingness to pay for circulation, other things equal, tends to reduce the price the newspaper charges for subscriptions.

If bundling is driven solely by cost savings, an external regulatory constraint making bundling unlawful will reduce welfare by increasing costs. This is true whether or not sellers have market power.

2. Price discrimination models of bundling

Alongside cost savings reasons for bundling just discussed, the economic literature offers another explanation for product bundling that depends on the incentive for a seller to discriminate among consumers, some of whom place a higher value on a given product than others. Bundling can be viewed as an implicit way to charge a higher price to those consumers who most value some components of the bundle and a lower price to those who value those components least.²⁸ It can be much easier to predict purchasers' valuations for a bundle of goods than their valuations for the individual components when sold as separate goods. Research into the bundling of information

²⁸ See, for example, George Stigler, "The Economics of Block Booking," in *The Organization of Industry*, Chicago: The University of Chicago Press (1968).

goods, i.e., goods for which the marginal costs of production and distribution are very low, finds that by taking advantage of this effect it is possible for a firm to achieve greater sales and greater economic efficiency. The low marginal cost for information goods not used by the buyer can create this efficiency effect for information goods where the same effect might not hold for other physical goods.²⁹

Economists have studied the economics of bundling for many years and have constructed numerous abstract models of this decision-making process. The analyses indicate that bundling is a natural consequence of competitive as well as imperfect markets and that a given seller's profit-maximizing marketing strategy depends on many factors, including the details of production and demand conditions. Any given instance of bundling is at least as likely to be beneficial to consumers as a group as not. Generalizations are very difficult to come by, partly because virtually every instance of bundling, whatever its overall effects, improves the positions of some customers while worsening the positions of others. This makes policy analysis of bundling extremely complicated, and counsels against blanket condemnation of the practice.

Professor Timothy Brennan summarizes the point that in the economics literature there are results where bundling can either benefit consumers or harm consumers:

The economics of bundling has a long and complex history, characterized mainly by a set of results that focus on price discrimination. As with the price discrimination literature generally, bundling has been regarded as a practice with highly ambiguous consequences. Analyses of bundling by monopolists are either indeterminate or depend heavily on virtually unobservable variables such as correlations of inframarginal valuations across bundled products.³⁰ [footnotes omitted]

To see how pure bundling can make some purchasers better off and some worse off relative to stand-alone pricing, consider the following example. Assume that there are two goods, Good1 and Good2, and two purchasers, Alpha and Beta. The following table shows the reservation prices of each of the purchasers (i.e., the maximum amount each purchaser is willing to pay) for each of the goods.

²⁹ Yannis Bakos and Erik Brynjolfsson, "Bundling Information Goods: Pricing, Profits and Efficiency," *Management Science*, Vol. 45, No. 12 (Dec. 1999), pp. 1613-1630.

³⁰ Timothy J. Brennan, "Competition as an Entry Barrier? Consumer and Total Welfare Benefits of Bundling," AEI-Brookings Joint Center for Regulatory Studies, Working Paper, June 2005, p. 1.

	GOOD1	GOOD2
ALPHA	3	5
BETA	9	3

To keep the example simple, assume that the cost of producing each good is zero and that each purchaser will purchase either 0 or 1 unit of each good. If a firm sells each product separately, its profit maximizing prices are 9 for Good1 and 3 for Good2. At these prices the firm will sell a unit of Good1 to Beta and a unit of Good2 to both Alpha and Beta. The firm's profit will be 15. At these prices, purchaser Alpha has a surplus of 2, because Alpha is willing to spend 5 on Good2 but only has to pay 3. In contrast, purchaser Beta has a surplus of 0, because Beta has to pay its reservation price for each good.

Now assume the firm sells the two goods only as a bundle. In this situation the profit maximizing price for the bundle is 8, and each purchaser buys the bundle. The firm's profit will be 16. At this price for the bundle, purchaser Alpha has a surplus of 0, because Alpha has to pay the sum of its reservation prices for the bundle. In contrast, purchaser Beta has a surplus of 4, because Beta only has to pay 8 for the bundle but is willing to spend 12 on both products.

Selling the bundle is the more profitable alternative for the firm. Relative to selling the products separately, selling them as a bundle makes Alpha worse off, because Alpha's surplus falls from 2 to 0, but makes Beta better off, because Beta's surplus increases from 0 to 4. Selling the bundle also increases social welfare (defined as the sum of surplus plus profit) because social welfare equals 20 with the bundle but only 17 if the goods are sold separately.

This simple example shows that selling products as a bundle may increase the welfare of one purchaser while decreasing the welfare of another purchaser. Similarly, prohibiting the firm from selling the goods as a bundle will make one purchaser (Alpha) better off while making another purchaser (Beta) worse off. The example also illustrates that prohibiting the bundle can reduce the firm's profit, total consumer surplus, and social welfare.

It is possible to construct other examples that illustrate other possible outcomes. For instance, Appendix B in Attachment 5 presents an example illustrating that all consumers can be better off (or at least no worse off) with bundling than with unbundled

sales. Examples discussed in Attachment 4 illustrate that bundling may be necessary to ensure that a socially desirable product is provided at all or that socially desirable quality improvements in a product occur. Examples can be constructed to show that some purchasers who would not have purchased either of the products if sold separately will purchase the bundle, while at the same time some purchasers will fail to purchase the bundle even though they would have purchased one of the goods if offered stand-alone. The particular assumptions underlying any example or economic model determine whether bundling will increase or decrease total purchaser surplus. Similarly, depending on the way the example is structured, total surplus can go up or down.

These examples do not demonstrate that bundling *always* is desirable and improves welfare. Rather, they demonstrate simply that there should be no presumption of a welfare loss stemming from observed bundling, or a welfare improvement from mandatory unbundling. It is also possible to construct a hypothetical example in which mandatory unbundling improves welfare. However, without any empirical basis there is no reason for believing that hypothetical examples that show an improvement in welfare from unbundling are more representative of reality than others with opposite effects. A somewhat deeper point, from a policy perspective, is the great difficulty of telling one situation from another. Note, in the example above, how the welfare analysis turns on the assumption that the consumers' individual valuations for each product are known to the observer. In the real world this is very seldom true.

The same a priori indeterminacies arise in comparing mixed bundling to selling products only separately. A policy outlawing mixed bundling and requiring individual product sales will generally make some consumers better off and other consumers worse off. Such a policy can reduce total purchaser surplus and total surplus, as illustrated in Appendix C of Attachment 5.

A regulatory intervention restricting bundling may increase the welfare of some consumers who prefer specific individual services, but the increase comes at the expense of consumers who prefer the bundled services. A complete welfare analysis also requires knowing who or what type of individual is harmed or benefited, because marginal changes may not have an equal value to all consumers. For example, if it turned out that relatively well-off people would benefit from an intervention that required unbundling, while less well-off families would fare better under pure bundling, the intervention would harm the poorest Americans. Generally, the economic models

provide no basis to predict whether the consumers who may be better off have a special claim on society arising from conditions such as poverty or geographic isolation.

3. Antitrust and tying and bundling

In many cases where bundling is observed, the reason that separate goods are sold in a package is easily explained on efficiency grounds. This is certainly the presumptive explanation for bundling when it occurs in highly competitive markets. These efficiency-based explanations apply with equal force to the use of bundling by firms with market power. In addition, firms with market power can use bundling for other reasons—for example, as a price discrimination device or a way to internalize pricing externalities in the presence of complementary goods. However, in markets where firms can exercise monopoly power, bundling can have anticompetitive uses that may be scrutinized under the antitrust laws. Because bundling can also be an efficient practice when firms possess market power, any evaluation of bundling must simultaneously consider both the strategic and efficiency reasons for its use.

Tying

A tying arrangement occurs when the seller of a product, service or intangible (the “tying” product) conditions the sale on the buyer’s purchasing a second product (the “tied” product).³¹ Practices by firms with monopoly power in the tying good that involve such coercion can be unlawful. While some economists define pure bundling as tying, bundling has been distinguished from tying under the antitrust laws, and bundling and other forms of packaged sales have generally been found to lack a coercive element.

A tying arrangement is unlawful under the Sherman Act if (1) there exist two separate products, (2) the sale of one product is conditioned on the purchase of the other, (3) the seller has sufficient market power with respect to one product (the tying product) to enable it restrain competition appreciably in the other (the tied product,) and (4) the tie has an effect upon a substantial amount of commerce in the tied product.

³¹ See *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 25 (1984).

A key criterion is that the seller must have considerable economic power in the tying product. This economic power is often demonstrated by showing that the seller has a dominant position in the tying product market or that the seller's product enjoys some significant advantage not shared by competitors in the tying market.

Exclusionary bundling

Recent economic analysis has also examined the use of bundling as an exclusionary or entry-detering device.³² That is, bundling could be used by a monopolist in one market to reduce competition in another market. Taken as a whole, the literature on exclusionary bundling provides the following results: (1) bundled discounts can exclude or deter the entry of equally efficient competitors, (2) this exclusion can occur at prices that are above cost, and (3) bundled discounts that exclude equally efficient competitors can increase or decrease consumer and total welfare. At the same time, the literature does not go beyond showing that such effects are possible; it does not provide any empirical evidence that such effects are likely under real-world conditions.³³

The exclusionary bundling literature assumes that the firm engaging in the practice is a monopolist in one of the markets, and little attention has been paid to examining the firm's incentives if there is competition in that market. Moreover, these models typically ignore other reasons for bundling, such as cost efficiencies and pricing to heterogeneous purchasers. As a result, these models cannot gauge whether the potential for harm outweighs any demonstrable benefits.³⁴

4. Application to cable wholesaling

As discussed in the text, programmers are not selling cable networks to MVPDs only as bundles, or forcing MVPDs to purchase bundles of networks. But even if this were happening, there is no reason to believe that prohibiting bundling would make MVPDs or consumers better off. As discussed, the overall welfare effects of bundling on purchasers are typically ambiguous, because generally some purchasers benefit

³² See, for example, Barry Nalebuff, "Bundling as an Entry Barrier," *Quarterly Journal of Economics*, 119, no. 1, pp. 159-87 (2004).

³³ Kobayashi, *op cit.*, at 21.

³⁴ *Ibid.* at 22.

from bundling and others are harmed. For purposes of this section, it is assumed that some bundling to MVPDs of the type that would be prohibited actually occurs.

There is no economic model clearly applicable to the business of wholesale provision of video programming that incorporates its special features (differentiated product competition, non-rivalrous services, two-sided markets, multiple temporal and geographic releases, etc.). Even aside from these special features, there are intrinsic economic characteristics of the business that make bundling likely to be efficient: complementarities in production and marketing (e.g., cross-promotion) and savings in transaction and bargaining costs. Similarly imponderable are the potential effects on diversity, however defined. The Commission is not likely through this proceeding or otherwise to uncover empirical evidence sufficient to avoid a very substantial risk that a regulatory intervention will reduce efficiency and welfare.

If bundling by programmers were prohibited, some MVPDs would be better off, some worse off. Some MVPDs will benefit from stand-alone purchases. They will acquire fewer networks and will pay less in total for programming from a particular supplier. The total effect on their programming purchases and pricing to consumers is indeterminate because these MVPDs could increase purchases from other programmers.

Other MVPDs, however, will be better off purchasing all the networks in the bundle at the bundled price. If the bundle were prohibited, these MVPDs would either (1) purchase the same group of networks as contained in the bundle but pay more than previously, or (2) not buy all the networks because the sum of the stand-alone prices is higher. In the latter case, the MVPDs are worse off because the value to them of the networks that are dropped exceeds the marginal “price” of those networks in the bundle but does not exceed the stand-alone price.

From a consumer’s standpoint, prohibiting wholesale bundling will change the mix of networks purchased and the prices paid by MVPDs. This in turn will change the mix of networks offered by each MVPD to its subscribers, and the subscription price. This is likely to make some consumers better off and make others worse off. Many elements affecting the net result are empirical and difficult to observe. If, for example, an MVPD stops purchasing some networks, which networks would no longer be purchased and included in the MVPD’s bundle/tier, how much less would the MVPD pay for the programming, how much would the MVPD’s retail price for the bundle/tier be reduced, and how would various consumers value the networks no longer included in the MVPD’s bundle/tier? If the MVPD were to add other networks in place of the networks that were dropped, what would be added and what would this do to the retail

price? An even more complete evaluation would have to take into account the appeal to various segments of consumers of any networks that are carried under bundling but would not be carried with stand alone pricing as well as those networks that would be carried by these MVPDs but for bundling.

To illustrate, assume initially that an MVPD offers a bundle of 10 networks to consumers for \$20. If wholesale bundling is prohibited, the MVPD may no longer purchase one of the networks and simply offer a bundle of 9 networks for \$18. In this case, those consumers that value the 10th network at more than \$2 are net worse off; those that value the 10th network at less than \$2 are net better off. Another possibility is that the MVPD drops one of the original 10 networks and replaces it with another network, still charging \$20 for the bundle. In this case, those consumers that value the network that was dropped more (less) than they value the network that was added are worse (better) off. Clearly, there is a myriad of possibilities and no clear-cut impact on consumers as a whole, much less on any particular segment of society.

The Notice seeks comment on whether satellite cable programmers are tying carriage of “desirable” channels to carriage of other less desirable owned or affiliated channels, and whether such “take-it-or-leave-it” tying arrangements without any alternative offer to provide the programming on a stand-alone basis are prevalent in the industry. It is possible that what MVPD complainants may really object to is that the price offered for the “desirable” programming is not available without the “less desirable” programming. That is, an MVPD may be offered a network bundle at a price, and though the MVPD can remove an “undesired” network from the bundle, the price of the remaining bundle is not more attractive—it may even be higher than the price with the undesired network.

Program suppliers often are willing to offer a lower price or superior terms on some of their programming services if a cable operator is willing to ensure distribution of additional services. Indeed, even if an MVPD were otherwise inclined to purchase and carry only a single network from a particular programmer, the MVPD still might find it economically efficient to purchase a package of networks. This is because a programmer may be willing to pay an MVPD to ensure launch and carriage of a network. A payment from the programmer to the MVPD reflects the fact that the stand-alone competitive price for a network is negative, and this negative price for the “undesirable” network is “hidden” in the bundled price and causes the bundled price to be lower than the stand-alone price of the “desirable” network. All that is being observed is a price incentive offered by the programmer so the MVPD will take more programming.

Attachment 1

**CABLE NETWORKS: BUNDLING, UNBUNDLING, AND THE
COSTS OF INTERVENTION**

by

Bruce M. Owen and John M. Gale

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ECONOMISTS INCORPORATED

Washington DC

Cable Networks: Bundling, Unbundling, and the Costs of Intervention

by

Bruce M. Owen and John M. Gale[†]

Summary

Congress has asked the Commission to respond to a series of questions regarding the manner in which programming is sold to cable operators and direct broadcast satellite systems (collectively, “MVPDs”) and to subscribers. The questions focus on the economic and legal impact of possible changes in the way programming is sold, to be mandated by law or regulation. These possibilities include requiring suppliers¹ to license their cable networks to MVPDs individually (à la carte), rather than as bundles;² requiring suppliers to permit MVPDs to resell cable networks either à la carte or as part of a theme tier; mandating à la carte pricing; mandating theme tiers; and mandating a “family tier.” In order to help prepare its response to Congress, the Commission issued a Public Notice seeking

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¹ Throughout the paper, network refers to a specific “cable” network, such as Nickelodeon or CNN, marketed to MVPDs, whereas supplier refers to the entity that owns a network or group of networks, such as Viacom or Time Warner.

² We use the terms “unbundled” and “à la carte” synonymously herein.

comment on factual questions regarding the provision of à la carte and theme tier services by MVPDs.³

Viacom asked us to provide economic analysis of certain issues raised by the various proposals. Specifically, we address the following issues:

- Do upstream suppliers of scheduled program services (“cable networks”) licensing to MVPDs require MVPDs to purchase bundles of cable networks rather than offering program services individually?
- Is the MVPD practice of offering bundles or tiers of services to retail subscribers harmful to consumers? What would be the effect on cable networks and consumers of a regulation requiring MVPDs to offer programming à la carte, with or without continued bundling?

We address these issues factually where time and available data permit, and in any case conceptually. Our conclusions, briefly, are as follows:

1. Bundling is an extremely common phenomenon in the American economy. Indeed, it is more the rule than the exception. Bundling presents no presumptive threat to consumer welfare. In fact, bundling generally promotes consumer welfare by lowering the prices of goods and services. Whether and how to bundle components is an important aspect of the competitive strategies of individual firms. In general, an external regulatory constraint making bundling unlawful will reduce welfare by increasing costs. This is true whether or not sellers have market power. While a

³ FCC, “Comment Requested on à La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems,” MB Docket No. 04-207, May 25, 2004 (hereinafter “Public Notice”).

regulatory intervention restricting bundling is likely to reduce overall welfare, it may increase the welfare of those consumers who prefer highly customized services, but at the expense of consumers who prefer highly bundled services. There is no basis to predict that any consumers who may be better off have a special claim on society, such as poverty or geographic isolation. Thus, giving each consumer equal weight, consumers as a group will be worse off if bundling is not permitted.

2. Our empirical research contradicts the idea that suppliers generally require MVPDs to purchase bundles of programming. The cable network industry is competitive. MVPDs have many sources of programming and can vary the proportions in which they buy programming.⁴ Entry into the business of providing programming to MVPDs is not restricted, as evidenced by the actual entry of more than 200 new networks in the past decade.⁵ Suppliers of cable networks may well offer bundles of networks to MVPDs, but they must offer a price for the bundle that is no greater than the sum of the competitive prices of the individual networks, compensating their customers for taking low-value networks by, in effect, lowering the price of their most popular networks. In any event, the evidence is that cable networks are not systematically purchased by MVPDs as bundles. For example, a large percentage of 2,455 cable systems studied do *not* carry all the networks offered by leading suppliers such as Time Warner, Discovery, Dis-

⁴ One piece of evidence attesting to the increasing competitiveness and efficiency of wholesale suppliers of programming has been the decline in the extent of vertical integration in the industry. See FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report, MB Docket No. 03-172, 2004, Table 8.

⁵ Id.

ney and Viacom. These data also show that suppliers license their networks in many different combinations and on a stand-alone basis.

3. Our economic analysis of the competitive forces on cable networks leads us to predict that suppliers would offer MVPDs a substantially lower price in exchange for placing any network on a tier that matches that network's national marketing strategy. Cable networks generally must adopt a particular marketing strategy in order to survive competitively. One important choice is whether to offer "premium" programming supported solely by subscription license fees or "basic" programming, supported by advertising and license fees. There are advantages if the strategy is uniform across markets for any given network, chiefly because the different strategies call for different program qualities, but also because customized marketing is more expensive than national marketing. Therefore, cable networks will prefer a particular tier placement, and will likely offer a better price to MVPDs who agree to that placement.
4. Prices cannot be ignored. Neither the issue of whether MVPDs are required to buy bundles of programs nor the issue of whether they are required to place certain cable networks on certain tiers can be addressed in the absence of price comparisons. To understand this, consider whether a shopper who is offered a quantity discount for laundry soap, for example, is *required* to buy a larger quantity. Assuming for the sake of argument, and contrary to common sense, that the answer is yes, requiring the soap powder to be "unbundled" is no solution unless the government is prepared to regulate both the sizes of the components and their prices.
5. The last point is especially important. It is very difficult to imagine an effective law or regulation requiring unbundling of MVPD networks, either

at wholesale or retail, that was not accompanied by government regulation of the prices and license fees and other terms of trade between cable networks and MVPDs and between MVPDs and retail subscribers. Such regulation would be far more complex than the Commission's attempts to regulate the prices of unbundled elements of local telephone service.

6. We examine the limited empirical evidence bearing on the effect of mandated unbundling on specific cable network à la carte retail prices. Making a series of assumptions, and not attempting to account for certain important but unknowable factors, we offer a rough empirical basis for predicting the effects of mandated unbundling of particular cable networks at the retail level. We find that at the mid-point of the ranges considered the average cost per subscriber (exclusive of the basic tier fee and converter box fee) for ten à la carte networks would be \$44.60. These calculations, summarized in Table 4, strongly suggest that consumers will end up paying substantially more than they do now for the present collection of cable networks or for any substantial subset of networks. Consumers who wish to subscribe only to a very few of the existing networks, including consumers who currently do not subscribe to any expanded tier, may be better off. However, these are short-term "partial equilibrium" predictions. In the longer term, there is no assurance that the networks such consumers prefer will survive the change, or, if they do, that they will retain their current levels of program quality.
7. Unbundling clearly will increase the costs to viewers of sampling content on cable networks they do not regularly watch. This provides a firm basis to predict that the effect of the proposed interventions would be to impair

the ease of access of all Americans to new ideas and contrary and minority viewpoints.

8. We consider, last, the proposal to mandate certain bundles of content organized according to specified themes. An example is the proposal for a “family tier.” Based on the analysis in Section V, we conclude that consumers who subscribed only to such a bundle would pay as much or more than they do now, and that some or all of the networks that they currently receive might no longer exist. Moreover, unbundling only a few specific networks might not reduce the price of the remaining bundle of networks. Further, for reasons explained in Section VI, we think that overall consumer welfare would be adversely affected by mandated unbundling or tiering, and that it would raise substantial First Amendment issues.

I. Introduction

The task before the Commission in responding to the Congressional inquiry is extraordinarily difficult and complex. To illustrate the difficulty, consider the proposal to require MVPDs to offer all cable networks à la carte, either as the only alternative or in combination with various tiers.

Many cable networks are dependent upon a dual revenue stream, consisting of advertising revenues and subscriber fees. It is reasonable to expect that, if a cable network were taken out of the basic or expanded basic bundle and instead offered à la carte, it would lose subscribers. A reduction in subscribership, holding subscriber license fees and advertising rates constant, would reduce revenues in both these categories.

In addition to these revenue losses, if a cable network were taken off a tier and offered à la carte it would incur additional transactional marketing and associated costs. Transactional marketing consists of tactics, activities and resources designed to generate subscriptions to an à la carte network by stimulating consumer demand and influencing consumer choice. A cable network offered to consumers à la carte would face these additional marketing costs in order to overcome the higher search and transactions costs faced by potential viewers. The network would have to compete with dozens, if not hundreds, of other networks for the consumer's dollar.

There are many factors to consider in assessing an à la carte regime. How will suppliers of cable networks respond? How will MVPDs respond? How will consumers respond? How will providers of inputs, such as rights holders, respond? How will competitive interactions among networks change? All of these factors and their interactions affect what will happen to subscriber rates for cable

programming under an à la carte regime. One cannot confidently predict all the specific long-run changes that would result from restricting the way cable programming is sold. Bundling of cable networks is part of a complex system of related economic decisions that involve program quality and marketing as well as pricing.

Section V below describes our empirically-based effort to predict the effects of unbundling on the weighted average network price. Such predictions necessarily cannot account for certain important but immeasurable factors, such as consumer demand for individual networks and future competitive interactions among cable networks and MVPDs. Predicting what will eventually happen, to what extent, and to which cable networks, is immensely complicated by the fact that a rule requiring a change in marketing practices would affect all MVPDs, nearly all program suppliers and nearly all networks. While one might hope to model the behavior of any one cable network holding the behavior of other networks constant, changes of the magnitude proposed would clearly throw the entire industry into a period of disruption and disequilibrium. It is beyond this paper's scope to model and describe with certainty the duration of this period of disruption, the likely new industry equilibrium, if any exists, much less the path the industry would follow, during a period of uncertain duration, to arrive at such an equilibrium. Nevertheless, the lost advertising revenues and higher costs associated with à la carte pricing are likely to persist in the long run, and to result in a permanent reduction in aggregate welfare.⁶

⁶ We think it likely that the proposed interventions would reduce the size of the economic pie available to be shared by all consumers. However, despite the smaller overall pie, some consumers may be better off as measured by their surplus from consumption of MVPD services. When we predict reductions in overall welfare we are implicitly giving equal weight to each consumer. This assumption is justified by the absence of any apparent correlation between

Although predictions regarding specific networks are difficult, some generalizations are possible. Clearly, any loss of subscriber or advertising revenue and any increase in costs would in the first instance increase consumers' per-network subscription prices, reduce program quality, cause the exit of some networks, and limit the entry of new networks. Hence, the change in pricing would reduce the variety and breadth of programming offered to subscribers. Moreover, it would reduce what a cable network is willing to pay for both original and syndicated off-network programming, reducing the quality of cable programming offered to subscribers as well as the quality of certain types of broadcast network programming.⁷ Also reduced would be the revenues earned by certain program inputs with possible further reductions in the quantity and quality of their output. All of these effects will serve to reduce consumer welfare. Subsequently, competitive interactions would take place among cable networks and among MVPDs, further complicating one's ability to predict specific effects.

The uncertainty of impacts on specific consumers and suppliers within this overall picture is itself a strong argument against requiring programmers and MVPD systems to make such a drastic change. Regulatory interventions, once instituted, are difficult to reverse.

those likely to benefit from unbundling and the characteristics traditionally associated with unequal weighting of income. In this respect mandatory unbundling resembles an economically inefficient tax that transfers income from one randomly selected group of consumers to another, reducing GNP in the process.

⁷ Part of the cost of certain types of broadcast network programming is recouped from sale of the programming into syndication. If syndication revenues, such as payments from cable networks, are decreased, creators of broadcast programming will have to reduce production costs, and quality, of new broadcast network programming.

