[redacted]

From: Karen Hayden [redacted]
Sent: Friday, January 23, 2015 11:51 AM
To: CommActUpdate
Cc: Mike Wassenaar
Subject: Communications Act Update Comments

January 22, 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

CC: The Honorable Niki Tsongas

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

Why should PEG Access be part of the equation for future generations?

At Methuen Community Television, Methuen, MA, we would like to cite what we have done and are doing for our current generations. We run the public access station as a non-profit corporation. Our city hall runs the government access station and the high school runs the educational access station.

We are a multi-generational facility where both teens and retirees work side by side and on their own. Although we have many successes, several projects stand out.

“Call to Serve”, in production since 2003, captures the personal stories of our veterans from all branches of the service. The show has featured 95 year old World War II veterans to the 20 somethings of the War for Iraqi Freedom. This project actually stemmed from a creation of the Library of Congress called the Veterans Oral History Project. The interviews are based on questions from the VOH Project. Given the opportunity to tell their stories of war & loss AND service & victory was freeing and cathartic for many veterans.

The majority of the crew members are veterans themselves. But within that group were two teens who grew up helping on this show. Both have chosen to work in the media for their careers, trying to make a difference in their world. Without the experience of working in the studio with adults on a serious endeavor, who knows if these talented young men would have made this choice. Future youngsters deserve the same opportunity to nurture interest and develop skills in a supervised setting beyond the classroom which can completely impact their lives.

“The Empty Chair: Exposing Addiction” is a program hosted by a father and daughter on the topic of addiction and recovery. This family survived the daughter’s heroin addiction and she has been clean for several years. They have decided to give back to the community to help others through this tough time. Without public access station facilities, they would not be producing a regionally recognized program which frankly tells stories of addiction and recovery from people who have been there. They offer hope and inspiration to many.

MCTV has taken a leadership role in “Local and State Election Coverage”. Since 2001, we have covered city elections, giving all candidates the opportunity to record messages at no cost and share them- like an electronic knock on the door- via our station. We have also hosted non-partisan forums for candidates to answer the same questions and help voters distinguish between them. Many of these folks are running for office for the first time and have little money. Having this opportunity is invaluable.

In 2012, when our state senator stepped down, the field was wide open for his replacement. We saw an opportunity to do something on a grander scale and band together with the other public access stations in the First Essex district.

We put together a forum for both the Republican and Democratic challengers in the summer of that year. It was the first time that all candidates were in the same location. We hosted a public event and invited people to come and ask questions. The program was shared with all cities and towns in the district.

Our primary election night was streamed via the internet to all involved and transferred onto the area access stations. The eventual winner- Katie O’Connor Ives- was watching our show which was LIVE in Methuen from her headquarters in Salisbury, MA (24 miles away) and called in to participate in the program.

We did the same for the state representative race in a newly created district that includes part of Methuen. We are learning the lessons of collaboration and hoping that by opening up the democratic process, we are serving an important purpose in the health and well being of our community.

We have had students interning with us from local colleges during election season. Having these young people on the front lines of the election process impacts their experience as an American. Without these opportunities for youth to participate in election programming, we are missing an important way to engage them in our democracy.

Methuen Community Television has produced a local newsmagazine since 2003 called “Methuen Now!” With a long track record of covering local events and interesting people, we now get the question when we are out with a camera: “Is this going to be on “Methuen Now!” Our viewers have come to understand that the local broadcast stations will only show up in our city if something bad happens; <u>we</u> are there all the time.

We are able to accept photos and videos sent by local organizations such as Churches, Schools and Service Clubs to include in our “Community Contributions” section of “Methuen Now!”. They can post these on Facebook or their own website, but many groups lack the time and resources to upkeep their web presence. When they become part of a recognized program, it boosts their exposure to the community. People still say, "I saw you on TV!" And there is still room to grow.

Although the equipment and delivery system may change, the need for local news and information remains. Cable television still delivers a reliable good quality signal. The world wide web is a window on the world; PEG Access stations are the window that looks out on our back yard. We see the need for our window to open further. We see the need for all generations to have the opportunity to work together to create media to speak to their communities. There are still voices that we have not yet heard from. Future generations deserve every opportunity we can give them to speak effectively.

Sincerely,

Karen L. Hayden

Executive Director

Methuen Community Television

[redacted]

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January 23, 2015

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

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

Sent via Email to: commactupdate@mail.house.gov
Re: **Regulation of the Market for Video Content and Distribution – Response to White Paper #6**
Dear Representative Walden & Upton:
I have been the Program Manger of Metro Television, the Government Cable channel for 30 years. I am writing to let you know that the federal, state, and local franchising provisions that require our cable/video service providers to carry and support local Public, Educational, and Governmental (PEG) channel access are even more necessary and warranted today as they have ever been. Approximately 60% of the metropolitan area of Eugene/Springfield Oregon is served by Cable television. My particular station shows citizens the political process related to City and County management, Planning Commission decisions and information on programs and services available to residents.

The fact that there are other, Internet-based ways to share video programming in no way diminishes the important role that PEG programming via cable television continues to play for the sector of the public that cannot afford broadband equipment and connectivity. If cable distribution is no longer critical to PEG channels, why, then are broadcasters and commercial cable programmers not abandoning their cable channel slots in favor of Internet-only delivery? The real answer, of course, is that Internet delivery is merely a complement to, rather than a substitute for, cable channel delivery, especially when it comes to PEG channels.

There is a real need to increase, rather than decrease such support going forward. PEG centers provide constructive outlets for community youth to learn media skills and seniors to actively create programming on a range of issues in their local community. PEG channels promote civic participation, educational opportunities and technology access.

Robert Lewis
Program Manager
Metro Television
859 Willamette St
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Eugene, OR 97401

MetroEast
COMMUNITY MEDIA
829 NE 8th St. Gresham, OR 97030 (503) 667-8848 www.metroeast.org

January 22, 2015

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

The Honorable Greg Walden
2183 Rayburn House Office Building
Washington, DC 20515

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

Dear Sirs:

I write the House Energy and Commerce Committee in response to the question of whether or not Public, Education and Government (PEG) access should continue in cable television systems in the era of the Internet. I respond with a resounding "Yes!" As do the communities we serve. Community television – a more accurate description than PEG access -- is more important than ever and is a more integral part of our community than ever. We use the very modest funds from our cable television franchises to connect our community with the work of local governments, schools, non-profit service organizations, churches and individuals.

We do not live in a world of either it's television or it's the Intenet. It's both and more. MetroEast Community Media, which serves the suburbs east of Portland, Oregon, like other media outlets, uses all the avenues available, including television and the Internet. Neither is sufficient by itself.

Oregon has plenty of rain shadows but the communities we serve are in Portland's media shadow, with local network affiliates providing little or no coverage of our local events, local government, local elections, local sports, local culture – well, I'm sure you get the idea. Portland media may not care much at all about what happens in our communities but we sure do. Our communities are unique and the services MetroEast provides are unique and irreplaceable.

A few examples:

- We're the only genuine local electronic media in our communties.

- We're the only organization that provides transparent, unfiltered access to our local governments in action with gavel-to-gavel coverage of city and county councils, school boards and planning commissions.
- We're the only organization that covers the local events that distinguish our communities and are integral to their identities
- We teach media skills, including media literacy to hundreds of people of all ages, backgrounds, and socio-economic status every year.
- We provide a gathering place for community events
- We work with students, often acting as their gateway to careers in technology and media
- We provide services to hundreds of public benefit non-profit organizations each year, helping them publicize and provide their services, acquire resources, and recruit volunteers.

Cable television may be expensive but community media does not drive those costs. Community media is not just affordable, we're downright cheap, using limited funds paid by cable providers for the use of pubic rights-of-way to leverage this array of efficient and effective services for our communities.

While we at MetroEast recognize the importance of the Internet and the communications opportunities it provides, we also recognize that traditional, cable-based delivery of content is still the dominant medium for mass communication, and will continue to be for some time, particularly within the communities we serve.

In the recently published, "Local Watch: Where You Live And It's Impact On Your Choices (January 2015)," Nielsen statistics tell us that local media (PEG and others) delivered over cable television distribution paths are clearly the dominant means of media consumption, and will continue to be a vital means of connecting with marginalized and under represented populations within our community for some time.

Only a small number of people in our use the Internet or apps to access to local content and those who do are generally of high income, employed and educated. Eliminating community television would only magnify the barriers already faced marginalized, under-represented and low-income individuals in the communities we serve and would make it all but impossible for those individuals to participate in a meaningful way in local civic conversations and decision-making.

Yes, we're more than a television station. But it all starts with television and the cable system. If cable television is essential to Fox or CBS or TNT or ESPN, it's essential to our communities.

Thank you for your time and consideration.

Sincerely,

Robert Brading
CEO
MetroEast Community Media

MICROSOFT'S RESPONSE TO THE ENERGY AND COMMERCE COMMITTEE WHITE PAPER CONCERNING REGULATION OF THE MARKET FOR VIDEO CONTENT AND DISTRIBUTION

January 23, 2015

Online Video Individualizes Television Viewing

The Internet is democratizing video programming. Online video, or "over-the-top" as the White Paper terms it, represents another step in the evolution of video programming distribution – an alternative for U.S. consumers and an innovative response to consumer demand. Traditionally, video distributors in any given geographic market were few: they were the licensees of broadcast spectrum or the companies allowed to build networks using the public rights-of-way. By their nature, these distribution methods were designed to appeal to a mass audience all at once. By contrast, consumers have access to a large number and variety of online video programmers. Rather than being limited to a single channel lineup selected by an MVPD, online video programming distribution allows the consumer to select programming, often "on demand," from multiple providers of their choosing. It is not difficult to understand the consumer appeal of online video: due to the ever-increasing variety of programming options available and the always-available nature of online video, viewers decide what to watch and when to watch it, on an ever increasing array of devices from smart TVs to mobile phones and tablets. Online video also allows more traditional video programming distributors to extend their reach, examples including Internet "broadcasting" of grand events such as the Olympics and more regular linear online feeds such as CBS All Access. Thus, online video can both complement and compete with traditional sources of video programming. Moreover, companies are increasingly developing and providing innovative ways for consumers to interact with video programming. How the online video delivery mechanism and business model will evolve is uncertain; thus the legislative goal should be to allow online video to serve the demands and preferences of consumers and to clear a path so that consumers can watch their lawfully acquired video content on appropriately capable devices of their choice, at anytime, anywhere.

Online Video Demands a Fresh Look, Not Legacy Rules

The traditional broadcasting regulatory model was premised on the notion that a limited number of actors (broadcasters) would receive access to and use of a finite public resource – broadcast spectrum – and, in exchange for that access and use, those actors were assigned certain public interest obligations. Similar characteristics of cable television's occupation and use of public rights-of-way and Direct Broadcast Satellite providers' access to and use of spectrum led to similar, albeit differing, forms of regulation. The fundamental bases for broadcast, cable, and satellite television regulation do not exist for online video distribution: the number of actors is not limited – even today in its nascent stages there are many providers of video programming operating around the globe – and the resource used for distribution (the Internet) is neither public nor finite in terms of its capacity. Accordingly, Microsoft strongly encourages any legislative activity to revisit first principles, as the White Paper appears to do, in order to avoid transferring regulation, even in modified form, from one medium (broadcast, cable, or satellite) to another (online) simply because they share a single characteristic: all serve as outlets for video programming. As a general principle, Congress should refrain from extending regulation into the evolving online video marketplace unless the need for doing so can be identified as a clear necessity to avoid an enduring market failure or a harm to consumers and any resulting regulation should be designed to minimize potentially negative "side effects."

Enforcement Constraints Should Inform the Extent of Online Video Regulation

American consumers can and do access online video programming that originates from all corners of the world. While this generally is a positive development for American consumers, it poses unique challenges for enforcing laws governing online video distribution. Unlike broadcasters or cable operators, online video distributors may not own facilities and may not even "distribute" their content from within the United States. Thus, short of censoring the Internet and blocking video programming websites – distasteful options of dubious constitutionality – there lacks a jurisdictional nexus to facilitate a regulatory enforcement mechanism – at least not an option that, if utilized, wouldn't competitively disadvantage U.S. companies. Indeed, there may be many producers of online video programming in other regions of the world that would remain honestly unaware of U.S. laws governing online video. Laws that could or would be enforced only against those with a U.S. presence but not against their extraterritorial in-market competitors would encourage online video distributors to locate operations outside the U.S., thereby driving revenue-generating and job creating activity offshore.

Net Neutrality Is Important for Online Video Development

U.S. laws and regulations addressing video programming seek, among other things, to ensure that anti-competitive actions do not restrict consumers' access to or options for video programming. For example, program access and retransmission consent laws seek to resolve competing interests in a manner that ultimately serves viewers. As consumers increasingly utilize online distribution mechanisms for receiving and watching their television programming, laws and policies that ensure unfettered consumer access to broadband Internet services and content are critical to the health, vibrancy, and growth of a developing video programming marketplace that has tremendous potential to benefit consumers. Accordingly, Microsoft encourages laws and policies that promote widespread broadband adoption and consumer Internet usage that is free of discriminatory restrictions on their choice of content and applications.

Microsoft thanks the Committee for the opportunity to provide this response to the Committee's white paper, and looks forward to ongoing discussions concerning regulation of the market for video content and distribution. For questions and additional information, please contact Paula Boyd, Director, Government and Regulatory Affairs at Paula.Boyd@microsoft.com or 202.263.5946 or John Sampson, Director Government Affairs at jsampson@microsoft.com or 202.263.5913.

MidValley Television
21 W 1st Avenue
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(509) 865-6888
Email jd@midvalleytv.com

January 29 , 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

Dear Chairman Upton and Chairman Walden:

I am pleased to send you this letter on behalf of the Cities of Wapato, Toppenish, Granger and Zillah. The cities form an inter-local agreement for public, educational and government access, MidValley Televison.

The House Energy and Commerce Committee's White Paper Number Six sought feedback on a number of questions related to the regulation of the market for video content and distribution. The Cities of Wapato, Toppenish, Granger and Zillah, would like to add its voice and indicate that we fully support the positions taken in the January 23, 2015 letter from the Washington Association for Telecommunications Officers and Advisors, the Alliance for Community Media – Northwest Region and the Colorado Communications and Utility Alliance.

In addition, we would like to provide additional information about the value of local access programming in our community. In addition to broadcasting live the four cities council meetings, town halls, and government issues, MVTV broadcasts school information, public library information, parks and recreation activities, and many more community activities.

New legislation considered by the Congress should recognize the value and importance of local programming. We encourage you to include local governments, PEG access providers, broadband network operators, content providers, and the public in the continuing discussions to develop a new legislative framework that includes 21st century public interest obligations.

Sincerely,

Judy Devall,
MVTV Community TV Manager

cc: 15th District Representatives: Bruce Chandler and David Taylor

[redacted]

From: Patti [redacted]
Sent: Friday, January 16, 2015 4:59 PM
To: CommActUpdate
Subject: Telecommunications Act

Dear Members of the House Energy and Commerce Committee,

I am a volunteer with New Gloucester, Maine's public, educational and government access channel. Our PEG channel is of importance to our community because the focus of our programming is hyper-local. Our television productions run the gamut of programs hosted by the New Gloucester Historical Society to area business summits to local and state candidates' forums.

Videos of these productions are posted on our town's website; however, many community members do not have access to high-speed Internet services. They watch our programming on cable TV.

As you contemplate video reform, please keep in mind the vital role that PEG access stations have in providing a gateway to information, cultural interest and entertainment to a sizeable group who otherwise would be excluded.

Best regards,
Patti Mikkelsen
[redacted]

[redacted]

From: Mark F Monk [redacted]
Sent: Friday, January 23, 2015 12:25 PM
To: CommActUpdate
Subject: PEG Centers and Kalamazoo - Public Media Network

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

Dear Fred,

Recent comments by the FCC, president Obama, congress and telco-Industries have led me to write to you today. As you know public, educational and government access centers are an important part of any local community lucky enough to have them.

Whether it's gavel to gavel coverage of local governmental meeting, high school sports or church services all these things have several things in common. Public Media Network (PMN) along with their local governmental partners have created a way to let community members share stories, viewpoints and opinions. TV is just one of many things PMN does within its community.

Beyond the five cable channels of local 24/7 programming, they partner with numerous local schools, not-for-profits, businesses and individual citizens. Teaching technology to university and high school students as well as continuing education to adults are just few examples. PMN helps reunite lost pets with their family through a show called Doggie In The Window. Various talk shows of community interest are watched each week. They could be about automotive street rods, religious viewpoints or hundreds of other topics. All these things are what help make up a republic.

PEG access has a fundamental roll in helping the public exercise their free speech to the communities they live, work, pray and play in. Efforts that would limit these rights would, in my opinion cut to the core of our democratic society.

As you consider past, pending and future legislation; please consider the comments above when making your decision about what gets a vote and what does not.

Respectfully Submitted,

Mark F Monk
[redacted]

mcm
montgomery community media
mymcmedia.org

January 20, 2015

To Whom It May Concern,

I understand that 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. The committee's latest paper (number six) focuses on the regulation of the market for video content and distribution. It also poses a number of related questions for comment:

"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?"

We at MCM feel strongly that the answer to this question is YES. Provisions requiring PEG access are still necessary and warranted today. PEG organizations like ours are vital sources of news and information, even in communities as large and affluent as Montgomery County. Commercial media outlets no longer effectively cover our diverse communities, and often MCM is the ONLY organization reporting on vital stories that impact individuals, small businesses and voters. Without PEG cable television channels available to the community, these voices and stories simply would not be heard. PEG organizations like MCM require continued carriage on local cable services… in addition to all the other distribution platforms we serve.

We hope the House Energy and Commerce Committee will continue to support PEG access to local cable as part of regulation of the market for video content and distribution.

Thank you and my very best regards,

[redacted]
Executive Director, Montgomery Community Media
Rockville MD

montgomery CHANNEL access.19

7548 Standish Place • Rockville, MD 20855 • Phone 301.424.1730 Fax 301.294.7476

Services of Montgomery Community Television, Inc.