Another consequence of required à la carte pricing is predictable in direction if not in magnitude. That consequence would be a reduction in the opportunity of American households to be exposed to different points of view and new ideas. To see how this would come about, consider the difference between the way in which MVPDs currently provide networks (i.e., bundled) and the way that magazine publishers offer subscriptions (i.e., à la carte). Many consumers today can sample or “surf” across the various video options available to them, deciding to settle on a particular network based on the attractiveness of a quick sample of the programming. This facilitates the opportunity for content suppliers to compete for viewer attention across disparate sources and genres.

In contrast, the subscription model used by the magazine industry (or, for that matter, by premium movie and sports networks) does not permit such easy “surfing.” A given consumer typically makes a decision at some point to subscribe to *Time*, *Newsweek*, *The Economist*, or another newsweekly, and thereafter relatively seldom has the opportunity to sample the content of the magazines not subscribed to. Other things being equal, this reduces the opportunity for consumers to be exposed to new ideas and new ways of expressing them, or different opinions.

The magazine industry and the cable network industry arrived at their current competitive marketing strategies by different historical paths that may well be sufficient to explain the present differences between their marketing strategies. If magazine distributors were to bundle magazine subscriptions (and offer “family” collections of magazines) they could reduce costs and probably would make some magazine readers better off economically and others worse off economically. The opposite requirement, applied to the cable industry as proposed, similarly would benefit some viewers and harm others. In both cases there is likely to

be a negative net welfare effect on consumers as a group.⁸ But it seems clear that the cause of greater diversity of viewpoints and a better informed public would be better served by forcing publishers to offer bundles and tiers—much the same way the government requires cable operators to sell a basic service tier of broadcast signals—rather than by forcing MVPDs to do the opposite.

Section II of this paper contains a general discussion of bundling and pricing. Section III describes our empirical analysis of the carriage of cable networks by over 2,400 cable systems representing about 80 percent of cable subscribers. Section IV discusses how subscriptions, cable advertising revenue, and cable network costs are likely to be affected by unbundling. Section V describes the data we examined, and the analysis we conducted in an attempt to predict (in a partial equilibrium framework) the effects of mandated à la carte pricing on the prices of cable networks. Section VI offers a brief analysis of the proposal that MVPD systems provide program tiers based on content, an issue to which the analysis in Section V is also applicable.

⁸ Magazine industry costs would increase because such bundling would require an intermediate layer of distribution, which we assume would exist if consumer benefits justified its costs. (See also note 6.) There is a theoretical possibility that path dependence and changing conditions have led one or the other of these two industries to equilibrium pricing strategies that are no longer globally efficient. The Commission faces insuperable practical difficulties in exploring this possibility, and even if these were overcome, still greater difficulties in fashioning a remedy that would be responsive to changing conditions of technology and demand.

II. Background

A. Bundling is a universal and benign practice

Almost every product and service purchased by consumers is “bundled,” by sellers, from various components that could each, at least in principle, be sold or priced separately. Purchased bundles are then further combined, by customers, into useful consumption activities. A consumer who wishes to make and drink tea buys several bundles: teabags (consisting of tea, filter paper folded into pouches, string, staples, packaging, advertising, transportation, wholesale and retail services); milk (consisting of raw milk, processing, packaging, advertising, transportation and retail services); sugar (you get the idea); energy to heat the water, and other inputs (e.g., crockery) into the activity of making tea. Most of the components of each bundle could be purchased separately. The consumer herself bundles the bundles into a hot cup of tea.

In the tea example, it is important to note that the price a consumer is likely to pay for bundles such as a teabag or a quart of milk is much lower than what the consumer would pay to purchase all the various components, even aside from the cost to the consumer of assembling the components. This relationship between the price of components and the price of bundles is common, and reflects supply-side economies. One way to think about this price relationship is that customers who want highly personalized, tailor-made products have to pay a premium because they incur costs that are not spread over a large number of fellow-consumers.

Bundling occurs for a variety of reasons. Probably chief among them is that sellers can assemble parts into bundled units more cheaply and efficiently than customers. Customers get a bundled product for a lower price, which they

prefer to a self-assembled product, even though the self-assembled or tailor-made product might more closely match their own special tastes. Sellers obtain competitive advantage from offering bundles of components that are cheaper and/or better suited to the demands of various consumers, and the competitive market process tends to ensure that the driving force behind the assembly of bundles is consumer satisfaction.

A seller decides what components to bundle, and which components to offer for sale individually or in other bundles, in light of its costs and its understanding of what will appeal to customers and the current and expected future marketing strategies of competing sellers. Economists have constructed numerous abstract models of this decision-making process. These models demonstrate, in general, that a given seller's profit-maximizing marketing strategy depends on many factors, including the details of production and demand conditions. Generalizations are very difficult to come by, partly because different bundling strategies produce different impacts on one group of consumers than on another. This makes policy analysis extremely complicated. For example, while it is possible to think of assumptions about demand or cost conditions under which (imperfect) competition does not always maximize consumer welfare, these conditions do not suggest any feasible remedial policy intervention.⁹

Thus, while market power where it exists may reduce consumer welfare, bundling may make things either better or worse. As with competition, even when bundling leaves consumers worse off, it is usually difficult to specify a feasible

⁹ Similarly, bundling by a firm with any degree of market power may either increase or decrease consumer welfare (relative to simple component pricing, holding other things equal). Our point is that market power is neither necessary nor sufficient for bundling to have adverse effects on consumer welfare.

policy intervention. For example, requiring that an imperfectly competitive firm offer both a bundle and its components (mixed bundling) or no bundles, is likely to be meaningless unless prices are regulated. But no regulator in the real world is likely to be able to obtain the demand and supply information required to ensure that such firms price efficiently.

B. Pricing is an essential part of the analysis of bundling, and price regulation would be an essential element of mandated unbundling

It is important to understand that most of the Commission's questions cannot be answered meaningfully without consideration of the *prices* at which various components and bundles are offered, a daunting task. For example, what does it mean when a customer chooses a particular bundle that costs less than the sum of the individual prices of a subset of the components of the bundle? Is such a customer "required" to buy the bundle, or is the customer simply offered an opportunity to take advantage of the cost savings that result from bundling, giving up some tailoring in return? Clearly, the latter interpretation is the correct one.

More ominously, consideration of such pricing issues leads fairly directly to the conclusion that mandatory unbundling is likely to be ineffectual if it is not accompanied by regulation of prices. The Commission has ample and unhappy recent experience with unbundling requirements and associated pricing issues in the telephone industry. Those telephony-related issues are, from a technical economic point of view, almost trivial in comparison with what the Commission would face in determining regulated prices for intellectual property whose consumption is non-rivalrous. By this we mean that efficient telephone component pricing focused on long-run forward-looking incremental cost, with controversy centering on which stakeholder would bear the burden of unrecovered historical costs. In video programming, the Commission would be faced with an economi-

cally efficient price (from a demand-side perspective) of zero, but with a potentially large positive price required to induce production of the next day's programs. The incentive effects of stranded costs would not be a side show, they would be the whole show.

III. Evidence on how cable networks are sold to MVPDs

A. Existing cable network sales practices

Here we investigate whether suppliers require MVPDs to purchase bundles of cable networks. We address that question by examining the programming carried by a large sample of cable systems. The data indicate that a substantial percentage of cable systems do not carry all the program services offered by leading program suppliers such as Time Warner, Discovery, Disney and Viacom. This evidence contradicts the allegation that upstream suppliers of programming to MVPDs require MVPDs to carry all of the supplier's offerings.

Available data on the networks carried by cable systems across the country confirm that systems can and usually do choose to carry some but not all of the networks from any given program supplier. We obtained data on cable network carriage by cable system from Warren Communications.¹⁰ For our analysis, we excluded cable systems that reported carrying fewer than 35 satellite-delivered basic cable networks. It is likely that some of these systems did not report all of the networks they carry, and including such systems could overstate the extent to which certain networks were not carried. Other excluded systems may have relatively small channel capacity and, therefore, are clearly not required to carry all networks that the programming suppliers offer simply because there would not be enough channel capacity to do so.

Our analysis therefore focused on 2,455 cable systems, representing approximately 80 percent of cable subscribers, that reported carrying at least 35 sat-

¹⁰ Warren Communications News, *Televisions and Cable Factbook: Online*, June 2004.

ellite-delivered programming services on their basic and expanded basic tiers of service. (These systems typically carry broadcast channels, local origination programming, premium cable networks and pay-per-view services in addition to the basic cable networks.) Nine program suppliers that own multiple basic networks were identified, and carriage of those networks by the cable systems was examined. For each supplier of commonly-owned basic cable networks, a count was made of the number of systems carrying one network of that supplier, two networks, etc. The networks offered by each supplier are listed in Appendix A. Networks launched later than 2000 were not included with the relevant supplier. A network launched just last month, for instance, would be too recent to be reflected in the data, if carried at all. In addition, in a test of the proposition that network suppliers require MVPDs systems to carry all the supplier's programming, a recently launched network might not be carried because an MVPD's current carriage agreement may have been signed before the network was launched.

Table 1 shows, for various network suppliers, what portion of cable systems that take any of the supplier's networks take all of its networks. This can be seen in the far right-hand column. For instance, of the 2,454 systems that carried any A&E network, 1,185 or 48 percent carried all four A&E networks. In other words, more than half of the systems carrying any A&E network declined to take all the A&E networks. For most of the other network suppliers shown in Table 1, far less than 50 percent of the systems taking any network carried all the networks. This means that for most suppliers shown, the overwhelming majority of systems declined to take all the networks.

Table 1: Percentage of systems carrying at least quarter, half or more, three-quarters or all the basic cable networks, by supplier group

Supplier	Percentage of cable systems carrying indicated proportion of supplier's networks			
	One quarter or more	Half or more	Three quarters or more	All
A&E	100%	98%	53%	48%
Cablevision	100%	74%	55%	25%
Comcast	100%	83%	69%	41%
Discovery	97%	74%	71%	5%
Disney	100%	96%	62%	23%
Fox	100%	90%	74%	39%
Lifetime	n.a. [‡]	100%	n.a. [‡]	50%
Time Warner	100%	100%	74%	4%
Viacom	98%	67%	13%	0%

[‡] Lifetime has only two networks included in this analysis, so the one quarter and three quarter columns are not applicable.

The data underlying Table 1 also show that network suppliers sell their networks in many different combinations and on a stand-alone basis. To take Cablevision, which owns four networks, as an example, 26 percent of sample systems carried only a single Cablevision network, 19 percent carried only two Cablevision networks, 30 percent carried only three, and 25 percent carried all four Cablevision networks. This pattern probably understates the diversity of offered “bundles,” because systems that carried the same number of Cablevision networks would not necessarily have taken the same networks.

Several of the questions in the Public Notice appear to link “bundling” by programmers selling their networks to MVPDs with “bundling” by MVPDs providing networks to consumers. Linking these two issues may reflect a misunderstanding. Whether or not MVPDs are required to purchase certain bundles of networks from network suppliers has no necessary connection to whether MVPDs will offer the networks to their subscribers bundled or à la carte. MVPDs have

flexibility in the way they purchase their programming from suppliers, as shown in Table 1, and MVPDs offer basic programming in tiers or bundles. Even if, hypothetically, an MVPD were required to carry all of a supplier's networks if it chose to carry any network in the group, this would not change the MVPD's decision about whether to offer those networks to subscribers bundled or à la carte. Alternatively, if a network supplier were prohibited from selling any of its networks as part of a bundle, the MVPD could still bundle the networks it carries. In short, there is no particular connection between wholesale and retail bundling in this context. Of course, any higher prices and reduced program quality effects introduced by regulations aimed at preventing bundling at the wholesale level will be passed through to retail consumers.

B. Should cable networks be prohibited from bargaining for tier placement?

We also set out to investigate whether program suppliers now require MVPDs to place particular networks on particular tiers. For the reasons set out below, we do not believe that it is possible to answer this question empirically, at least in the time available. We conclude that it would be rational for competitive suppliers of cable networks to offer substantially lower license fees to MVPDs who agree to carry particular networks on particular tiers.

Cable networks compete with each other not only in the compilation and sale of programming but also in the sale of advertising. Each network's competitive strategy includes the type and quality of programming it offers, the size and demographic composition of the audience it aims to produce for sale to advertisers, a marketing strategy, and the prices it will offer to MVPDs for its programming and to advertisers for its audiences. Given the large number of competing program services and the ease of entry, marketing a cable network is a complex and risky endeavor.

A supplier chooses its own competitive strategy based on an assumption about whether the network will be bundled with other networks or will be sold à la carte by MVPDs. A given supplier would adopt one national promotional and marketing strategy, and associated pricing and programming decisions, if the network were offered as part of a tier by MVPDs, but probably an entirely different competitive strategy if the network were sold à la carte by MVPDs. Both promotion of the network and programming purchased or produced for the network are necessarily national decisions; they cannot easily be varied geographically. The same is true of national advertising sales. A supplier therefore will be at a disadvantage in competition if its programming service is not marketed uniformly by all MVPDs.

It is therefore understandable that suppliers would seek to ensure that their cable networks are carried on commensurate tiers on all MVPDs. Other things being equal, this policy gives each network an equal foundation to succeed in competition with its rivals.

Nevertheless, the benefits of uniform national placement of a given network are not infinitely large. At least in principle, there is some price that an MVPD could offer to pay that would compensate a supplier for the losses it would sustain as a result of non-standard tier placement by that MVPD. Thus, a supplier might offer its cable network at a given price to an MVPD, but also offer a substantial discount for the MVPD's acceptance of a contractual obligation to carry the network on a given tier or to carry additional networks. MVPDs might interpret or characterize such offers as requiring them to offer a given network as part of a given tier.

There is no guarantee that the maximum price an MVPD would be willing to pay for a given cable network to be retailed à la carte would be greater than the

minimum price that would compensate the network supplier for the costs that a less uniform marketing strategy would impose. In the real world, firms with limited time and resources do not offer hypothetical bargains that they know in advance will likely be unacceptable. Thus, we would not necessarily expect to find evidence of actual offers or negotiations of this kind. In any event, such evidence is not publicly available, and might have to be obtained through interviews and other such techniques. Even if such evidence were obtained, it would shed little useful light on any public policy issue, because the pricing pattern indicated could easily arise under competitive behavior on the part of program suppliers. Thus, efforts by suppliers to ensure that their networks are marketed in a uniform way at retail cannot be interpreted as anticompetitive or harmful to consumer welfare.

IV. Effects of unbundling on the economics of a basic cable network

We turn next to whether the MVPD practice of offering bundles or tiers of services to retail subscribers is harmful to consumers. And more specifically, what would be the effect on cable networks and consumers of a regulation requiring MVPDs to offer all programming à la carte, either by network or by program, with or without continued bundling?

The first part of this question was addressed at a conceptual level in Section II above. Bundling is a universal feature of the economy, and greatly improves consumer welfare by enabling consumers to share the fixed costs of creating goods and services from component parts.¹¹ Based on current knowledge, there is no more reason to assume that bundling of cable networks into tiers is harmful to consumers than it would be to assume that bundling individual programs into schedules (i.e., networks) is harmful, or that bundling tires with new cars is harmful.

The second part of the question requires simulation of the operation of the industry under conditions different from today's circumstances. That is, an assessment of the impact of bundling and pricing practices requires a specific counter-factual or "but-for" world. An initial issue is what regulatory change is being contemplated. The Public Notice does not make clear exactly how MVPDs might be required to unbundle the networks they offer to subscribers. The following are some possibilities.

¹¹ Nevertheless, it is possible to construct hypothetical circumstances in which bundling is harmful. These circumstances are technical, not easily characterized, and differ from one market to another.

1. Pure à la carte—all cable networks must be sold individually and MVPDs may not bundle networks within or beyond the basic “broadcast only” tier. (We assume that, due to government-mandated must carry rules, broadcast networks and PEG channels would continue to be bundled on a basic service tier. We also assume for simplicity that any à la carte requirement would not extend beyond networks, that is, would not require each program to be priced individually, even though there is no obvious logical reason to stop at the network level.)
2. À la carte with bundling permitted—MVPDs are required to offer all cable networks à la carte and also permitted to offer certain bundled packages of some or all of the networks.
3. Limited à la carte—MVPDs are required to sell only certain networks, or certain types of programming (e.g., ESPN or sports more generally), à la carte.
4. Theme tiers—MVPDs are not required to price à la carte, but must create theme tiers that could be individually purchased.

We believe that all of these options will have similar effects since they all involve an element of unbundling. Therefore, we begin by examining pure à la carte. Under pure unbundling, the MVPD charges a flat fee for the basic service tier—consisting of broadcast television and PEG programming—and offers all other programming à la carte. In Section VI we discuss how the existence of theme tiers or a mixture of à la carte and tiers would alter our conclusions. The analysis focuses on how programming suppliers might be affected by unbundling and what impact this might have on consumers. The impact on MVPDs, or the

exact response of MVPDs to changes in wholesale program pricing, is not studied in detail.

This section explores the effects of mandatory unbundling on the economics of a basic cable network in a partial equilibrium framework. The effects unfold as a multistage process, with the impact from one stage influencing the next stage. The process starts with consumers' decisions whether to subscribe to the network. An overview of the sequence of the stages and the impact at each stage is as follows:

- Stage 1: Subscribers—If a cable network were taken off a tier and offered à la carte it would likely lose subscribers. The consumers that choose to subscribe will likely have been heavy viewers of the network.

- Stage 2: Reach—Given a reduction in subscribers, a cable network's audience will decline. In addition, the network's reach will decline because non-subscribers cannot readily sample the network. The network will be placed at a greater disadvantage in attracting advertising relative to the broadcast networks, which are distributed to virtually all television households.

- Stage 3: Viewers—Networks sell audiences to advertisers. A reduction in subscribers will reduce viewing. For each network, typically there are heavy viewers, medium viewers, light viewers and non-viewers. The percentage of each type varies by network. Since heavy viewers are more likely to choose to subscribe, the reduction in viewers will be less than the reduction in subscribers. Nonetheless, the loss of light and possibly medium viewers will significantly reduce a network's overall viewership, and reduce the ease with which the network can expand viewing by making changes in programming and promotion.

- Stage 4: Advertising Revenue—Advertising revenue depends on distribution (the number of subscribers regardless of how much they watch), viewers, and CPM. To an approximation, a cable network’s advertising revenue will decline by about the same percentage as its viewership. However, the decline in the network’s distribution and other factors will also affect the network’s ability to generate advertising revenue.

Unbundling will also affect a cable network’s economics in other ways. This section discusses the following two:

- Hit Programs—A network’s ability to create and grow a hit program will be reduced since consumers that do not subscribe to the network cannot easily sample the network’s programming. This will limit a network’s ability to increase subscribership and advertising revenue.

- Marketing Costs—A network will incur additional costs associated with generating consumer demand for the network. These additional transactional marketing costs would likely be hundreds of million of dollars a year.

All of these effects will put pressure on a network to generate additional revenues from subscribers. The effect of unbundling on subscriber prices is explored in Section V.

A. Consumer demand for basic networks

When consumers purchase a bundled tier of networks from an MVPD, they pay a single price for the bundle but no explicit price for the individual networks contained in the bundle. Moving to an à la carte regime would obviously drastically change this arrangement. In some sense, consumers that receive a bundle of networks for a single payment may view each of the individual networks as

having a zero price, because there is no incremental cost to viewing any of the networks within the bundle. With unbundling, consumers will be asked to move from an effective zero price for a network to some positive price for that network. In addition to the explicit price for subscribing to an additional network, there would be an implicit associated transaction cost. This pricing change is so dramatic that current consumer behavior regarding basic networks provides virtually no information about behavior in an à la carte world. Specifically, it is difficult to estimate what portion of consumers would choose to subscribe to a given network at various alternative à la carte prices set by their MVPDs. The effect is likely to differ across networks, may vary depending on whether the network provides niche programming or general interest programming, and may depend on the number of other networks that offer a similar type of programming.

It is probably reasonable to assume that if a cable network were taken off a tier and offered à la carte, other things being equal, it would lose subscribers. At any positive price set by the MVPD, the consumers most likely to decline to take the network à la carte would probably be those who viewed the network least intensively when it was offered as part of a tier. Among the consumers who would be lost from the subscriber base are those that rarely or never watch the network and would pay only a modest amount to preserve their option to watch the network occasionally or for special events.¹² If the price for the network were somewhat higher, some consumers that previously viewed the network to a greater but still small extent would also choose not to subscribe à la carte. The consumers

¹² There may be some networks, such as the Weather Channel and the various cable news networks, that are valued chiefly as an option. The impact of à la carte pricing on such channels depends on the ease with which consumers expect to be able to subscribe to it when a relevant contingency arises, such as a serious storm.

that choose to subscribe à la carte will include those that place a relatively high value on the network. Because incremental subscribers do not increase program production costs, the cable network will attempt to maximize revenue.¹³ The price that accomplishes this depends on the elasticity of demand at various points on the demand curve for each cable network.

Appendix B summarizes some recent economic studies that have examined consumers' willingness to pay for basic cable networks. It also reviews the current pricing and subscription rates for three premium services. We find that the available evidence is not sufficient to predict the demand curve for individual networks under à la carte pricing.

In addition to the obvious changes in marketing and pricing strategies that would be imposed on program suppliers by à la carte pricing, there would be a significant reduction in consumer awareness of competitive options, as described above. To illustrate, imagine what would happen if newspapers were required to offer each section of their publication à la carte. Subscribers who now glance at, but do not read, certain sections would lose their current awareness of the content of such sections. When and if such content becomes relevant, they would have to engage in a relatively costly search process.

¹³ There are, however, positive transactional and perhaps incremental marketing costs. See herein at Section IV.C. Further, while program costs are fixed in the short run and do not vary with audience size, program costs are endogenous in the long run. Other things being equal, in equilibrium attracting larger audiences will require higher program expenditures.

B. Cable advertising rates and revenues

1. Overview

On the one hand, there appears to be a belief held by some individuals that if the number of subscribers to a cable network were reduced by some percentage due to unbundling then the network's advertising revenue would be reduced by the same percentage. On the other hand, some other individuals appear to believe that if a cable network is sold à la carte it will lose only those current subscribers who do not watch the network, or only rarely watch the network, and therefore there will be only a negligible impact on the network's advertising revenue. This section explores the relationship between subscribers, viewers, and advertising revenue.

The hypothesized proportional relationship between tier subscribers and network revenue might roughly hold when a reduction in subscribers is due to MVPD systems no longer carrying a given network. But the proportional relationship is unlikely to hold if the reduction in subscribers is due to consumers' self-selecting to subscribe under an à la carte regime. Advertisers obviously care about the number of viewers and their demographic characteristics. Self-selected subscribers are more likely to view the network than the average tier subscriber. However, unbundling will still produce some reduction in a network's advertising revenue, because there will be a reduction in viewership due to the fact that not all viewers of the network when it was part of the bundle will subscribe to the network if it is sold à la carte. Having fewer viewers reduces advertising revenue because it lowers both the number of viewers and the advertising rate paid per viewer.

Reducing an audience will not normally increase the total value of the audience to advertisers unless the audience thereby becomes demographically more homogeneous in a way that is useful to advertisers. For example, some non-golfers may watch The Golf Channel, but moving The Golf Channel to à la carte might eliminate all but the avid golfers from the audience, potentially making advertisers of golf clubs willing to pay more per viewer—but advertisers of automobiles, beer, etc. inclined to pay less. Whether this exception is important is an empirical issue. However, most advertising revenue, even for such specialized magazines as *Golf World*, is **not** from specialized advertisers, but rather from the major marketers, and the same is true of specialized cable networks.

2. Cable network reliance on advertising revenue

The impact of any reduction in advertising revenues caused by unbundling will likely vary widely across cable networks. Some basic cable networks depend on advertising for most of their revenues, while others are much less dependent on advertising. Kagan Research has estimated 2003 net advertising revenue and total net revenue for 107 basic cable networks.¹⁴ See Table 2. At the extremes, over a dozen of these networks rely on advertising for less than 10 percent of revenue, and there are a couple of networks that are estimated to have no revenue other than advertising. The median value of advertising revenue as a portion of total

¹⁴ Disney, Fox Movie Channel, and Turner Classic Movies were included as having zero reliance on advertising although this was not explicitly reported by Kagan. Chronicle DTV was excluded as it was reported by Kagan to have zero Net Advertising Revenue and zero Total Net Revenue. Blackbelt TV was excluded as it was reported by Kagan to have no subscribers. Nick Too was excluded because it is a time-shifted feed of Nickelodeon/Nick at Nite. Sundance Channel was excluded because it is a premium service. Source: Kagan Research, LLC, *Economics of Basic Cable Networks 2005: Key Spreadsheets*, June 2004.

network revenue was 44 percent and the mean value was 41 percent.¹⁵ It may be that some of the networks that receive nearly all or nearly none of their revenue from advertising hope to move away from these extremes over time. However, at any given time, as in this 2003 “snapshot,” there are many networks at various points on this spectrum that would be affected differently by a decrease in advertising revenue.

Table 2: Basic cable network advertising revenue as a percentage of total revenue

Advertising as a percentage of revenue	Number of networks
0 – 9.99	15
10 – 19.99	5
20 – 29.99	10
30 – 39.99	18
40 – 49.99	15
50 – 59.99	23
60 – 69.99	10
70 – 79.99	7
80 - 89.99	2
90-100	2
Total	107

Advertising revenue is net of agency fees.

This diverse picture is much the same for networks of all sizes. For instance, among the networks that Kagan Research reports as having 80 million or more subscribers in 2003, the percent of revenue attributable to advertising ranged

¹⁵ This is consistent with the GAO finding that “cable networks obtain roughly half of their overall revenues from advertising.” (GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, October 2003, at 30.) It is not clear if GAO used net or gross advertising revenue in making its estimate.