MPAA Response
to Communications Act Update White Paper 6:
Regulation of the Market for Video Content and Distribution

Jan. 23, 2015

I. The Modern Video Marketplace is Thriving

Never before have audiences had as many video options—including what, how, where, and when to watch—as we have pointed out in previous whitepaper responses.[1] Viewers can choose from among hundreds of national, regional, and local programming networks that appeal to almost every conceivable interest. They can access programming from a variety of distribution platforms, and in most markets can choose from among at least four broadcasters, two satellite providers, one cable provider, a variety of over-the-top providers, and increasingly a phone company. They can view content on a television, cellphone, computer, or tablet. And they can watch content as it airs or at the time of their choosing. Under the existing statutory and regulatory framework, studios are licensing television and film content to all different types of providers, including many online distributors. The existing framework also encourages online distributors to expand audiences' viewing choices further by investing in original programming. Netflix, Amazon, and Hulu, for example, are all expanding the slate of exclusive content they offer, increasingly involving marquee writers, directors, and actors. By one estimate, more than 300 original, scripted, prime-time shows aired on broadcast, cable, or online networks in 2014.[2]

As the advocate for the American film, television, and home video industries, the Motion Picture Association of America is pleased to submit these comments on behalf of our six members: Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox, Universal City Studios, and Warner Bros. Entertainment. Our members are some of the leading providers of television and film content and play a large role in making all these choices available.

And in the process of entertaining and informing audiences, fostering discussion and debate, and contributing to America's cultural history, the movie and television industry is a significant driver of the local and national economies. The movie and television industry directly and indirectly supports 1.9 million jobs in the United States, involving backgrounds including trade skills, college educations, and professional degrees. Direct industry jobs generate $46 billion in wages and the industry is responsible for more than 99,000 businesses across all 50 states. Most of those businesses are small businesses, with 85 percent employing fewer than 10 people. The industry accounts for $111 billion in total wages and $15.9 billion in sales tax, state income tax, and federal taxes. It produces $16.2 billion in exports with a 6-to-1 export-to-import ratio and a $13.6

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[1] *See* Comments of the Motion Picture Association of America In Response to the #CommActUpdate White Paper on Modernizing the Communications Act (Jan. 31, 2014); Comments of the Motion Picture Association of America in Response to the May 19, 2014, #CommActUpdate White Paper on Competition Policy and the Role of the Federal Communications Commission (June 13, 2014).

[2] *See* Why You Feel Like There's Too Much TV to Watch, *available at* http://www.vulture.com/2015/01/why-you-feel-like-theres-too-much-tv-to-watch.html?mid=twitter_nymag.

billion trade surplus. That's 6 percent of the total U.S. private-sector trade surplus in services and more than the telecommunications, advertising, mining, management and consulting, legal, medical, computer, and insurance service sectors.

If this picture of massive investment, rampant innovation, and growing competition demonstrates anything, it is that government need not increase intervention in the production or distribution of video programming.

II. How Content Owners Produce and Distribute Video Programming Should Continue to Be Left to the Free Market, the First Amendment, and Copyright Law

The white paper asks what Communications Act changes Congress should consider regarding the relationship between video content and distributors.[3] We begin by pointing to the three principles we articulated in response to the first Communications Act Update white paper, on "Modernizing the Communications Act":

> *1. Government should not act absent evidence of market failure.*
>
> *2. Before taking action, government should determine whether the costs will outweigh the benefits.*
>
> *3. Creators, distributors, and consumers can themselves enter into relationships in the competitive video marketplace that capitalize on technology to make content accessible in innovative ways so long as a framework exists for the effective enforcement of intellectual property rights.*[4]

We do not believe government should intervene in the video marketplace absent evidence of a market failure. Government is unlikely to be as efficient or to produce better outcomes than the thousands of actors creating and experimenting each day to attract eyeballs. As the white paper observes, "[w]ith the advent of mainstream, over-the-top video services, the development of time-shifted viewing, and the proliferation of over 800 programming networks, video audiences have become increasingly fractured."[5] Said another way, viewers are benefitting from a vibrantly competitive marketplace. Absent a failure in that marketplace, there is no economic or other justification for Congress to expand the regulation currently embodied in the Communications Act.

And even if there were a market failure, Congress must be careful to ensure that the benefits of any action it may take outweighs the costs. In addition to purely economic costs, Congress must consider the impact on existing marketplace dynamics, which are characterized by rapid innovation and intense competition as content owners and distributors seek to accommodate ever-changing consumer expectations. The current

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3 *See* White Paper at 6, question 4(a).

4 Comments of the Motion Picture Association of America In Response to the #CommActUpdate White Paper on Modernizing the Communications Act (Jan. 31, 2014), at 1.

5 White Paper at 5.

environment has fostered significant investment and allowed market participants to experiment both with new technologies and new business models.

The production and distribution of video content is already fraught with significant risk in this competitive environment, as the white paper acknowledges.[6] The continually evolving business models that have arisen help companies bear that risk and support the investments necessary to produce today's wide diversity of content. Indeed, a major motion picture costs, on average, about $100 million to make, but only four out of ten will recoup the initial investment. In today's competitive environment, major television productions are beginning to rival feature films not only in quality and cost, but also risk. Indeed, an oft-quoted rule of thumb is that 80 percent of scripts submitted will never become a pilot episode, 80 percent of those scripts that make it to the pilot stage will never become a series, and 80 percent of series never see a second season. Even with this risk, the industry continues to invest, largely because audiences continue to clamor for more original programming from both established and new sources. The millions of jobs and tens of thousands of businesses mentioned at the outset of these comments are built, in part, on the current regulatory environment. Altering the existing regime could lead to considerable uncertainty about the future of the content marketplace, potentially hindering investment and experimentation.

Among the most important ingredients in the success of the video marketplace is respect for two fundamentally American values: free speech and intellectual property. The ability to determine the substance of their content and the mechanisms by which it is distributed, as well as effective tools for copyright enforcement, are essential to enabling producers to develop relationships with distributors and audiences as technology and consumer expectations evolve. We thus ask that the Committee remain mindful of the distinction between regulation of signals and regulation of content.

The Communications Act governs the transmission of signals,[7] as the white paper acknowledges.[8] Indeed, the retransmission consent, must-carry, and program access rules all pertain to the availability of network signals, not the underlying content. By contrast, production and distribution of, and access to, the underlying content is left to the free market, the First Amendment, and copyright law. Regulating what content a programmer

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[6] *Id*.

[7] *See* 47 U.S.C. §§ 151, 152(a), 153(33), 153(52) (creating the FCC "[f]or the purpose of regulating interstate and foreign commerce in *communication by wire and radio*," stating that "[t]he provisions of [the Communications Act] shall apply to all interstate and foreign *communication by wire or radio*," and defining communication by wire and radio as "the *transmission* … of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission") (emphasis added).

[8] *See, e.g.,* White Paper at 3 (recognizing that "[t]he law makes a distinction between the right to carry the content of a broadcaster (a matter of copyright law) and the right to retransmit the signal carrying the content (a matter of communications law).").

must provide or the way it must do so would raise significant constitutional concerns.[9] As the Supreme Court has made clear, government-forced access to media "brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment."[10] This is why Congress has been loath to authorize content regulation by agencies.[11] Similarly, the Copyright Act reserves to content owners discretion over the distribution and public performance of their works.[12] Accordingly, government should let the market do its work: bringing audiences, programmers, and distributors together to determine which business models best result in the production and dissemination of compelling content that audiences demand.

The white paper also asks about the right balance between consumer welfare and the rights of content creators.[13] There, again, constitutional notions of free expression and copyright point the way. Under the First Amendment, it is the speaker and the audience acting in the marketplace of ideas—not the government—that determines what is said and heard. And the Copyright Clause recognizes that respecting the right of creators to determine how to disseminate their works increases both the production and distribution of content, to the ultimate public benefit.[14]

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9 *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (finding government compulsion of a newspaper to publish content it otherwise would not have published violated the First Amendment).

10 *Id.*, at 254.

11 *See, e.g.,* 47 U.S.C. § 544(f) (providing that "[a]ny Federal agency ... may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title"); 47 U.S.C. § 326 (providing that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication").

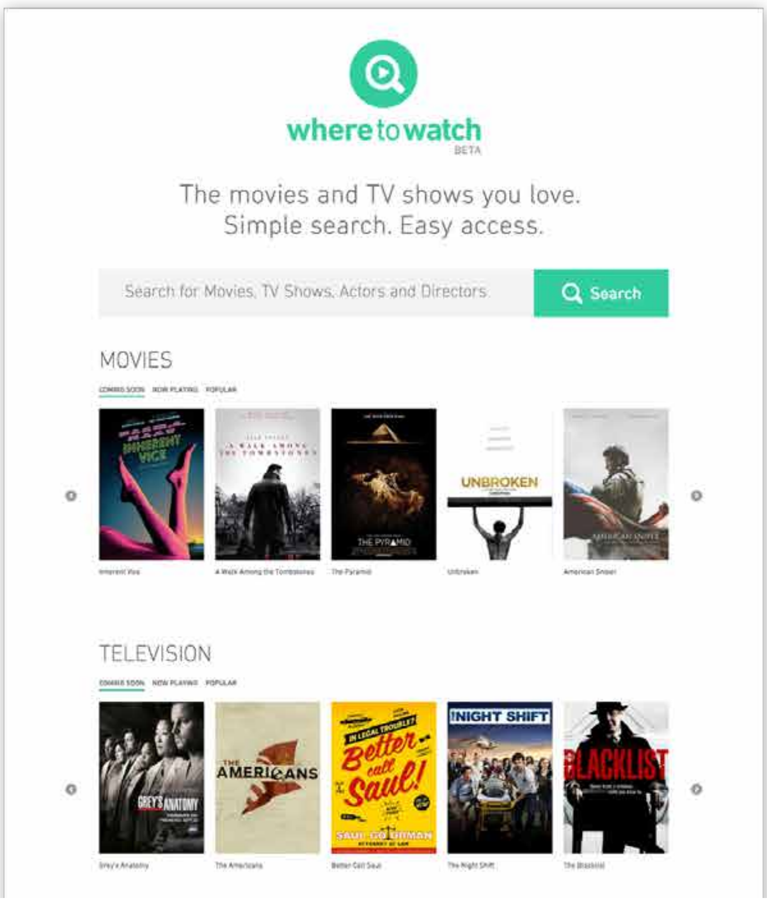
12 *See* 17 U.S.C. § 106 (3), (4). See also *Orson Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3rd Cir. 1999) (partially pre-empting a Pennsylvania statute restricting a motion picture distributor from entering into an exclusive first-run exhibition agreement with an exhibitor because it violate the distributor's rights under the Copyright Act); *Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910, 912 (1st Cir. 1965) (supporting proposition that a movie distributor is under no obligation to make its motion picture available in all markets at the same time); *Syufy Enterprises v. National General Theatres*, 575 F.2d 233, 236 (9th Cir. 1978) (supporting proposition that a movie distributor may license a movie exclusively); *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 124 (5th Cir. 1954) (stating that "a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently"); *Westway Theatre Inc. v. Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 836-37 (D. Md.) (stating "it is clearly the established law that the distributors have the right to select their customers, and therefore the plaintiff has no absolute right to demand exhibition rights for the pictures of any of the distributors") (citations omitted), *aff'd,* 113 F.2d 932 (4th Cir. 1940).

13 *See* White Paper at 6, question 4(b).

14 *See* U.S. Const., Art. I, § 8, cl. 8 (conferring upon the legislative branch the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

III. There Is Currently No Need to Amend the Communications Act with Regard to Internet Distribution of Video

The white paper asks how over-the-top video services should be treated under the Communications Act.[15] We do not believe any changes to the Act with regard to Internet-distributed video programing are currently warranted. Although still nascent, Internet-based video distribution models are flourishing, just like the broader video marketplace. By 2009, there were already more than 50 lawful online services in the United States providing access to film and television content, and U.S. consumers used those services to access 376 million movies and 20 billion television shows that year. By 2013, the number of legitimate services had jumped to more than one hundred, and the numbers of movies and television episodes viewers accessed rose to 5.7 billion and 56 billion, respectively.[16] To help audiences navigate among all those choices, the MPAA has launched WhereToWatch.com, which enables viewers to search for video content by title, actor, or director, and then click through to a variety of legal online sources to access the film or television show.



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[15] *See* White Paper at 6, question 5.

[16] Comments of the Motion Picture Association of America in Response to the May 19, 2014, #CommActUpdate White Paper on Competition Policy and the Role of the Federal Communications Commission (June 13, 2014), at 1.

The white paper suggests that "[a]ccess to programming has stymied a number of would-be OTT providers, including Aereo, ivi.tv, SkyAngel, and FilmOn."[17] To the extent anything stymied these providers, it was their attempts to build businesses that re-transmitted content without permission from copyright owners, in violation of the law, or the inability to develop business models that offered sufficient incentives to draw content partners and viewers. Indeed, the Supreme Court and the Second Circuit, respectively, held that Aereo and ivi.tv violated copyright owners' exclusive right to publicly perform their works, and a federal district court held FilmOn in contempt for violating an injunction to cease retransmitting content in violation of the Copyright Act.[18] Plenty of other OTT businesses are developing under current law, such as ABC.com, Amazon, Blockbuster on Demand, Crackle, Flixster, Fox.com, Google Play, Hulu, iTunes, NBC.com, Netflix, Target Ticket, Vudu, and YouTube.

A quick scan of announcements over just the last four months shows how vibrant the over-the-top television marketplace is already becoming:

- On Oct. 15, 2014, TimeWarner announced the launch of a stand-alone, over-the-top, HBO service in the United States.[19]
- On Oct. 16, 2014, CBS announced the launch of *CBS All Access,* a subscription video-on-demand and live-streaming service that makes available both archived and current CBS television network programming.[20]
- Between Oct. 27, 2014, and Jan. 14, 2015, Amazon introduced the Google Chromecast competitor Fire TV Stick; announced the debut of three original television series and 12 original television pilots; and signed Woody Allen to create his first television series.[21]

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17 White Paper at 1.

18 *See, e.g., ABC v. Aereo*, 134 S.Ct. 2498 (2014); *WPIX v. ivi*, 691 F.3d 275 (2d Cir. 2012)); *CBS v. FilmOn.com*, No. 10 CIV. 7532 NRB, 2014 WL 3702568 (S.D.N.Y. July 24, 2014). *See also Fox, NBC, FilmOn Drop 9th Circ. Appeals After Aereo Ruling*, Law 360 (July 24, 2014), *available at* http://www.law360.com/articles/560983/fox-nbc-filmon-drop-9th-circ-appeals-after-aereo-ruling.

19 HBO Chairman and CEO Richard Plepler Announces HBO to Offer a Stand-Alone HBO Streaming Service in 2015, *available at* http://www.timewarner.com/newsroom/press-releases/2014/10/15/hbo-chairman-and-ceo-richard-plepler-announces-hbo-to-offer-a.

20 CBS Brings Programming Direct to Consumers with New Multi-Platform Digital Subscription Service, *available at* http://www.cbscorporation.com/news-article.php?id=1096.

21 Introducing Fire TV Stick, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1981713; Amazon Debuts First Original Live-Action Kids Series Gortimer Gibbon's Life on Normal Street, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1982430; Amazon's First Pilot Season of 2015, Featuring Slate of 13 Original Comedy, Drama, Docuseries and Kids Offerings, will Debut January 15, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=2003577; Amazon Announces Lineup for its First Pilot Season of 2015, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1988353; Amazon to Debut the Highly-Anticipated Dramatic Comedy Mozart in the Jungle, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1991658; Amazon to Debut its First Original Hour-Long Drama Series Bosch, *available*

- Between Oct. 29, 2014, and Jan. 7, 2015, Netflix made announcements regarding 10 original television series.[22] On Jan. 20, 2015, the company announced it had added a record 13 million new subscribers during the fourth quarter of 2014, bringing its total subscriber base to 57.4 million.[23]

- Between Oct. 30 and Nov. 18, 2014, Hulu announced two original television series.[24]

- On Nov. 13, 2014, Sony announced the launch of PlayStation™ Vue, a cloud-based TV service that makes available 75 channels of live and archived programming, including from CBS, FOX, FX, FOX Sports, YES Network, National Geographic, NBC, NBCSN, CNBC, Telemundo, Bravo, E!, Oxygen, Sprout, Syfy, USA Network, BET, CMT, Comedy Central, MTV, Nickelodeon, VH1, Discovery, TLC, Animal Planet, Oprah Winfrey Network, HGTV, Food Network, and the Travel Channel.[25]

- On Jan. 5, 2015, DISH announced the launch of Sling TV, a live, over-the-top television service, including content from ESPN, Disney, TNT, TBS, Food Network, HGTV, and the Cartoon Network.[26]

All of these over-the-top services and Internet-original television programs are arising under current law. One industry analyst wrote recently that "[m]omentum is in OTT video's corner, and viewing on mobile devices, streaming media players and game consoles will continue to rise. These consumption trends and the use of Internet-

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at http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=2007574; Amazon Studios Signs Woody Allen to Create His First Television Series Ever, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=2007234.

22 AwesomenessTV's All New Richie Rich Series to Air Only on Netflix, *available at* https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1701; The Wildest Party Ever Hits the Jungle When the Netflix Original Series All Hail King Julien Debuts Dec. 19, *available at* https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1715; From Academy Award® nominees Peter Morgan and Stephen Daldry: The Masterful New Netflix Original Series, The Crown, *available at* https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1741; Netflix to Adapt Lemony Snicket's A Series of Unfortunate Events into Original Series, available at https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1742 Netflix TCA Winter 2015 Release, *available at* https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1831.

23 Netflix Adds Record 13 Million New Members in 2014; Q4 Revenue and EPS Rise, *available at* http://www.thewrap.com/netflix-adds-record-13-million-new-members-in-2014-q4-revenue-and-eps-rise/.

24 Oscar®-Nominated Director Jason Reitman Comes to Hulu in Straight-to-Series Order for Casual, *available at http://blog.hulu.com/2014/10/30/jason-reitmans-casual-comes-to-hulu/;* Hulu Orders Amy Poehler's Difficult People Starring Julie Klausner and Billy Eichner, *available at* http://blog.hulu.com/2014/11/18/hulu-orders-amy-poehlers-difficult-people-starring-julie-klausner-and-billy-eichner/.