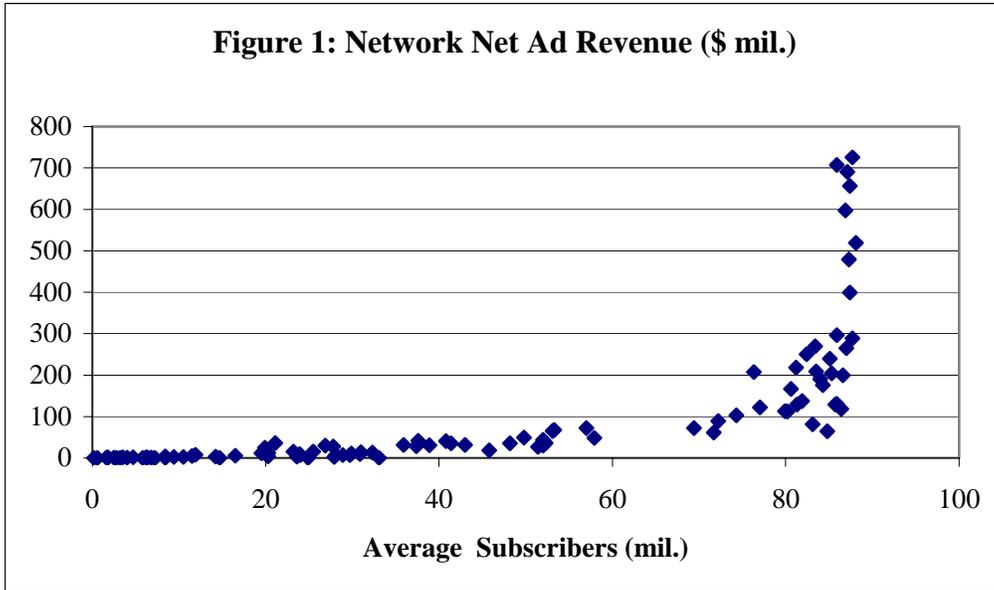
from 83.7 percent (Home & Garden Television) down to 22.9 percent (American Movie Classics), and Disney with no advertising.

3. Variation in cable advertising rates and revenues

Two of the key factors in determining the advertising revenues of a basic cable network are its distribution (i.e., the number of subscribers to the programming tier that contains the network) and its viewership (as reflected in ratings or estimates of ratings). The network's distribution is the set of all consumers that have the opportunity to view the network at any given point in time. Some portion (in many cases a very small portion) of these potential viewers actually watch the network.

Network advertisers are interested in getting their messages to consumers. As the number of viewers that a network can provide increases or decreases, a network's value to advertisers and the revenue that a network receives from advertising likewise increases or decreases. Discussions with Viacom advertising sales personnel indicated that currently, as a rule of thumb, a cable network needs a subscriber base of approximately 50 million households in order to gain a significant amount of national advertising. One reason for this is that national advertisers prefer broad reach and it is at the 50 million subscriber level that the network is available to about half of all TV households. Additionally, national advertisers are interested in a network's ratings, and while Nielsen provides ratings information for networks starting at about 20 million to 30 million subscribers, the ratings numbers become more statistically reliable when a network reaches about 50 million subscribers. This is due to the fact that the Nielsen rating system is based on a sample of households. Fewer subscribers to a network means that there are likely fewer Nielsen households that report on the network, and as sample size decreases uncertainty increases.

Kagan Research has estimated the annual advertising revenue for 105 basic networks.¹⁶ Figure 1 depicts net advertising revenue in 2003 for these 105 networks plotted against their subscriber bases. As Figure 1 makes clear, advertising revenue is not a linear function of tier subscribers.

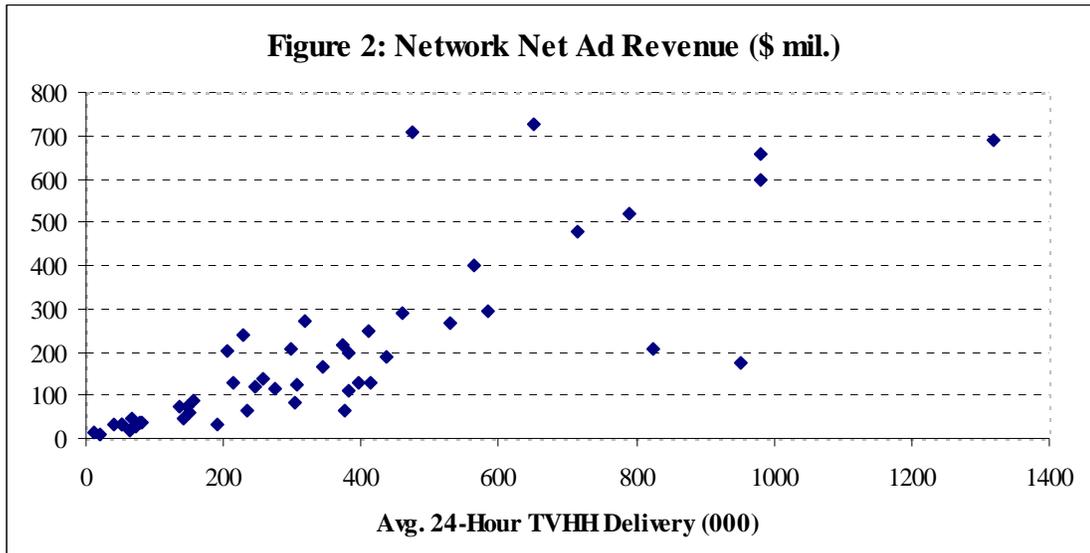


Though the size of the subscriber base is important, it is not the only factor explaining a network's advertising revenue. Figure 2 shows net advertising revenue plotted against the average 24-hour number of television households delivered for 49 cable networks.¹⁷ This indicates that the number of households viewing a network is a key determinant of the network's advertising revenue. This

¹⁶ Kagan Research, LLC, *Economics of Basic Cable Networks 2005: Key Spreadsheets*, June 2004. This excludes those networks that do not sell advertising.

¹⁷ Id.

simple analysis does not hold constant the demographics or the desirability of the network's audience to advertisers.



4. Impact of à la carte pricing on advertising revenue

As discussed above, if a basic cable network were to be dropped by some MVPD systems, the number of actual viewers would likely decrease in about the same proportion as the decrease in the total subscriber base. However, in the case of a cable network being taken off a tier and offered à la carte, this assumption is not correct. At any positive price set by the MVPD, the consumers most likely to decline to take a network à la carte will be those who viewed the network least intensively when it was offered as part of a tier. Among the consumers who would be lost from the subscriber base are those that rarely or never watch the network and would pay only a modest amount to preserve their option to watch the network occasionally or for special events. If the MVPD's price for the net-

work were somewhat higher, some consumers that previously viewed the network to a greater but still small extent would also choose not to subscribe à la carte. The viewers who choose to subscribe à la carte will include those who place a relatively high value on the network, and it is reasonable to assume (although of course not universally correct) that such viewers watch the network when offered on a tier more than the average tier subscriber.

For these reasons, the reduction in a network’s subscriber base is likely to exceed, in percentage terms, the decline in its viewing audience. For a simplified hypothetical illustration, suppose that, when offered by MVPDs as part of a tier, Network X routinely attracts 500,000 viewing hours in the course of a 24-hour day. Suppose further that tier subscribers can be broken into eight equal-sized segments, each with differing propensities to watch the network. The number of average daily viewing hours coming from each segment is depicted in Table 3.

Table 3: Viewing hours for a hypothetical tiered Network X, by subscriber segment

Segment	1	2	3	4	5	6	7	8	All
Viewing Hours	0	0	0	25,000	50,000	75,000	150,000	200,000	500,000

Now suppose in this hypothetical illustration that 75 percent of Network X’s subscriber base chooses not to subscribe when MVPDs offer the network à la carte. The 75 percent of subscribers who are lost will include all the subscriber segments that viewed the network seldom if ever. Segments 1-3 in Table 3 represent these subscribers. Segments 4-6 would also be lost, which would decrease average daily viewing hours by 150,000, or 30 percent of the initial 500,000

level.¹⁸ The remaining two segments would provide a daily audience of 350,000 viewing hours. Thus, as a first approximation, a 75 percent decrease in the subscriber base of this hypothetical network would result in only a 30 percent reduction in viewing hours. As a rough estimate, advertising revenue would decrease by 30 percent in this hypothetical example. Of course the pattern of viewing across subscribers varies by network. Some cable networks may have most of their viewing concentrated within a small group of subscribers, while other networks may find their viewing is spread across a large group of subscribers. Reducing an audience is unlikely to increase CPMs. Many of the advertisers on a network sell products that appeal to a broad audience and purchase time in order to reach a broad audience. For such advertisers, there is little or no benefit, and perhaps a disadvantage, from reducing the audience. In addition, many networks are general interest networks and shrinking the audience for such a network probably would not change the overall make-up of the audience in a way that makes the audience more attractive to advertisers.

The loss of advertising revenue when moving to an unbundled environment may be more than proportional to the reduction in viewing. On a per-viewing-hour basis, the audience Network X offers advertisers in the à la carte environment will tend to be less valuable because it is smaller. As explained above, advertisers value unduplicated reach, and pay a premium for a larger audi-

¹⁸ This simplified hypothetical obviously omits other factors such as income that would affect which consumers choose to subscribe to a channel à la carte. It is not necessarily the case that all consumers who view a network at a low level would decline to take it à la carte, nor is it necessarily the case that all consumers that view a network most intensively would choose to take it à la carte.

ence. For this reason, a 10 percent increase in audience size will produce a greater than 10 percent increase in advertising revenue.¹⁹

Another aspect of advertising that would likely be affected by à la carte pricing is the ability of a “hit show” to be discovered and grow its audience. Part of the hit show phenomenon is that a program can quickly attract viewers. Many of these new viewers are likely to be infrequent viewers of the network, but nonetheless have access to it. When the network is part of a tier, these infrequent viewers can quickly and easily switch to the network and watch the program. After sampling the programming on the network, these viewers may then become more frequent viewers of the network. However, if the network were sold à la carte, there would be a longer delay and perhaps a smaller response because switching would now be more involved and the costs of switching would be higher. This would reduce the network’s ability to generate audiences and advertising revenues from a hit show.

C. Other costs due to unbundling

In addition to the possible reduction of advertising revenues, there are various costs that networks, MVPDs and consumers are likely to incur when cable networks are offered à la carte. This subsection examines the nature and magnitude of some of those additional costs based on data and information provided by

¹⁹ This effect was demonstrated empirically by Franklin M. Fisher, John J. McGowan and David S. Evans in “The audience-revenue relationship for local television stations,” *The Bell Journal of Economics*, Autumn 1980, pp. 694-708.

Showtime Networks Inc. (a subsidiary of Viacom), which is attached as Appendix C.²⁰

A cable network will face additional marketing costs, once unbundled, because it must now sell its programming to consumers as well as to MVPDs. The network must compete with dozens, if not hundreds, of other networks for the consumer's selection. MVPDs and consumers will face increased costs as well. Cable operator costs may increase due to the need for additional addressable converters, additional headend equipment, increased marketing costs, increased customer service costs, increased technical costs, and increased costs associated with customer ordering and billing. At least a portion of these increased costs will likely be passed on to subscribers. MVPDs will also likely face a reduction in advertising revenues due to fewer subscriptions.

Consumers will face increased search costs, as they must now learn about the various cable networks in order to determine which ones to select. Consumers will also face a probable loss of some existing networks and program services, a reduction in the number of new networks and program services entering the market, a lost option value to view infrequently watched programming on networks no longer subscribed to, and additional equipment costs. As the GAO pointed out, the need for subscribers to have an addressable converter box could be costly.²¹ According to the FCC's 2002 cable rate survey, the average monthly rental price for a digital converter box and remote control is \$4.87.²² Subscribers with multi-

²⁰ Showtime Networks, *The Impact of A la Carte Pricing on Multichannel Video*, July 2004.

²¹ GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, October 2003, at 32.

²² FCC, *Report on Cable Industry Prices*, MM Docket No. 92-266, July 8, 2003, at Table 10.

ple television sets would need multiple converter boxes. The average American television household has about 2.5 televisions, and hence could face an equipment cost of over \$12 per month in order to have access to à la carte networks.²³

Currently, much of a cable network's marketing is directed at MVPD systems, with consumer-directed marketing designed to improve ratings for specific programs. However, in an à la carte regime, a network's marketing focus would need to change to the consumer to generate consumer demand for the network. The network as a whole would have to be marketed, not just specific programs. A cable network's additional costs would consist of transactional marketing expenses and the associated sales organization, business operations, human resources costs and associated auditing costs. Transactional marketing is a program of tactics, activities and resources designed to generate subscriptions to an à la carte network by stimulating consumer demand and influencing consumer choice at the point of sale. These tactics include consumer rebates, free previews, promotional offers, telemarketing, direct mail, customer contact personnel (CCP) sales incentives, CCP training and awareness tools, and distributor incentives to favorably price, package and promote the network such as volume and penetration discounts, retail price incentives and cash marketing support. In addition to these transactional marketing expenses, there are associated costs of the personnel needed to implement the transactional marketing program. For the most part, these transactional and associated marketing costs would be in addition to the existing advertising and marketing expenses incurred by a cable network. Indeed,

²³ Kagan Research, *Digital Television*, April 29, 2004, p. 5. Note that some households, particularly those subscribing to a direct broadcast satellite service, a digital tier of service, or a premium service, may already have a converter box for some of their television sets. These households would need a converter only for any television that is not currently equipped with a converter box.

advertising and marketing expenses may also increase in an à la carte regime as networks compete to get noticed by consumers.

Showtime Networks' analysis of the annual connects and transactional marketing expenses for the premium movie network category consists of Showtime Networks (Showtime, The Movie Channel, Flix), Home Box Office (HBO, Cinemax), and Starz Encore Group (Starz, Encore). Showtime Networks determined that the average annual transactional and associated marketing costs per connect for the premium network category as a whole is about \$11.25.

This estimate is likely to be understated because \$11.25 is the average cost when one premium network supplier is competing principally against only the other two existing major premium network suppliers. The transactional costs would likely be much higher if the network had to compete against the hundreds of other networks available on an unbundled basis. Moreover, the transaction costs likely would be higher as the recently unbundled networks scramble to attract initial subscribers. The \$11.25 estimate is based on maintaining a given level of subscribers using the well-established marketing expertise of the premium networks. For these reasons, Showtime estimates that the average annual transactional and associated marketing costs per connect for an unbundled network would average about \$16.90.

One way to estimate the total transactional and associated marketing costs that would be incurred were a cable network to be offered à la carte instead of as part of a tier is to consider the number of subscribers to the network and the churn rate. Churn is defined as the percentage of households that discontinue their subscription to the network each month. If a network wants to maintain its number of subscribers, much less grow, it must replace those subscribers it loses to churn.

Showtime Networks determined that the average monthly churn rate for Showtime, The Movie Channel, HBO, Cinemax and Starz is currently 5.9 percent.

Consider a network with 25 million à la carte subscribers. If the network's monthly churn rate is the same as that for those five premium networks, 5.9 percent, then the average annual "replacement" connects needed just to maintain the subscriber base are 17.7 million households. Using an estimate of \$16.90 per connect, the annual transactional and associated marketing costs incurred by the network would be about \$300 million just to maintain its subscription level of 25 million.

V. Effects of unbundling on prices paid by subscribers

As noted above, one cannot confidently predict all the effects that would result from a change in the way that cable programming is sold to consumers. The retail bundling of cable networks is part of a complex system of interrelated economic decisions that involves program quality and marketing as well as pricing, as described above. In addition, the competitive interactions among networks are also important, as are the individual network pricing decisions made by the MVPDs.

The available evidence is not sufficient, even leaving aside the general disequilibrium into which the entire industry would be thrown by mandated unbundling, to predict exactly what prices would prevail for individual networks in a pure à la carte world. It does seem reasonable to expect, however, that any MVPD subscriber who sought to subscribe to the same array of networks now available on any given tier would pay more, and quite likely much more (because of the lost advertising support, decreased subscription revenue and increased marketing costs) to receive the current quantity and quality of programming, and that is indeed the result that emerges from the modeling exercise in this Section. The model indicates that consumers who subscribe to a moderate or large number of networks will end up paying more, while consumers who subscribe to only a few networks may pay less. However, in the longer run, there is no guarantee that the networks preferred by the latter group will remain in existence.

A complete general equilibrium model of consumer demand, network programmer supply, and MVPD system pricing is beyond the scope of this paper. But in order to provide some gauge of possible impact on consumer prices, we develop a simple model of the effect on subscriber prices of imposing à la carte. We do not check to see whether the resulting predictions of prices are consistent

with a competitive equilibrium. While we have made some simplifying assumptions in order to arrive at our estimates, the results are nonetheless instructive.

The analysis that follows focuses on the 110 cable networks for which Kagan Research provides 2003 data.²⁴ The analysis begins with an assumption as to the percentage of current subscribers that would continue to subscribe if à la carte pricing were required. We have selected three different subscriber retention rates: 10 percent, 20 percent, and 30 percent.²⁵

For the reasons discussed in Section IV.B, there is likely to be some loss of advertising revenue if unbundling is required. In order to account for the effect of lost advertising revenue on wholesale cable pricing, we have selected three different levels of advertising revenue retention: 80 percent, 60 percent, and 40 percent. Our assumption is that those consumers who continue to subscribe to a particular cable network under à la carte are the core viewers of the network. Hence, regardless of how many subscribers are retained, it is likely that the percentage loss in advertising revenue will be less than the percentage loss in subscribers.

As discussed in Section IV.C, programmers also are likely to incur additional marketing costs if à la carte pricing is imposed. In order to account for that effect on wholesale network pricing, we have estimated the additional transactional marketing and associated costs of each network. We assume that a network's monthly churn rate is the same as that for the existing premium networks, 5.9 percent, and that the average transactional marketing and associated costs are

²⁴ Kagan Research, *Economics of Basic Cable Networks 2005: Key Spreadsheets*, June 2004.

²⁵ These values seem to cover the reasonable range of subscriber retention given the current take rates of the premium cable movie networks. See Appendix B.

about \$16.90 per connect per year. Therefore, the additional expense the network incurs to replace those subscribers it loses to churn is about \$1.00 per subscriber per month.²⁶

In the real world, networks can respond to unbundling in a variety of ways. To facilitate an illustrative analysis, we assume that networks will raise license fees in order to offset any decline in subscriber or advertiser revenues and any increase in marketing costs, rather than lowering program expenditures. These assumptions permit us to calculate a network's wholesale price (license fee) to the MVPD systems. We then assume that MVPD systems apply a uniform 90 percent markup over wholesale price to calculate each network's à la carte retail price.²⁷

Using these assumptions, we estimate à la carte retail prices for each of the 110 networks. We then compute the average price of a network under à la carte

²⁶ The annual cost to replace subscribers lost to churn equals $\$16.90 \times 5.9\% \times 12 \times \text{subscribers}$. Therefore, the cost per subscriber per month equals $\$16.90 \times 5.9\%$, or about \$1.00.

²⁷ The assumption of 90 percent markup appears to be in line with current MVPD markups. NCTA estimated 2003 basic cable subscriber revenue at \$28.962 billion and 2003 premium subscriber revenue at \$5.192 billion. (NCTA, *Cable Developments 2004*, p. 14.) Basic cable subscribers were reported at about 73.4 million in 2003. (NCTA, p. 8.) This implies basic and premium subscriber revenues of \$38.79 per subscriber per month. In its 2002 cable industry survey, the FCC found that the average price of the basic service tier was \$14.45. (FCC, *Report on Cable Industry Prices*, MM Docket No. 92-266, July 8, 2003, at Table 1.) This implies that subscribers paid about \$24.34 per month for the programming beyond the basic service tier. Total cable programming expenditures, including license fees, copyright fees and investments in local original programming, was estimated at \$11.46 billion, or \$13.02 per basic subscriber per month. (NCTA, p. 13.) The markup of \$11.33 over programming costs implies an estimated markup of 87 percent. This estimate understates the actual markup. The basic service tier often includes some basic networks, so some of the \$14.45 should be considered payments to networks. The payment to networks or \$13.02 is overstated because programming expenditures include local programming expenditures. Making these adjustments would increase the estimated markup.

pricing.²⁸ The results are presented in Table 4. For example, assuming that networks increase subscriber fees to recover lost subscriber and advertising revenue and increased transactional marketing costs, that networks retain 30 percent of their subscribers and 80 percent of their advertising revenue, and a 90 percent markup of the wholesale price, the average price of a network under à la carte pricing would be \$3.39.

Table 4: Weighted average retail price of a network under à la carte pricing

Advertising Revenue Retention	Subscriber Retention		
	30%	20%	10%
80%	\$3.39	\$4.13	\$6.37
60%	\$3.61	\$4.46	\$7.03
40%	\$3.83	\$4.79	\$7.70

As either the advertising revenue retention rate or the subscriber retention rate falls, the average price of a network increases. A decline in subscriber retention rates from 30 percent to 20 percent, holding the advertising revenue retention rate constant, increases the average price of a network by slightly less than \$1.00, but a decline from 20 percent to 10 percent increase the average price of a network by over \$2.00 to almost \$3.00. If the advertising revenue retention rate declines from 80 percent to 60 percent, holding the subscriber retention rate constant, the average price of a network increases by 22 cents to 66 cents; a decline from 60 percent to 40 percent has the same effect.

²⁸ Throughout this section, the average price of a network is computed as the subscriber-weighted average price of the 110 networks included in the analysis. All prices reported are retail prices.

For comparison, consider that currently the average retail price of a network is \$0.38.²⁹ Hence, after unbundling, the average retail price of a network is estimated to be 9 to 20 times higher than it is currently.

At the mid-point of the ranges considered—20 percent subscriber retention and 60 percent advertising revenue retention—the average price of a network is \$4.46. At this price, the average cost per subscriber (exclusive of the basic tier fee and converter box fee) for 10 à la carte networks would be \$44.60.³⁰ Adding the cost of the basic service tier and one converter box, the average consumer would pay \$63.92 for basic service and 10 cable networks.³¹ This is over 50 percent higher than the Commission’s estimated 2002 average programming and equipment charge of \$40.11 for basic service, equipment and 46 satellite delivered cable networks.³²

It is possible that instead of raising license fees a network may respond by decreasing programming expenditures. However, any decrease in program quality is a cost to consumers, equivalent to a price increase. It is also quite possible that a network may not be able to recover from the decrease in revenues and increase in costs and may simply fail. Absent much better information on consumer de-

²⁹ This is based on Kagan Research’s estimates of subscribers and license fees for each of the 110 networks, and assumes a 90 percent retail markup of license fees.

³⁰ At least one study found that the average cable subscriber watches 12 to 15 channels. *See*, Concerned Women for America, “Cable Choice is Channel Choice,” 2004. Since these channels probably included the broadcast networks, we use 10 cable networks in this example.

³¹ In its 2002 cable industry survey, the FCC found that the average price of the basic service tier was \$14.45 and the average price of a digital converter box was \$4.87. FCC, *Report on Cable Industry Prices*, MM Docket No. 92-266, July 8, 2003, at Tables 1 and 10.

³² *Id.*

mand for individual networks, as well as assumptions about the nature of and the path to the new industry equilibrium, it is not possible to predict which networks will fail. But it is reasonable to believe that at least some networks will be forced out of existence by unbundling.

C. Effect of unbundling on the number of cable networks

Finally, a natural question is whether the overall number of cable networks will increase or decrease as a result of unbundling, and whether entry costs for new networks will increase or decrease. As with the issues addressed above, a more extensive and speculative modeling effort would be required to answer these questions precisely. It is clear, however, that the short-run or partial equilibrium effect of unbundling would be to reduce the number of networks and to increase entry costs. The number of networks would likely decrease because the models above predict both decreasing revenues and increasing costs for individual cable networks required to be unbundled. As is well known, many cable networks are, for a variety of reasons, unprofitable or marginally profitable. At least some of these networks will be forced out of existence by unbundling. Further, it is possible that there would be a reduction in aggregate expenditure on programming by the surviving networks, which would presumably result in a reduction in average program quality.

As to entry, it appears that new entrants would have a more difficult time than at present because tier subscribers would not be able to sample or “surf” their programs, but would instead have to commit to a network subscription. Overcoming this handicap would require increased expenditure on upfront and continuous advertising and promotion.

VI. Other regulatory proposals – blocking and theme tiers

The preceding sections have discussed the economics of bundling and the consequences of requiring that MVPDs provide cable programming on an à la carte basis. We can now draw on this background to discuss other regulatory proposals and specific questions raised by some consumers and public officials.

A. Blocking

One complaint that is sometimes made about tiers of programming offered by MVPDs is that some subscribers find objectionable programming bundled together with programming that they want. Of course, this can happen in any of the packages of media content that consumers purchase. *Time* or *Newsweek* may occasionally or even regularly contain material to which certain individuals object and which they do not want their children to see, even though they value the remainder of the content of the magazine and would encourage their children to read that content. The same may be true of local daily newspapers, of which most communities have but one. Consumers may have to make difficult decisions about whether to subscribe or not, and if they decide to subscribe they may need to take steps to protect their children from gaining access to the material that is objectionable. Similarly, consumers must decide whether to subscribe to MVPD bundles of content that contain objectionable material, and if they do subscribe they must take steps to prevent children from access to the objectionable material.