25 Sony Network Entertainment International And Sony Computer Entertainment Unveil PlayStation™Vue, *available at http://www.sony.com/SCA/company-news/press-releases/sony-corporation-of-america/2014/sony-network-entertainment-international-and-sony-.shtml?icid=pr-newswire-feed.*

26 Sling TV to Launch Live, Over-the-Top Service, *available at* http://about.dish.com/press-release/products-and-services/sling-tv-launch-live-over-top-service-20-month-watch-tvs-tablets.

connected devices and the OTT apps on them may have the ability to change the way TV is conceptualized."[27] Taken together, these observations indicate that although still in its infancy, the online video marketplace is alive and well, and that there is no current need to amend the Communications Act with respect to online video programing.

Respectfully submitted:

[redacted]

Joanna McIntosh
Executive Vice President for Global Policy and External Affairs
Motion Picture Association of America, Inc.
1600 Eye St. NW
Washington, DC 20006
(202) 293-1966

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[27] SNL Kagan, Frictionless content, millennials and the 'appification' of TV at CES '15, *available at*, https://www.snl.com/InteractiveX/article.aspx?id=30546111.

MT. HOOD CABLE REGULATORY COMMISSION
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Phone: (503) 823-5385 • Fax (503) 823-5370
www.mhcrc.org

Serving Multnomah County and the Cities of Fairview, Gresham, Portland, Troutdale and Wood Village

January 23, 2015

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

Sent via Email to: commactupdate@mail.house.gov
Re: **Regulation of the Market for Video Content and Distribution – Response to White Paper #6**

Dear Representatives Walden and Upton:

I am writing on behalf of the Mt Hood Cable Regulatory Commission (MHCRC) to let you know that the federal and local franchising provisions that require our cable/video service providers to carry and support local Public, Educational, and Governmental (PEG) channel access are as necessary and warranted today as they were over 30 years ago when community media began in our region.

The MHCRC was created in 1992 when the City of Portland, Oregon agreed to consolidate its cable regulatory program and staffing with the already-existent (since 1982) joint cable regulatory program of Multnomah County and the cities of Gresham, Troutdale, Fairview, and Wood Village, Oregon. The MHCRC advocates for and protects the public interest in the regulation and development of cable communications systems, resolves cable subscribers' concerns, and facilitates the planning and implementation of community uses of cable communications technologies that make use of the public rights-of-way. The six jurisdictions which form the Commission comprise the majority of the Portland media market.

In the MHCRC jurisdictions, Mt Hood Community College, Portland Community College and Portland Public School channels provide important sources of educational opportunities and program information for students and parents alike, while the governmental channels keep our citizens informed of all major local government meetings and a wide range of other public interest issues. The public access channels, through Portland Community Media and MetroEast Community Media, provide a unique forum for faith-based organizations, non-profits, and individuals to voice their messages, demonstrate their creative talents, and exercise their freedom of expression.

Our region has a rich history of community media. Portland Community Media was founded in 1981 while MetroEast Community Media celebrates 30 years later this month thanks to the support of our community and the companies who provide cable television services to our region. Citizens from all walks of life have received training through these organizations in the tools of electronic media at free or nominal cost, and the voices and concerns of citizens and groups under-served by dominant print and electronic media have been heard in this community through this ongoing work. Moreover, through the channels set aside for cable community access, PCM and MetroEast significantly contribute to the transparency and accountability of local government by providing live, gavel-to-gavel coverage of City Council meetings, School Board meetings, the Multnomah County Commission, Metro and many other governmental organizations making decisions that affect the day-to-day lives of citizens

The fact that there are other, Internet-based ways to share video programming in no way diminishes the important role that PEG programming via cable television continues to play for the sector of the public that cannot afford broadband equipment and connectivity. If cable distribution is no longer critical to PEG channels, why, then are broadcasters and commercial cable programmers not abandoning their cable channel slots in favor of Internet-only delivery? The answer is that Internet delivery is merely a complement to, rather than a substitute for, cable channel delivery, especially when it comes to PEG channels. In the MHCRC region, one of the most Internet-savvy region's in the country, we know, based on a recent scientific survey conducted by the Oregon Broadband Advisory Council, that 15% of our population doesn't have Internet access or computers in the home. The percentage rises to 18% for households with income under $30,000, to 30% for Hispanic households and 28% for those who are 65 and older.

In the "Blueprint for Localism in Communications" the National Association of Telecommunication Officers and Advisors (NATOA) correctly said:

> "The convergence of communications technologies led by Internet Protocol and exponential growth of computing power is fundamentally transforming the communications industry. This transformation is taking place at a time of increasing industry consolidation and the concentration of political and economic power in the hands of a few incumbent providers. That in turn has led to deregulatory measures, laws and regulations that have the potential to be harmful to the interests of the public and local communities. At stake is local government's ability to ensure provision of important public benefits such as local consumer protection, support for multiple voices in media through Public, Education and Government ("PEG") programming, and regulation and compensation for the private use of public property…"

Community media centers provide constructive outlets for community youth to learn media skills and seniors to actively create programming on a range of issues in their local community. PEG channels promote civic participation, educational opportunities and technology access.

We appreciate your careful consideration of these grass roots, community-based communication tools and hope that you will work to incorporate them into any legislation moving forward.

Very truly yours,

[redacted]

Mary Beth Henry, Director
Mt Hood Cable Regulatory Commission

[redacted]

From: Clare Mullin [redacted]
Sent: Friday, January 23, 2015 5:19 PM
To: [redacted]
[redacted]
Subject: Re: Fwd: Urgent-Letter to Commerce Committee Leadership Needed

commactupdate@mail.house.gov
[redacted]

To all concerned,

I understand that there are changes to the law that are waiting to happen and they would severely affect KMVT's future. I understand our government is considering taking over our beloved and respected "Community Television".

Such a loss! Our community channel, KMVT offers education, entertainment and excitement on different levels. KMVT is such an asset to the community.

PLEASE DON'T TAKE IT AWAY. THAT WOULD BE SUCH A LOSS.

I am shocked to learn this as there are so many seniors who look forward to our shows. There are so many families who look forward to our community government meetings, local sports, and informative shows with unique concepts, valuable information and fascinating talent that offer so much to our communities.

I am speaking on behalf of so many other producers. As a volunteer producer for ten plus years and a senior, my shows Visions Unlimited and Colorful Journey of Success are carefully planned and created with our local community in mind.

AGAIN, PLEASE LET US HAVE OUR RIGHTS TO PUBLIC ACCESS TELEVISION.

Clare Mullin

Clare Mullin, M.A., DTM
"Colorful Journeys of Success".
TV Producer, Host, Author & Speaker
[redacted]
www.claremullin.com

On Friday, January 23, 2015 1:41 PM, Clare Mullin <6colors@sbcglobal.net> wrote:

Clare Mullin, M.A., DTM
"Colorful Journeys of Success".
TV Producer, Host, Author & Speaker
[redacted]
www.claremullin.com

On Friday, January 23, 2015 12:36 PM, Shelley Wolfe <swolfe@kmvt15.org> wrote:

---------- Forwarded message ----------
From: **Shelley Wolfe** <s[redacted]
Date: Wed, Jan 21, 2015 at 6:39 PM
Subject: Fwd: Urgent-Letter to Commerce Committee Leadership Needed
To:

Hello All,

I am asking you all to take a moment out of your day and to send a letter, expressing why KMVT is such an asset to the community. Below you will see that there are changes to law that are waiting to happen and they would severely effect KMVT's future. We need everyone's support and quickly. Below is information about the white paper law changes that are being proposed.

Please email letters to the following:

[redacted]

Subject line to read: **"Re: Regulation of the Market for Video Content and Distribution – Response to White Paper #6"**

If you have any questions let me know.

Hi Everyone,

We're need to get letters off to the U.S. House Energy & Commerce Committee this week to help beat back the latest efforts to do away with PEG. These letter need to be emailed by January 23!

With the change in control of Congress, we've learned that one of the first areas of interest is deregulation and the U.S. House Energy & Commerce Committee is debating whether to no longer require cable companies to provide public access channels or make PEG fee payments to support public, educational or governmental programming.

The white paper they've issued poses a a number of questions. One of those questions (see below) indicates that it is their belief is that somehow the private sector alone would cover what needs to be covered locally.

> **"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?"**

ACM thinks it's particularly important for PEG operations to explain why the benefits they provide are necessary in their communities and how PEG supports localism in ways that other media cannot. This shouldn't be hard for any of you because you've all written letters like this before. DO IT TODAY!!!!

Please submit your letter to the House Energy and Commerce Committee by JANUARY 23.

> **Use to the following header on your communications "Re: Regulation of the Market for Video Content and Distribution – Response to**
> **White Paper #6"**

Address your comments 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

. . . and please **email** them to commactupdate@mail.house.gov.

If you have a relationship with your House Representative, please copy them on the correspondence.

Please also cc mwassenaar@allcommunitymedia.org and to me so we can insure that your comments are also sent to your Members of Congress.

Thanks to each of you for all you do!!

Sue
Sue Miller Buske
[redacted]

--

Shelley Wolfe, *ED*

KMVT 15 Silicon Valley Community Media

[redacted]

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Shelley Wolfe, *ED*

[redacted]

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Shelley Wolfe, *ED*

[redacted]

Response to Video White Paper

United States House of Representatives
Committee on Energy & Commerce
Subcommittee on
Communications and Technology

February 3, 2013

In response to the House Committee on Energy & Commerce's video white paper, the National Association of Broadcasters submit the following comments.

The Value and Importance of Localism

The heart of our nation's model of broadcasters as public trustees of spectrum is broadcasting's local focus. Indeed, from the original contemplation of broadcast television in the Communications Act, Congress wisely recognized the public benefit of a local – as distinct from a national or regional – broadcasting system to the viewing public and communities as a whole. Through its legal framework, and the attendant regulations issued by the Federal Communications Commission (FCC or Commission), the Communications Act enables a broadcast television industry that provides a free and universally available video service to every community in America featuring local news, sports, weather, and emergency information.

In an era of increasing audience fragmentation, local broadcasters continue to invest in locally-focused journalism and serve as powerful platforms for the democratic exchange of ideas. Broadcasters are also market makers that connect local advertisers with local consumers and, as such, broadcasters are fundamental engines of the economic activity even beyond their direct employment numbers. Further, broadcasters are local leaders that enhance the social fabric of our local communities through public service and charitable work built around our unique platform. Finally, broadcasters continue to innovate to connect with our communities through complimentary platforms.

Broadcasters Deliver Locally-focused News, Investigative Journalism and Public Affairs Programming That Is Unique Among Entertainment Mediums

Fulfilling Congress' vision, America's television broadcasters deliver local news, weather, and lifesaving information every day to keep our communities informed, educated, and safe. Despite the growth of national and even global news outlets, the enduring value of local broadcast television news is evidenced not only by the size of our audience, which dwarfs that of cable news,[1] but also the trust of our viewers. Outranking news services on cable or the Internet, local news is viewed by the public as a far more credible source of information.[2] Not surprisingly, local news viewing is up throughout the day[3] and, according to the Pew Foundation, almost three quarters of adult Americans tune in regularly to local news, compared to just 38% who watch cable news.[4] To meet these community interests, television broadcasters are investing more in our productions leading to an all-time high in local news.

As the circulation of daily newspapers has declined, local television stations are at the forefront of investigative journalism and watchdogs of local government. Across the country, from

[1] http://www.tvb.org/measurement/local_news_audience_dwarfs_national_cable
[2] http://rbr.com/local-broadcast-earns-trust/
[3] http://www.pewresearch.org/fact-tank/2014/01/28/local-tv-audiences-bounce-back/
[4] http://www.journalism.org/2013/10/11/how-americans-get-tv-news-at-home/

stations in Providence, San Francisco, New Orleans, and Charlotte, local broadcasters improve the lives of viewers in their communities by holding public officials accountable and providing unparalleled consumer reporting.[5] Celebrating this tremendous service to the viewing public, local television broadcasters are recognized time and again with prestigious Peabody and Edward R. Murrow awards for their achievements in journalism.

Local television broadcasters also devote tremendous resources to inform their communities of the democratic process that goes well beyond providing news coverage of races for local, state and federal offices. During the 2014 midterm election season, television broadcasters offered more free air time for candidate profiles and debates than in any mid-term election in history. Amplifying and affirming the unique value of this locally-generated election content, national cable news outlets such as C-SPAN draw on the live debate coverage of local television broadcasters for much of their political programming.

Broadcasters' Free Service is a Local Lifeline During Times of Emergency

Perhaps nowhere is the importance of public trust in local broadcasting more important than before, during and after times of emergency. Combined with the resilient architecture of broadcasting compared to other networks' deficiencies, the local, boots-on-the-ground reporting by broadcast television stations has saved countless lives in times of crisis across the nation. Most recently, local broadcasters in Buffalo, N.Y. devoted 24-hour live news coverage to the lake-effect storm that delivered over 60 inches of snow in one day and more than seven feet in total. To keep their community safe, local broadcasters delivered critical updates on weather patterns, road closures and emergency information to local residents. FCC Commissioner Michael O'Rielly, a Buffalo native, praised area radio and TV stations for their coverage: "They kept powering through the storm, committing umpteen hours of airtime, and bringing in teams from other parts of the country, making sure they had troops to get out the information.… I was very impressed also with their use of social media — not only were people listening and watching their broadcasts, they were also getting their information out as fast as they could on different media as best they could."

This exemplar work of television broadcasters as a platform for local officials and emergency managers is recognized in the highest capacities of our Federal government. As Hurricane Irene headed towards communities up and down the East Coast, Federal Emergency Management Agency head Craig Fugate shared this guidance:

> "Those local broadcasters are going to be giving you the best information, real time, from those local officials out of those press conferences. So make sure you got your radio and television…and again cell phones get congested, but we did have some success with people text messaging or using social media…but remember cell phones themselves in heavy congestion may not be able to get through. And stay off the phones

[5] http://www.tvnewscheck.com/marketshare/2014/11/17/local-tv-news-sweeps-stories-for-the-greater-good/

> if it is not an emergency, because other people may be trying to call 911. Use text messaging, use land lines, but again local TV and radio are going to probably be one of the best sources of information from those local officials during the crunch time of evacuation."

Broadcasters Are Key Drivers of Growth In Local Economies

Local broadcast television stations also serve as key drivers for economic growth in America's hometowns. Whether it is by providing hundreds of thousands of jobs or offering an advertising platform for small businesses, local broadcasting has an unmatched legacy as an engine for economic development and growth. Detailed in a recent study by Woods and Poole,[6] local television broadcasters directly employ nearly 200,000 individuals in communities across the U.S. each year, contributing more than $30 billion to our nation's Gross Domestic Product (GDP). For local communities, local broadcast jobs help support local grocers, restaurants, plumbers, car dealers, and homebuilders.

The indirect economic effects of broadcasters are even greater. As detailed in the Woods & Poole report, "Local [broadcast] advertising serves an important role for both consumers and businesses in providing economic information on product prices and features. This information increases market efficiencies and results in greater demand for well-made and well-priced goods and services. The additional demand contributes to aggregate economic growth." Per the study, this stimulative effect generates nearly 900,000 jobs and more than $600 billion in GDP each year. When combined with the direct employment and impact on related industries, local television broadcasters create 1.57 million jobs and contribute more than $730 billion in annual GDP.

While national video choices may be growing on cable and online, local television broadcasters are unparalleled community leaders and use our unique platform to improve lives. Local broadcasters are and will always be where people live – in our hometowns, on Main Street, providing a helping hand when people need it most. From record-breaking food, clothing and toy drives to providing free air time for political campaign coverage, the ongoing commitment of local broadcasters to public service leads to greater support of local issues, stronger and safer neighborhoods, cleaner cities, successful charities, and healthier residents.

In sum, broadcast localism remains a unique public good and should continue to stand as a pillar in our nation's communications policy. Any modification to the Communications Act should strengthen, not diminish broadcasting's local focus.

The Hyper-Regulation of Broadcasting

As the video landscape continues to become more crowded and competition for viewers and advertising dollars continues to rise, there needs to be a recognition that the video landscape

[6] http://www.nab.org/documents/newsRoom/pdfs/Local_Broadcasting_Engine_for_Growth_Publication.pdf

has changed dramatically. This change necessitates an open mind as to how broadcasters should be regulated.

Namely, if this Committee intends to modify the video carriage laws, it should be mindful of broadcasters' extensive public interest requirements, and only undertake statutory changes that promote the continued creation and dissemination of our valuable locally-focused programming. This could be furthered through the creation of a more a level regulatory playing field where broadcasters can fairly compete with other platforms.

Today broadcasting competes directly with cable, satellite, wireless companies and increasingly the over-the-top video providers. In order to be a viable market player, there needs to be some relief from the litany of FCC regulations that broadcasters currently live under. Below are some suggestions that NAB believes will maintain quality local content, while giving broadcasters the ability to grow and achieve the scale and scope necessary to compete with our larger video competitors.

Separately, NAB specifically cautions the Committee against what many broadcast competitors continue to advocate: namely, that local television stations should be relieved of their statutory and regulatory benefits, but continue to be saddled with their statutory and regulatory burdens. NAB urges the Committee to ensure a careful balancing of these interests in the Communications Act Update. NAB expects there are always going to be public interest obligations that local television stations abide by that our video competitors do not. The "credit" broadcasters receive for these obligations should be focused on ensuring that local content is being both created and consumed. The goal of providing local content is as relevant as it has even been. If that goal is to be promoted, then broadcasting should continue to enjoy both the benefits and burdens. Those competing forces should be equalized and balanced in a way that achieves the public good of producing quality national and local content while continuing to provide another competitive player in the video marketplace.

Allow Local Television Stations to Negotiate a Fair Price for Their Local Signals

Recognizing the vital importance of local, over-the-air broadcast television to viewers across America, Congress adopted retransmission consent in 1992. Congress sought to implement a market-based system of property rights and private contracts to address a distortion in the video marketplace. The distortion was the ability of cable operators to retransmit and resell a local broadcast station's signal without its permission. Retransmission consent recognizes in local television stations a property interest in their over-the-air signal, permitting them to seek compensation from cable operators and other multichannel video programming distributors (MVPDs) for carriage of their signals.

The fundamental factual, equitable and competition policy considerations before Congress in 1992 remain true and valid today. Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems. For this reason, a substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals.

In recent years, some pay-TV providers have come before the Energy & Commerce Committee seeking either wholesale revisions of the retransmission consent framework or more targeted "solutions." But the reality is the retransmission consent system provides strong incentives to complete retransmission negotiations in the marketplace before any disruption to the viewer occurs, and thus nearly all negotiations are completed on time. In fact, NAB studies show that over a recent five-year period, service interruptions from retransmission consent impasses represented approximately one one-hundredth of one percent of annual U.S. television viewing hours. Consumers are more than 20 times more likely to lose access to television programming due to a power outage than a retransmission negotiation impasse.

Nevertheless, opponents of retransmission consent cite rising retail cable and satellite bills as justification to "reform" retransmission consent. In reality, MVPDs are seeking to limit one of their operating costs, in this case, broadcast programming, and asking for Congress's help. NAB Retransmission consent payments are not responsible for high and rising consumer prices charged by MVPDs. Indeed, one need only examine their own family cable bill to see that the fees paid by pay-TV subscribers for set top box rentals far surpasses the amount paid to all broadcast stations combined in most markets.

The fact is, cable companies' abhorrent billing practices, not the occasional contractual dispute over retransmission consent, pose the greatest harm to viewers. To that end, should this Committee wish to make meaningful retransmission consent reforms that reflect this consumer sentiment, it would be well-served to address the cable companies' exorbitant early termination fees and refusal to grant consumer refunds during carriage disruptions. These cable business practices insulate them from any consumer recourse resulting from their failure to expeditiously resolve retransmission consent impasses.

There are no changes in the marketplace that justify eroding Congress's original rationale that broadcasters should be compensated for their signal as a matter of fairness and sound competition policy. Retransmission consent merely vests in local television stations the right to negotiate for the retransmission of their signal – it does not guarantee carriage on an operator's system nor does it dictate the terms or outcome of that negotiation.

Protect Consumers by Maintaining the Broadcast Basic Tier

Finding that cable systems were increasingly carrying broadcast channels in ways that made it difficult to receive them, Congress required cable operators to offer all local broadcast channels carried pursuant to must-carry, as well as any public, educational, governmental, or leased access channels, on a basic level of service – called the "basic tier." This is the least expensive tier of service available on cable systems.

Budget-conscious consumers typically subscribe to the least-expensive basic tier to access all the broadcast network's popular programming and local news. If Congress were to eliminate the this level of service, cable providers would no longer be required to carry local and national broadcast stations in this basic tier and could split these channels up along more expensive levels of service. Ultimately, a TV viewer who previously enjoyed access to all broadcast programming at the lowest cable cost may find themselves having to go up two or three tiers of service to access the same programming. For those consumers where affordability is an important consideration, this is simply not an option. Cable companies supporting this change are upending the public service responsibility of TV broadcast programming by making this content less accessible and less affordable. Without the basic tier and buy-thru requirements, nothing protects cable subscribers who want to receive only local broadcast programming from sky-high prices, or protects over-the-air viewers from a loss of programming diversity.

The basic tier and buy through provisions buttress the policy goals ensuring that consumers have access to local programming, often times life-line programing. Therefore, NAB urges the Committee to reject proposals by the pay-TV carriers to upend the basic tier making programming more expensive for viewers.

Revise the Broadcast Ownership Regime to Promote Competition and Encourage Programming Diversity

The world has changed considerably since the last meaningful ownership review in 2006. The digital and IP revolutions have fundamentally altered the way Americans consume, produce and share information and entertainment. Nearly all available evidence demonstrates that the overwhelming increase in information and the platforms on which that information is available has revolutionized the way Americans consume media. All one need do is look at today's news and see the massive consolidation that has taken place and continues to take place in industries that directly compete with local television stations. As a result, media companies, including local TV stations, have had to adjust their business models to remain relevant in a now highly competitive marketplace.

The local television ownership rules that exist today are simply arbitrary tests that bear no relation to the competitive marketplace. Both the existing top-four prohibition and the arbitrary "eight voices test" operate as barriers to a more efficient and competitively equitable marketplace. Both rules should be modified in a way that accurately reflects the realities of today's video programming market and the needs of local audiences.

NAB respectfully requests that the Committee recognize the impact marketplace changes are having on broadcasters, consumers, the development of content and the flow of information. Local TV stations remain an essential part of the communications landscape – but they are no longer the dominant medium that they were decades ago. Regulations that substantially reduce broadcasters' marketplace flexibility have the dual effect of hampering their ability to compete against ever-growing cable, satellite and wireless rivals and limiting their capacity to serve local communities as they have for the last 90 years.

In light of the tectonic shift in the media landscape, each of the broadcast ownership rules needs updating. The local TV ownership rules have a disproportionate negative impact on smaller markets where relief from the rules is needed most. The existing rules all but prevent combinations among lower rated stations in small and medium markets that, if allowed, would likely lead to more financially viable competitors that would have the wherewithal to commit resources to increased local news and better technology. The net effect of these rules is a weakened local TV industry that cannot serve its local communities as well as it could absent these restrictions.

The so-called cross-ownership rules, both between radio and television stations and especially between broadcast entities and newspapers, can no longer be rationally maintained. The newspaper-broadcast cross-ownership rule, which was created in 1975, should have been eliminated years ago. Failure to do so has likely led to the hastened diminishment of the newspaper industry and should serve as a warning of what can happen to the broadcast marketplace if Congress' deregulatory mandate is ignored, and the Commission waits too long to adjust its rules. NAB supports the elimination of the cross-ownership rules because the restrictions do not promote the localism, competition or diversity goals.

Instill Increased Parity Among Video Competitors – Repeal Broadcast-Only Regulations

After a lengthy review of the Communications Act and the FCC regulations, there are an inordinate number of regulations that only apply to broadcasters. Regardless of the fact that cable, satellite, wireless and over the top providers all deliver video content, these other platforms lack many of the restrictive rules that encumber local television stations. In light of today's vibrant video competition, there is no justifiable reason to burden *only* local TV stations with these obligations. For instance, local television stations are uniquely burdened specific regulations, including the following: contest rules, hoax rules, recorded phone conversations, tape delay announcement requirements, and main studio location and staffing requirements.

With the dramatic expansion of the video marketplace, there is no justification to maintain such dramatically different rules for local television stations but not for broadcasting's competitors. In the interest of leveling the playing field to better promote and facilitate competition, NAB urges the Committee to eliminate such rules that are not fairly applied or not relevant for the entirety of the video marketplace.

NAB thanks the Committee for its thoughtful examination of video regulations and we look forward to working with you on this important project.

January 23, 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

Dear Chairman Upton and Chairman Walden:

The National Association of Telecommunications Officers and Advisors ("NATOA") is the leading national organization representing the communications interests of local governments. Its members include elected officials, cable administrators, professional staff, and consultants who are responsible for ensuring that city and county residents, first responders, businesses, schools, and other anchor institutions have the advanced communications services they need and deserve. Among the many communications activities overseen by our members are cable franchising and renewals; public, educational, and government ("PEG") programming and operations; public safety/Next Gen 911 services; consumer protection; and facilitation of broadband deployment and services.

With the continuing growth of broadband services, and the ongoing transition from traditional delivery platforms to IP-based systems, NATOA has strived to ensure that all communities have access to these advanced services. Our members have long known of the economic, social, and educational benefits that high-speed, reliable, and reasonably priced Internet services can bring to all Americans. But NATOA is also aware of the difficulties and challenges of trying to fit these new and evolving technologies and services into existing regulatory schemes.

As a result, NATOA undertook the task of putting together a white paper - "NATOA Blueprint for Localism in Communications - Communications Policy in an IP Environment: Principles, Challenges and Strategies" – which identifies: 1) "key principles that should guide communications policy development as we transition to an all IP environment, 2) problems in the existing communications marketplace, and 3) strategies and solutions for arriving at the proper balance between private sector goals and public benefit and protection." A copy of the Blueprint is attached. NATOA believes the Blueprint sets forth local governments' position on many of the issues Congress may address if it proceeds with any reform or rewrite of the Communications Act. NATOA would also like to offer additional comment on a number of specific issues raised in White Paper #6.

Question 1 a. Does the public trustee model still make sense in the current communications marketplace?

Absolutely. It is without question that the communications marketplace has changed – and continues to change on an almost daily basis. But the fact remains that broadcasters make use of the public airways for private profit. In exchange for their use of licensed spectrum, it is only appropriate that the public trustee model with reasonable public interest obligations remain in place.

Question 2 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?

The simple answer is YES. There is no denying that public, educational, and government programming protects and promotes localism. No other programming is available that reflects the unique community interests and values that PEG programming does. From council meetings to local sporting events to religious services, PEG programming covers it all. It is a vital source of information in times of emergencies; it entertains; it educates; it speaks in the language(s) of the community it serves; and it promotes civic engagement and debate. (Indeed, it is probably safe to say that many in Congress have appeared – and continue to appear – on their local PEG channels to communicate with their constituents, especially during election time.)

But much of this programming would not be available if cable systems were not required to carry it. While some PEG operators have expanded their program distribution through various means, such as web-streaming and video on demand, many viewers prefer to watch these programs the "old-fashioned way" – sitting in front of their televisions at home. In addition, not everyone has access to affordable broadband with sufficient speeds in order to watch video.

While the Internet may have expanded the distribution option for PEG programming, it is not a substitute for cable carriage – rather, it provides an additional choice for viewers who want to view programming when they want, where they want, and on the devise(s) of their choosing. Congress should do nothing to limit or impede consumer access to PEG programming.

Question 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?

It would be a mistake to assert that similar services should be regulated alike without first looking at the rationale for any disparate treatment. As the Colorado Communications and Utility Alliance ("CCUA") et al. point out in their comments, companies make a decision on how their services are delivered and that choice often determines what obligations – and benefits – that particular service is subject to. For example, traditional cable companies install their infrastructure in the public rights-of-way, the use of which may result in the imposition of franchise fees and PEG obligations.

It is important when looking at ways to "level the playing field" for competing services that we do not find ourselves in a "race to the bottom." We must not lose sight that communications regulation must be done with the goal of promoting and protecting the public interest. While it is important to examine how the current regulatory scheme may be revised to increase competition in the provision of communications services, similar efforts must be made to encourage localism. For example, removing the arbitrary restriction on using PEG fees only for capital expenses and not for operational costs would help ease the financial constraints many PEG operators currently face.

Respectfully submitted,

[redacted]

Stephen Traylor
Executive Director/General Counsel
NATOA

NATOA Blueprint for Localism in Communications
"Communications Policy in an IP Environment: Principles, Challenges and Strategies"

Introduction

The convergence of communications technologies led by Internet Protocol and exponential growth of computing power is fundamentally transforming the communications industry. This transformation is taking place at a time of increasing industry consolidation and the concentration of political and economic power in the hands of a few incumbent providers. That in turn has led to deregulatory measures, laws and regulations that have the potential to be harmful to the interests of the public and local communities. At stake is local government's ability to ensure provision of important public benefits such as local consumer protection, support for multiple voices in media through Public, Education and Government ("PEG") programming, and regulation and compensation for the private use of public property, to name just a few. As technological developments, such as the transition to all IP networks, increase the likelihood of regulatory change, incumbent providers are well positioned to lobby Congress and state legislatures to shape the laws in their favor. If the voices of those who rely on communications services are to be heard, local communities must assert our role in communications policy. The nation will lose great opportunities to promote the well-being of our residents if we fail to do so.

Great nations depend on great cities and strong communities of informed and empowered residents. Local governments, being closest and most accountable to our residents, have a critical role to play in ensuring that our communities benefit from the advances in communications technology. Local governments understand that our residents must have affordable access to the infrastructure and services they need for economic development, access to modern and more affordable health care, enhanced educational opportunities, energetic civil discourse and a high quality of life. Just as the federal government owns the airwaves on behalf of the public, local governments own critical public assets, including the local rights-of-way, on which for-profit communications providers place their facilities. Local governments should therefore be viewed as essential partners whose social and economic interests must be taken into account as traditional communications services migrate to applications over IP broadband networks. Without a strong local component, much of the country will be left with inadequate communications infrastructure and services.

The nation's existing communications policies fail to adequately incorporate sound principles to ensure that our broadband networks work for everyone and reflect a mutually beneficial relationship between communications providers and the communities they serve. As a result, consumers today are saddled with expensive bundles of communications services and many communities face de facto wireline and wireless monopolies or duopolies. Internet access is slower and more expensive than in many other countries. Our major ISPs treat bandwidth as a scarce resource and are introducing metered billing and bandwidth caps even as the costs of transporting bits over a network decrease. The resistance of vertically integrated broadband network owners to open Internet rules and principles has fostered gatekeeper interference with customer communications, has impaired competition at the applications layer, and has imposed private Internet regulation that reduces individual users' freedom. The current closed business model established by major content companies and network operators is outdated. It is stifling innovation in the delivery of Internet video, limiting consumer choice, driving prices higher and forcing consumers to pay for products they do not want. As we transition to all-IP networks, there is a danger that the protections that traditionally applied to communications services, such as common carriage duties and obligations to serve all on a non-discriminatory basis, are being challenged and avoided. Our wireline public switched networks are likely to disappear entirely. Current methods for determining whether a company faces competition, so that the market may be relied upon to protect against abuses, are by every measure failing to do the job. Finally, many lower-income communities are underserved by communications providers and do not have ready access to affordable and effective broadband services.

NATOA is a recognized and effective leader in public interest communications advocacy at local, state and federal levels. It is in this light that we inform our members and partners that we have arrived at a critical juncture where the economic interests of network owners are nearly completely eclipsing the public interest. Unless local communities act, things will likely become worse. As a first step in reversing this course, NATOA calls on policymakers to recognize that our residents and businesses benefit when the critical role of local communities in promoting the public interest in communications is respected by industry, as well as federal and state lawmakers and regulators. To that end NATOA identifies: 1) key principles that should guide communications policy development as we transition to an all IP environment, 2) problems in the existing communications marketplace, and 3) strategies and solutions for arriving at the proper balance between private sector goals and public benefit and protection.

Principles

NATOA policies and strategies in an IP world are premised on the belief that any changes to the nation's communications laws must be guided by the following key principles:

Principle 1— Local Authority

The United States is founded on the idea that power should be as widely distributed as possible; it should be centralized only when necessary. Like the Internet's distributed architecture, America's political and economic structure is founded on keeping political and economic power as close to its residents as possible. Individuals' and communities' decisions, for example, a community's decision to build its own broadband network to address its unique needs or to ensure competition and choice, must not be constrained. Local municipal authority is a key component to expanding broadband availability and adoption.

Principle 2— Localism and Diversity of Voices

The tradition of community media has helped ensure that individuals and small groups can communicate effectively in today's electronic world and take part in the national, regional and local debates that shape the character of our communities and our nation. For example, local cable franchising has leveraged resources and enabled innovation by mobilizing volunteers, creative partnerships, and grant opportunities to enhance the technology available to residents. New technology should be used to expand, not limit, widespread ability to create and to access diverse and independent content. Community media deserve to have the same delivery features as commercial offerings, including options such as Video on Demand (VOD), Electronic Program Guides, and cloud-based Digital Video Recording (DVR) technologies.

Principle 3— Consumer Protection and Advocacy

Consumers must have ready access to all information that might be relevant or useful to their purchasing decisions. Individual consumers lack the market power to protect themselves against communications providers with vastly greater resources and political influence. Sound communications policy must include legal recourse and government protections that level the playing field for consumers when dealing with industry players.

Principle 4— Local Rights-of-Way Management, Zoning and Siting Authority

Sound communications policy must recognize and support local communities' authority to manage their public rights-of-way and maintain zoning and related land use authority in the public interest. Communications providers should be subject to the same local rules that govern other individuals and businesses to protect public safety, property, community character, and local commerce.

Principle 5— Compensation for Use of Public Property

Local governments should retain the authority to determine the appropriate level of compensation to be paid for the use of public property by communications providers, as they do with all other private users of public resources.

Principle 6— Innovation

Sound policy must enable innovation, not just by network owners, but by all network participants. No entity or group of entities can be allowed to gain a stranglehold over broadband networks. Communications law must prevent such interference, and the necessary ground rules must be technology agnostic. In particular, communications law must prevent entrenched incumbents from throttling startup enterprises or unreasonably interfering in traffic among network end points. In addition, to ensure that U.S. workers, students, and businesses can innovate and compete in the global marketplace, local communities must have access to open, fiber-to-the-premises networks and high capacity wireless networks.

Principle 7— Meaningful Competition and Choice

Communications policies must promote meaningful competition that results in greater innovation, choice and capacity, lower prices and better customer service. Yet few new facilities-based competitors are likely to arise in today's market. Certain deregulatory policies predicated on increasing facilities-based competition have proven to be ineffective and harmful. Instead, sound policy must facilitate active competition at the service layer by non-facilities based and edge providers. And in those areas where facilities-based competition is still possible, for example, by municipal entities, it should be encouraged rather than discouraged or blocked.

Principle 8— Preservation of Local Taxation Authority

Congress and the courts have traditionally respected local government authority to determine taxation policies and rates impacting their jurisdictions. The transition to IP-based communications networks does not justify or suggest valid public policy reasons to create special exceptions for this subset of American commercial enterprises. Taxation is a matter between local residents, businesses and their elected officials. If residents and businesses are willing to support taxation to fund local services, it is not the role of the state or federal government, or industry lobbyists, to dictate special treatment at the local level for one segment of the industry. The federal government and state governments retain their own ability to create incentives for certain businesses through federal and state tax policy. Our system of government demands that local governments likewise retain control to determine the most appropriate direction of local tax policy.

Challenges

NATOA has documented critical problems caused by the failure of our nation's existing communications laws and policies to adequately incorporate these principles. In an IP world some familiar challenges remain and new ones must be addressed.