Consumers can take various steps to ensure that they do not watch these networks. Many set-top boxes, including most or all modern boxes, can be programmed to block specific networks, and some set-top boxes and televisions can block individual programs. Cable companies will, on request and for no additional charge, install a physical device outside the home that filters out or “traps” a spe-

cific network so it cannot be received. Consumers can also simply change the channel and not tune their televisions to the objectionable networks.

Some consumers who use a set-top box or “trap” to block a network ask why the fee they are charged by their MVPD is not reduced to reflect the reduced number of networks they are actually getting. However, ordinary consumer experience would not lead them to expect a fee reduction. As was pointed out above, sellers of all types bundle components together as products or services and provide them at a lower price than the sum of the cost of the individual components. A consumer who wants to buy a product that is not “off the shelf,” customized either by including or excluding some features, often has to pay more. A diner ordering a steak may ask the restaurant to hold the baked potato that is “bundled” with the steak, but she does not expect the restaurant to decrease the price of the meal accordingly.³³

The consumer who finds a network objectionable is not significantly different, in this regard, from a consumer who finds a network uninteresting. As pointed out above, most consumers have networks in their MVPD’s programming tier that they do not watch. These consumers decide to subscribe to the MVPD’s programming tier because, taken together, the networks that consumers do watch have a value that exceeds the price that the MVPD charges. They do not expect to

³³ As with any unbundling of content, blocking imposes costs on the MVPD and the cable network, as well as other subscribers. Returning to the magazine analogy from the Introduction Section, a subscriber could ask the publisher of *Newsweek* that a particular section dealing with foibles of celebrities be blacked out. Conceivably, the publisher might accommodate this request for a subscriber, or (more plausibly) even offer a redacted edition of the magazine if a significant percentage of subscribers had the same interest. However, both the costs and revenue effects of tailoring content in this way would likely, in a competitive environment, result in subscribers paying a higher price for the customized magazine, rather than receiving a discount because of the reduced content.

have their fee reduced to reflect the networks that they do not watch. Similarly, consumers who choose to subscribe even though they either block or do not watch certain objectionable networks find the value of the programming they do watch exceeds the price they have to pay, without any fee reduction.

The issue here arises not merely with MVPD bundling but with bundling of any kind. More specifically, suppose that a shopper needs exactly 12 ounces of bitter chocolate for a recipe. The store sells bitter chocolate in a 10-ounce bar for \$2.00 (20¢ per ounce) and a 15-ounce bar for \$2.25 (15¢ per ounce). The shopper buys the larger bar and later returns with the unneeded 3 ounces to the store, requesting a refund. Should the law require a refund in these circumstances? If so, how much should the refund be? What would happen to the cost of retail services and the prices of goods sold at retail if the law required a refund in these circumstances? It does not take much imagination to see that such a law would quickly produce a nightmare for suppliers and consumers alike.

In any event, it currently may not be economical or possibly even feasible for MVPDs to report reliably to a network the number of subscribers that block the network, especially if subscribers block the network using a set-top box. Thus, there is no mechanism for MVPDs to reduce their program acquisition fees when a consumer chooses to block. There is no cost savings for the MVPD to “pass through” to the consumer as a reduction in the consumer’s monthly fee.

B. Theme tiers and mixed bundling

The Commission asks about the likely effects of mandating theme tiers. For example, there might be a sports tier, a movie tier, an adult tier, and/or a family tier. Presumably, material likely to be objectionable for children would be omitted from the family tier, for example. It is unclear who decides what program

networks would be made part of such a tier. There are at least two problems with this approach. First, to the extent that MVPDs compete with one another (there are now at least three major MVPDs available to nearly every consumer, and sometimes other minor ones), a theme tier requirement would constrain the industry away from its competitive equilibrium. Policymakers generally accept the legitimacy of competitive market outcomes, if not because such outcomes optimize consumer welfare, then because there is no basis for improving matters with a regulatory intervention. In this case, forcing MVPDs to market their services in a way that differs from the strategy that best serves consumer demand seems likely to reduce economic welfare.

The second objection to a requirement of theme tiering is that it is not a content-neutral regulatory intervention. Indeed, the essence of the intervention is to organize content in a way different from the way the MVPD would like to organize and market it. This raises First Amendment issues that the Commission and the courts would have to address.

Government-mandated tiers would entail the same problems as à la carte pricing. Mandated tiers would reduce subscriber and advertising revenues because of reduced circulation for each network included on a tier that was not chosen by all current subscribers. Dividing the basic bundle into tiers would require consumers to pay for set-top boxes as with à la carte pricing of networks. Tiering would lead to increased marketing, transactional, and customer support service costs. Transactional costs may even be higher than with à la carte because a programmer would have to convince consumers to subscribe not to just its network, but to some tier of programming that will likely differ across MVPD systems. Indeed, a programmer's transactional expenditure will benefit not only itself, but whatever networks it is packaged with on the tier. Strategic interaction among

networks in each tier might result in promotional expenditures greater or less than optimal levels.

Other proposals include “mixed bundling,” whereby an MVPD must offer all the networks à la carte as well as in a bundle, and “voluntary” à la carte, whereby an MVPD can offer some networks à la carte rather than as part of a bundle. Again, breaking networks out of a tier taken by all subscribers would reduce a network’s subscriber and advertising revenues because of reduced circulation for the network. Offering any of the networks à la carte would require consumers to pay for set-top boxes and would lead to increased marketing, transactional, and customer support service costs.³⁴ A program supplier’s optimal promotional and marketing strategy and associated pricing decisions would likely differ if its network is sold à la carte rather than as part of a tier. If a programmer’s network is offered à la carte in some areas and as part of a tier in other areas the programmer may need two different types of advertising and marketing campaigns. Indeed, the programmer may be in a difficult position because the programming would need to appeal to the à la carte consumer and to the tier consumer, and the optimal type of programming to reach these two types of consumers may be different. There could also be problems in selling national advertising. Hence, a cable network may not be able to survive in competition if its program service is not marketed uniformly (i.e., on the same type of tier) by all MVPDs.

Being forced to unbundle only a few specific networks will create the problems discussed above for those networks that are unbundled and might not

³⁴ In a mixed bundling regime, consumers who subscribe to the bundle may not need a converter box.

reduce the price of the remaining bundle of networks. To the extent that certain subscribers are willing to pay only a very low price for the networks that are unbundled, the price they are willing to pay for the remaining bundle of networks is unchanged or only slightly reduced. If there are many such subscribers, the MVPD will not significantly reduce the price of the bundle. Since these consumers were initially purchasing the bundle to view networks other than the networks that were unbundled they should be willing to pay the same price for the bundle excluding those networks.

VII. Conclusion

We conclude that mandatory unbundling of cable program services at the wholesale or retail level would be harmful to consumer welfare in the United States. At the wholesale level the evidence suggests that bundling simply is not an important feature of the commercial landscape. Where buyers do perceive it to occur, they probably mistake what amounts to a quantity discount for a true bundled offer. At the retail level, complaints about bundling may reflect the false assumption that the sum of the competitive prices for unbundled networks would be the same as current bundle prices. As we have shown, the reality is that the components would likely cost more than the bundle. More generally, bundling is a very common and efficiency-enhancing economic phenomenon. In its absence, costs and prices would increase, making virtually everyone worse off and reducing the output of goods and services.

Even if all of the foregoing is assumed to be incorrect, so that bundling actually reduced welfare in the MVPD programming markets, remedial action would be elusive. Bundling is in part a pricing phenomenon, and it could not be limited without regulating both the definition of what constitutes a bundle for each product or service as well as its price. In contrast to the task of regulating unbundled elements of local exchange services, where the conditions for efficient pricing are relatively straightforward, there is no generally accepted rule for pricing non-rivalrous consumption goods such as video programming that is incentive compatible on the supply side and efficient on the demand side.

Appendix A. Basic cable networks included in each network supplier

Network supplier	Cable networks
A&E	Arts & Entertainment, Biography, History Channel, History Channel International
Cablevision	American Movie Classics, Fuse, Independent Film Channel, Women's Entertainment
Comcast	E! Entertainment Television, Golf Channel, Outdoor Life Network, Style.
Discovery	Animal Planet, Discovery Channel, Discovery en Espanol, Discovery Health Channel, Discovery Home Channel, Discovery Kids Channel, Discovery Science Channel, Discovery Times Channel, Discovery Wings Channel, The Learning Channel, Travel Channel. (FitTV was not included because it was acquired in 2001 and re-launched in 2004.)
Disney	ABC Family Channel, Disney Channel, ESPN, ESPN2, ESPN Classic Sports, ESPNews, SoapNet, Toon Disney
Fox	Fox Movie Channel, Fox News Channel, FX, Speed Channel (National Geographic Channel was not included because it started in 2001.)
Lifetime	Lifetime, Lifetime Movie Network (Lifetime Real Women was not included because it started in 2001.)
Time Warner	Cartoon Network, CNN, CNNfn, Headline News, NBA.com TV, TBS Superstation, Turner Classic Movies, Turner Network TV
Viacom	BET, BET Jazz, CMT: Country Music Television, Comedy Central, MTV: Music Television, MTV Espanol, MTV2, Nickelodeon/Nick at Nite, Nickelodeon GAS, Noggin, Spike TV, TV Land, VH1, VH1 Classic, VH1 Country, VH1 Soul.

Appendix B

Demand evidence

Economic literature

Recent economic studies have attempted to estimate mean consumer willingness to pay for basic cable networks while accounting for the differences among networks.³⁵ One study estimates the price of the basic cable bundle when different cable networks are added.³⁶ The study assigns cable networks to various groups (news, sports, family, etc.) and then estimates the common value of any member within a group. Using nearly fifteen-year-old subscriber data (from 1990), this study finds that the addition of a family or sports network increased the price of basic cable by 7 percent while the addition of a music, news, or educational network increased the price by 4 percent. At \$15.90, the average basic

³⁵ Earlier economic literature focused on the incremental price charged by cable operators when they included an additional cable network. No distinction was made for the type of network added. Incremental values found ranged from a few cents per month to less than a dollar per month. These results most likely do not provide a useful guide to optimal à la carte prices for a number of reasons. First, there is no variation in the value of different cable networks. It is likely that some cable networks are more valuable to consumers than others (some may even have negative values for a portion of subscribers). Averaging consumer value over all cable networks will mask this variation. Second, these studies attempt to determine the incremental value consumers place on a cable network when it is *included in* the basic or expanded basic bundle. This value is certainly affected by the other choices already available within the bundle. This is especially problematic when the value estimated is for an additional generic cable network. Third, these studies make no allowance for non-subscriber revenue to cable systems. Fourth, the studies do not control for variation in cable system programming acquisition costs. Cable systems not only take into consideration consumer demand and advertising revenue, they also account for the cost of the programming. There are obviously wide differences in carriage fees paid by cable systems that must be included in any model of consumer demand.

³⁶ Diane Anstine, "How Much Will Consumers Pay? A Hedonic Analysis of the Cable Television Industry," *Review of Industrial Organization*, Number 19, pp. 129-147, 2001.

cable price in the sample, this would imply an increase in price of \$1.11 and \$0.67 respectively.³⁷ The use of categories of networks was required because the author was unable to get statistically significant results when using individual cable networks.

The estimates of consumer value derived in this study are of limited value for estimating optimal cable network à la carte pricing for several reasons. First, values are not derived for particular networks, but for each of the 15 categories of networks defined by the author. Second, the value of the network is determined when *added* to the basic bundle. This may not be the same value assigned to the network *outside* of any bundle. Third, the study estimates the average value across all consumers and does not indicate how the value varies across consumers—i.e., the results do not describe demand curves.

In a series of papers by Gregory Crawford, consumers' mean willingness to pay is estimated for particular networks.³⁸ Professor Crawford and his co-authors use carriage variation across cable systems to estimate the mean willingness to pay for the top 15 cable networks (based on total subscribers). Using data from 1992 and 1995, these studies find that the mean willingness to pay varies

³⁷ Anstine finds that the addition of general program networks and superstations adds no significant value. The author speculates that this is due to the similarity between those networks and over-the-air programming.

³⁸ "The Impact of the 1992 Cable Act on Household Demand and Welfare," Gregory S. Crawford, *Rand Journal of Economics*, Vol. 31, No. 3, Autumn 2000, pp. 422-449. "The Discriminatory Incentives to Bundle in the Cable Television Industry," Gregory S. Crawford, Working Paper, University of Arizona, April 2, 2004, "Bundling in Cable Television: Incentives and Implications for Regulatory Policy," Mark Copejans, Gregory Crawford, Duke University Working Paper [Draft], November 1999.

from a high of \$5.50 for ESPN to a low of -\$1.22 for the Family network.³⁹ Even though the authors have estimated values for particular cable networks, these estimates retain some of the unsuitable features of the previous study for purposes of estimating prices under à la carte pricing.

Inferences from premium services

A limited amount of information about consumer choice and prices can be gleaned from premium networks that are now offered à la carte. Data from Warren Communications show, for many cable systems, the number of subscribers taking individual premium networks and the monthly fee charged by the cable operator for that network. Usable data were available for HBO on 3,416 systems, for Cinemax on 1,944 systems and for Showtime on 1,922 systems.⁴⁰

To study thoroughly the effect of price on subscription levels, one would want to control for economic and demographic characteristics of MVPD systems' service areas, the price and quality of basic service, the number of broadcast signals available, and other relevant factors. Such a study is not feasible within the time available to respond to the Public Notice. Nonetheless, some rough observations may be useful in calibrating the analysis of prices and subscription levels that might be expected among basic networks in an à la carte environment.

³⁹ Negative values are possible since the authors are measuring mean willingness to pay. The network may still have positive value to the bundle if some subscribers value it highly.

⁴⁰ Systems were excluded if they did not carry a particular network, if there was no fee reported to receive that network alone (as opposed to a bundle of premium networks), if no subscriber counts were reported, or if the reported number of subscribers to the premium service exceeded the number of basic subscribers reported for the system.

Among the systems providing useable data:

- Ninety-three percent of HBO subscribers pay between \$8.00 and \$14.00 per month. At each dollar interval in that range, the ratio of HBO subscribers to total basic subscribers was calculated for all systems offering HBO at a price in that range. For instance, among systems offering HBO for \$8.00-\$9.00, 21.5 percent of total basic subscribers were also HBO subscribers. Across different dollar price intervals, the percentage of basic subscribers taking HBO, or the “take rate,” reached a low of 20.2 percent and a high of 23.4 percent. The average take rate among subscribers in all systems pricing in the \$8.00-\$14.00 range was 21.7 percent, at an average price of \$11.47.
- Again, ninety-three percent of Showtime subscribers pay between \$7.00 and \$14.00 per month. Across different dollar price intervals, the Showtime take rate ranged between 9.5 percent and 22.9 percent. The average take rate among subscribers in all systems pricing in the \$7.00-\$14.00 range was 10.6 percent, at an average price \$10.95.
- Ninety-five percent of Cinemax subscribers pay between \$7.00 and 14.00 per month. Across different dollar price intervals, the Cinemax take rate ranged between 9.2 percent and 11.4 percent. The average take rate among subscribers in all systems pricing in the \$7.00-\$14.00 range was 10.3 percent, at an average price of \$10.84.

Care must be taken in applying even these limited conclusions to the likely prices and take rates for basic cable networks if they were to be sold à la carte. The numbers of consumers that choose to subscribe to a premium service will depend not only on the price of the service, as just discussed, but also on the price and availability of other alternative programming. Extrapolating these results to

basic networks also requires that account be taken of the differences in programming genre on premium networks (principally recent movies and original programming) and programming on basic networks (either general interest or niche programming). Additionally, the premium networks do not rely on any advertising revenue, and subscribers pay a higher fee because of this. One also has to control for the quality of the programming.

In sum, the available evidence is not sufficient, even leaving aside the general disequilibrium into which the entire industry would be thrown, to predict the demand for individual channels in a pure à la carte world. It does seem reasonable to expect, however, that there will be a decrease in the number of subscribers to any current network. Moreover, the number of subscribers that a network retains is likely to be correlated with the number of households currently viewing the network.

Appendix C



The Impact of A la Carte Pricing On Multichannel Video

July 2004

Showtime Networks Research & Analysis

Summary

- ***Up to \$60 billion*** per year in incremental transactional and related marketing costs would be incurred by programmers in an a la carte pricing scenario
- A la carte pricing requires tremendous transactional marketing* in order to attract and retain subscribers

* For the purposes of this discussion, transactional marketing is defined as a program of tactics, activities and resources designed to generate subscriptions to an a la carte network by stimulating consumer demand and influencing consumer choice at the point of sale. These tactics include, but are not limited to, consumer rebates, free previews, promotional offers, telemarketing, direct mail, customer contact personnel (CCP) sales incentives, CCP trainings and awareness tools, and distributor incentives to favorably price, package and promote the network such as penetration discounts, retail price incentives, cash marketing support.

Premium Business Overview

- There are three companies in the premium category
 - Showtime Networks Inc. (Showtime, The Movie Channel)
 - Home Box Office, Inc. (HBO, Cinemax)
 - Starz Encore Group LLC (Starz)
- Annual premium retail revenue for cable and DBS is \$8.2 billion
- Total premium households in cable and DBS is 31.2MM
 - Among the five premium services, there are 74.4MM premium units
- As an a la carte video service, premium is much more ‘transactional’ than basic cable
 - Requires significant marketing and operational support*

* Transactional marketing as defined on previous page, plus related sales organization, business operations/finance infrastructure.

Source: Premium and household and unit estimates from Kagan Research, LLC, 4/04, Nielsen Homevideo Index, 11/03; revenue estimates from Deutsche Bank, 3/04 and 5/04.



Annual Premium Category Connects & Marketing

Cable & DBS Total Premium Households (December 2003)	31.2MM
Average Monthly Household Churn Rate	5.9%
Annual Premium Household ‘Replacement’ Connects Required <i>Just to Stay Even</i>	22.1MM
Annual Premium Unit ‘Replacement’ Connects Required <i>Just to Stay Even</i>	41.6MM
Annual Premium ‘Transactional’ Marketing Expense	\$240.4MM
Annual Premium Addl. Marketing Expense	\$227.9MM
Total Annual Premium Sales, Marketing & Advert Expense	\$468.3MM
Average Cost per Unit Connect	\$11.25

Source: Third party public filings and equity research reports; churn and connect estimates derived from SNI Sales & Marketing analysis; Kagan Research, LLC premium HH estimates; Nielsen Homevideo Index, 11/03.



Additional Costs From Making All Video Services Available A la Carte

For Programmers:

- Reduced advertising revenue
- More branding/advertising required
- Higher programming investment
- Greater costs and complexity associated with
 - Subscriber reporting administration
 - Collections and accounting
 - Affiliate auditing
- Additional Sales personnel and corresponding increase in overhead required
- Training costs for Sales Personnel
- Transactional marketing expenses

Additional Costs From Making All Video Services Available A la Carte

For Distributors:

- Digital set-top box required for every TV
- Billing system upgrades
- Signal transmission/bandwidth management inefficiencies
- Higher license fees from programmers
- Reduced local advertising revenue
- Capital investment in new Call Center facilities
- Training costs for Customer Contact Personnel (CCP)
- More phone time per call for CCP
- More customer confusion and dissatisfaction

Basic Networks Could Incur up to \$300MM in Annual Transactional and Related Marketing Expense, Which is Not Currently Part of Their Operating Budget

**Estimated Additional Costs with Total A la Carte Pricing
(based on the current Premium business)**

For A Typical* Network

	Current	A la Carte
Average Annual Connects	17.8MM	17.8MM
Average Cost Per Connect	\$11.25	\$16.90
Annual Transactional & Related Marketing Expense	\$200.3MM	\$300.8MM

* Connect volume is based on a network with 25% subscriber penetration of multichannel video universe. Increased cost per connect estimate derived from SNI analysis; cost may vary.

What Would Consumers Have to Pay?

Building on Bear Stearns' analysis, we have added transactional marketing costs to the impact of a la carte on the estimated cost to consumer. In this case, in order to preserve current revenue, TBS might cost as much as \$5.20 if its penetration dropped to 25% in an a la carte scenario.

	TBS*			
	Current	75%	Take Rate 50%	25%
<i>(\$ and subscribers in millions, except per subscriber data)</i>				
Subscribers	88.6	66.5	44.3	22.2
Subscription Revenue	\$252	\$252	\$252	\$252
Advertising Revenue	553	507	461	415
Incremental Subscription Fee from Loss of Advertising (1)	0	46	92	138
Total Subscription and Advertising Revenue	\$805	\$805	\$805	\$805
Increase in Transactional Mktg Costs	0	\$904	\$602	\$301
Monthly Wholesale Subscription Fee per Sub to maintain Subscription Revenue	\$0.24	\$0.32	\$0.47	\$0.95
Monthly Incremental Subscription Fee from Loss of Advertising	0	0.06	0.17	0.52
Monthly Incremental Subscription Fee from Increase in Mktg Costs	0.00	1.13	1.13	1.13
New Monthly Wholesale Subscription Fee per Subscriber	\$0.24	\$1.51	\$1.78	\$2.60
Estimated Cost to Consumer (2)	\$0.47	\$3.02	\$3.56	\$5.20

* TBS was selected as one of the five network examples Bear Stearns analyzed for illustrative purposes. (1) Bear Stearns assumes 33% of the subscriber reductions impact ad revenue (i.e., a 50% take rate would translate into a 16.7% reduction in ad revenue). (2) SNI assumes a 50% gross margin on the wholesale subscription fee for the cable operator (i.e., a 100% mark-up to the wholesale cost).

Source: Bear Stearns & Co., Inc., *A La Smart?*, March 29, 2004, plus SNI analysis of transactional marketing costs.



What Would Consumers Have to Pay?

Building on Bear Stearns' analysis, we have added transactional marketing costs to the impact of a la carte on the estimated cost to consumer. In this case, in order to preserve current revenue, ESPN might cost as much as \$18.77 if its penetration dropped to 25% in an a la carte scenario.

ESPN*

(\$ and subscribers in millions, except per subscriber data)

	Current	75%	Take Rate 50%	25%
Subscribers	88.7	66.5	44.4	22.2
Subscription Revenue	\$2,012	\$2,012	\$2,012	\$2,012
Advertising Revenue	737	676	614	553
Incremental Subscription Fee from Loss of Advertising (1)	0	61	123	184
Total Subscription and Advertising Revenue	\$2,749	\$2,749	\$2,749	\$2,749
Increase in Transactional Mktg Costs	0	\$904	\$603	\$301
Monthly Wholesale Subscription Fee per Sub to maintain Subscription Revenue	\$1.89	\$2.52	\$3.78	\$7.56
Monthly Incremental Subscription Fee from Loss of Advertising	0	0.08	0.23	0.69
Monthly Incremental Subscription Fee from Increase in Mktg Costs	0.00	1.13	1.13	1.13
New Monthly Wholesale Subscription Fee per Subscriber	\$1.89	\$3.73	\$5.15	\$9.38
Estimated Cost to Consumer (2)	\$3.78	\$7.46	\$10.29	\$18.77

* ESPN was selected as one of the five network examples Bear Stearns analyzed for illustrative purposes. (1) Bear Stearns assumes 33% of the subscriber reductions impact ad revenue (i.e., a 50% take rate would translate into a 16.7% reduction in ad revenue). (2) SNI assumes a 50% gross margin on the wholesale subscription fee for the cable operator (i.e., a 100% mark-up to the wholesale cost).

Source: Bear Stearns & Co., Inc., *A La Smart?*, March 29, 2004, plus SNI analysis of transactional marketing costs.



Estimated Additional Costs with Total A la Carte Pricing (based on the current Premium business)

For Distributors

	A la Carte	Increase
Annual Video Installs/Disconnects	51.4MM	N/C
Annual Video 'Service Adjustments'*	38.6MM	22.2MM
Annual CCP Phone Hours Required	5.2MM	4.1MM
Annual CCP Expense	\$244.0MM	\$128.0MM

* Service adjustments are changes to existing premium or digital service subscription, such as adding services, dropping services, or substituting one service for another. A la carte is projected to increase the complexity and duration of service adjustment phone calls, as consumers inquire about their new options, and evaluate cost savings with more extensive assistance from CCP.

Source: SNI Sales & Marketing analysis; CCP phone expense averages from 2003 CCP industry conference guide.

Attachment 2

Excerpts from

**WHY A BOX OF CRAYONS HAS MANY COLORS, AND THE “CABLE TAX” IS
NOT A TAX**

WHY CONTRACT CONFIDENTIALITY PROMOTES COMPETITION

AND

**WHY THE *NEWS CORP* RETRANSMISSION CONSENT CONDITIONS
DON'T APPLY TO OTHER BROADCAST NETWORKS**

by

Bruce M. Owen and John M. Gale

August 13, 2004

ECONOMISTS INCORPORATED

Washington DC

Excerpts from

**Why A Box Of Crayons Has Many Colors, And The “Cable Tax” Is Not A
Tax**

Why Contract Confidentiality Promotes Competition

And

**Why The News Corp Retransmission Consent Conditions Don’t Apply To
Other Broadcast Networks**

by

Bruce M. Owen and John M. Gale[†]

Summary

Viacom asked us to provide economic analysis of certain issues raised by first round filings in this proceeding. In this brief paper, we reiterate our point that bundling is, in general, a practice highly beneficial to consumers and to competition. We also point out that economic theory does not, as has been insinuated, condemn as inherently suspect all instances of product bundling. Further, the argument that MVPD subscribers are being “taxed” for programming they “do not want” makes no economic sense.