Challenge 1— Anti-competitive Rules Benefiting Entrenched Incumbents

Among other things, industry-driven state laws prevent local governments from deploying communications networks to address our communities' needs, even as existing providers decline to modernize their networks or expand them. Providers also appear to want to maintain the benefits of the regulated monopoly, which were provided in return for the Public Switched Telephone Network, while abandoning that network. They should not be allowed to do so.

Challenge 2— Loss of Localism and Diversity

Companies have attempted to relegate important noncommercial local programming to the digital hinterlands by limiting the quality and accessibility of PEG programming. PEG channels should be on par with commercial channels. State franchising legislation has resulted in the disappearance of funding for community media in many localities, while commercial content is increasingly dominated by a few large media conglomerates and local news is frequently minimized or absent. Consolidation of content and distribution providers will lead to further erosion in the diversity of content by creating economic incentives for a network owner to provide favorable transport terms for its own products and viewpoints. Taken together, these developments are likely to have a chilling impact on innovation and the quality and extent of civil discourse.

Challenge 3— Impaired Consumer Protection

Despite the fact that broadband is an essential service that has become integral to everyday life, a broadband subscriber or business customer today has no formal avenue of redress for complaints about an Internet service provider and little or no access to competitive alternatives. With the elimination of local cable franchise agreements and state PUC regulation of telecommunications and broadband in many states, the traditional framework for dispute resolution and oversight of industry performance has been removed. Consumers are forced to turn to the courts or to mandatory arbitration by industry-chosen parties to settle disputes. State franchising has often eliminated the role local governments have played in addressing consumer complaints and ensuring that communications networks address the community's communications needs.

Challenge 4— Dwindling Compensation for Communities' Property

Laws and regulations have been changed to reduce the compensation received by local communities for the use of their property. Local governments have a fiduciary duty to manage the multiple uses of the public assets that communications firms use for their private operations, and to do that, communications firms, like all other users of public property, should pay a reasonable amount as determined by the local government, and not receive special, subsidized treatment that is not afforded to any other private entity.

Challenge 5— Management of Public Rights-of-Way in the Public Interest

Often lost in the discussion about deploying broadband network facilities in the public rights-of-way is the fact that the rights-of-way are dedicated primarily *to ensure the safe and efficient movement of vehicular and pedestrian traffic.* Communications companies are just one of multiple private and public utility and utility-like entities that make secondary use of the rights-of-way. These secondary uses can and often do have significant and negative impacts on a local government's ability to address its public safety obligations, and secondary users of the rights-of-way must recognize an obligation to comply with a local government's management authority. A communications company has one focus, getting its network deployed as quickly and inexpensively as possible. The local government, however, must adopt and enforce regulations that balance the competing interests of many different types of rights-of-way users, adjoining property owners and the public, in a manner that best preserves public safety and welfare.

Strategies

As we transition to an all IP environment there is reason to believe that things will get considerably worse for consumers and local governments if our communications providers are allowed by our inaction to shed the public interest obligations associated with traditional communications services. Creative and forward-looking solutions that take local needs and interests into account will ensure that our communications networks aid rather than inhibit competition, innovation, fairness and the freedom of individuals and communities to pursue their own goals and ideas. NATOA's vision for achieving these objectives includes:

Strategy 1— Consumer Protection at the Local Level

Increasingly, consumers are turning to local governments for help with communications provider complaints, because the best venue for consumer protection is the local community, where recourse for individuals is provided at a level most effective and most directly accountable to the residents themselves. Sound communications policy should ensure local consumer protection authority, consistent with a federal or state framework, over all services provided by communications networks. Local and state bodies should be able to recover the costs of consumer protection oversight from the communications service providers.

Strategy 2— Local Authority

The experiment of moving franchising and public rights-of-way control to the state level or eliminating it altogether in an effort to incent facilities-based competition is a documented failure. Studies show that such legislation has produced no gains for the public in terms of increased broadband deployment, reduced prices, increased consumer accountability or improved quality of service. As we transition to all IP networks, states must respect local government authority to manage their rights-of-way and ensure important public benefits.

Strategy 3— Compensation for Rights-of-Way

Sound communications policy should relegate provisions such as 47 U.S.C. § 253 to its proper role of eliminating *legal* prohibitions against market entry and cut off its misuse by industry to seize local property without reasonable compensation and usage conditions. Companies that use the public rights-of-way for any communications purpose must adhere to the same set of laws governing the rights-of-way, including compensation, as do other private users of this public property. Local governments must to be able to charge users for the use of the rights-of-way without regard to the regulatory category within which certain services may fall. Such compensation may include a percentage of all gross revenue received by all owners of facilities occupying public rights-of-way, a linear foot calculation, or other methods used by local governments to calculate the value of their assets.

Strategy 4— Public Interest Obligations

Broadband providers can meet public interest obligations through a combination of funding and in-kind considerations that address their community's unique communications needs. NATOA believes that such considerations could include funding to support vibrant community media and digital divide programs and allocating channels or equivalent network capacity to serve local content. Local governments have long played the crucial role of identifying community needs and interests that can be addressed by cable operators. Such efforts have resulted in full network build-out throughout communities with no redlining; improved technology that leads to higher speeds with lower costs; affordable high-speed broadband to schools, public safety, other government entities and non-profits that otherwise could not afford such service; collaborations for local TV programming; community services; and Internet applications for education, public safety, economic development and employment. Local agreements are proven, effective ways to achieve these important public interests.

Strategy 5— Accountability

Legislation in many states would make any IP-delivered service exempt from regulation. Such measures would leave consumers without recourse. Regulatory oversight is necessary to ensure service quality where providers exercise market power. Use of artificial distinctions such as "IP-enabled" to evade accountability in the name of "innovation" should be prevented. Regulatory policy must be flexible enough to protect against consumer harms, and preserve basic public benefits regardless of the technology used.

Strategy 6— Fiber-to-the-Home Networks

We must formulate policies that stimulate innovation through the deployment of local, fiber-to-the-premises systems while respecting local rights-of-way authority**.** U.S. workers, students, and businesses must be able to compete in the global marketplace that increasingly relies on high-capacity networks. U.S. competitors in Europe and Asia are building symmetrical 100 Mbps to 1 Gbps broadband networks to each premise. To remain globally competitive, this country should meet or exceed those standards and networks should be designed so that capacity can be expanded by replacing electronics without having to be rebuilt.

Strategy 7— Local Decision Making

Communities must have the freedom to meet their unique communications needs. Legal barriers to the construction of community owned networks should be eliminated. We should not be limiting broadband deployment and competition, particularly at a time when community networks are providing the nation's fastest Internet speeds for the lowest costs.

Strategy 8— Close Analysis of Industry Mergers and Acquisitions

Any mergers, acquisitions or joint marketing arrangements must bear a heavy burden of proof that the resulting combinations will not adversely affect the public interest and that the resulting market reflects the hallmarks of competition: greater innovation, choice, lower prices, and improved customer service. Conditions placed upon any such mergers must have clearly enforceable provisions to ensure compliance.

Strategy 9— Antitrust Laws

Antitrust laws should be enforced against market dominance that prevents the proper operation of a free market. But these laws are too blunt an instrument to police the misuse of market power by incumbents. They require enormous expense and inordinate time to apply. As a result, the best they can do is often to apply a mild punishment to a successful monopolist once it has already driven competitors out of business. The antitrust laws are vital, but they cannot displace the need for other measures of the kinds described above.

Strategy 10— No Discrimination

We encourage policymakers to learn from recent developments in New Zealand, Singapore, and Australia where national governments are implementing policies designed to address potential abuses from vertical integration of content and carriage. Our nation would benefit from regulations designed to enable competition where possible, and block the use of market power by dominant industry players. The FCC's open Internet rules provide an example; they do not regulate communications, but rather prevent private entities from doing so.

Conclusion

All three of the traditional communications services, telephone, cable television, and broadcast (radio & television), developed in an environment where the goal of the law was to balance public needs and interests with private commercial profit. Laws and regulations ensured that while deployment, competition, and innovation were promoted and supported, public benefits were prioritized. Programs like the universal service fund to ensure that affordable telephone service reached every rural corner of our nation, local PEG programming and consumer protection for cable subscribers, state consumer protection laws for other communications services, and public service obligations for broadcasters, all existed under the various regulatory "silos" to create an important equilibrium between the private profit incentive and the public good.

It made sense during the formative stages of the Internet to limit regulation and taxation to allow new networks to blossom and thrive. However, as all communications services migrate onto one hybrid network of fiber- and wireless- Internet Protocol data streams, eliminating the definitions and regulatory silos that govern "telephone" and "cable," or even, "cell phone" and "data," we see clearly that public assets, consumers, and the underserved populations must be protected.

The myth that "competition" or "the marketplace" will adequately address all consumer issues has been thoroughly debunked. The need for ongoing public benefits does not diminish with convergence. Rather, the need to protect consumers and public assets becomes more critical as the United States and the world come to rely upon one converged network to carry the information that drives the global economy. Our local, state, and federal lawmakers and regulatory agencies must be acutely aware of the need to re-balance public needs and interests with the commercial goals of the private sector. These policymakers must not accept the false promises that "competition" and "removal of barriers" (which usually is code for "eliminating costs of doing business") will provide all necessary solutions to complex communications challenges.

NATOA will lead the effort to provide information, create partnerships, garner support, promote deployment of bigger, faster and more affordable broadband to all Americans, and be a watchdog over the transition from the current regulatory and legislative silos to a new balanced equilibrium between a thriving and competitive marketplace and the public's communications needs and interests. NATOA asks our members to stay engaged and others to join with NATOA so that we can have a stronger voice as the future of IP and communications policy evolves in Congress, our state legislatures, and at the FCC. For more information please visit NATOA online at www.natoa.org.

Regulation of the Market for Video Content and Distribution:
Questions for Stakeholder Comment

Responses of the National Cable & Telecommunications Association

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?**
- **b. Which specific obligations in law and regulation should be changed to address changes in the marketplace?**
- **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?**
- **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?**

NCTA does not have a position on these issues.

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?**
- **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?**

In 1992, cable operators served 98 percent of all multichannel video homes, the top ten multichannel video distributors were all cable operators, the first DBS satellite had not yet been launched, and telcos were prohibited from providing video services. Cable broadband and voice services did not exist. The typical cable system offered 30-40 analog video channels, and a significant majority of those channels, including some of the most popular networks, were owned in whole or in part by cable operators. In that environment, the 1992 Cable Act, finding that "[c]able television systems often are the single most efficient distribution system for television programming," was intended to prevent cable operators from having "undue market power via-a-vis video programmers and consumers," and in particular, to protect against cable operators favoring their affiliated programmers (and vice versa), to prevent a reduction in the number of media voices and diversity of viewpoints available to consumers, and to ensure consumers could access important local news and other information about their local community.[1/]

Today, media competition has not only emerged but flourished. Incumbent cable operators serve 52 percent of multichannel video homes. The second, third, fifth and sixth largest multichannel video distributors are not traditional cable companies, but DBS or telco video service providers, and the FCC recently found that 99 percent of the population has access to three or more choices of multichannel video distributors. Cable operators also compete with telcos, wireless providers, and others to provide broadband Internet and voice services. Broadband Internet speeds from 15-60 Mbps are standard and many networks offer 100+ Mbps and more. Cable operators provide voice service to one in three homes that use wireline voice service. The typical cable system offers hundreds of digital and HD channels, VOD and DVR capabilities, and innovative cloud-based services. Moreover, only a very small percentage of channels are owned by cable operators, so the vertical integration concerns that animated the 1992 Act no longer exist.

Not only are there more multichannel video programming distributors from customers to choose from, with an enormously expanded array of program and service offerings, but much of this same content, along with all sorts of new and different video content, is available from many different online sources. Internet-delivered video has ushered in an explosion of choice. Consumers have embraced these online options, and increasingly consider them competitive alternatives to MVPD services, choosing the service or services among them that best fits their needs. By one estimate, real-time video streaming represents 64 percent of downstream Internet traffic in North America during prime time evening hours.[2/] More than 196 million Americans watch online video each month on a wide range of devices.[3/] The largest subscription video provider in the country today is Netflix — not Comcast, Time Warner Cable, DIRECTV or any other cable, DBS or telco MVPD.

Competition among content providers is also at an all-time high. Consumers today enjoy more content, more variety and diversity in video content, and more sources for video content than ever before. Today there are hundreds of video programming networks, presented in brilliant HD quality -- an enormous expansion from 30 years ago. These content providers offer a diversity of viewpoints, and a dizzying array of niche programs for smaller yet passionate audiences, to an extent never seen before. The competitive market for video content has grown organically in response to viewer demand for programming that speaks to individual interests and experiences. Content offerings now run the gamut – from compelling scripted dramas, situation comedies, educational content, and kids programming, to sports, cooking shows, and news and public affairs – and all are available on a wide array of viewing platforms and services.

1/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Sect. 2(a)(2), (4), (5), (6), (11); *id.*, Sect. 2(b)(5).

2/ *Global Internet Phenomena Spotlight 1H 2014 Global Internet Phenomena Report,* SANDVINE INCORPORATED, May 15, 2014.

3/ *ComScore Releases August 2014 U.S. Online Video Rankings,* COMSCORE (Aug 2014).

Moreover, online video distributors like Netflix and Amazon are now creating and offering original, high-profile scripted programming exclusive to their platforms.

In today's highly competitive communications marketplace, there is no need for extensive regulations governing MVPD products, services and behaviors, and no justification for singling out cable operators or programmers for different and even more burdensome regulation. Instead, the law should focus on nurturing the conditions for innovation and investment by all service and content providers. It should keep the marketplace as deregulated as possible, to allow providers to innovate in creative ways that respond to marketplace demands; allow and reward risk-taking by new and existing providers, which is key to achieving innovative breakthroughs; and rely primarily on market forces to constrain anticompetitive behavior.

Long outdated laws that were premised on a very different cable marketplace should be eliminated. Laws that hinder cable's ability to respond quickly to customer demands or prevent them from responding to changes in the marketplace place them at a competitive disadvantage and result in a service that is less appealing and valuable to consumers. In particular, Congress should eliminate Section 623 of the Act, an extraordinarily detailed rate regulation scheme that serves no productive purpose in today's highly competitive video distribution marketplace, and should make clear that all state and local regulation of rates is preempted. In such a competitive environment, cable rates are effectively constrained by market forces, rendering the complex and burdensome rate regulation scheme unnecessary and placing cable at a distinct disadvantage vis-à-vis its competitors, who are free to innovate and experiment with different pricing approaches.

Section 623 also requires cable operators – and cable operators *alone* among video programming distributors – to offer a "must buy" basic tier that consumers must purchase before they are allowed to purchase other cable programming services (for cable systems not determined by the FCC to be subject to effective competition). This imposes a significant and unjustified competitive disadvantage on cable operators without a countervailing public interest benefit. Repeal of Section 623 would eliminate this onerous requirement. To the extent Congress considers a more limited approach, it should, at the very least, limit any must-buy requirement to broadcast stations electing must-carry status and certain other required channels. Retransmission consent stations should not have a government-mandated right to be included in cable operators' "must buy" basic tier; there is no need to supplement the right of retransmission consent stations to negotiate terms of carriage with a legal obligation guaranteeing that such carriage occurs within the cable operator's basic tier of service and the government should not force consumers to pay for such broadcast stations as part of a cable subscription, particularly given that today's consumers can access broadcast content in a number of ways.

In addition, any requirement that is premised on the idea that carriage on the cable system is the only effective way for a content provider to reach its potential audience, or that cable offerings are the only means for consumers to access diverse programming, is outdated in the era of robust MVPD competition, the emergence of many online video distributors, and the ability of any individual to make content available over the Internet, and should be reexamined. Consumers today enjoy more content, more variety and diversity in video content, and more sources for video content than ever before, along with the ability to access video on an increasingly wider range of devices and distribution platforms the idea that cable subscribers can only enjoy more sources of video content through cable channels, or that entities wishing to offer such content need cable carriage to reach their intended audience, is untenable. Any such requirement, including leased access, must-carry, PEG, and other requirements forcing cable operators to dedicate channels on the cable system to particular uses, deprives consumers of the opportunity to receive the most compelling service offering that their cable operator can create, and puts cable operators at a serious competitive disadvantage in the marketplace, since no other MVPD is subject to these same outdated requirements.

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?**

As noted above, NCTA has long advocated that laws can and should be more technology-neutral and that functionally equivalent services should be treated similarly. Competitive parity requires not giving special advantages to use of any particular technology, or conditioning deregulatory status on a particular technological offering. A law that confers a regulatory advantage on a particular technology, or that deregulates not when marketplace forces warrant, but when a favored technology is used, is a serious threat to innovation and competition. Experimentation in new services and new business models should be encouraged. Decisions about what technology to use should not be driven, or even affected, by a need to fit a service into a particular regulatory box. A technology-based approach creates a perverse incentive for providers to select the technologies they use based on a particular regulatory result even if those technologies do not necessarily respond to consumer demand most effectively and efficiently, and to hold onto a technological approach, even long after it has outlived its usefulness. Similarly situated companies should be regulated similarly – not differently. Providers of the same or similar service to consumers should play by the same rules, so that they can compete for consumers on a level playing field.

Under existing law, cable operators remain subject to a number of statutory requirements that DBS providers are not, even though – from the consumer's perspective – they provide the same type of service and the DBS providers are the second and third largest MVPDs in the country. As noted above, for example, only cable operators are subject to rate regulation and "must-buy" requirements; DBS providers essentially avoid PEG and leased access obligations; and DBS providers have no statutory obligations to make their affiliated networks available to competing multichannel video programming distributors. The competitiveness of the multichannel marketplace is undeniable and continuing to impose these and other cable-specific requirements on cable operators is no longer necessary and cannot be justified.

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?**
   b. **How should the Communications Act balance consumer welfare with the rights of content creators?**

The current regulatory model has led to the creation of hundreds of diverse programming choices for consumers. Marketplace forces will continue to provide consumers with new services, features, and additional programming options. While NCTA's individual member companies may have differing views about the merits of congressional intervention, in general, NCTA believes that communications law should provide for a level playing field and a high degree of business flexibility to allow for the greatest possible innovation in service and content offerings.

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?

When Congress first acknowledged the emergence of broadband Internet service in the Telecommunications Act of 1996, it pronounced that it was the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation." Under this policy, innovation has flourished at a remarkable rate, especially in the video distribution marketplace. Broadband networks have created an environment that encourages risk-taking and innovation in the creation of groundbreaking new programming and in the development of dynamic new distribution methods.

The online video marketplace today is thriving. Consumers have an ever-growing roster of online video offerings in addition to robust multichannel video services. Netflix already has more than 36 million U.S. streaming customers – far larger than any single multichannel video programming distributor. Many other services, such as Hulu, iTunes, Amazon Prime, Crackle, M-GO, Vudu, Vimeo, and YouTube are providing consumers with increasing options for competitive entertainment choices. Importantly, it is not just the newer entrants who are offering new online services. A number of incumbent video programming providers have recently launched or announced the launch of new and innovative online video services, including CBS, HBO, Sony and DISH. These developments demonstrate that the marketplace is responding to consumer demand for more viewing and platform options for access to video programming. While it is appropriate for Congress to monitor these developments, intervention in this robust marketplace would be premature at this time.

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January 22, 2015

The Honorable Fred Upton, Chairman
House Energy and Commerce Committee
Washington, DC 20510

Dear Chairman Upton,

On behalf of the National Court Reporters Association and the 16,000 court reporters and captioners that we represent nationwide, I am writing today with comments on the Energy and Commerce Committee's latest questions regarding the overall market for video content and distribution. NCRA appreciates the openness that the committee has shown in beginning the process of rewriting the woefully out-of-date Telecommunications Act of 1996. NCRA, as the national organization that represents individuals who are broadcast captioners, would like to provide specific comments on several sections in the committee's most recent white paper.

Regarding closed captioning, there are several issues we would like the newest iteration of the Telecommunications Act to address. First, the Telecommunications Act of 1996 authorized the Federal Communications Commission to decide how many media markets need to have all of their television programming captioned and their live programming done by a realtime captioner. The Commission decided on the 25 largest media markets. NCRA believes it is time to revisit this. According to Nielson's 2013-2014 population estimates[1], the top 25 media markets constitute roughly 57 million Americans. With approximately 315 million Americans, this leaves a staggering 258 million Americans without access to high quality captioning when they watch their local news broadcasts. In fact, cities the size of Grand Rapids, Michigan, the second largest city in the state, fall into this category.

In 2015, this is unacceptable. Accessibility to local news broadcasts is critical in understanding local culture, norms, and helps build a connection to the city in which the individual lives. Unfortunately, for millions of Americans, they are unable to have these connections. If Congress or the FCC chose to require the top 50 media markets utilize realtime captioners, for example, an additional 20 million Americans would have access to realtime captioning and a complete understanding of the news program.

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[1] Nielson Local Television Market Universe Estimates.
http://www.nielsen.com/content/dam/corporate/us/en/docs/solutions/measurement/television/2013-2014-DMA-Ranks.pdf

Additionally, while Congress made great strides towards Internet accessibility through the Communications and Video Accessibility Act of 2010, the final package did leave several key provisions out of the implemented law. Namely, original content only produced on the web has no captioning requirements. Most of the auto-captioning programs rely on inferior voice recognition technology and often lead to comical results from the captions. While NCRA certainly recognizes that requiring captioning on all original content on the Internet is unfeasible, there should be some regulations that require captioning on original web content that produced by over-the-top video services.

Original technological limitations led to the creation of the Internet as a hearing-neutral medium as video content could not be distributed. However, that has changed, especially since the Telecommunications Act of 1996 when watching original content via the Internet was an abstract concept, instead of a common way for Americans to view content. It is not out of the realm of possibility that companies like Hulu, Netflix, Yahoo!, or other purveyors of original Internet content could create daily or weekly news broadcasts in the future that are streamed live to millions. This content should be captioned by a live, realtime captioner and NCRA would like the framework of the Telecommunications Act's rewrite to include this possibility and eventuality. Currently, individuals who are deaf or hard of hearing are often excluded from much of the content that is available over the Internet and Congress and the FCC should work towards ensuring equal access for all.

Overall, broadcast captioning has become an absolutely critical mechanism for millions of Americans to access television programming over the past several decades. As America's baby boomers continue to age and their hearing continues to deteriorate, the demand for broadcast captioning will continue to grow. Congress can anticipate that demand now and create a blueprint to revisit the number of media markets that must have their live programming captioned by a realtime captioner and requiring over-the-top video services to make their content fully accessible to all who want to watch it.

If you have any questions or comments, do not hesitate to contact me at president@ncra.org, or NCRA Director of Government Relations Adam Finkel at 703-584-9059.

Sincerely,

[redacted]

Sarah Nageotte, RDR, CRR, CBC
2014-2015 President
National Court Reporters Association

National
Religious
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Christian Communicators Impacting the World

NRB

January 22, 2015

The Honorable Fred Upton
Chairman
Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Greg Walden
Chairman
Subcommittee on Communications & Technology
Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Upton and Chairman Walden:

Thank you for your invitation for public input as you consider amending the *Communications Act*. As you evaluate laws affecting video media, I write to stress the importance of existing rules requiring pay-tv platforms to honor communities by carrying local broadcast content.

NRB is an association of Christian communicators whose member organizations represent millions of listeners, viewers, and readers. NRB's membership includes a number of Christian television broadcasters. They are important servants of their communities, providing local church or non-profit content and wholesome, family-friendly viewing choices.

To serve their neighbors, religious TV broadcasters often rely on the so-called "Must Carry" provisions of the *Communications Act*. These rules ensure that viewers can access the important and edifying programming their local Christian broadcasters offer free-of-charge. Any move to remove these local channel carriage responsibilities of cable and other pay-tv platforms would be a significant detriment to the stations NRB represents and the viewers that rely on them for spiritual guidance. Indeed, as the NRB Board of Directors, a body of approximately a hundred key leaders among Christian communicators, stated in a 2014 *Resolution* supporting "Must Carry," "History of non-carriage by cable companies prior to 'Must Carry' provisions suggests that religious TV would again be ignored in the absence of those rules."

Must Carry law is sound and unobtrusive. On behalf of NRB's members, I urge you to leave intact the long-standing local channel carriage rights for all broadcasters, commercial and non-commercial, as you consider the future of this *Communications Act* initiative.

Thank you for your consideration and your leadership in the House Energy and Commerce Committee.

Respectfully,

Jerry A. Johnson, Ph.D.
President & CEO

NEW HAMPSHIRE COALITION FOR COMMUNITY MEDIA
P.O. Box 1211 Concord, NH 03302

TO: The House Energy and Commerce Committee

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

Dear Sirs,

I write on behalf of 30 PEG Cable Television stations who are members of the New Hampshire Coalition for Community Media. These stations provide much needed Public, Educational and local Government programming via required PEG access channels on Cable TV systems serving over half a million New Hampshire residents.

Our membership believes that at this point in time the PEG channel access requirement for cable TV systems is still needed for the following reasons:

- A majority of television viewers continue to watch their television traditionally. For most, this is a habit that has been ingrained. They may watch a few short video clips as they check their computers, but will still watch comedies, dramas, news, sports and other long form programming using their television sets.

- Viewers of PEG television tend to be well informed and in many cases older. They use PEG programming to find out what is happening in their communities, especially as more traditional forms of local news and information including newspaper, radio and regional television have been either drastically cut back or eliminated altogether. This has made finding sources of local information difficult or in many smaller communities nearly impossible. PEG television excels in filling that "local" void that exists in communities big and small.

- In addition to those who regularly watch stations - local programs and government meetings are often stumbled upon as viewers surf their cable channel lineups. If forced to go solely via the Internet, many viewers will simply never find their local programming in the vastness of the Internet or won't bother to look in the first place.

- As previously mentioned many of our viewers are elderly and use their cable service and local PEG channels as a lifeline to the outside world. These folks find it difficult enough to navigate their cable remotes, let alone trying to find local programs via the internet, if they even have a computer.

- PEG access television provides countless communities throughout the country with a window to their hometowns. Local sporting events, educational activities and student programs fill Education Channels. Public Access channels give millions of residents a voice in their communities and offer viewers a uniquely local perspective on events in their home town. And, Government channels bring live local government meetings to residents which help to provide much needed transparency in local government.

We need to make sure that these valuable resources continue to be readily available via cable TV. Although the industry is in a transition mode we firmly believe that PEG access programming should continue to remain available via cable TV. We urge you to leave the PEG access provision intact in any rewrite of the Telecommunications Act.

Sincerely,

[redacted]

Peter N Johnson
President, New Hampshire Coalition for Community Media

NewTV
23 Needham Street
Newton, MA 02461

January 23, 2015
RE: White Paper #6

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

To The Honorable Fred Upton,

NewTV, a 25 year old PEG station, is writing to explain that PEG programming plays an effective role in the community and must be included in the Regulation of the Market for Video Content and Distribution – White Paper #6.

NewTV is a Public, Education and Government Channel in the City of Newton, Massachusetts. We provide a video outlet for residents in the community, people in government roles and teachers and students in the many schools in Newton. Our organization provides local folks the unique opportunity to voice their opinions by providing the necessary staff, training and equipment to do so. If the cable systems were no longer required to provide an outlet because of the age of the Internet, the loss of the community voice would be devastating to the vast majority of cable subscribers across the United States. No other media outlet creates this opportunity for the public like a PEG Channel.

While the age of the Internet is upon us, we must look at ways to enhance the services we have now and encourage growth together so as not to dispose of the public's right to be heard on many platforms regarding video content and distribution.

Please continue to allow PEG Channels to provide the localism many communities desperately need on any and all platforms provided by cable systems.

Respectfully,

NewTV/Jenn Adams

cc: The Honorable Greg Walden
Mike Wassenaarr, Pres., Alliance for Community Media
Robert Kelly, Exec. Dir., NewTV

North Haven Community Television, operated by Connecticut Community Television, Inc.
127 Washington Avenue, North Haven CT 06473-1715 Tel: 203-234-0025 Fax: 203-907-4059

January 20, 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

Dear Sir,

This is in regards to Regulation of the Market for Video Content and Distribution-Response to White Paper #6. The question of "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?"

Connecticut Community Television, Inc.'s (CCTV) (d/b/a NHTV) strongly believes that the required provisions for cable TV systems and IPTV systems stay in place as there is STILL critical need for the existence of Public, Educational and Government (PEG) community access television, even in the era of the internet. To eliminate these provisions would be like saying that we don't need to be able to watch local commercial broadcast stations (affiliates of ABC, CBS, FOX, NBC, CW, MY-TV, or independent stations) or local non-commercial broadcast stations (affiliates of PBS) on cable TV systems due to the internet. Not for one minute would these major networks or broadcast station owners agree to "dump" their signals from cable TV systems due to content being available online. Evidence of this are the continued carriage "wars" between cable networks, broadcast networks, and local stations with both cable TV operators (MSO's) or satellite distributors such as DishNet or DirecTV. These "wars" have resulted in various program services being dropped, albeit temporarily, from such MSO's line-ups.

PEG access operations have grown to become vital parts of local communities, especially in this age of continued deregulation, including the loosening of radio and TV broadcast station ownership limits, which has resulted in the ELIMINATION of much of the localism that was once a staple of these federally-licensed (FCC) stations. Local public service content used to be a requirement for station license renewal. Most radio stations are fully-automated, with voice-tracked announcers from other parts of the country who have little or no knowledge of local issues in other states.

Deregulation has resulted in the "dumbing-down" of local radio and TV, as countless stations taking advantage of technology to eliminate jobs and thus, localism. PEG access TV has stepped in to provide the "hyper-local" programming content NOT AVAILABLE from licensed TV and radio broadcast stations. PEG stations provide a myriad of services to the communities they serve, such as gavel-to-gavel coverage of local Town government meetings, live local (municipal) debates and election night coverage, local parade coverage, programs hosted by local and state elected officials, many public service programs, church services and much more. PEG stations also help provide local programs to seniors and shut-ins, who are not able to leave home and would otherwise not be able to participate in local government happenings that affect their communities.

PEG stations also help provide emergency operations content, such as in the case of a natural weather disaster or other events that endanger the community. PEG stations give local elected officials the opportunity to communicate directly with their constituents. This is critical during such situations and can save lives.

PEG stations also provide local youth who are interested in careers in the TV or film industry with real, hands-on experience in TV and film production. NHTV itself is proud of the many middle school, high school and college students who have participated in our free internship program who have gone on to careers at such entities as Disney, ESPN, FOX, Tru-TV, WWE Network, Lifetime, A&E Networks, MTV, History Channel, WCBS-TV, WCPO-TV, WXIA-TV, WTNH-TV, Al Jazeera America, and countless other outlets. These students would NEVER get hands-on (equipment) experience at local broadcast TV stations due to TV Union rules prohibiting non-union members from touching or utilizing such equipment in ANY WAY.

In closing, why ANY elected government official or agency would consider eliminating requirements for cable TV and IPTV systems to provide PEG access, is mind-boggling. Remember, de-regulation and loosened ownership rules have caused much less localism in the broadcast TV and radio industry. As well, the newspaper industry (once a valid provider of local content) is in a free-fall and heading for extinction. Mega-corporations such as Comcast/NBC, AT&T, Time-Warner, etc. DO NOT need to be relieved of more requirements. Is there ANY evidence that continuing to provide PEG stations would affect these mega-corporations financial bottom-lines? Media consolidation has had dramatically negative results on localism, and eliminating PEG access provisions just would continue to bolster the elimination of localism. The only positive outcome would be the bolstering of income of these mega-corporations, which is the only reason I would think an elected official would support such mindless regulation changes, as it affects the "feelings" of their large campaign donors. Please help save the last viable bastion of local media content generation-PEG community access TV.

Sincerely,

[redacted]

Walter Mann
Executive Director
NHTV
North Haven Community TV
Operated by: Connecticut Community TV, Inc.

NHTV

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127 Washington Avenue, North Haven CT 06473-1715 Tel: 203-234-0025 Fax: 203-907-4059

January 20, 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

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Sincerely,

[redacted]

Walter Mann
Executive Director
NHTV
North Haven Community TV
Operated by: Connecticut Community TV, Inc.

North
Suburban
Communications
Commission

North Suburbs

January 22, 2015

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, D.C. 20515

VIA E-MAIL

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

Dear Representative Upton and Representative Walden:

Question 2.b. in Regulation of the Market for Video Content and Distribution – White Paper #6 asks whether provisions requiring cable television systems should be required to carry public, educational and government (PEG) access channels, and our response is an emphatic "yes!"

First, although it would appear that "everyone" is accessing video programming via the Internet, in fact there are large and significant populations who either do not have the skills to download content or who, because of income or location, do not have access to a network that would enable them to either stream or download video programming. These include senior citizens and the poor, but it also includes those who live in areas where a sufficiently robust network is either not available or not available at a price they can afford. These populations are also a key demographic that is interested in locally produced PEG programming.

Second, although the programming networks are making much of their content available on-line, none of them appear to be ready to abandon their cable channel delivery platforms. For many years, cable customers have clamored for a la carte programming options, but now that they have them they are discovering that the bundling and packaging of programming content on the cable system results in a more efficient and cost-effective delivery mechanism. In fact, a la carte delivery costs more. The reality is that on-line delivery is complementary, not a substitute for cable channel delivery.

North Suburban Communications Commission · North Suburban Access Corporation
2670 Arthur Street · Roseville, MN 55113 · Phone: (NSCC) 651-792-7500 (CTV) 651-792-7515 Fax: 651-792-7501 · www.CTVNorthSuburbs.org

To give you an idea of the scope of locally produced community programming provided over our PEG channels and the community constituencies we serve, I have attached an annual report we produced for the years 2012 and 2013. (We are still working on our 2014 annual report.) Our community media center works with our cities, our schools, two area universities, and numerous community producers and organizations to enable them to share their activities, their mission and their messages with the residents of our nine cities.

We appreciate your careful consideration of the value of still having locally produced community programming available on cable channels.