[†] Owen is the Gordon Cain Senior Fellow in Stanford University’s Institute for Economic Policy Research and a Special Consultant to Economists Incorporated. Gale is a Senior Economist at Economists Incorporated.

Why A Box of Crayons Has Many Colors

It simply cannot be true, as a matter of common sense, that there is a grave economic inefficiency associated with every product that we purchase, owing to its being made up of various parts. As we pointed out in our earlier paper in this proceeding, virtually all goods and services are bundled at the time of sale.¹ Very often, perhaps most often, the parts of the bundle are not available separately, or would cost more than the price of the bundle if supplied separately.

Nevertheless, some commentators in this proceeding on à la carte cable pricing have asked, “Why should I have to pay for channels I never watch?” The short answer is that they are not paying for them, they are paying for a complete package. The package as a whole is worth more than the price; otherwise they would not subscribe. The long answer requires explaining some basic economic concepts about how bundling a variety of elements into a single sale benefits both the seller and the buyer.

Many products are bundled because the bundling service itself is highly valuable to consumers, as with the purchase of an automobile. Many other products are bundled together into a single sale in order to provide variety to buyers at low cost. For this type of product, consumers would like to have a variety of different types of the product offered as a single purchase. An analogy, though not an exact one, can be drawn between cable networks and crayons. Consumers can choose among 8, 16, 64, or (the coveted) 96 crayon boxes, just as they can choose among the various tiers offered by an MVPD. In each of the boxes there are col-

¹ Bruce Owen and John Gale, *Cable Networks: Bundling, Unbundling, and the Costs of Intervention*, July 15, 2004, submitted with Viacom’s initial comments in the matter of À La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, FCC Docket No. MB-04-207 (July 15, 2004).

ors that a particular consumer likes and uses often and colors that he will likely never use. One could ask the same question about crayons as about cable networks: “Why should I be forced to pay for crayons that I don’t like and will never use?” Why shouldn’t regulators require that crayons be unbundled so that consumers can buy only the colors they like?

The answer is the same for both crayons and cable networks, though the intuition behind it may be clearer for crayons. For products where it costs little (or nothing) for a provider to include more variety that *someone* may like, it is in the best interests of the seller and the buyer to include elements that not *everyone* wants. One consumer may not care to use the periwinkle crayon, but that is someone else’s favorite color, so it is included in the box to please the second person and get him to buy a box. A maker of crayons knows that some colors are popular and some are not-so-popular. To make as many sales as he can, the crayon maker will include the popular colors in more boxes and will also include the not-so-popular colors in some boxes to induce the odd-color-lovers to buy a box of crayons. A color may be included only in the largest box if it appeals to few people, even though it is especially important to those people. In this way the seller makes the complete box more valuable to consumers as a whole, even though it may not make it more valuable to a particular consumer. Finally, it has to be the case that each buyer values the box of crayons he chooses to buy more than the price he pays, even though he may not value a particular color at all. Similarly, removing a particular color from the box because a buyer does not intend to use it would not change the price charged for the box of crayons. The same price is charged to all buyers, whether they use only one color or every color in the box.

In the same way, an MVPD will offer the most popular channels in most packages (or tiers) while also including some specialty or niche channels. By including more channels, the entire package is more valuable to potential cable subscribers on average, so the cable system sells more subscriptions. At the same

time, a particular subscriber may not find that the additional channels make the package more valuable to her. It is always true that each subscriber values the entire package more than the price she pays *or she would not choose to subscribe*.

It may seem wasteful for a seller to give people crayons (or channels) that they do not use, but in fact, it can be more costly to provide only the specific colors each buyer wants. For crayons, one could imagine a specialized crayon store with bins of each color crayon where a buyer could mix and match whatever colors he wants. Of course, this would require the creation of the specialized crayon store and a trip by each consumer to the store. In the case of MVPDs, this would require each consumer to have a set-top box for each television and to have good information about the programming on every network offered by the cable system. It is likely more efficient to give a buyer some crayons he does not use (or a subscriber channels she does not watch) than to mandate a system where each buyer only gets the colors he likes (or the channels she watches).

An additional feature shared by crayons and MVPD services is that although consumers buy crayons and channels that they never use, they may value the option of using that color or channel in the future. Crayon purchasers often do not know which colors will be right for some future project, and value the option to experiment. Even the consumer who does not like periwinkle and would not buy a periwinkle crayon if it were sold separately, may have an occasion in the future where he has to use periwinkle to make a picture. Even though that event may be unlikely, he still values the option of using the color. Similarly, there are channels included in a cable subscription that a consumer has never watched, but there may be a day when that channel carries a show she wants to see. Because of this, even if she never watches a channel it can still be of some value to her. Of course, it is even easier to see that consumers value crayons or networks that they do use, albeit infrequently, even if they would not choose that crayon or network if sold separately.

A final feature shared by crayons and MVPD service is that consumers may not be able to predict accurately what colors or channels they will like when they make their initial purchase. A consumer may not have a good idea of whether he will use a cyan crayon (in fact, he may not even know what cyan looks like), so he cannot make an informed decision about whether to buy a cyan crayon. After using his box of crayons, he realizes that he loves cyan and uses it all the time, which makes his box of crayons more valuable than he had expected. If cyan had not been included in his box, he would never have known how much he liked it. Similarly, every subscriber's cable package includes channels she would probably not have chosen. But the history of cable television programming is replete with examples of shows carried on obscure cable channels that become very popular. In these instances there have to be consumers who would not have chosen the channel but, after sampling a particular show, are very happy to have the channel in their package.

While it is true that bundling benefits consumers overall, admittedly it can make some consumers worse off. To return to the example, if a consumer wants a blue crayon, and only a blue crayon—and will never use any color but blue—then depending on the cost of providing that choice it can be cheaper for that one consumer if crayons are not bundled. That consumer would be able to buy a box with only a blue crayon, while consumers who prefer a variety of colors would have to select and pay for each individual color. While a consumer with very narrow tastes may be worse off, bundling makes consumers with broad tastes better off because they pay a lower price than if they had to select and purchase each crayon or network individually. As shown in our initial comments, consumers are likely to pay more for the programming they receive if channels were unbundled. Hence, consumers as a whole would be worse off if bundling were prohibited.

On a closely related point, Consumers Union and Consumer Federation of America (CU/CFA) have introduced a new and highly misleading term into the

discussion. They maintain that cable subscribers pay a “cable tax.”² This tax allegedly consists of the payment that consumers make for programming they don’t want but which they must purchase in order to get the programming they do want. This term is misleading for at least two reasons.

First, CU/CFA seem to include among the channels that consumers “want” only the channels that they watch “regularly,” estimated to be 12-17 channels on average. As we pointed out in our initial comments, consumers who subscribe to a large tier of channels also derive benefits from the channels that they do not view regularly. These consumers are able to tune to channels outside their “regular” channels to watch attractive shows on an occasional basis. They are also able to browse the other channels to determine at low cost whether they would be of interest. Actual behavior shows that consumers value these options and take advantage of them.

Second, the notion of a “tax” implies that consumers pay more for the bundle of programs that includes some channels that are not of interest than they would pay to receive the channels of interest on an à la carte basis. Our initial comments showed that if networks were widely distributed on an à la carte basis, consumers buying a significant number of networks, such as ten, could well end up paying more for those channels than they currently pay for a tier that includes a much larger collection of networks. It is a strange tax that leaves people better off if they pay it than if they don’t.

CU/CFA also submitted a paper by sociologist Dr. Mark Cooper, noting that “the possibility of anti-consumer bundling has long been recognized in static consumer welfare economics literature.”³ Dr. Cooper cites three economic articles

² *Comments of Consumers Union and Consumer Federation of America*, July 15, 2004, at 3.

³ Mark Cooper, *Time to Give Consumers Real Cable Choices*, July 2004, at 5.

in support of this statement.⁴ These papers consider bundling in circumstances that eliminate many of the potential advantages of bundling from being considered. For example, they assume that bundling is strictly a pricing practice, and that consumers derive no utility from the assembly of the bundle on their behalf. They assume that bundles do not cost less to produce and market than their components would. They also assume that each component of the bundle could viably exist as a stand-alone “product;” that is, they do not consider the vast class of components that are efficiently supplied only as “parts.” Dr. Cooper is correct that there is the *possibility* of adverse effects from bundling under certain assumptions, but he does not show, and there is no reason to believe, that MVPD bundling satisfies these assumptions. If Dr. Cooper believes that the situations studied in the theoretical papers he cites are applicable to network programming supplied by MVPDs, he must make that case with appropriate evidence. It is absurd to suggest that every bundled product is guilty of causing consumer harm until proven innocent.

⁴ William J. Adams and Janet L. Yellen, “Commodity Bundling and the Burden of Monopoly,” *Quarterly Journal of Economics*, (1976), 475-98; Richard Schmalensee, “Gaussian Demand and Commodity Bundling,” *Journal of Business*, (1984), 211-30; and R. P. McAfee, John McMillan, and Michael D. Whinston, “Multi-product monopoly, commodity bundling, and correlation of values,” *Quarterly Journal of Economics*, (1989), 371-83.

U.S. House Energy & Commerce Committee
Washington D.C.

RE: Regulation of the Market for Video Content and Distribution -- Response to White Paper #6

Dear U.S. House Energy & Commerce Committee:

It has come to my attention that your committee is interested in deregulation and is debating whether or not to require cable companies to provide public access channels or make PEG fee payments to support public, educational or governmental programming.

I believe a change in current policy would all but eliminate public access channels which would in turn eliminate public, educational or governmental programming. PEG supports localism in ways that other media cannot, and assists not just with building a sense of community, but fosters local programming and provides transparency into the actions of government.

Without this service many community related items will not be shared, jobs will be lost and education opportunities will be gone. So please do not make changes to this legislation and allow communities the opportunity to continue providing these services.

Sincerely,
Jeff Vrieze

████████████████████
████████████████████

[REDACTED]

From: Chip Bergquist <[REDACTED]>
Sent: Thursday, January 22, 2015 2:32 PM
To: CommActUpdate
Cc: [REDACTED]
Subject: Regulation of the Market for Video Content and Distribution - Response to Energy and Commerce Committee White Paper #6 – PEG Channels

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

cc: Representative Steve Chabot & Representative Brad Wenstrup

Re: Regulation of the Market for Video Content and Distribution - Response to Energy and Commerce Committee White Paper #6 – PEG Channels

Date: January 22, 2015

Gentlemen:

Even in the era of YouTube and online video, PEG channels serve an important role in our local community.

Waycross Community Media is a PEG Access center located in suburban Cincinnati Ohio, serving 4 communities – City of Forest Park, Village of Greenhills, Colerain Township and Springfield Township.

The area is served by five commercial stations and one PBS affiliate. None of these local broadcast stations, nor the two cable companies in our area, provide the truly local programming that our center provides to our communities. In reality, PEG access is nothing like the “Wayne’s World” image of access created by Hollywood and held up as fact by the cable companies. We provide a valuable service to our communities.

In addition to the government and education programming we produce for our communities, the residents of our communities also use our facilities to produce and cablecast their programs. Are they all “broadcast quality”? – no (although many are). Does everyone always agree with their message? – no. Are many of them religious in nature? – yes. However none of these programs would ever be aired by the local broadcast affiliates or cable channels due to content restrictions, perceived production values or high carriage fee – effectively muting the voice of the average citizen. Programming produced by and distributed through PEG centers reflect the local community.

“You don’t need cable channels, just put everything on YouTube”.

Unlike PEG channels, the gatekeepers at YouTube can filter out programming. If it only appeals to 100 people instead of 10,000, it can be pulled. If the folks at YouTube do not agree with the message, it can be pulled. If someone sings the national anthem during your program - or a sound not relevant to the production, such as someone’s ringtone, is heard in the background – YouTube can block the audio on the entire program and

banish the user from posting new videos.

Do we, as a PEG facility, use online resources to distribute programming? Of course we do. However, the local message gets lost in the world of cute kitties and music videos. Much of the relevant local content on YouTube is buried so deep it is only found by detailed searching or by those that already know it exists. Our most important, and we think our most utilized, distribution method is our cable channels on Time Warner Cable and Cincinnati Bell Fiopics Cable. Cable will be around for a long time and is important in serving baby boomers and subsequent generations who find local programming more easily there than online.

Here are just a few examples of government and educational programming produced by Waycross which help in building our community. No one else in town is covering these events:

- LIVE gavel to gavel coverage of council and trustee meetings
- coverage of school board, zoning, town hall and other special government proceedings
- complete coverage of local press conferences (not just sound bites)
- election forums – for LOCAL candidates and issues. While broadcast TV does some national races, no one else provides these forums for council races, schools board races or local tax issues.
- coverage of community events and concerts featuring local talent
- coverage of concerts, assemblies and events from our Elementary, Middle and High Schools
- coverage of high school sports. While the cable companies have started covering sports such as football and boys basketball (but only if they think they can make money), we cover all the sports – from soccer to swimming to hockey and volleyball – and many, many more.
- monthly shows featuring our city managers and township administrators
- quarterly show featuring our elected officials in Washington and monthly programs featuring our Columbus legislators.
- magazine programs for our school districts highlighting activities in the classroom.

In addition, our residents produce hundreds of hours of local programming each year – including LIVE talk shows, church services, political programs and more.

To answer the question posed in White Paper #6 – PEG provisions are not only warranted, but essential in the era of the internet.

Thank you for your time in reviewing this information.

Chip Bergquist
Executive Director
Waycross Community Media
2086 Waycross Road
Forest Park, OH 45240

www.waycross.tv

[REDACTED]

From: Mauro DePasquale [REDACTED]
Sent: Friday, January 16, 2015 11:16 AM
To: CommActUpdate; [REDACTED]

Subject: HOUSE OF ENERGY and Commerce Committee Comment: Request that you move in favor to support that all "Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and...

Jan. 16, 2015 VIA FAX TRANSMISSION

FROM: WCCA TV "The People's Channel", WORCESTER, MA. 01608 c/o Mauro DePasquale, Executive Director

TO: The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

&

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

Dear Mr Upton and Mr Walden and members of the House Energy and Commerce Committee;

Today's social unrest makes it most apparent that public harmony requires many voices. Without opened, "free" and accessible dialogue, divisions between people will only widen. PEG channels play a huge role in bridging gaps of views opinions and in enhancing local economies by allowing citizens to publicly interact, in a constructive way, in a public forum of sharing news and ideas. More importantly, Public Access Institutions, such as our WCCA TV, are the only broadly available accessible institutions that stand for and facilitate media literacy and media democracy.

Please respect our request that you move in favor to support that all "Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. "Are these provisions warranted in the era of the Internet?" YES, MORE THAN EVER.

WCCA TV has quantified evidence which we have collected within our own city testifies that provisions requiring and supporting PEG access are still necessary and warranted today. See media literacy and democracy in action visit <http://www.wccatv.com> today.

Thank you for your consideration my community counts on you to move justly on this matter.

Sincerely, on behalf of our Board of Directors, Staff, and Community Members

Mauro DePasquale, WCCA TV "The People's Channel"
415 Main Street, Worcester, MA 01602
<http://www.wccatv.com>

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Mauro DePasquale, Executive Director
WCCA TV 13, "The People's Channel"
415 Main Street
Worcester, MA
01608


<http://www.wccatv.com>
Twitter: @WCCA TV
facebook.com/WCCATV13

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www.Goodsearch.com (powered by Yahoo), shopping online at www.Goodshop.com or dining at a
restaurant in the www.Gooddining.com network.

[REDACTED]

From: John Madding [REDACTED]
Sent: Tuesday, January 20, 2015 12:09 PM
To: CommActUpdate; Representative Jim Renacci
Subject: CAP Act

To: House Energy & Commerce Committee
Copy To: Representative, Jim Ranacci

Dear Committee,

Wadsworth Community Television is a full service PEG access facility in Wadsworth, Ohio. Our community produces nearly 2,000 local programs each year; including high school sports, plays, concerts, Commencement, Baccalaureate and class projects. We also provide LIVE City Council meetings, Planning Commission, Board of Zoning Appeals and Board of Education. Polka Time, one of our most popular programs for older adults, has produced over 1,000 programs over a 20 year period, we have 4 others that have produced over 800 shows for our community.

Our high school sports productions are the best in the area. We utilize an all volunteer student production team; director, camera operators, slow-motion replay operator, graphics & set-up crew. The entire Wadsworth community looks forward to seeing their sons, daughters and grandchildren play their favorite sports on their local PEG channel.

As former Mayor of Wadsworth, Representative Jim Ranacci can attest to the quality and the viewership of our programs. I'm sure he would agree how much more informed our community is due to local PEG programming than other communities in our area. People can follow a local issue from initial call in to Council, to Public Ways or Service Committee, then to City Council for 3 readings, and finally see the issue become legislation. Our LIVE and delayed public meetings are a highly viewed portion of our programming. In fact, our last viewership survey showed that 85% of those polled watched our PEG channels from 1-3 times per week, 60% watched 4 or more times per week. These are ratings that would make any TV station #1 in their market.

We also provide all of our programs on-line via our website, my.pegcentral.com. With nearly 1,000 shows currently available for on-demand streaming, we receive approximately 2,000 views per month. The average length of time spent streaming per view is over 25 minutes, which means people are watching entire programs, not just a clip here or there. Our sporting events receive 80 views in just two days.

Although we are excited that our streaming on-demand site is receiving great response, the vast majority of community members prefer to view our actual PEG channels seen on Time-Warner and CityLink, the City of Wadsworth's municipally run cable system.

Last May, Time-Warner took our system through an all-digital conversion, and migrated our local channels into the 900's. We received an overwhelming response from disgruntled viewers of our PEG channels who could no longer view their favorite local programming on their basic level of service, where they have been since 1982. They are now forced to rent a DTA adapter or digital cable box in order to view our channels on their normal positions.

In closing, PEG programming is an essential part of our community and MUST remain on the basic cable tier. I cannot express enough how important local community programming is to each and every household in Wadsworth.

I greatly appreciate your concern for PEG programming.

John Madding
WCTV/CATV Programming Manager
City of Wadsworth

--

John D. Madding
WCTV / CATV Programming Mgr.



ONLINE...ANYTIME...ANYWHERE
my.pegcentral.com
WatchTVEverywhere.com

"A Better Community Through Communication"

[REDACTED]

From: Daniel Weaver [REDACTED]
Sent: Wednesday, January 21, 2015 2:53 PM
To: CommActUpdate
Subject: cable access

Dear Honorable Fred Upton: I understand that the question has been posed that, because of the internet, are things like cable access still needed. I am very much in favor of keeping cable access for the many people who still rely on television as their primary source of news and information. Many older folks such as myself as just not accustomed to using internet in the way I use my TV. I strongly urge that you reconsider the question and we keep cable access running.

With regards,
Dan Weaver

[REDACTED]

[REDACTED]

From: Jennifer Evans [REDACTED]
Sent: Saturday, January 24, 2015 12:51 AM
To: CommActUpdate
Subject: Re: Regulation of the Market for Video Content and Distribution - Response to White Paper #6
Attachments: The Honorable Fred Upton.xwd

The Honorable Fred Upton

2183 Rayburn House Office Building

Washington, DC 20515

The Honorable Greg Walden

2185 Rayburn House Office Building

Washington, DC 20515

Re: Regulation of the Market for Video Content and Distribution - Response to White Paper #6

Thank you for the opportunity to share the story of West Hartford Community Television. Our community media center was founded in 1979 and serves as the community access provider for public, educational and government channels for our town of 60,000 people in West Hartford, CT.

As I send this, we are just back from recording a rivalry girls basketball game between our two high schools which went significantly longer than anticipated. The production featured volunteers on camera and in the booth from both schools working together to cover the game.

The story of community television is much more than the television programs that are produced and telecast. What happens behind the scenes is truly special. Here are some specific examples of how our station has had an significant community impact.

Over 150 non-profit organization submit messages to our community calendar of events. Temple Beth El's attempts to get press coverage were ignored. They posted the event on our calendar and reached out to us. Ticket sales were meager and they were facing a loss. We helped them produce a segment promoting the

event and telecast it a few days before the event. They sold out the concert and still attribute the success to that public access show. Last weekend, The Bridge Family Center's video helped raise over \$60,000 during the raise the paddle fundraiser at their Children's Charity Ball. We're here behind the scenes helping non-profits tell their story so they can focus on their mission. We're really good at filling the food pantry, too.

Sometimes people claim that PEG is not needed during times of emergency. We have learned first hand this is not true. Local information is always critical and when West Hartford has an emergency the Executive Director of West Hartford Community Television is one of the members embedded in the operations center. During the famous October Storm, 99% of West Hartford was without power. WHC-TV was able to mobilize our youth reporters from our Be The Media project to prepare short news stories with key information like tours of the shelters shared via social media, e-mail lists and other creative delivery methods to get the message out. . We also provided free WiFi and charging stations for people to charge phones. One story was picked up by the local NBC affiliate and became a catalyst for change and negotiation for more tree removal teams which brought power back sooner.

We train people to be tech savvy but even more importantly how to tell a story. All residents are welcome. We don't screen. We are open to all. We know that understanding media is now a life skill to fully participate in our culture. We collaborate with three different programs which provide job training for people with special needs.

Each semester we host interns from local colleges. Pamela Topalska was rejected by every local station even though she already knew how to edit with Final Cut Pro. She interned with us and we paired her with a mentor at the League of Women Voters to produce a documentary. She worked in television but more importantly became the youngest member of League of Women Voters and still attends and participates in local meetings. She is empowered. She is one of many. Our youth outreach program begins in fifth grade and trains hundreds of students each year.

The broadcast media deemed the race for the 1st Congressional District noncompetitive and was not interested in conducting a debate. We were contacted and together with the League of Women Voters of Greater Hartford produced a debate with all candidates including minority parties which we telecast live.. The debate was then covered by mainstream media and the CT-N, our state channel. We made DVDs available to every access center in the 1st Congressional District.

Our station is an eclectic place where people come together. When Zion Davidson died, a Conard High School football player, there was concern this might split the community. His friends were upset that he was referred to as the 7th homicide of the year on the local news. He was more than that to them. It was the summer. School was out. They made a video and brought it us to show. We telecast it along with interview with of friends and counselors. People came to the taping to grieve together. It was a sad but powerful lesson for me about the value of self-expression and participatory media.

Our community has invested in community television. We're asking you to honor this investment. We're not just PEG channels. We're where stories begin. We're the place for hyper-local news. We're providing meetings on demand and via live stream so now public officials who have to be away on business can join the meeting and participate. Some people say public access is obsolete. We believe this is our time. Never before has technology been so easy to use and yet so vital to our community. The ability to build connections through a media has never been more important.

Thank you for creating media for the public good. Please help us continue to grow and provide media in service to your community. Please feel free to contact me if you have any questions.

Kindest Regards,

Jennifer Evans

West Hartford Community Television

cc:/ The Honorable John B. Larson

January 20, 2015
The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

Re: Regulation of the Market for Video Content and Distribution - Response to White Paper #6

Dear Congressman Upton:

As the House Energy and Commerce Committee considers regulation of the market for video content and distribution, in response to White Paper 6, please consider the following points:

- Provisions requiring PEG access are still necessary and warranted today to ensure that the average American citizen in any community will have the ability to exercise their right of freedom of speech by creating and broadcasting messages that are important to them and their communities;
- PEG stations fulfill an essential need, connecting people to their local communities of interest, hyper-local politics, businesses, schools, best practices and strategies for nonprofits, highlighting volunteerism and grass roots activism and organizing;
- In Washington DC, like other major media outlets, there is a prominent focus on national news, regional news and extremely limited coverage of local events, restricting access to information for residents in the area.

PEG stations represent the voice of the people. For 15 years, I have had the pleasure and duty, to create programming that educates my community. From local DC elections programming, to educational videos about HIV/AIDS prevention, public access stations have given me the ability to empower others to be heard. Hundreds of communities all over the country have already been adversely affected because of closing PEG stations, poor quality signals, channel slamming, and other efforts to disenfranchise a valuable community structure. Please protect this resource.

As you contemplate updating the Communications Act, which may include video reform, please understand the need and value in making sure PEG stations are protected and supported by national legislation to ensure its longevity.

Sincerely,
Jasmine N. White
Advisory Neighborhood Commissioner, 5A06



cc: Congressman Greg Walden
Congresswoman Eleanor Holmes-Norton
Representative Franklin Garcia

As a layman and concerned citizen that has been watching the evolution of the video market for several years now, I have learned much about the state of the marketplace and of the government regulation thereof. Watching from afar over the course of the past year, I have been guardedly pleased at the efforts of the committee to update our communications laws for the twenty-first century. I fully support the committee's stated goal to rationalize and simplify our communications law by doing away with arbitrary regulatory "silos" and establishing a consistent regulatory regime that treats services performing equivalent functions equivalently, thus encouraging innovation and the best use of technology. I only hope that this goal is not a façade and a cover for giving more power to moneyed interests at the expense of the consumer and smaller, less politically-connected businesses.

The topic of the present white paper relates to a subject I have been particularly interested in over the past year or more, the present state and future potential of the video marketplace and whether or not current government policies, whether those of Congress or the FCC, are having an adverse effect on its evolution. As such, much of what I have to say will relate to this topic, but I will also touch on issues raised by the previous white papers as well as the broader issue of how to achieve the present effort's stated goals. What is the best way to create a robust, flexible communications act that can accommodate whatever shape technology takes in the future, encouraging innovation that can exploit that technology to the fullest while protecting the consumer?