[redacted]

Coralie A. Wilson
Executive Director

2013 Year in Review

CTV North Suburbs – Community Media Center serving 10 cities: Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, Saint Anthony & Shoreview

2013 2012 Data from the past two years

CTV Productions

764	716	programs produced
54	13	events at the Guidant John Rose MN OVAL
25	38	hours of election programming
20	20	city parades & festivals

Municipal Assistance

810	612	staff hours
67	49	programs produced by staff
83	112	staff hours of technical assistance

Production Trucks

191	211	community events
167	147	school concerts & sporting events

Government Agencies & Nonprofits

31	126	programs produced by staff
14	28	organizations worked with; 2013 organizations include:

- Roseville Visitors Association
- Ramsey County Sheriff
- Ramsey County Attorney
- Ramsey County Human Services
- Ramsey County Human Rights
- MACTA Conference
- Minnesota State Council on Disability
- Guidant John Rose MN OVAL
- Rural Health Care Initiative
- Northwest Youth & Family Services
- Twin Cities Army Ammunition Plant
- Minnesota National Guard
- Boys Scouts & Girl Scouts
- Minnesota Family, Career & Community Leaders of America

2013	2012	Data from the past two years

Youth Media Program

161	85	youth participants
700	350	hours of volunteer time
64	11	videos produced
15	1	events with youth volunteers, including:

- Night to Light MN at the Guidant John Rose MN OVAL
- Mounds View Community Theatre: "Les Miserables"
- North Oaks Vintage Baseball Association
- Roseville Area High School Dance Recital

Community Training

555	312	students received certification
105	83	media production & computer classes
34	12	students from Roseville Adult English Learners Program
20	51	students from Bethel University and University of Northwestern
1	0	student from Mounds View Schools Career & Life Transition Program

Awards

4 4 Hometown Video Awards (ACM)

- "Disability Viewpoints: ADA Celebration"
- "The Ghosts of CTV"
- "2012 RAHS Spring Jazz Showcase"
- "Lemonade"

1 2 Government Programming Award (NATOA)

- Third Place - "SPUT: Saint Paul Urban Tennis"

1 0 Minnesota Association of Government Communicators Award

- Award of Merit - "What Public Works Crews Do For You"

2 0 Wisconsin Community Media Awards

- Award of Achievement - "MVCT Pirates of Penzance Featurette"
- Award of Excellence - "North Oaks VBBA '12 Q'Steps vs. All-Stars"

Municipal Assistance Program - Agency Connections in 2013

Shoreview Community Foundation
Shoreview Human Rights Commission
Shoreview Community Center
Shoreview Northern Lights Variety Band
Shoreview Farmers Market
Shoreview 500 Club Group
Roseville Human Rights Commission
Roseville Public Works Department
Roseville Parks and Recreation
Roseville Fire Department
Roseville Police Department
Roseville Puppet Wagon
New Brighton Community Development Initiatives
Saint Anthony Police Department
Saint Anthony Civic Orchestra
Saint Anthony Schools
Mounds View Community Theater
Mounds View Community Center
Mounds View Fire Department
North Oaks Historical Society
North Oaks "Huckleberry Finns" Vintage Baseball Team
"The Quicksteps" Vintage Baseball Team
YMCA
Ecumen
Arden Hills Parks and Recreation
Falcon Heights Fire Department
Lauderdale Parks and Recreation
Lauderdale Community Involvement Committee
Little Canada Recreation Association

Municipal Assistance Program - School Connections

Irondale High School
Little Canada Elementary
St. John's Elementary
Turtle Lake Elementary
Whilshire Park Elementary
Children's Discovery School
University of Minnesota - Sustainability Class

Municipal Assistance Program - City Meeting Coverage

New Brighton Parks and Recreation Commission
New Brighton Community/Neighborhood Update
Lauderdale City Council
Roseville City Council
Roseville Parks and Recreation
Mounds View City Council
Mounds View Planning Commission
Saint Anthony City Council
Saint Anthony School Board
Arden Hills City Council
Arden Hills Planning Commission
Shoreview City Council
Shoreview Planning Commission
Shoreview EQC Series

NTCA–The Rural Broadband Association Comments in Response to the U. S. House of Representatives Energy & Commerce Committee White Paper 6: Regulation of the Market for Video Content and Distribution (Released December 10, 2014)

January 23, 2015

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I. INTRODUCTION & BACKGROUND

NTCA–The Rural Broadband Association ("NTCA") hereby submits comments in response to the House Energy & Commerce Committee "Video Content and Distribution" white paper.[1] NTCA represents nearly 900 small, rate-of-return rural telecommunications providers (commonly called "RLECs"). These companies operate in areas long ago left behind by larger providers because the markets were too high-cost – too sparsely populated, too far from larger towns and cities, and/or too challenging to serve in terms of topography or terrain. As anchors in the communities in which they live and serve, these small businesses create jobs, drive the economy, and connect rural Americans to the rest of the world. These rural network operators have been at the forefront of the broadband and Internet Protocol ("IP") evolution for years, deploying advanced wireline and wireless networks that respond to consumer and business demand for cutting-edge services while extracting greater efficiencies from network operations in the face of operating in difficult-to-serve areas.

NTCA members have also been leaders in delivering video services to their communities through their multichannel video programming distributor ("MVPD") affiliates. Nearly 77 percent of NTCA members provide video services in their service areas, via Internet protocol television ("IPTV") and/or legacy coaxial cable systems.

In response to member surveys, NTCA members have consistently stated that access to video content at affordable rates and under reasonable terms and conditions is the single biggest obstacle they face in the video services market. As discussed below, governing federal statutory provisions enacted decades ago – and the rules interpreting and implementing these provisions

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[1] *Regulation of the Market for Video Content and Distribution*, Energy and Commerce Committee, U.S. House of Representatives (released Dec. 10, 2014) (available at: http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20141210WhitePaper-Video.pdf).

adopted by the Federal Communications Commission ("FCC" or "Commission") – do not reflect today's video services market, and in many cases enable programmers to exercise their control over video content to the detriment of consumers and competition.

More specifically, as noted in greater detail below, the current retransmission consent regime is based on the 1992 Cable Act,[2] a provision adopted when competition in the video services market was rare and the Internet was in its infancy. Today, it enables broadcasters to extract ever-increasing fees from MVPDs, fees often extracted under threat of "must-have" programming being withheld. Ultimately, it is consumers that pay the price in ever-increasing rates and frequently the loss of programming and access to on-line content as they are held hostage to broadcasters' abuse.

In addition, programmers of all kinds engage in several practices such as "forced tying" (a.k.a. "wholesale bundling") and "forced tiering," practices that force MVPDs to purchase content that consumers do not want or limit MVPDs' ability to offer consumers affordable, low-cost service tiers. Even worse, the "forced tying" practice has crept into the broadband market as well, as some programmers require rural MVPDs to pay an additional fee based on the number of <u>broadband subscribers</u> they serve, regardless of whether or not those customers actually subscribe to video services. This practice forces rural broadband providers to either absorb the additional costs or raise their end-user rates for broadband, neither of which benefits rural consumers or has any logical nexus to the cost of content.

NTCA proposes below several simple, common sense updates to the various federal statutory provisions which govern the video services market. These changes are necessary to

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[2] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

reflect the communications market as it exists today and to protect consumers' continued access to affordable video services of their choice.

Finally, reform of the federal statutory regime governing video content is all but compelled by and must account for the nascent yet rapidly changing Over-the-Top content market. Certainly, the migration of video content to the Internet can be a boon to consumer choice and competition. "Cord-cutters" have additional options[3] that were unforeseen just a few months ago. At the same time, these trends can serve as an excuse for video programmers to seek to increase their stranglehold on video content delivered via other means, force MVPDs into long-term agreements, or even prevent them from making such content available to consumers via their broadband connections (or to impose additional charges for such content even for those consumers that do *not* view that content). In addition, the migration of content to the broadband platform will place additional strain on the broadband network; given the significance of this especially in rural areas that depend upon costly "middle mile" networks to reach distant Internet gateways, these developments must be accounted for in both Congressional and Commission universal service policies. NTCA and its members look forward to working with policymakers to ensure that consumers have access to the content they desire, on the platform of their choice, at affordable rates.

[3] *Sling TV Just Gave You One More Reason to Ditch Cable*, ChipChick.com (Jan. 23, 2015) (available at: http://www.chipchick.com/2015/01/sling-tv-ditch-cable.html); *Heads-up, cord-cutters: HBO to start online-only subscriptions in 2015*, CNET.com (Oct. 15, 2014) (available at: http://www.cnet.com/news/cord-cutters-hbo-to-start-online-only-subscriptions-in-2015/).

II. DISCUSSION

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?

The current retransmission regime is based on the 1992 Cable Act and several FCC orders interpreting its provisions. Since the enactment of the Cable Act more than two decades ago, the video services market – and indeed the entire communications landscape – has changed considerably, and has done so in ways that policymakers in 1992 could have never envisioned. Despite these marketplace changes, the outdated retransmission consent regime still in place today insulates broadcasters from the operation of market forces, limits consumer choice in the video market, and impedes broadband investment and adoption. Even-handed negotiations for access to broadcast signals are close to impossible. As a result, the MVPDs that NTCA represents are forced to either accept the prices and terms dictated by a broadcaster or forgo access to the broadcaster's signal. Ultimately, consumers pay the price with frequent rate increases and diminished choice.

As an initial matter, it is important to understand the conditions that existed in 1992 as context for why the current retransmission consent regime no longer makes sense. The retransmission consent provisions of the 1992 Cable Act were spurred in part by concern in Congress that cable providers were functioning as monopolies and threatening the future of over-the-air broadcasting.[4] This threatened consumers' access to local content and the ultimate viability of broadcasters.

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[4] *See*, American Cable Association; Bright House Networks, LLC; Cablevision Systems Corp.; Charter Communications, Inc.; DIRECTV, Inc.; DISH Network LLC; Insight Communications Company, Inc.; Mediacom Communications Corp.; New America Foundation; OPASTCO; Public Knowledge;

However, as the Commission itself has since recognized, "[i]n 1992, the only option for many local broadcast television stations seeking to reach MVPD customers in a particular Designated Market Area ("DMA") was a single local cable provider."[5] Of course, the nature of the video services market – much like the entire communications market – has been utterly transformed, with the emergence of satellite providers and legacy telephone providers' entry into the video market, as well as the rapid emergence of Internet-based over-the-top video offerings.[6] In light of these changes, it would seem beyond debate that the retransmission regime should be updated to account for these changed circumstances.

While not specifically a part of the video marketplace, the broadband market is relevant to this discussion as well. The intervening years since the 1992 Cable Act was adopted have seen an explosion in the use of broadband Internet access services all across the nation. For NTCA members providing video services, the ability to offer an affordable video service with video content that consumers desire spurs broadband adoption. The intrinsic link between video and broadband offerings has long been recognized by the Commission.[7] More specifically,

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Suddenlink Communications; Time Warner Cable Inc.; and Verizon Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71 (fil. Mar. 9, 2010), citing S. Rep. No. 102-92 (1991), reprinted in 1992 V.S.C.CAN. 1133,1168 ("Senate Report") (stating that retransmission consent was initially designed to "advance[] the public interest" served by broadcasters by correcting for "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

5 Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, Notice of Proposed Rulemaking, FCC 11-31 (rel. Mar. 3, 2011) ("2011 NPRM"), ¶ 2.

6 *Id*. ("Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite ("DBS") providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet."). While competition has developed in most video retail markets, there is effectively no competition at the wholesale level as non-duplication and syndicated exclusivity allow programmers to retain a stranglehold on content.

7 *See, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-

broadband adoption rates increase when providers are able to offer their consumers bundled packages that also include affordable video services.

Unfortunately, the ability of NTCA members and other MVPDs to offer affordable video services is increasingly threatened by the broken and outdated retransmission consent regime and the resultant explosion in the fees demanded by broadcasters – fees that must be passed on to consumers. These fees can only be expected to rise. One industry expert has predicted that retransmission consent fees will amount to $9.3 billion per year by 2020, an increase from approximately $4.9 billion in 2014.[8]

In recognition of today's communications market and the role that the current retransmission consent regime plays as a barrier to both affordable video services and broadband adoption, NTCA urges Congress to adopt several changes to the 1992 Act. Such proposed changes as discussed below will interject market forces into the retransmission consent regime and protect consumers all across the nation from frequent rate increases and the potential loss of "must-have" programming.

Market Area Choice. The Commission's non-duplication and syndicated exclusivity rules hamper consumer choice and negatively impact retransmission consent negotiations, to the extent that the FCC's prohibition against "take it or leave it" offers is routinely flouted by broadcasters. The non-duplication and syndicated exclusivity rules prevent MVPDs from purchasing programming from an alternative broadcast station in a neighboring DMA even if the MVPD could obtain such programming at a lower rate. In effect, small MVPDs are hostages to

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311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007).

8 *U.S. TV Station Retransmission Fees Will Hit $9.3 Billion by 2020, SNL Kagan Projects*, The Wrap.com (Oct. 27, 2014) (available at: http://www.thewrap.com/u-s-tv-station-retransmission-fees-will-hit-9-3-billion-by-2020-snl-kagan-projects/)

local broadcasters and have no other choice but to pay whatever retransmission rates are demanded by the broadcast station within their given DMA. This provides broadcasters with a one-sided level of protection and artificially-inflated bargaining leverage in retransmission consent negotiations. Freedom to purchase content from neighboring DMAs would inject much-needed market forces into the retransmission consent regime and enable MVPDs to pass cost savings on to consumers. One possible solution to broadcast related disputes/issues could be enactment of "Local Choice," as proposed by Senators John Thune and Jay Rockefeller in 2014, or something similar. Taking the MVPD out of the middle of the transaction and giving customers the freedom to choose the broadcast channels they want to watch and letting broadcasters set their own pricing for those channels would eliminate blackouts, tying/bundling, and market area choice issues. While the Local Choice proposal has many positive provisions, NTCA looks forward to working with the sponsors to consider moving up the proposal's effective date, addressing the added "billing agent" costs MVPDs would confront, and giving special waiver consideration to small analog-only MVPDs.

<u>"Most Favored Nation" Rule.</u> Small MVPDs such as those represented by NTCA also face higher retransmission consent fees due to their inability to obtain volume discounts available to the nation's largest MVPDs. Large MVPDs are able to provide broadcasters with a substantial number of potential viewers that generate additional advertising revenue, thus enabling them to negotiate favorable rates. Small and midsize MVPDs, on the other hand, have no such leverage, as many broadcasters understand that they will lose little by denying them access to programming. This is only compounded by the DMA rules noted above, which prevent small MVPDs from shopping for a better deal.

Thus, a "most favored nation" rule would allow small and mid-size MVPDs to request the same prices and conditions from any of the other existing retransmission consent agreements that a broadcast station has entered into with other MVPDs. This would help to level the playing field among negotiating parties and reduce a barrier to affordable video services that is imposed by discriminatory pricing.

Lack of Transparency Frustrates a Working Market. Broadcasters typically require MVPDs to agree to non-disclosure ("NDA") provisions in order to gain access to programming. Hence, small and mid-size MVPDs have no way of knowing whether the price they are paying for programming is at all representative of its market value. A prohibition on such provisions would inject much-needed transparency into the retransmission consent negotiation process.

Standstill Provisions. Other provisions would level the negotiating playing field and, most importantly, prevent consumers from being caught in the middle when negotiations between MVPDs and broadcasters fail. For one, broadcasters are able to pull their signal from the MVPDs' customers upon expiration of a retransmission consent agreement. As a result, the retransmission consent process is often beset by "brinksmanship," where broadcasters use the pending loss of the signal as simply one more "arrow in their quiver" during the negotiation process. This leaves MVPDs with the unenviable choice of incurring higher costs by acceding to the broadcasters' demands or forgoing access to programming that consumers demand and expect. Even worse, consumers have in several instances lost access to in-demand programming as broadcasters have made good on their threats to withhold programming unless their demands are met.[9]

[9] In August of 2013, CBS content was unavailable to more than 3 million Time Warner Cable customers for several days as the parties' retransmission agreement expired and CBS pulled their signal for several days when agreement on an extension of the agreement could not be reached. USA Today, *CBS, Time Warner Cable Reach Agreement, End Blackout* (Sept. 3, 2013) (available at:

NTCA therefore supports the creation of an interim carriage (or "standstill") provision that would preserve consumers' access to a broadcast signal while negotiations and/or dispute resolution proceedings are underway. As to the former, interim carriage (under the existing expiring agreement's rates, terms, and conditions) would continue so long as the MVPD continues to negotiate in good faith towards a renewal arrangement and would continue unless the Commission finds that the MVPD is engaging in bad faith. As to the latter, interim carriage would continue during the period while a dispute resolution proceeding is pending.

In addition to these issues specific to the retransmission consent regime, as discussed further below, video programmers of all kinds frequently engage in forced "tying" and "tiering." Broadcasters frequently require MVPDs to purchase both popular and less popular channels as a "bundle," leaving the small video providers represented by NTCA with the choice of either forgoing the popular channels that their customers demand or purchasing channels that they do not want. This unnecessarily increases these MVPDs' costs, which are passed on to consumers or absorbed by the MVPDs. It also diverts resources that could be utilized by smaller providers to invest in their broadband networks and/or other innovative products and services that their consumers want. Broadcasters also frequently employ "forced tiering" practices, under which a condition of purchasing "must-have" content is that the MVPD place a channel or a group of channels in its top one or two programming tiers (in terms of number of subscribers). This practice makes it impossible for rural MVPDs to offer truly basic, stripped-down service tiers that can be offered at very affordable rates and that many subscribers actually desire. This is the very antithesis of consumer choice.

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http://www.usatoday.com/story/money/business/2013/09/02/cbs-time-warner-cable-agreement/2755953/). *See also*, American Television Alliance, *Broadcasters Begin New Year With Blackout Bang* (Jan. 5, 2015) (noting 15 markets all across the nation where consumers were without access to broadcast content due to retransmission consent disputes) (available at: http://www.americantelevisionalliance.org/broadcasters-begin-new-year-with-blackout-bang/).

4. The relationship between content and distributors consumes much of the debate on video services.

Small rural video providers, like larger urban ones, must respond to consumer demand for certain popular programming to be able to sell their services and remain competitive. NTCA's members are not affiliated with content providers and therefore must rely on vertically integrated or non-affiliated programmers for "must-have" content. The availability of "must-have" programming at affordable rates and under reasonable terms and conditions marks the difference between a viable video service and one that will fail.

a. What changes to the existing rules that govern these relationships should be considered to reflect the modern market for content?

Contractual Non-Disclosure Provisions. A marketplace cannot function effectively if its most basic workings are kept under wraps and there is no transparency among and between buyers and sellers to inform decision-making. As discussed above, mandatory non-disclosure agreements demanded by content providers in contracts for programming prohibit rural MVPDs from disclosing the rates they pay, even in the event of policymakers' requests for this information. Similarly, these agreements prevent rural MVPDs from learning the true market value of video content. As rural video providers have no way of knowing whether the price at which programming is being offered to them is in line with what other video providers are paying for the same content, their ability to negotiate fair and reasonable rates is compromised from the outset. Equitable market-based negotiations should be encouraged by prohibiting the use of mandatory non-disclosure provisions.

Mandatory Content Tying. NTCA has consistently opposed the commonly employed practice of forced tying in which content providers require MVPDs to purchase undesired content in order to obtain the content they actually want. Forced tying is one of the most prevalent and pernicious problems faced by rural MVPDs. In practice, the only viable way that rural MVPDs may gain access to "must-have" programming is to agree to purchase unwanted programming, which drives up the retail price of their service offerings. Rural MVPDs have found that in order to provide customers with access to the 10 most requested channels, it is necessary to pay for and distribute as many as 120 to 125 additional programming channels. While the lineup of video programming that consumers demand changes little from year to year, the channel lineups in rural MVPDs' service tiers are growing ever larger and more expensive, due to the forced tying practices of network program providers and local broadcasters.

In short, forced tying unnecessarily increases rural MVPDs' costs and prevents them from offering affordable service packages. This limits rural MVPDs' ability to effectively compete in the video services market and diminishes consumer choice. Forced tying should be banned.