A Framework for Understanding the Communications Landscape

Currently, the areas that communications regulation has overseen can broadly be broken down into the following areas:¹

- *Television*, used broadly to refer to the one-way transmission of video and audio content.
- *Radio*, similar to television, used broadly to refer to the one-way transmission of audio only.
- *Internet*, the two-way transmission of general data, usually with the consumer sending a request and receiving data back from the content provider.
- *Phone*, a two-way real-time audio conversation, in theory possibly involving video as well.

The means by which these different forms of telecommunications are delivered can in turn be broken down into the following categories, with their generally most popular uses from a consumer-centered perspective:

- *Wireless* transmission, which makes use of the public spectrum to transmit information over a given area, and which has the advantage of not being tied down to a particular location and requiring a relatively small investment to cover a relatively broad area. This latter property allowed it to be capitalized upon by TV and radio from their beginnings; the wireless spectrum's colonization by the two-way media, Internet and phone, is comparatively recent.
- *Wired* transmission, which requires a larger upfront cost but can reach individual homes in a more targeted fashion and can make use of as much spectrum as it can, without competing for a limited swath of the public spectrum. Phone service was the first medium to make use of wired

¹ Based on, e.g., House Committee on Energy and Commerce, "Modernizing the Communications Act", 8 Jan 2014, retrieved from <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf>, p2.

transmission, with Internet and television joining it at different points in the twentieth century; although Internet piggybacked on the phone lines for most consumers in its early days, it was not until the late nineties that the three would all use the *same* lines as TV providers diversified into Internet and phone “triple play” services. Radio has not benefitted much from wired transmission; the closest it has come has been audio services offered as part of a TV package.

- *Satellite* transmission, involving satellites high above the Earth. Satellite transmission involves a very high (though not disruptive) upfront cost but a very low cost of reaching individual customers due to the extremely wide swath a single satellite can cover. This has allowed satellites to play a key role in allowing people to communicate in near-real time across the globe. However, in general the large distance between the Earth and the satellite makes it impractical for use for the two-way communications methods of Internet and phone, despite some forays into the Internet space. However, television and radio services are thriving on satellite and effectively competing with wired and wireless providers.

One striking thing that becomes apparent about this list is that the great unification of the various methods of communication the Internet has impelled in recent decades was preceded, and perhaps set up, by the unification of the means by which those communications were delivered. For much of the twentieth century, broadly speaking, television and radio were delivered over the airwaves while the phone service was delivered over wires. Starting as early as the seventies, though, wired delivery of television became increasingly popular as the Internet started to leak into small pockets of wider society and cell phone infrastructure began being built, while consumer-fronted satellite services also began starting in the eighties, so that by the time the Internet began competing for the *uses* of television, radio, and phone service, the *means* by which all of them were delivered were not totally different.

Given these unifications, is it still necessary for communications law to distinguish between these various methods of communication, and if so what purpose do such distinctions serve? Certainly the great expansion of the Internet into areas once undreamed of has blurred the lines between it and the other methods of communication considerably, and some may wonder if it may ultimately absorb the other categories entirely. Certainly phone service may appear to simply be a more specific form of the two-way communication carried out by the Internet; the main distinction would appear to be that phone service is a communication between two equals, but even then it has always travelled between numerous intermediaries. Moreover, the redundancy of dedicated phone service seems to have already been recognized by the industry and government alike, as both parties have long been talking about an “IP transition” that, to the layman at least, amounts to moving phone service to the same system as the Internet. Television and radio have more entrenched interests that, especially in the case of television, are being dragged into Internet-based delivery kicking and screaming, but even those efforts would seem to demonstrate that in theory, the Internet could deliver all the video and audio content currently being delivered via TV and radio and then some.

Before we are too quick to dismiss the one-way forms of communication as outdated and redundant with the Internet, however, we should take a closer look at the inner workings of these different methods of communication to determine what the difference is between one-way and two-way communication and whether that difference might give one form some virtues over the other. With one-way transmission, a source sends out a signal that can be received by anyone with the proper equipment; a television or radio station can be received by anyone within range of the signal, a cable system sends its channels out to everyone connected to its headend, and customers simply tune in to

the channel they want. A two-way communication begins with the consumer sending a request for some data, which is then sent through the network to the server containing the data, which sends the data back through the network to the consumer. With the Internet at least, each of these connections are treated individually, and because of the asymmetry between the consumer and the server with the data to be delivered, it is quite possible, even likely, for the same content to be delivered to multiple consumers with their own dedicated connections. Whereas with one approach a server, and all the intermediate steps in the network, must send the same content multiple times over, once for each person that wants it, in the other approach the content needs to be only sent out once for as many people as can receive the signal to receive it.

This is especially apparent and important when it comes to video content, which is much more bandwidth-intensive than other types of content to the point of dominating Web traffic and discussions of net neutrality despite amounting to a pale shadow of the demand represented by traditional linear television. Were linear television to completely go away, because of the Internet supposedly rendering it obsolete, it is easy to envision a scenario where the Internet effectively becomes a conduit for the delivery of video, with any other purposes it's used for effectively a side benefit even if they might be more popular in terms of number of people using them. If the ideal of net neutrality is still desirable, it would be exceedingly difficult to plausibly maintain at this point.

What does this mean for the means by which the content is delivered? Satellite transmission is probably practically the sole domain of one-way communication from a consumer-oriented perspective, but Congress has historically been reticent to rely too much on satellites to deliver content to consumers, partly out of worries about forcing too many people to put satellite dishes on their homes. From a practical perspective, satellite television is generally considered not an option for people living in apartments. (Satellite radio seems more consumer-friendly in both of these categories.)

That leaves wired and wireless delivery. As mentioned earlier, wired transmission is able to utilize whatever capacity lies in the wires being used to transmit the content, while wireless transmission is restricted to specific bands of the public spectrum (and possibly by the transmission medium). Several different wireless Internet providers compete for public spectrum with each other and with TV and radio broadcasters, but even if all the spectrum used by wireless providers, Wi-Fi and similar technologies, and broadcasters were consolidated into a single set of wireless Internet spectrum, the size of that spectrum would be limited by other uses that wired providers would not have to deal with. As such, wireless providers will always be more restricted in the bandwidth and capacity they can deliver compared to wired Internet providers. On the other hand, wired services are severely restricted in the sorts of devices they can reach without using wireless services like Wi-Fi as an intermediary. These two factors suggest that one-way services that can reduce the video and other high-bandwidth load on wireless Internet providers are especially important compared to similar services on wired connections.

Indeed, wireless Internet providers seem to already recognize the importance of supplementing their services with one-way networks; both AT&T and Verizon have instituted plans to begin rolling out networks variously called "LTE-Broadcast" or "LTE-Multicast" sometime this year, working similarly to broadcast television stations, that can deliver content to devices in just this sort of fashion.² Existing

² Allevan, Monica, "Unlike Verizon, AT&T takes its LTE Broadcast trial inside stadium", [FierceWirelessTech](http://www.fiercewireless.com/tech/story/unlike-verizon-att-takes-its-lte-broadcast-trial-inside-stadium/2015-01-09), 9 Jan 2015, retrieved from <http://www.fiercewireless.com/tech/story/unlike-verizon-att-takes-its-lte-broadcast-trial-inside-stadium/2015-01-09>.

actual broadcast television stations are currently not doing a good job of delivering content to any devices that are not a traditional fixed television set, due to oversights in the ATSC standard used for the digital transition completed by 2008 (when the iPhone was barely a year old), but this may not be a theoretical constraint; an addendum to the ATSC standard, ATSC M/H, has allowed for the transmission of content to mobile devices for several years now (provided the presence of an antenna dongle), and a proposed large-scale overhaul of the ATSC standard, ATSC 3.0, proposes to make transmission to mobile devices even easier.³ (Delivery of radio directly to mobile devices has begun to see some promise with the advent of the NextRadio app.)⁴

The bigger problem seems to be that the broadcast television industry has become dominated by companies that have little interest in making it easier for people to receive their content over the air, due to their interests in cable networks and their broadcast entities' reliance on retransmission consent payments from cable operators. This is despite, or perhaps because of, the boom of widespread interest in "cord-cutting" in recent years. It is apparent that government regulation in this area is decidedly not technologically neutral and has resulted in an unfree market that has depressed investment in broadcast television, a situation that should be kept in mind not only as the government rewrites communications law, but as it proposes to auction off broadcast television spectrum to wireless Internet providers who may ultimately desire the spectrum in large part to provide sufficient bandwidth for the large-scale delivery of video.⁵ Many consider the spectrum currently being used by broadcast television to be wasted, but while it could be allocated more efficiently, Congress and the commission should take steps to ensure broadcasters have every incentive and ability to utilize the full potential of broadcast spectrum so that heading into the incentive auctions, it can be valued fairly for its use as broadcast spectrum compared to any other uses it could be used for.

The video market is instructive as to what has made the current structure of the Communications Act irrelevant. Internet-based video providers have greatly disrupted the video market and all of its providers. The average consumer does not care much whether they get their video via a broadcast antenna, a cable provider, a satellite provider, a fiber-optic line, or the Internet, other than that the last four all have the capacity to provide much more video than has historically been possible via an antenna, and the last one has more potential than the others. The FCC and the law correctly treats the middle three options equivalently as "multichannel video programming distributors", but its pending proposal to grant the same MVPD status to online providers highlights the weakness of the approach it must currently take. The FCC is effectively proposing to regulate a certain subset of online service, not even the entire set of services that provide video online, based on the type of content it purports to offer, under a regulatory structure that mostly developed when the entire notion of online video was unheard of. The video market is one place where it is most obvious to the consumer what the state of

³ Jessell, Harry A., "ATSC 3.0: Lead, Follow Or Get Out Of The Way", [TVNewsCheck](http://www.tvnewscheck.com/article/80837/atsc-30-lead-follow-or-get-out-of-the-way), 14 Nov 2014, retrieved from <http://www.tvnewscheck.com/article/80837/atsc-30-lead-follow-or-get-out-of-the-way>.

⁴ House Committee on Energy and Commerce, "Competition Policy and the Role of the Federal Communications Commission", 19 May 2014, retrieved from <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140519WhitePaper-Competition.pdf>, p2.

⁵ See Wick, Morgan, "The Other Threat to Net Neutrality", [MorganWick.com](http://www.morganwick.com), 13 Nov 2014, retrieved from <http://www.morganwick.com/2014/11/the-other-threat-to-net-neutrality/>.

the marketplace is, but it is also highly impractical to regulate. Specific technologies are the easiest to regulate but are also the place where regulation is perhaps the most useless.

As such, the best approach is probably to regulate *all* of communications equivalently, along principles designed to maximize innovation and investment across all the various specific applications such communications could be used for. Distinguishing between one-way and two-way communications is of only limited merit, because the latter in some situations can fill the same role as the former, possibly without the consumer even being aware of the difference. Distinguishing between wireless, wired, and satellite forms of communication is more practical and relevant, but even then many of the same principles will apply to each.

Because the areas a modern Communications Act needs to distinguish between are so broad, the best approach should be to maintain a light regulatory touch, but to allow the FCC broad leeway to regulate the market to promote innovation and investment in young markets and competition and fair market practices in mature ones, ideally without the need for a formal forbearance process. What has become apparent is that the distinction between “telecommunications” and “information” services, as described by the first white paper, was always a distinction between these two regulatory approaches, and as such their names were never perfectly descriptive nor was the distinction ever much better than a kludge to attempt to ensure the proper level of regulation.⁶ Communications law should be descriptive rather than prescriptive, laying out certain principles that apply across various means of communication, and leaving it to the commission to define which areas to apply which regulations to. In many cases, provisions developed for specific media can and should be broadened and adapted to become available to whatever media the commission wishes to apply them to; in others, particularly restrictions on the content and monetization possibilities of broadcast television stations, they may need to be discarded entirely.

However, giving the commission too much power means taking care to insulate it from regulatory capture to the greatest extent possible, which may mean overhauling its structure to make sure no specific industry can exert too much influence on the composition or decisions of the commission, a problem that may already be apparent in the relationship between commissioners and the cable industry lobby. Objective measures of the level of competition and development that can help determine the level and nature of regulation to be imposed regardless of the composition of the commission may be useful, but only if the FCC can be prevented from defining markets in such a way that the regulatory options available or not available to them happen to be those that help or hurt the incumbent interests it may be beholden to.

The Challenges Facing the Video Market

We can now move on to how all of this affects the video market more specifically, which will also touch on issues raised in previous white papers. The present white paper omits some important elements of the evolution of the present state of the video marketplace, and as a result misrepresents some of the challenges facing it today.

The Cable Act of 1992, which established most of the regulations that currently govern the relationships between MVPDs and content providers, was passed at a time when most cable systems did not have

⁶ “Modernizing the Communications Act”, op. cit.

much more than 70 channels. Direct-broadcast satellite did not have such a restriction, but it was in its infancy. As such, the scarcity of space on cable lineups governed how many different services could be active and thriving, and the must-carry and PEG regulations further constricted the amount of space cable providers could work with. The Telecommunications Act of 1996 was enacted when DBS was more mature and cable operators had high hopes for the potential of digital cable, which opened up the possibility of hundreds of channels, but that was itself in its infancy and Congress changed little of the rules regarding access to programming laid out in the Cable Act of 1992.

As such, the condition of scarcity has become significantly less pressing on cable operators, and virtually all DBS and digital cable providers can offer all of the most popular channels. Moreover, the rise of the Internet as a conduit for video content has blown the condition of scarcity right out of the water, to the point that the market for traditional linear television channels on MVPDs may well be badly oversaturated, and concerns about independent programmers' ability to get onto cable lineups seems like a decidedly 90s concern. Yet the marketplace is still by and large governed by the rules laid out in 1992. Cable operators regularly engage in disputes with content providers over the subscription fees the former pays to the latter and over what channels the cable operators will carry, regardless of their popularity. Once upon a time space was the main constraint on whether or not a cable operator would carry a channel; now the main constraint is whether or not the operator and content provider can agree on a price, which the consumer is mostly ignorant of. It is worth noting that this system is completely forbidden on the Internet, where ISPs generally cannot restrict access to content and where the American people have made clear they want it to stay that way, but on linear cable television operators can decide to carry or not carry certain channels, and whether or not to carry them in HD, seemingly arbitrarily, with limited restrictions set by the Cable Act. Yet if anything, the provision of linear television content on the Internet (even that originating from broadcast stations and networks) is best characterized by an attempt to impose the structures of the linear MVPD market on the Internet, with its closed agreements between MVPDs and content providers the consumer has little control over, through authenticated "TV Everywhere" services, betraying a desperate attempt by all involved parties to maintain the current structure against the competing, more consumer-friendly structure the Internet represents.

It is certainly true that this proliferation of viewing options has reduced the average audience size for programming and as such the amount of money that can be collected from advertising, but I do not believe this is the main reason why the economics of the video industry has evolved to emphasize the prominence of subscription fees. Rather, I believe the main factor has been the penetration of pay-TV service to the vast majority of American homes. About 75% of American homes had cable TV in 1996, compared to a peak of 87% in the early part of this decade, with the vast majority of those in the remaining 13% outside demographics that appeal to advertisers.⁷ The increased revenue from subscription fees is no longer outweighed by broadcast television's larger audience, because that audience difference is now fairly negligible. Combine broadcast stations' inability to collect the subscription fees cable networks collect with other restrictions on broadcast stations the FCC has claimed powerlessness to apply to cable networks, and it becomes clear that linear television is the original inconsistently regulated market based on outdated technological distinctions.

⁷ Based on TVB, "National ADS, Wired-Cable & Over-The-Air Penetration Trends", retrieved from http://www.tvb.org/research/media_comparisons/4729/72512.

That the balance has now decidedly tipped in favor of cable television is most apparent in the world of sports, a major source of precisely the sort of live programming one-way linear television is best suited for. By all accounts, ESPN now charges cable operators upwards of \$6/month per subscriber for access to its diverse collection of live sports; no other national non-premium cable network charges more than \$2 (if even \$1.50), and most of the next-most expensive cable networks also have significant sports programming. That revenue stream, which gives ESPN over half a billion dollars of revenue before it sells a single advertisement, has allowed ESPN to compete for and even win sports rights, such as the nascent College Football Playoff, that once was taken for granted to be the province of broadcast television. That broadcast still airs most of the most popular and important sports and other live events seems to be as much because of inertia, and the fear of Congressional action, as anything else.⁸

But the situation is even more acute when we come to local sports teams, which not only constitute the sort of live programming linear television does best, but also represent, more than anything else, the sort of locally based programming that broadcast television supposedly stands for. It's a quite potent form of it as well: midway through last year's baseball season, Maury Brown of *Forbes* magazine determined that in half of the 24 markets where at least one baseball team wasn't on a regional sports network that was having trouble getting widespread carriage, that team's games were the single most popular programming on all of television in the market to that point in the season, and every one of the 24 markets had at least one team in the top eight.⁹ Yet local MLB, NBA, and NHL teams have become almost unheard of on broadcast television, and NFL teams only maintain a substantial broadcast presence because of the NFL's national television deals with the networks and its requirement for games on cable networks to be shown on broadcast stations in the teams' home markets.

And yet, if most Americans heard it described to them how ESPN and regional sports networks make their money that allows them to consistently outbid broadcast stations for such programming, they would think it to be some sort of con: every single person that subscribes to an MVPD on a package that includes those networks is paying subscriber fees to those networks, without even realizing it, even if they never watch a second of them. The result is great for sports fans, who have perhaps never had access to more sports on television (for, really, a surprisingly cheap price), but it's not so great for everyone else. Many consumer advocates have called for a la carte pricing of cable networks so that people don't have to pay for channels they don't watch.¹⁰

As the present white paper notes, retransmission consent has played a key role in allowing broadcast stations to continue to survive despite these pressures, and no wonder: it is their only hope of even attempting to make up the deficit caused by cable networks' ability to collect subscription fees, by serving as their own equivalent.¹¹ Yet it has also caused broadcasters to neglect and even disdain their own medium, fearful of the "cord-cutting" movement one might think they would be the biggest

⁸ Reply Comments of Morgan Wick in the matter of FCC MB Docket RM-11728 (Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors), 14 Oct 2014, pp. 2-3.

⁹ Brown, Maury, "Through July, MLB Telecasts On Regional Sports Networks Dominate Prime Time TV [UPDATED]", *Forbes*, 5 Aug 2014, retrieved from <http://www.forbes.com/sites/maurybrown/2014/08/05/mlb-telecasts-on-regional-sports-networks-dominate-prime-time-television/>.

¹⁰ See sources cited in Reply Comments of Morgan Wick in the matter of FCC MB Docket RM-11728, notes 23 and 24.

¹¹ House Committee on Energy and Commerce, "Regulation of the Market for Video Content and Distribution", 10 Dec 2014, p5.

beneficiaries of, lest broadcasters lose their retransmission consent revenue without necessarily seeing cable networks lose much in the way of ad revenue, especially if the people cutting the cord are outside of valuable advertising demographics. This is especially the case for the major networks which are owned by large media conglomerates with considerable investment in cable networks; ABC, NBC, and Fox are all owned by companies that also own a substantial number of popular cable networks and thus have little incentive to see anything happen that would substantially shake up the cable ecosystem (especially NBC, which is owned by the nation's largest cable operator). As such, broadcasters have done little to promote technologies and services that would make it easier for people to receive their over-the-air signal and have often attempted to put roadblocks in their way, to the point of being hesitant to throw their support behind the adoption of ATSC 3.0¹²; at the most extreme, while ultimately successfully litigating Aereo out of business, several of the most popular networks threatened to remove their signals from the free airwaves entirely if Aereo was not killed one way or another.¹³

As the current white paper notes, in the age of multichannel television and the Internet, broadcast licenses no longer represent a valuable platform to deliver one's message the ownership of which precludes its use by anyone else without permission of the licensee.¹⁴ As such, public interest and ownership obligations no longer seem to be necessary, and today serve more as another disadvantage broadcasters face compared to their relatively unregulated cable brethren. Before we are too quick to discard them, however, we should note that under the framework laid out above, we have classified broadcast television licenses under the rubric of one-way methods of communication, a special and separate means of communication compared to the two-way method we have every reason to believe will be the norm in the future, if it is not already. Those that control the one-way methods of communication may not have an *exclusive* platform to disseminate their message, but they do control something that gives them an *advantage* at reaching a maximum of people.

As such, ownership restrictions on over-the-air television are still of paramount importance. (Incidentally, this also means that because spectrum and competition policies are intertwined, spectrum policy should continue to distinguish between one-way and two-way forms of communication, rather than use a single "flexible" license for either purpose, though a license for either category could allow the licensee to engage in any commercial activity *within* each category.) This is especially the case given the emphasis Congress has historically given to localism; wireless, over-the-air broadcasting is the only remaining form of communications that is *necessarily* local (unless one counts one-to-one phone communications). The Internet is, by its nature, national, indeed international, in scope; even a "hyperlocal" neighborhood blog can be read by someone clear on the other side of the world. As such, the local market rules are also of vital importance to some degree, but as will be seen later, are very flawed as they presently stand.

In its response to the third white paper on competition policy, the National Association of Broadcasters accurately notes that broadcasting's ability to effectively compete in the marketplace is hampered by "rules written when broadcasters were the *only* wireless service" (emphasis in original), but

¹² Jessell, *op. cit.*

¹³ Fixner, Andy, "News Corp. to Take Fox Off Air if Courts Back Aereo", [Bloomberg](http://www.bloomberg.com/news/2013-04-08/news-corp-says-it-will-take-fox-off-air-if-courts-ok-aereo-1-.html), 8 Apr 2013, retrieved from <http://www.bloomberg.com/news/2013-04-08/news-corp-says-it-will-take-fox-off-air-if-courts-ok-aereo-1-.html>; Musil, Steven, "CBS joins Fox in considering subscription-only model", [CNet](http://www.cnet.com/news/cbs-joins-fox-in-considering-subscription-only-model/), 9 Apr 2013, retrieved from <http://www.cnet.com/news/cbs-joins-fox-in-considering-subscription-only-model/>.

¹⁴ "Regulation of the Market for Video Content and Distribution", especially p1.

misidentifies the rules in question as restrictions on ownership.¹⁵ In fact, the neglect of broadcast television as a medium in its own right, as opposed to merely another sort of cable channel, may well have been aided by the ownership rules being too *loose*, especially after the legalization of duopolies in 2000 allowed fewer companies to operate in each market and thus fewer companies to operate in general, as owners of larger stations were able to buy their would-be competition. Localism has suffered as massive station groups have gobbled up as many stations as they can under current rules and run them as cheaply as possible, sacrificing investment in local programming outside of news (which often follows the same template across a station group) to signing huge groupwide syndication deals. Since the legalization of duopolies, most commercial general entertainment stations that aren't affiliates to the major, "big four" networks, stations that were once a laboratory of localism and innovation, have become supplements to sister stations that are big four affiliates and dumping grounds for syndicated programming bought by the large, national station owner, with just about any other non-PBS station withering in obscurity.¹⁶ NAB's position is, in my view, an excellent example of the short-sighted perspective that has come over the broadcasting industry: NAB cares more about strengthening broadcast stations' retransmission consent leverage than their reason to exist. At best, when it comes to ownership restrictions Congress and the commission should impose similar limitations to cable networks and operators as broadcast stations are currently bound by, not loosen restrictions on broadcast stations to bring them to the level of cable entities.

Congress should prepare a set of regulations that encourages broadcast television, and one-way communications more generally, to emphasize those areas that one-way communication can do better than two-way forms such as the Internet. Congress should repeal restrictions on what sort of content broadcasters may or may not air, or conversely what content they are required to air, instead ensuring that any content that would benefit from utilizing a one-way means of communication can do so regardless of source. This includes allowing broadcasters to do whatever they want with their spectrum, whether to broadcast video, data, or whatever else. Congress should consider allowing broadcasters to restrict reception of their content to those who pay for the privilege, which does not necessarily mean doing so through a middleman such as a cable operator, ISP, or wireless provider – though this should not be done lightly if it has too much of an effect of shutting off entertainment and information options for those less well-off. And Congress should lead an effort to encourage broadcasters to adopt and embrace a standard that, in addition to making all of the above possible, can be received by *any* device, including allowing and encouraging the FCC to require the corresponding device manufacturers to include the requisite reception technology, and to ensure such a standard is in place and approved by the FCC *before* the incentive auctions currently scheduled for 2016.

Congress and the FCC should also ensure that broadcast television signals are strong enough to reach a maximum of people with a minimum of effort on the consumer's part once the auctions are complete, specifically on a device of the sort mentioned above. The commission and stakeholders may have needlessly crippled broadcast television in the aftermath of the digital transition by setting coverage

¹⁵ National Association of Broadcasters, "NAB Response to the House Committee on Energy & Commerce White Paper on Competition Policy", 13 Jun 2014, retrieved from http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/WP3_Responses_43-63.pdf.

¹⁶ Reply Comments of Morgan Wick in the matter of FCC MB Docket 14-50 (2014 Quadrennial Regulatory Review), pp. 5-12.

areas based on the use of a high-powered rooftop directional antenna. Rather than merely “preserving” the crippled post-transition coverage areas in the aftermath of the incentive auction, the FCC should correct their initial mistake and ensure widespread access to free, over-the-air television to as many people as possible. Colocation of each market’s stations in a single place should be encouraged to conserve spectrum by allowing stations to be placed adjacent to each other, and to allow those that do need to use directional antennas to aim them at a single place to receive all a market’s stations.¹⁷

Re-emphasizing broadcast television’s actual ostensible medium, and utilizing the colocation scheme laid out above, should greatly simplify the local market rules if not render them irrelevant – although giving one station exclusive access to programming and making it available to everyone is superior to the model likely to take shape if linear television were dominated by the LTE-Broadcast/Multicast model, with each wireless provider showing the same programming on their own channels, just from an efficiency of spectrum standpoint. However, as it stands the local market rules give a private, nongovernmental organization, Nielsen Media Research, the power to influence public policy and market outcomes by dividing the United States into 210 “designated market areas”, each of which is assigned a certain set of stations. Nielsen wields the power to determine what areas count as their own separate market and which do not, and what market each county belongs in, based more on their primary business of selling television ratings to stations than any public-interest, governmental purpose. Nielsen tries to determine DMA boundaries based on what stations each county’s residents watch, but because what stations appear on cable lineups are partly, and what stations appear on satellite lineups are entirely, determined by the DMA boundaries, they have become self-perpetuating in this age of widespread cable penetration. More disturbingly, *what* those DMA boundaries are are not freely available, but requires purchasing the requisite maps from Nielsen, which has reportedly cracked down on non-Nielsen sites disseminating the DMA boundaries and even prevented Wikipedia from using its DMA rankings it does make freely available.¹⁸ This would seem to call into question any commitment by Congress or the FCC to open government.

Ideally, especially if the colocation scheme suggested above is used, the FCC (or at least objective facts) should be determining the market areas Nielsen uses, not the other way around. The industry should be given the leeway to collectively determine what areas justify the expense of investment and the requisite consumption of spectrum to be considered a local market with a minimum of reliance on Nielsen, with the opportunity to change their mind later – *after* they have been given a reason to invest anywhere.

How This Affects Cable and Satellite Video Providers

We established above that one-way methods of communication such as traditional linear television are especially important to distribute wirelessly because of the greater scarcity of spectrum. What does this mean for wired and satellite distribution of linear television?

¹⁷ See Baumgartner, Fred, “Guest Blog: TV’s Evolution Depends on Smart Use of Spectrum”, Broadcasting and Cable, 11 Jan 2014, retrieved from <http://www.broadcastingcable.com/blog/bc-beat/guest-blog-tv-s-evolution-depends-smart-use-spectrum/128438>; Reply Comments of Mark J. Colombo in the matter of FCC MB Docket 12-268 (Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions), retrieved from <http://apps.fcc.gov/ecfs/document/view?id=7022129689>.

¹⁸ Wick, Morgan, “An Open Letter to FCC Chairman Tom Wheeler”, MorganWick.com, 17 Jan 2014, retrieved from <http://sports.morganwick.com/2014/01/an-open-letter-to-fcc-chairman-tom-wheeler/>.

The two are worth treating separately because of their disparate prospects for two-way communication. It is tempting to argue that there is no justification for wired providers to give up *any* of their bandwidth for linear television since the Internet can do the same thing (just not as well) and we should be encouraging broadcasters to make their signals as widely available as possible, which would both obviate the need for their signals to be carried on cable and possibly make it against the public interest to discourage them from doing so. Remember, though, that cable started out as “community antenna television”, delivering television signals to mountainous areas where over-the-air signals couldn’t penetrate. As such, a wired Internet provider may find it necessary to deliver the benefits of one-way communication into areas not capable of receiving the signals wirelessly by relaying them from areas that can. Of course, one technology in place now that was not in place at the dawn of cable is wireless phone service, whose greater density of transmitting sites can penetrate specifically into areas that might not have been served by a single, booming broadcast antenna, raising the possibility of linear television distributed by way of many scattered transmitter sites rather than one big one; I have little to say about the merits of this approach other than that it would likely render the concept of the local market relevant once again, though such could be determined by the free market.

If it is necessary for wired Internet providers to relay linear television signals into areas they cannot reach over-the-air, a form of the must-carry rule is probably warranted: carry one signal in a given area, carry them all. It may also be beneficial to carry additional one-way signals across the wires to reflect the likelihood of greater consumption of content over wires and at higher qualities. If this is the case, however, such should follow the distribution paradigm established for the Internet. The present white paper asks if provisions requiring cable operators to grant access to their platform such as, among others, program access rules are still warranted in the era of the Internet, and it is easy to see why given that MVPDs have lost their exclusive platform for delivering content just as much as broadcast stations have, but when cable operators become Internet providers they are effectively subject to *more* stringent rules for granting access to content, because they are required to deliver *all* content a consumer may request.¹⁹ If the content available through an additional linear television channel is also available on the Internet, granting a linear channel to that content is effectively analogous to the “paid prioritization” system that has been the cause of such controversy regarding the FCC’s proposed Open Internet rules; as such either Congress or the commission would need to take steps to mitigate any resulting negative consequences. There may be reason to allow some content’s carriage on a linear channel to be exclusive to one provider or another, but any linear channels available from at least two providers in an area should be available from all, and as with broadcast stations, the consumer should have sole discretion as to whether or not (or when) to pay for it.

A major market space for satellite television has proved to be delivering service to rural areas not served by cable television. Congress and the commission has attempted for a long time to encourage the development of rural broadband by both wired and wireless providers. If it continues that no one else steps up, it may be that satellite-delivered Internet and television service is better than nothing, and in this case can be expected to follow the same rules as cable operators laid out above. It may be that satellite Internet service should be governed by its own rules given its inferior quality, but if at all possible all services for the delivery of linear television beyond picking it up directly from the air should be brought under a single set of rules.

¹⁹ “Regulation of the Market for Video Content and Distribution”, p6.

Although rules governing carriage of content on MVPDs should in fact be made stricter, as above, to match the rules in place governing the Internet, it is important to note that in the case of both one-way and two-way communication, it is the *physical* infrastructure that necessitates such rules and makes them relevant, not the *content* they happen to carry. During the 80s and 90s, including when the Cable Act was passed, the assumption was that the physical infrastructure was a necessary condition for delivering the content. The advent of over-the-top video providers is perhaps the highest expression of the fact that this is no longer the case, yet the fact that such services would need to be classified as MVPDs is a reflection of the fact that those assumptions still rule. Over-the-top providers, having no infrastructure of their own, exist *entirely* to deliver content, and by necessity they do not use actual linear television channels to do so, but rather do so over the Internet. To the extent they carry broadcast stations, they are another manifestation of broadcast's neglect of its own nominal medium; to the extent they carry cable channels, they are an attempt to break MVPDs' monopoly over certain classes of content, a monopoly that is much harder to justify now than 23 years ago. A well-written communications act, and corresponding well-thought out FCC action, should render them unnecessary and superfluous; certainly Congress and the commission should think long and hard before doubling down on rules that assumed the primacy of physical infrastructure by applying them to entities without any.

I would reconsider the purpose and necessity of the retransmission consent rules, although I do not think it is wise to simply wipe them off the books without some sort of transition period, especially to help fund the reversal of the years of neglect broadcast television has suffered as a result. When the Cable Act was passed the purpose of retransmission consent was ostensibly to compensate stations for access to their signals being used to attract customers to cable operators and, through them, to content that was in direct competition with those stations. By the time the Cable Act was passed, however, access to that additional content itself was already showing signs of eventually eclipsing access to broadcast stations as a primary reason for subscribing to cable (and had done so for over a decade), particularly in urban areas that could receive broadcast stations perfectly well, and with the advent of the cord-cutting movement and the delivery of content over the Internet, as well as cable operators' diversification into Internet and phone services, such an eclipse is well and truly completed, or at least would be if cable carriage didn't disincentivize broadcast stations from improving their signal. Ideally returning control of what content is distributed to the consumer can serve the purpose of obviating the need for a system like retransmission consent.

Is Competition the Answer to Net Neutrality?

In many places in the above discussion, I indicated that the regulation of broadcast and cable television should be made to match the net neutrality principle that governs the Internet, since linear television is likely to become subordinated to the Internet as a source of content and intertwined with it as part of the larger competitive landscape for video. Some may argue that net neutrality constitutes unwarranted government interference in the marketplace and that competition and the free market should be able to prevent the negative consequences net neutrality attempts to prevent. However, the present state of the cable television and wired Internet provision landscape is decidedly *not* one of competition and the free market; although there are many cable television and Internet providers, it is quite rare that the average person has a choice of more than one, not counting providers using other media such as satellite. As such, the question becomes decidedly more complex if we prefer fostering competition to maintaining formal net neutrality rules.

Congress and the commission needs to determine whether or not wired television and Internet service represents a natural monopoly that tends to only one provider in most areas with any attempt to establish a competing service constituting unnecessary “overbuilding”, or whether it can and should support multiple providers in a given area. If the former, the commission must continue to ensure true net neutrality, and Congress should enshrine it in law; indeed, for all practical purposes this would imply that Title II as it is is not as “outdated”, and in fact is more applicable to the wired Internet landscape, than its opponents acknowledge. If the latter, that implies that in most places cable operators have engaged in anticompetitive practices to prevent the institution of competition from other wired service providers. Some of these may have to do with local franchising requirements, regulations laid out in the 1992 Cable Act, and other vestiges from the early days of cable. If the wired television and Internet service landscape can and should support competition, Congress in a revised Communications Act and the FCC through its own action should reduce the barriers to entry to competitors as much as possible.

If the wired communications delivery market is fully open to competition, it may well be that it is acceptable to allow service providers to reach their own agreements with content providers over the quality of the connection between them, and let the free market do the rest. Even then, however, the result could still be that parties with money will have an advantage over parties without, especially in high-bandwidth fields like video. As the fourth white paper implicitly acknowledges, the issue of interconnection between networks remains an important issue precisely for the purpose of fostering competition; people want to know that whatever provider they sign up for, they are connecting to the same Internet.²⁰ As such, I believe many of the principles laid out above would still apply, though I fully acknowledge that this is entirely speculative.

Conclusion

The goal of a technology-neutral rewrite of the Communications Act should be to ensure a level playing field between different technologies so that each technology can do what it does best and better than any other, yet the playing field in the video marketplace is so un-level that the proposals of broadcasters, which suffer from the unbalanced playing field more than anyone else, would make things worse. There are few areas that better demonstrate the need for a technology-neutral rewrite of the Communications Act than the video marketplace, and perhaps nowhere else is a proper understanding of the issues involved more important to the success of the entire rewrite effort, yet due to the looming incentive auctions there is nowhere else where getting the issues right is so time-sensitive. Getting the video marketplace right is critical to ensuring the preservation of the ideal of net neutrality, and thus to ensuring that whatever comes out of this process works for the American consumer. I hope the committee takes the above into consideration and understands the importance of these issues to the task of shaping the communications landscape of the twenty-first century.

Morgan Wick
Venice, CA
January 23, 2015

²⁰ House Committee on Energy and Commerce, “Network Interconnection”, 15 Jul 2014, retrieved from <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140715WhitePaper-Interconnection.pdf>.

[REDACTED]

From: Melody Ashford [REDACTED]
Sent: Friday, January 23, 2015 2:36 PM
To: CommActUpdate
Cc: Michelle Ostrowski
Subject: Re: Regulation of the Market for Video Content and Distribution – Response to

"Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the Internet?"

Our community media center serves as a local information hub that is extremely important to our citizens. The programming on our PEG channels provides content that keep our community connected to our local elected officials, along with their neighborhood events.

We are in the era of information, yet there is a crusade to limit the avenues in which it can be received. By removing the cable system requirements to provide access stations, communities would lose a vital media communications resource. Today, as reported by MassAccess, public, educational and governmental access television stations across America, and around the world, annually produce more hours of original, non-repeated programming than ABC, CBS, NBC, and Fox Network combined. This original programming is the voice of the people. The fundamental benefit of community access is that it protects individual citizens' rights to free speech turning the, the ancient soapbox into public access TV stations, videoblogging, and podcasts.

TV is not a dying form of technology, it is an evolving one. Community access is evolving and progressing in tandem with the mainstream media. As a result, it remains as technologically relevant and valuable to the communities it serves. The work we do and the services we provide are vital to community connectivity. This resource requires continued cable funding to allow delivery to both TV and the internet.

Thank you for your time and consideration on this important matter.

Best regards,

Melody Ashford

*Melody Ashford, Executive Director
Willamette Falls Media Center*

[REDACTED]



32 Swanton Street - Winchester, MA 01890
781-721-2050 – wincam.org

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

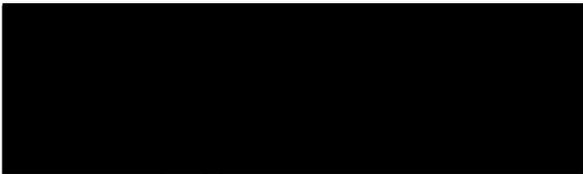
The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

Dear Congressmen Upton and Walden:

As the House Energy & Commerce Committee meets to discuss video reform, it is imperative that you look with favor upon the future of local PEG channels. These organizations support and defend one of the most patriotic of American Civil Rights – freedom of speech. And while affordable technology and the internet have expanded citizens' abilities to express themselves, it is no substitute for expertise, the sense of community and local pride that the community media station can provide. Where the internet can be impersonal and vast, the local media is still about the municipality or municipalities it serves – its residents, its government, its history. To that end, the community media station is the archive of the community – preserving a story told by its residents for generations to come.

In Winchester, Massachusetts our broad membership ranges from schoolchildren needing a safe place to go in their spare time to senior citizens learning new skills. Recently, our staff produced a fundraising event at the local high school – two basketball games raising money for cancer research. Along with our paid staff, our crew consisted of two college students, two disabled adult members and four middle school girls. I was proud to be part of this community event. This was a populace working together to combat a global issue and the community media station played no small role in it. Empowering people is just as much part of the mission of most of these organizations as is the use of technology. In that sense, there aren't many organizations like the community media station and the funding must continue.

I know I can speak for the thousands of members, viewers and supporters of local media in this small town when I ask that you do what you can to protect this noble institution. The idea of local community media was brilliant when it was first conceived many decades ago. And though technology has changed how we deliver and receive information, the idea of the electronic soap box remains ahead of its time. Please ensure that citizens can continue to take advantage of these services well into the future.



Executive Director

WISCONSIN COMMUNITY



www.wisconsincommunitymedia.com

Supporting community expression through media since 1998

January 23, 2015

VIA EMAIL

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

Re: Regulation of the Market for Video Content and Distribution - Response to the House Energy & Commerce Committee White Paper #6

Dear Representatives Upton and Walden,

Thank you very much for providing this opportunity to talk about how communications policy can continue to serve the public interest in a changing media marketplace.

Wisconsin Community Media is a professional organization serving 47 public, education, and government media access centers in Wisconsin. Our members range from the Town of Sevastopol, a small community in Door County that operates with barely any budget at all, to the City of Milwaukee with a staff of five, to the non-profit Chippewa Valley Community Television in Eau Claire.

Our media access centers exist today because of provisions in federal law that require cable systems to set aside access channels and collect fees from subscribers to pay for local programming (PEG fees) and for using city rights-of-way (franchise fees) *if* local communities request these things. Today, virtually every community in Wisconsin has an access channel and collects a franchise fee for the use of rights-of-way.

Brick and mortar media access centers embedded in our communities:

- Bring people together from diverse backgrounds to create programs that appeal to a variety of social, political, and religious local communities.
- Provide open access to local and state government through professional coverage of meetings, candidate forums, and issues discussions.
- Provide coverage of community events and activities that are not televised by commercial broadcasters or individual video creators.

- Produce quality videos for local businesses and non-profit organizations that would otherwise not hire the expertise needed to effectively use this highly popular medium.
- Train residents to produce video and use social media to promote their programming. These free and low-cost training opportunities are available to all members of the public, including kids and seniors.

Cable television systems are the source of funding for the equipment and staff needed to produce locally-oriented programs that are “pushed” out to broad community audiences on cable. Some of these programs may also be distributed on the Internet, a very different type of platform, where users search for specific content and tend to prefer short videos. Programs may also appear on one of the other video platforms mentioned in your white paper, such as HuluPlus.

Future telecommunication policy should ensure that funding is set aside to produce local public interest programming for distribution on all video platforms. “Public access” should not be the responsibility of only one type of video provider and funding should not be derived from only one type of video platform. All video platforms should contribute to a fund and provide space as possible to public interest programming.

In the short term, Wisconsin Community Media asks the House Energy & Commerce Committee to support legislation that would strengthen PEG access on multi-channel video systems. In particular, local programming would be strengthened by requiring systems to:

1. *Assess a PEG fee if a local community wants it.* Wisconsin municipalities may not assess a PEG fee due to a state law passed in 2007 that made state government the “local franchising authority.” At the time, PEG fees in Wisconsin averaged 25 cents per subscriber per month but several public access facilities negotiated higher fees, closer to \$1, to fund operating costs. These centers either closed or were substantially diminished by the loss of PEG fees. Those that relied on PEG fees for capital equipment have never found alternate sources of funding.
2. *Include PEG program listings on the Electronic Program Guide.* Besides informing viewers about what’s on PEG channels, the EPG enables viewers to use time-shifting technology like DVRs. Only a handful of access channels in Wisconsin are listed on the Electronic Program Guide.
3. *Carry PEG programming on channel numbers closer to the location of broadcast channels.* In Charter communities, access channels are carried in the 980s and 990s where few viewers venture. AT&T systems don’t really carry the access channels on the line-up at all. Viewers must navigate through a series of web pages to get to and reverse out of viewing access channels.
4. *Assess funding for PEG fees and franchise fees on all wireline services both “cable” and information services (broadband Internet).* Both services carry video on the same line running through city rights-of-way.
5. *Support media centers that invest in HD equipment by providing them with the bandwidth needed to cablecast in HD.* WCM would like to see Charter, Time Warner, and AT&T follow the lead of Solarus, a company providing cable services in Wisconsin Rapids.

Media access centers provide an important public service by producing quality videos about local people, government, businesses, issues, and events and training residents to do the same. From a marketplace standpoint, these programs may never make money for the media businesses that carry them, but they are important to “community conversation.” Media access centers occupy a niche that serves the public far beyond the cable systems that support them.

Wisconsin Community Media believes the role of federal communications policy should be to ensure that these brick and mortar local media centers thrive and feed the many alternative distribution systems now available with public interest programming.

Thank you for your time.

Sincerely,



Mary Cardona
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cc: Wisconsin Congressional delegation
Alliance for Community Media
American Community Television
National Association of Telecommunications Officers and Advisors
League of Wisconsin Municipalities



Wallingford Public Access Association, Inc.
28 So. Orchard St.
Wallingford CT 06492

Jan 18, 2015

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

Re: Regulation of the Market for Video Content and Distribution – Response to White Paper #6

In an Internet connected world, can or should Community Access Television as we know it, be sustained? Yes and No. Everything this experiment in democracy has at its core: building community through the production of ideas, opinions, stories, news, information and/or performance as local television while valuing free speech, individual expression and diversity remains a vital part of sustaining democratic communities. There is no comparable network of organizations dedicated to being of, by and for the voice of the people. As an experiment, it has a range of successes and models of implementation that represents the diversity of America. As a network, it has shared principles, values and support that keep it from being rudderless among the many opportunities for voices to be enabled by worldwide connectivity.

If the Internet is ubiquitous and free to all in the near future, will the following personal aspects of local television still be desirable?

1. Comfortable watching of content from a living room recliner
2. Same viewing experience shared by neighbors
3. Community projects bringing folks together to tell community stories
4. Commercial-free viewing
5. Local media that is not controlled by media corporations, self-appointed power brokers or self-interested corporations

Community Access Centers and large media corporations extend content availability to viewers via the Internet; but Community Access is not the delivery system. It is the content that may be important to the shut-in who cannot attend church, the commuter who cannot attend a public meeting, the child who can be proud of their report seen by everyone in town, the immigrant learning a new language, the new homeowner trying to learn about his/her community. It is people agreeing and disagreeing about what makes a difference to them locally where they still have the potential to influence outcomes.



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Yes, the Internet should change Community Access TV by being another tool for delivery. What it cannot be or replace is the potential that Community Access TV holds to gather, teach, discuss and share what is local based on the reasonable needs and qualities of a community. Hundreds of volunteers and organizations are connected through a viable Community Media System. Youth can discover, learn and experiment; and elders can stay connected in what would hopefully be a community hub that is more vital today because what can be created as TV can be shared as Social Media and distributed additionally via the Internet.

Thanks for asking the people to share their ideas about the intersection of Community Access TV and the Internet and if the Internet is a reason to discontinue Cable Providers support of Citizen Media. The answer from this community is NO.

[REDACTED]
Susan Huizenga
Executive Director



Advocates for Rural Broadband

Mark M. Gailey
President
Kelly Worthington
Executive Vice President

**Response of WTA – Advocates for Rural Broadband to the
House Energy and Commerce Committee’s White Paper on
Regulation of the Market for Video Content and Distribution**

January 23, 2015

In its White Paper on *Regulation of the Market for Video Content and Distribution*, the House Energy and Commerce Committee (“Committee”) requests public comment on several issues regarding the current model for regulation in the video content and distribution marketplace and whether certain developments in the market necessitate legislative action.

WTA – Advocates for Rural Broadband (“WTA”) is a national trade association representing more than 280 small rural telecommunications providers that serve some of the United States’ most remote, difficult and expensive-to-reach areas and are providers of last resort to those communities. Most WTA rural local exchange carrier (“RLEC”) members serve fewer than 3,000 access lines in the aggregate and fewer than 500 access lines per exchange. Whereas WTA members were predominately providers of voice services over traditional copper telephone networks during the early 1990’s when the Cable Act of 1992 and Telecommunications Act of 1996 were being debated and enacted, they have now evolved far down the path toward becoming providers of increasingly higher-capacity broadband data, video and voice services over more and more fiber-intensive hybrid fiber/copper networks. They are also in the midst of converting from Time Division Multiplexing (“TDM”) to Internet Protocol (“IP”) technology.

The main challenge WTA members face in providing high-quality and affordable video services to their customers is the escalating cost of acquiring retransmission consent for broadcast network stations and distribution rights for “must have” satellite program channels. This isn’t a challenge faced solely by WTA members; content prices are increasing at a rapid rate for all multichannel video program distributors (“MVPDs”). However, WTA members—many of

which have fewer than 1,000 video customers and few of which have more than 3,000 video customers—have virtually none of the market power necessary to convince content providers to lower their per-subscriber prices or ease their carriage terms. Even where they are able to participate in larger buying groups such as the National Cable Television Cooperative (“NCTC”), WTA members believe that they pay significantly higher prices per subscriber than the larger multiple CATV system and Direct Broadcast Satellite (“DBS”) operators for most or all content, and that there is no meaningful economic basis for the lower prices or volume discounts furnished to the large operators. The combination of above-average and increasing content prices charged to small rural video providers with the limited and below-average incomes of many rural residents has resulted in a “video price squeeze” that has affected WTA members and other small rural video distributors more severely than the rest of the industry that benefits from lower programming costs as a result of volume-based and other price discounts.

Beyond the exponentially increasing per-subscriber costs of video programming charged by broadcasters and satellite video programmers, anti-competitive practices such as forced tying and tiering further limit the ability for WTA members to provide their customers with the content they want without also having to purchase and charge their customers for additional and undesired content.

The provision of video services constitutes an excellent opportunity for WTA members and other rural telephone companies to provide services desired by their rural customers, to encourage increased adoption of broadband by their existing and potential rural customers, and to generate additional revenue streams needed to deploy higher capacity broadband facilities in a world where critical universal service support programs are increasingly limited. Unfortunately, as a result of the aforementioned content pricing and carriage conditions, many WTA members have video businesses that are barely profitable, break even, or operate at a loss. A few WTA members have already shuttered their video businesses because they could not justify continuing losses with little or no relief in sight, and more are seriously considering doing so.

Several reforms to current regulation of the video distribution market can help alleviate the financial squeeze experienced particularly by rural video providers. Congress needs to limit the blank check that Section 325(b) of the Communications Act gives to commercial broadcast stations that has been increasingly abused by the demands of major network affiliates for increasingly onerous compensation for providing their written retransmission consent.

Congress also needs to address the increasing concentration of the video content industry that is responsible not only for rapidly increasing prices for the most popular satellite video channels, but also for increasingly intrusive tying and tiering conditions that increase the costs of CATV and IPTV providers and force them to sell service packages that are larger and more expensive than their subscribers want.

WTA recognizes that regulation of retransmission consent and satellite video program prices would be extremely complex, and would be likely to implicate constitutional issues as well as economic and administrative difficulties. However, WTA believes that there are effective ways to address the foregoing problems that do not entail price regulation.

The most comprehensive and effective solution would be to require MVPDs to sell all of their program services or channels to the public on an *a la carte* basis, and to prohibit any local cable franchise or program contract provisions that impair or preclude such *a la carte* pricing. In the alternative, Congress could make *a la carte* pricing by MVPDs voluntary rather than mandatory, but still prohibit any local cable franchise or program contract provisions that would impair or preclude an MVPD's option to adopt *a la carte* pricing. The advantage of *a la carte* pricing is that commercial broadcast stations and satellite content providers could charge whatever they wish for their programming, and their prices would not be regulated. Rather, their focus would have to change: (a) from forcing MVPDs to purchase and package expensive channels that are not wanted by all of their subscribers; (b) to offering their channels to the public at prices that are designed to meet their audience and advertising revenue objectives. *A la carte* pricing would be a major benefit to consumers, who would be able to design their own video services and purchase the channels they actually watch rather than paying for hundreds of channels in which they have little or no interest.

Other potential retransmission consent reforms include: (a) prohibiting commercial television stations from requiring retransmission consent compensation from MVPDs that serve areas beyond the viewable range of their over-the-air signals; and (b) requiring commercial television stations to include complete and non-redacted copies of all operative retransmission consent agreements in their public files, and to list the rates for all of their existing retransmission consent agreements in clearly marked and readily accessible sections of their websites. Rural MVPDs perform a major service for commercial television stations by extending their signals beyond the areas (once known as Grade A and Grade B contours) where they can be viewed off-

the-air, and thus enable the broadcasters to charge advertisers for audiences that they otherwise would not be able to reach. Congress should prohibit commercial television stations from charging compensation for retransmission consent in areas where they cannot provide a viewable off-the-air signal of acceptable quality. In the alternative, retransmission consent compensation in such areas should be limited to a percentage (*e.g.*, 10%) of the weighted average compensation rate charged by the broadcast station within its off-air service territory. Another proposed reform -- requiring the disclosure of retransmission consent agreements and compensation -- would increase transparency for consumers and distributors alike.

Satellite video programming vendors should also be subject to transparency requirements with respect to the video channels they distribute over the public airwaves in interstate commerce. Again, WTA sees no need to regulate the general ability of content providers to set the prices they feel are appropriate; it only requests that these prices be required to be listed in clearly marked and readily accessible sections of their websites. However, where content providers offer volume discounts or other price breaks to certain video distributors, they should be required to demonstrate legitimate business reasons and specific economic justifications for such arrangements.

Lastly, Congress should eliminate the network non-duplication and syndicated exclusivity rules because there is no evidence that the rules meet their intended goals of fostering local programming.

Responses to the Committee's Specific Questions

- 1. Broadcasters face a host of regulations based on their status as a “public trustee.”**
 - a. Does the public trustee model still make sense in the current communications marketplace?**

At its conception, the “public trustee model” provided that private licensees would get exclusive rights to control and use broadcast spectrum at no charge and in turn would have a series of public interest obligations, including public affairs programming, local programming, equal employment opportunities, and access for the disabled. WTA leaves it to others to debate the impacts of market changes on the public trustee model, but believes the Committee must consider the extent to which broadcast television stations are satisfying their local programming and other public interest obligations.

It is also imperative that the Committee considers whether and how current retransmission consent practices are consistent with a public trustee model. In particular, the CATV/IPTV systems of WTA members and other rural video providers allow broadcast stations to be viewed in rural households far beyond the range of their off-air signals. Yet, notwithstanding this expansion of their audiences and their advertising revenues without any cost, broadcast stations have continuously and substantially increased the retransmission consent fees they charge rural CATV and IPTV systems. Furthermore, after the implementation of the Digital Transition and Public Safety Act in 2009, broadcast signals do not carry as far as before and are less able than their analog signal counterparts to overcome topographic and other obstacles. As a result, small rural MVPDs now, more than ever before, are assisting broadcasters to meet their public trustee obligations by extending their signals to viewers who are otherwise unable to receive a good quality signal or any signal at all.

Whereas broadcasters for the first decade after the development of the retransmission consent regime did not charge for retransmission consent but rather relied on other carriage requirements, broadcasters have begun charging MVPDs increasingly large per-subscriber fees in addition to requiring other burdensome carriage conditions. Furthermore, whereas national networks previously paid affiliate stations to air their programming, the national networks appear increasingly to be dictating the terms of retransmission consent in addition to demanding larger and larger portions of retransmission consent fees from their affiliates through reverse compensation payments. Because small rural MVPDs in particular increasingly assist broadcasters to meet their public trustee obligations at the same time that they are forced to accept without any meaningful negotiation substantial increases in retransmission consent fees, WTA proposes that commercial television stations be prohibited from charging compensation for retransmission consent in areas where they cannot provide a viewable off-the-air signal of acceptable quality. In the alternative, retransmission consent compensation in such areas should be limited to a percentage (*e.g.*, 10%) of the weighted average compensation rate charged by the broadcast station within its off-air service territory. Limiting the ability of broadcasters to charge fees for retransmission consent outside of their actual off-air coverage areas would be an equitable adjustment that would more closely align with the notion of broadcasters as public trustees.

Furthermore, there are reports of national networks increasingly dictating to affiliate stations the consideration and terms for retransmission consent that must be secured in negotiations with

MVPDs in addition to the networks increasingly demanding that affiliates pass along larger and larger portions of retransmission consent revenues in “reverse compensation” to the national networks.¹ Congress should investigate these alleged practices to determine whether they are consistent with the role of broadcasters as public trustees.

b. Which specific obligations in law and regulation should be changed to address changes in the marketplace?

Please refer to the response to Question 1(a) for WTA’s response to this question.

c. How can the Communications Act foster broadcasting in the 21st century? What changes in law will promote a market in which broadcasting can compete with subscription video services?

Broadcast television is a free, off-the-air service that already serves as an alternative to “subscription video services” within the coverage area of the broadcast signals. In addition to providing service for free to those who are able to receive its signal off-the-air, a broadcast station can also elect to require an MVPD to carry its channel or alternatively can negotiate retransmission consent agreements with MVPDs for carriage. Any additional measures beyond providing broadcasters free use of a public resource for distribution and the right to demand carriage on competing subscription video services would further unjustly skew the video market in favor of broadcasters at the expense of new and alternative sources of video content.

d. Are the “local market rules” still necessary to protect localism? What other mechanisms could promote both localism and competition? Alternatively, what changes could be made to the current local market rules to improve consumer outcomes?

The “local market rules” (*i.e.*, the network non-duplication and syndicated exclusivity rules) originally written in the 1960s—when traditional cable was the only video distribution other than broadcast—are no longer necessary to protect localism. In the experience of WTA members, the threat of network non-duplication enforcement comes primarily during contentious retransmission consent negotiations when the network affiliate in the Designated Market Area (“DMA”) refuses to reduce its compensation demands and threatens to invoke the network non-duplication rule if the CATV or IPTV provider tries to substitute the adjacent market affiliate. WTA is not aware of any instances of enforcement of the syndicated exclusivity rule in recent

¹ See Adam Buckman, *Nets Hold Upper Hand in Affiliate Relations*, TVNewsCheck (Jan. 7, 2015), available at <http://www.tvnewscheck.com/article/82002/nets-hold-upper-hand-in-affiliate-relations> (last accessed Jan. 16, 2015); Brian Stelter, *Network Wants Slices of a New Pie*, New York Times (Jul. 3, 2011) available at http://www.nytimes.com/2011/07/04/business/media/04retrans.html?_r=0 (last accessed Jan. 16, 2015).

years due to the technical complexity and number of syndicated programs and episodes airing at any given time in a DMA.

Furthermore, the video marketplace has changed significantly since the time when broadcasters were the dominant video providers. The local market rules were written when cable was seen as the only viable competitor to local broadcast stations. However, the video distribution market now includes competition from broadcasters, cable providers, telco video providers, national satellite distributors, new over-builders like Google, and linear and on-demand online video distribution platforms. Moreover, the national networks themselves have begun (or have announced plans) to stream over-the-top the same content these rules require cable and satellite providers to black out in order to protect the viewership and advertising revenues of local network affiliates. For example, CBS has announced a stand-alone streaming service for \$5.99 per month² while NBC has announced its own live-streaming service for all 10 of its network-owned stations.³ Therefore, the national networks are diluting exclusivity in direct competition with network programming aired on their affiliates, while the network non-duplication rules continue to block adjacent market network affiliates from doing the same thing even if they share a community of interest (for example, by providing in-state news and public affairs programming) with a blacked-out cable community.

Furthermore, there is no evidence that network non-duplication or syndicated exclusivity in today's video marketplace truly fosters local programming as originally intended. According to a Federal Communications Commission ("FCC") report from 2011, local news programming accounted for an average of only 11.5 hours per week, amounting to just 7 percent of broadcast hours.⁴ Similarly, the FCC has also found that approximately 30.6 percent of all commercial broadcast stations air no local news programming whatsoever.⁵ Broadcast stations cover local public affairs even more sparingly, with an average of just 1.5 hours per week—not even 1 percent of total broadcast hours—of local public affairs programming on commercial broadcast

² See Brian Steinberg, *CBS News to Launch Video Streaming Service Thursday*, Variety, (Nov. 5, 2014) available at <http://variety.com/2014/tv/news/cbs-news-to-launch-video-streaming-service-thursday-1201348413/> (last accessed Jan. 16, 2015).

³ See Don Reisinger, *NBC Pushes Live Streaming to PCs*, CNET (Dec. 16, 2014) available at <http://www.cnet.com/news/nbc-pushes-live-streaming-to-pcs-as-tv-everywhere-heats-up/> (last accessed Jan. 16, 2015).

⁴ See Jack Erb (2011) *Local Information Programming and the Structure of Television Markets*, Federal Communications Commission Media Ownership Study #4.

⁵ Steven Waldman and the Working Group on Information Needs of Communities (2011). *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, Federal Communications Commission, p. 302.

stations.⁶ The market has also seen an increase in consolidation of local news resulting from broadcast acquisitions and broadcasters sharing resource for coverage of local news. In one WTA member's market, for example, Sinclair Broadcasting acquired two network affiliate stations and immediately eliminated the entire news team from one affiliate. In a blow to the goals of localism and diversity of voices, those separate stations now air the same local news programming created by the same news team.

Another adverse impact of the network non-duplication rules is their obstruction of the ability of small rural MVPDs in particular to negotiate retransmission consent with adjacent market broadcast stations that provide in-state news, public affairs and sports programming of interest to their customers. Often rural MVPDs are located within a DMA that does not correspond with an MVPD's customers' true community of interest. For example, some rural cable communities are located in one state but are designated as being located in the DMA of a city in an adjacent state. This leaves rural MVPDs with the difficult choice of incurring the higher cost of offering their customers two affiliates of the same network while blacking out the national network programming of the distant station (and leaving the potential for customer confusion and frustration) or offering only out-of-state broadcast stations and out-of-state local programs to which their customers do not relate. Elimination of the network non-duplication rule would allow small MVPDs, especially those at the edge of DMAs with which they have minimal community of interest, to choose to carry an in-state adjacent DMA network affiliate without the threat that the DMA network affiliate will force black-outs of all network programs, or to carry both the in-state and DMA network affiliates in their entirety without black-outs that aggravate their subscribers.

2. Cable services are governed largely by the 1992 Cable Act, a law passed when cable represented a near monopoly in subscription video.

a. How have market conditions changed the assumptions that form the foundation of the Cable Act? What changes to the Cable Act should be made in recognition of the market?

Since enactment of the 1992 Cable Act, the overall, nationwide subscription video marketplace has changed significantly. Traditional cable now faces competition from national satellite providers, regional satellite re-sellers, large telecommunications companies (e.g., Verizon FIOS and AT&T U-verse), and live and on-demand streaming from online video providers. Most

⁶ Jack Erb, *Local Information Programming and the Structure of Television Markets*, *Federal Communications Commission Media Ownership Study #4*, (2011) at 20.

notably, the Internet as a video content distribution platform was entirely beyond the anticipation of most people when Congress passed the 1992 Cable Act. However, now online video platforms include live streaming (e.g., Aereo, SkyAngel, FilmOn, Playstation Vue, Dish Network's over-the-top Sling TV, CBS All Access and NBC's authenticated streaming product), subscription on-demand services (e.g., Amazon Prime, Netflix, Hulu), streaming media players (e.g., Amazon Fire TV, Apple TV, Roku, Google Chromecast), and streaming content directly from a content provider's website. Because the Internet video market is in a nascent stage, it is impossible to know what new and innovative business models for distributing video content online will develop and attain commercial viability in the future.

At the same time, the video marketplace has also seen immense consolidation and concentration among MVPDs and programmers that have created even more difficulty for small video distributors to operate and survive. Despite talk of 500-channel cable systems, most of the "must have" content demanded by consumers originates from six dominant programmers. Five of the six most dominant video programmers are also vertically integrated with an MVPD, a broadcast network, and/or a major motion picture studio.⁷ The Walt Disney Company owns ABC broadcast network, the Walt Disney Studios, and the ESPN, A&E, and Disney suites of programming. NBCUniversal is owned by Comcast and owns the NBC and Telemundo broadcast networks, Universal Studios, and more than two dozen cable networks. The News Corporation is owner of the Fox broadcast network, 20th Century Fox, and various cable networks. Time Warner Inc. owns Warner Bros. and the HBO and Turner suites of programming and as well as a portion of the CW broadcast network. Viacom is the owner of Paramount Pictures, and the MTV, Nickelodeon and BET suites of cable networks. Finally, Discovery Communications Inc. owns more than 200 worldwide television networks including the Discovery Channel, Animal Planet, TLC, Investigation Discovery and Science, the Oprah Winfrey Network, and the Hub Network. Further, the FCC's most recent Video Competition Report found that the top five cable MVPDs and DBS MVPDs have ownership interests in at least 161 national programming networks.⁸ As the Committee is well aware, the FCC is currently reviewing two mergers of four of the largest national MVPDs (i.e., Comcast Corporation and Time Warner Cable; AT&T and DirecTV) that, if approved, would result in two large MVPDs accounting for nearly half of pay-TV subscribers in the United States.

⁷ See *In re Petition for Rulemaking to Amend Commission's Rules Governing Practices of Video Programming Vendors*, at 2, RM-11728 (filed Jul. 21, 2014).

⁸ See *In re Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 13-99, MB Docket No. 13-203 (rel. Jul. 22, 2013) at ¶ 39.

Whatever the competitive situation in urban areas, rural video providers like WTA's RLEC members are often the only wireline video distributor in their rural service areas. Even in the infrequent instances where a CATV system serves a town or small city in a WTA member's service area, such CATV systems virtually never build or serve beyond the town or city limits into the surrounding rural area. Rather, rural video providers like WTA's RLEC members most often compete solely with national wireless satellite providers like DirecTV and Dish Network—both of which appear to pay considerably lower prices for content at “volume-based” discounts not offered to smaller video providers.

The video marketplace has also seen dramatic transformation in the business practices related to negotiations for the rights to distribute video programming that have caused dramatically higher prices to be paid by MVPDs for access to video content and produced much less choice for consumers. Programmers often require tying—that is, requiring a distributor to carry less popular networks in order to obtain rights to carry the most popular networks. Programmers also often require a distributor to place its networks on the “most subscribed tier.” This practice ultimately leads to the bloated bundles about which consumers complain. Finally, programmers often give “volume-based” discounts to the largest national distributors while charging small MVPDs higher per-subscriber rates. Forced tying, tiering and volume-based discounts are issues seen across the video marketplace with respect to acquiring retransmission consent as well as satellite video programming.

As a result of these practices, rural MVPDs in particular are experiencing an economic squeeze in the business of distributing video content. As costs of content are increasing exponentially beyond any reasonable adjustment for inflation, MVPDs are only able to pass along so much of the increase to consumers, particularly consumers in rural areas that on average have lower incomes than consumers in other parts of the country.

WTA emphasizes that it does **not** advocate direct governmental regulation of the calculation of program content prices. Rather, it supports the continued freedom of programmers to set prices for their content as long as they treat all distributors equitably without undue preferences or unreasonable discrimination. Specifically, volume discounts and similar multiple-level pricing structures may ultimately be permissible, but should be required to be supported by auditable data and fully justified by specific and measurable cost savings. Given that the cost of

transmitting a satellite signal to the head-end is not likely to differ significantly with the number of subscribers served by the head-end, presumably volume discounts and other per-subscriber pricing differences stem from decreased transaction costs in negotiating carriage and billing and collections efforts. In order to facilitate transparency and equity in the pricing of content, Congress should require content providers to disclose—publicly or to the FCC—the per-subscriber rates charged to MVPDs large and small. In addition, content providers should be required to demonstrate that any volume-based discounts and similar multiple-level pricing structures resulting in different per-subscriber prices for different MVPDs should be based on actual, audited cost differences. To the extent that content providers claim that they have significantly lower costs in negotiating agreements, and billing and collecting their charges from larger MVPDs as compared to smaller MVPDs and buying groups, Congress should require the FCC to conduct a study to determine whether such savings truly exist and are sufficient to warrant the volume discounts currently provided to the larger MVPDs.

- b. Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the Internet?**

Although the requirements to provide access to cable distribution platforms to small and government content providers served a meaningful purpose in the pre-broadband age, governments and small content providers can utilize the Internet to distribute their programming in a much more inexpensive and efficient manner.

- 3. Satellite television providers are currently regulated under law and regulation specific to their technology, despite the fact that they compete directly with cable. What changes can be made in the Communications Act (and other statutes) to reduce disparate treatment of competing technologies?**

Although certain regulations specific to a video provider's technology might in some cases be appropriate, WTA believes that to the extent feasible, regulation of video distribution should be technologically neutral, and competing technologies should be treated similarly by regulators and content providers alike.

- 4. The relationship between content and distributors consumes much of the debate on video services.**
 - a. What changes to the existing rules that govern these relationships should be considered to reflect the modern market for content?**

Due to the concentration and market power of the video content industry, the prices demanded by programmers for the most popular satellite programming networks have been growing at an increasingly rapid pace. Not only are the prices of “must have” channels increasing much faster than the general inflation rate, not to mention the pace at which CATV and IPTV subscriber rates can be increased, but also WTA members and other small rural MVPDs are too often presented with “take it or leave it” carriage agreements that include 25 percent and greater per-subscriber rate increases. In addition to increased prices, content providers also often make carriage of a new or less popular network a non-negotiable part of the agreement. Other terms related to carriage have also been thrust on small MVPDs. There is also an utter lack of transparency in the price for programming paid by the larger distributors as compared to the small and mid-sized distributors resulting from aggressive nondisclosure clauses contained in retransmission consent and carriage agreements.

WTA recognizes that developing rules to regulate the pricing of content is very difficult from an economic and administrative viewpoint, and also raises constitutional issues. However, a few meaningful reforms of the regulations governing the video marketplace would go a long way towards restoring balance between content providers, distributors, and consumers. First, requiring disclosure by satellite content providers of the prices for the programming they distribute over public airwaves in interstate commerce would increase transparency and discourage anti-competitive price discrimination that currently plagues small MVPDs. Second, expressly requiring that any volume-based discounts given by satellite content providers be based on legitimate business reasons and that specific economic justifications (including provable and auditable cost savings) be demonstrated would ensure that small and rural MVPDs are not unfairly disadvantaged. Lastly, prohibiting contractual provisions that impose forced tying and/or tiering conditions would better enable small MVPDs to provide the programming its customers truly desire without forcing upon them bloated bundles filled with unwanted content.

As indicated in the introductory paragraphs, *a la carte* pricing appears to be the most efficient, effective and consumer friendly way to address the pricing and other problems afflicting both satellite programming and retransmission consent. Consumers on average watch 17 video programming networks while they are forced to buy much larger bundles of programming⁹

⁹ According to The Nielsen Co., the average subscriber receives a video package of approximately 189 networks. See Changing Channels: Americans View Just 17 Despite Record Number to Choose From, (May 6, 2014), available at <http://www.nielsen.com/us/en/insights/news/2014/changing-channels-americans-view-just-17-channels-despite-record-number-to-choose-from.html> (last accessed Jan. 16, 2015).

which MVPDs are often required by content providers to offer in order to obtain carriage rights. By requiring content providers to compete for an audience in the marketplace rather than being able to dictate pricing and carriage terms to MVPDs, Congress would force programmers to improve their product and price it more reasonably in line with what the free market would dictate. Such an approach would allow the market—rather than regulators and dominant content providers—to determine what content gets produced, paid for, and ultimately watched by consumers.

b. How should the Communications Act balance consumer welfare with the rights of content creators?

To the extent that the goal is to provide consumers with more choice in the market for video services, balancing consumer welfare with the rights of content creators could be achieved through requiring an *a la carte* pricing approach. Content providers would be able to price their programming without government regulation, while consumers would be able to decide how much and what types of content they are willing to pay for. Whereas some critics warn that consumers might pay more for the content they desire, most consumers will be better off paying a little more for each of the 20 or so channels they actually watch, than they are currently as they are forced to pay for large and expensive program tiers containing tens or hundreds of channels in which they have no interest. In fact, many consumers are likely would pay less overall and would be more satisfied with an *a la carte* service that they can design and modify to get and pay for the programming they want. Further, by allowing MVPDs to voluntarily offer programming on an *a la carte* basis, MVPDs could still offer bundled packages to consumers who desire bundled programming packages.

Moreover, *a la carte* service should not disadvantage smaller program content providers, or new channels and providers. As they seek to gain audience and popularity, they can offer their channels for free or at a nominal price, and/or attempt to finance their operations via advertising or audience contributions in a manner similar to free websites.

5. Over-the-top video services are not addressed in the current Communications Act. How should the Act treat these services? What are the consequences for competition and innovation if they are subjected to the legacy rules for MVPDs?

The over-the-top video market is nascent and is in the early stages of proliferation on a wide-scale. Congress has traditionally allowed such markets to develop before imposing regulation upon them. Similar to the broadband marketplace that has remained primarily unregulated for nearly two decades, it is too early for Congress to fully grasp the impact and trajectory of the

market for video over-the-top. It would be impossible to accurately predict the trajectory of the development of innovative over-the-top video services and business models and their impact on competition in a heavily regulated market.

While WTA does not advocate the expansion of current video regulation to over-the-top video providers, if Congress were to decide to expand video regulation in this manner, however, it must keep in mind that without addressing current dysfunctions in the video marketplace discussed in these comments, new over-the-top providers with small subscribership seeking to rely on the current retransmission consent and program access regimes for affordable access to content will likely face the same challenges with which WTA members and other new entrants and small MVPDs presently contend, including but not limited to forced tying, forced tiering, discriminatory discounting practices, and a severe imbalance of power in carriage negotiations.

Finally, over-the-top video providers rely on broadband connections supplied to consumers by a third party. As more and more consumers and innovators shift towards the over-the-top model for video distribution and consumption, more and more robust networks will be required to fulfill that demand. In order to provide the robust networks necessary to deliver high-quality video services, broadband service providers will need to invest substantially in upgrading and maintaining their networks to meet this demand. This only further demonstrates the fundamental need for sound, comprehensive broadband policies, including reasonable rates for network interconnection and middle mile arrangements as well as a continued commitment to the principles of Universal Service, especially in rural America.

Conclusion

WTA thanks the Committee for the opportunity to participate in its White Paper process. It looks forward to continuing discussions with the Committee on telecommunications matters, particularly with regard to the legislative and oversight activities that are needed to provide WTA's RLEC members offering video services the ability to offer "must-have" content to their customers at reasonably affordable rates.

[REDACTED]

From: Jeanne Yeager [REDACTED]
Sent: Thursday, January 22, 2015 3:53 AM
To: CommActUpdate
Subject: Re: Regulation of the Market for Video Content & Distribution - Response to White Paper #6

To: House Energy and Commerce Committee

To: Honorable Fred Upton
2183 Rayburn House Office Building
Washington DC 20515

Re: Regulation of the Market for Video Content & Distribution - Response to White Paper #6

Response to the changes discussed in the White Paper #6,

KMVT of Mt. View, California has offered Public/Education/Government (PEG) Access services to our community providing a very valuable and worthwhile function that is currently available for each city all over the United States.

Our Public Access Show, "On the Move" has volunteered for 28 years with over 400 1/2 hour programs that we produce for, by and about people with disabilities. KMVT has given us the privilege to be able to educate, inspire, entertain and raise awareness about people keeping "On The Move" regardless of a special need or a physical disability.

KMVT and all the Public Access Studios are such a great asset serving as a hub in each local area. The KMVT Public Access Studio offers training and equipment that the normal citizen could not afford, utilize or organize. Our "On The Move" all volunteer crews have been under the guidance of KMVT to be well trained on equipment and policies to provide quality and pertinent programming.

The Community will continue to benefit with quality worthwhile Public Access programs due to KMVT's guidance and existence.

Please allow "PEG" Public Access to continue to exist as a "Priceless Jewel" from Cable Companies.

Sincerely,

Donna Yeager and Jeanne Yeager
KMVT Volunteer Producers from "On The Move"
Public Access Television

Jeanne Yeager


[REDACTED]

From: Santa Dasu Kondapalli <[REDACTED]>
Sent: Friday, January 23, 2015 1:40 PM
To: [REDACTED]
Subject: Re: Regulation of the Market for Video Content and Distribution – Response to White Paper #6

Dear Regulators and People involved with providing Community Media,

Let me first start with telling you how Community Media and KMVT in particular have made a difference in our community. We have been hosting a classical Indian music and dance show on the community channel. So far we have produced 350 shows hosting 500 or so artists in past 10 years. Thanks to facilities like KMVT. People of Indian origin who made Silicon Valley a home, imbibe love for classical music and dance in their children. Music and dance being performing arts need a forum to present their culture. Community media has been a boon to our organization. Many of our artists now in teens and early 20s have grown along with our organization. Many parents wake up on weekends in anticipation of these programs as that provides them a feel of home away from home. These programs are true reflection of our motto "Enriching life through performing arts".

This program is not possible without of community media. Here are the reasons

- Given that the community is small it cannot afford the broadcast costs of commercial channels.
- artists get a forum to present their talent without need for expensive theater rentals etc.
- the reach of the TV programs via community channels is most suitable to the community
- TV programs on the air are great way of reaching to other communities at no-cost. Thus these programs celebrate diversity, promote understanding and goodwill among communities.

I, as a Founder and Board member of Yuva Bharati (a non profit organization) that promotes classical Indian performing arts earnestly request authorities to retain the beautiful concept and organization called "PEG Media".

Thanks
Santa Dasu
Founder and Board Member
Yuva Bharati
www.yuvabharati.org
www.swaralahari.org