Mandatory Broadband Tying. To obtain "must-have" video content, some programmers require rural MVPDs to pay an additional fee based on the number of broadband subscribers they serve, regardless of whether or not those customers subscribe to video services. This practice, commonly known as "broadband tying," amounts to a forced payment on a per-customer basis for access to online content (regardless of whether or not the customer views it), in addition to purchasing subscription video programming. Broadband tying goes well beyond the realm of any reasonable condition for access to traditional subscription video content. While parties may wish to negotiate packages that incorporate the optional tying of broadband content with subscription video programming, programmers that have engaged in broadband tying have typically done so in a "take-it-or-leave-it" manner. If an alternative is eventually offered by a programmer, the rates involved are so prohibitive as to effectively force the rural MVPD to accept the broadband tying or forgo the "must-have" content.

Additionally, some programmers have required rural MVPDs to promote their web sites. Also, some require MVPDs to submit payments for, and promote web sites to, broadband customers that not only do not subscribe to a carrier's video service, but are also located outside of the MVPD's video service territory.

Each of the practices described above is an unfair practice that forces rural broadband providers to either absorb the additional costs or raise their end-user rates for broadband, neither of which benefits rural consumers. Moreover, higher rates for broadband discourage broadband adoption, contrary to Congressional goals. The mandatory broadband tying provisions in contracts for video content should be prohibited.

Forced Tiering. NTCA's members report that programming vendors require that certain channels be placed in specific service tiers or that a certain percentage of subscribers receive the channels, forcing rural MVPDs to include these channels in the most popular tier(s) of service they offer. Rural MVPDs should be free to create and market video programming tiers as they see fit in order to meet the demands of their subscribers. However, the practice of "forced tiering" makes it impossible for rural MVPDs to offer truly basic, stripped down service tiers that can be offered at very affordable rates and that their subscribers actually desire. It also prevents rural MVPDs from offering service packages that help to distinguish themselves from their competitors.

By prohibiting video programmers' use of forced tiering arrangements, product differentiation and competition among video service providers in rural areas would be encouraged and consumers could have access to the content they desire at affordable rates.

b. How should the Communications Act balance consumer welfare with the rights of content creators?

Video programming distributors are entitled to a fair process and price for the content they offer. However, the market is opaque and distorted, and consumers require protection from the escalating cost of video service. Small and rural MVPDs lack the subscriber base, and thus the bargaining power, to secure content according to reasonable rates, terms and conditions. The large content providers own multiple channels. Some of their content is "must-have" and for which small providers are paying an exorbitant price, and other content that properly belongs in service tiers tailored to a specific audience. Content providers are able to use their market power to raise rural MVPDs' costs and prevent them from offering their subscribers desirable service packages at affordable rates. The ability of rural MVPDs to obtain video content at affordable rates and under reasonable terms and conditions will improve competition in the video services market and spur broadband investment and adoption in rural service areas.

NutmegTV
Community Television

January 21, 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: Importance of PEG on Cable Systems
Response to House Energy & Commerce Committee's White Paper Six – Questions 2.b. and 3.

Dear Chairman Upton and Chairman Walden:

We respectfully submit the following comments relative to the Questions referenced above:

Question 2. – Cable Services are governed largely by the 1992 Cable Act, a law passed when cable represented a near monopoly in subscription video.
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?

The 1992 Cable Act was created to provide an increase in consumer protection and promote increased competition in cable TV and related markets. The importance of diverse views and information along with the assurance that cable operators continued to expand their capacity and programming without excessive market power were reasons Congress adopted the Act to protect consumers.

What does the "era of the Internet" have to do with cable systems requirements to carry PEG? It has no bearing whatsoever. Just because consumers have more content choices available has no bearing on whether or not channel space must be put aside for the public views and use.

Cable systems can offer as many channels as they'd like leaving any PEG space requirement argument void. Additionally, the importance of localism, with no dictum from advertisers or political pressures leaves PEG the true, electronic soapbox of the pulse of its communities ON the cable systems.

Can this programming and other consumer video be found on the Internet? Yes. Does that in anyway detract from the reasons it should remain on cable systems? No.

The original franchise fees were put into place because private cable television companies used public property and rights-of-way for its extremely profitable cable systems. These fees aren't really paid for by the cable companies, they put them on the bill and the consumer pays for them. The give back was and is space for PEG channels. The fact that this question even appears on White Paper Six could make it evident that, the multi-million or billion dollar cable systems are lobbying for even more monopoly and control and less responsibility to consumers.

"The rationale for public access television was that, as mandated by the Federal Communications Act of 1934, the airwaves belong to the people, that in a democratic society it is useful to multiply public participation in political discussion, and that mainstream television severely limited the range of views and opinion. Public access television, then, would open television to the public, it would make possible community participation, and thus would be in the public interest of strengthening democracy.

Genuine democracy requires the participation of individuals in matters of concern to their common social and political life. During an era in which mass media of communication arbitrate political and social reality wield tremendous power over how individuals see the world and live their lives, the democratization of the media becomes an issue of paramount importance." – Douglas Kellner, Ph.D., Division of Social Sciences & Comparative Education, Graduate School of Education & Information Studies, UCLA

Democratic media requires media that furthers democracy and allows people access to their fellow citizens. Genuine democracy requires individuals who, minimally, are informed concerning the political issues and processes in their communities, and, maximally, who participate in public debate and decision-making. This is what LOCALISM is all about.

PEG Access stations across the country are diverse in their programming with a true pulse of the communities they service. An increase in the availability of Internet content has nothing to do with channel space for the consumer on cable systems.

In fact, we'd like to argue that these cable systems should be forced to give PEG channels the same access on the systems that it does for others. If PEG can deliver high definition content to cable systems why aren't they being forced to carry PEG in high definition as they do others? What is fair about localism being treated as a second class citizen? If the programming content appeared to the viewer as crisp and clear and in formats concurrent with large cable and broadcast networks, PEG would be on an equal playing field.

Can you help with that?

Question 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?

Why were Satellite TV providers given an exemption from having to carry PEG and provide for PEG dollars? They compete directly with cable yet they are void from having to provide anything to the communities they service. Is it because they didn't pay for public rights of way as the cable systems have done? The airwaves still belong to the people and as a result Satellite TV should have the same regulation imposed on them.

When a consumer or political leader walks in our door and wants to have access to our PEG channels and equipment and we check residency to ensure they reside within our franchise area, should we also ask them if they are a cable subscriber or a satellite TV subscriber?

Satellite pays nothing for PEG and doesn't have to carry PEG and why not?

We routinely hear from the public about consumers who make the switch and when they ask, can I get my "local station", satellite sales representatives assure them they can. They sign the contract to find out their

PEG stations are gone and now they have to wait through the end of the contract to cycle back to cable. The local stations are the local broadcasters but they don't make that evident in conversations.

Satellite is making money, lots of money and yet the regulators on the Federal level have allowed them to be exempt from PEG.

We'd like to know why.

Sincerely,

Joanie Sutter
Executive Director

Cc: Congressman John Larson
Congresswoman, Elizabeth Esty
Senator, Richard Blumenthal
Senator, Chris Murphy
Mike Wassenaar, President, Alliance for Community Media – National
Nutmeg Public Access Television, Inc. Board Directors
File

'ōlelo
COMMUNITY MEDIA

January 23, 2015

To: commactupdate@mail.house.gov

The Honorable Fred Upton
Committee Chair
House Energy and Commerce Committee
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
Subcommittee Chair
House Communications and Technology Subcommittee
House Energy and Commerce Committee
2185 Rayburn House Office Building
Washington, DC 20515

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

Dear Honorable Committee Chair Upton and Subcommitee Chair Walden:

My name is Angela Angel, Interim President and Chief Executive Officer of 'Ōlelo Community Media – designated operator of the City and County of Honolulu's PEG Access station and channels.

I am writing in response to the Committee's sixth of a series of white papers pertaining to its process of reviewing the Communications Act for update; specifically as it relates to the regulation of the market for video content and distribution. In particular, my comments will address the following statement and 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?"

This statement and question suggests that cable distribution is or will soon be secondary and subordinate to internet distribution. Such a proposal would:

1. Undermine the Communications Act's intent of providing a means for setting aside space for PEG Access Channels; and

2. Unlawfully abridge the fundamentals of our constitutionally protected Freedom of Speech (First Amendment to our Bill of Rights).

Section 611 of the Communications Act delegates powers to local franchising authorities to either require or not require cable operators to set aside channels for public, educational, or governmental (PEG) use. To preserve the deliberate nature of this provision, please consider amendments that will strengthen PEG Access in all states, counties, and cities.

As stewards and champions of free speech at the local level, Access operators are diligent in ensuring that community members and groups, representatives and agents of our educational institutions, and local government administrations, agencies, and departments are able to communicate effectively using television to share messages and engage in discussions that shape the character of our communities, our society.

The internet may increase exposure, but it does not ensure localism. On O'ahu, 'Ōlelo's highly viewed public access shows include Samoan and Tongan programs. Although we stream our channels on the internet, our community watches these programs primarily on television as indicated in viewership reports from Time Warner Cable. Similar trends are apparent with programs from our Okinawan, Hawaiian and Vietnamese communities. Our gavel-to-gavel coverage of legislative hearings, council meetings and neighborhood boards also receive regular viewership, and our volunteer producers from all sectors greatly respect and value the reach and impact cable distribution affords their video production efforts. 'Ōlelo's Access Channels have become a gathering place. Though some of the public may choose to tune in to a mobile device, internet or television; community programming starts with the original intent of setting aside space for PEG Access Channels to serve community voice.

For many years, PEG Access has struggled with cable companies limiting the quality and accessibility of PEG programming. These companies lobby to limit or eliminate funding for community media, while their commercial revenue continues to soar. These actions would eventually result in the demise of PEG Access and further create an uneven shift in the balance of public and private interests. We ask that Congress seek answers to protect the public interest, and urge the FCC to not only ensure healthy competition in the market but more importantly, to protect localism, and the diversity of voices.

For the past 25 years, 'Ōlelo Community Media has equipped and empowered thousands of O'ahu residents, community organizations, educational institutions, and local and State government officials and agencies through basic and advanced video production resources, trainings and services necessary to conceive, design, execute, and share unbridled messages and community dialogue via PEG Access Channels. We have long leveraged resources and enabled innovation with the use of volunteers, long-standing community partnerships, and local and national grant opportunities to maximize what services and resources we can offer to our island residents. 'Ōlelo Community Media now showcases nearly 5000 hours of locally produced programming a year. Our youth initiatives touch thousands of students annually with some schools incorporating our programs into their curriculum. To date, 'Ōlelo has cablecast over

110,000 locally produced programs that represent O'ahu's rich diversity in speech, culture, and community perspectives. These services and outcomes would be lost if there were a change in federal law diminishing PEG protections. Competition and innovation should be supported but equally so, public assets, consumers, underserved populations, and our first amendment rights must be protected.

That said; in response to your question, my answer is, "Yes, in the era of the internet, cable systems should be required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and, as it relates to ʻŌlelo Community Media and our clients, PEG channels." Any new technology, including the internet, can be used to expand the ability to create and to access diverse and independent content. To encourage the voices of our communities, please preserve PEG Access in any proposed amendment to the Communications Act and or Administrative Rules relating to our nation's communications policy.

On behalf of ʻŌlelo Community Media's management, board, staff, clients, and volunteers, I thank you for allowing me the opportunity to offer testimony on this most important Committee matter.

Sincerely,

[redacted]

Angela Q. Angel
Interim President and CEO
ʻŌlelo Community Media

Cc:

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Honolulu, Hawaii 96850

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[redacted]

From: Lance Powlison [redacted]
Sent: Tuesday, January 13, 2015 4:27 PM
To: CommActUpdate
Subject: Loss of cable system access would be detrimental to the continued vitality of City of Oregon City PEG operations

To Whom it may Concern,

The convergence of communications technologies led by Internet Protocol and exponential growth of computing power is fundamentally transforming the communications industry. This transformation is taking place at a time of increasing industry consolidation and the concentration of political and economic power in the hands of a few incumbent providers. That in turn has led to deregulatory measures, laws and regulations that have the potential to be harmful to the interests of the public and local communities. At stake is local government's ability to ensure provision of important public benefits such as local consumer protection, support for multiple voices in media through Public, Education and Government ("PEG") programming, and regulation and compensation for the private use of public property, to name just a few.

Our community uses and strongly NEEDS the PEG provisions and if lost would be detrimental to how we provide much needed services to our community.

Regards,

OREGON CITY

Lance E. Powlison
Rights of Way Program Manager
[redacted]

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January 23, 2015

Comments on 6th White Paper

The papers attached address many of the issues raised in the Committee's December 2014 while paper on video media regulation and its reform. I hope they may be useful to the Committee and its staff.

With best wishes,

[redacted]

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Washington D.C.
June 20, 2014

"Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?"

Submitted Written Testimony of

Bruce M. Owen
Morris M. Doyle Centennial Professor in Public Policy
Director, Stanford Public Policy Program
Stanford University

Includes Supplementary Testimony Submitted July 7, 2014

.

"Net Neutrality: Is Antitrust Law More Effective than Regulation
in Protecting Consumers and Innovation?"

Submitted Written Testimony of

Bruce M. Owen
Morris M. Doyle Centennial Professor in Public Policy
Director, Stanford Public Policy Program
Stanford University

Thank you, Mr. Chairman, for this opportunity to address the subcommittee.

Is antitrust law enforcement sufficient to address so-called "net neutrality"? Or do we need new regulatory safeguards? Although these questions are somewhat technical and arcane, they seem to arouse strong emotions among many citizens. I commend the committee on its efforts to contribute to the public debate, and perhaps to better define the policy issues.

My written testimony briefly summarizes the analysis set out in greater detail in the publications appended to this submission.

I have devoted much of the past 45 years to study of the communications industry and its regulation, including radio and TV broadcasting, cable television, telephone service, use and allocation of the radio spectrum, the Internet, and the many technologies, old and new, used to supply such services. I have had the privilege of working in telecommunications policy analysis in the executive branch of the government, in antitrust enforcement at the U.S. Department of Justice, in academic research and teaching at Stanford and Duke, and in consulting work. My special focus has been on the effects of regulation of these industries on the consuming public.

Communications regulation does not make a pretty picture. Over the last 100 years the Federal Communications Commission has pretty generally interpreted its legislative mandate in ways that stifle competition and technological innovation. Outcomes have in many cases probably been worse for consumers than the dangers they might have faced from unregulated monopolies or oligopolies. I believe that FCC commissioners have been trying their best for the public. However, the nature of our political system can easily mislead policy makers who seek to further the public interest. When it comes to low-salience technical matters involving regulated industries, it is the regulated firms themselves and other well-financed interest groups that dominate the policy debate. Theirs are the loudest voices heard in Washington and at the FCC. The interests of consumers are far less well represented.

Antitrust enforcement has, in general, been much more successful than regulation in service to the public. Especially since the 1970s, the goal of enhancing consumer welfare has been explicit at the antitrust agencies, and widely accepted by the judicial branch. The days of protecting competitors from competition are long past. I played a role in the litigation[1] that resulted in the disintegration of the old Bell System monopoly—both before the complaint was filed and in testimony at the trial. I believe that antitrust case, together with the burst of bipartisan deregulatory policies in the 1970s, led to the explosion of competition and technological innovation in the communications industries that we see all around us today.

The history of communications policy over the last century, however well-meant, has tended to protect incumbent providers from would-be competitors and innovators at a substantial cost to the public. This cost in my view likely far outweighs whatever benefits may have resulted from the short-term purposes served by the regulation. This applies especially to regulations that were vague, or prophylactic—that is, intended to forestall a theoretical danger in advance of its possible occurrence. In contrast, antitrust enforcement (merger law aside) is designed to deter or remedy specific instances of anticompetitive behavior, defined in terms of harms to customers. Antitrust action requires *evidence of harm.* Even in merger cases, courts increasingly require strong evidence that harm to consumers is very likely.

History lessons

History, of course, can be a useful adjunct to analysis of policy alternatives. Proponents of net neutrality may recognize their own fears and goals, for example, in the following 120-year-old claim:

> [T]he paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the [proposed legislation] is the prevention of these discriminations….[2]

This is from the legislative history of the first modern attempt by the federal government to regulate directly the behavior of large firms, in this case railroads. The result was the 1887 Act to Regulate Commerce, which contained this key provision:

> [I]t shall be unlawful for any common carrier [railroad] subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect

[1] U.S. v. AT&T et al. 552 F. Supp. 131 (D.D.C., 1982), affirmed February 28, 1983.
[2] Senate Report No. 46, 49th Cong., 1st Sess., p. 215, as quoted in Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

> whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[3]

This and subsequent legislation gave the now-defunct Interstate Commerce Commission (ICC) the power to prevent discrimination of the kind apparently feared by proponents of net neutrality. The policy did not work.

Railroads continued to price discriminate, filing rates with the ICC to charge different prices for hauling different commodities of the same weight, volume and origin/destination. So did regulated trucking firms. Railroad tariffs grew longer and more complex each decade. In the end, before it was abolished in 1995, the ICC was little more than the titular head of a series of highly discriminatory and dysfunctional regional transport cartels. There are few today who believe that this century-long experiment with regulation achieved net benefits for Americans.

We have more recent evidence in telecommunications itself of the intractable difficulty of preventing even truly anticompetitive discrimination, in this case by vertically integrated monopolies.[4] Few historical events resonate in telecommunications policy with the clarity of the 1982 settlement that terminated the trial in U.S. v. AT&T. The old Bell System agreed to settle by accepting the entire relief package sought by the government. The relief called for a platonically pure structural disintegration and future isolation of the local Bell telephone monopolies from the competitive services then offered by Bell, including long-distance service and equipment manufacturing. The reason: regulation had failed to prevent discrimination against and in fact exclusion of Bell's competitors. It was antitrust action not regulation that brought an end to the suppression of competition in telephone service.

I have more to say about transportation and telecommunications regulation later in this testimony. But it is important to explain at once that a primary focus of the net neutrality issue is vertical integration. The fear of discrimination arises, I suppose naturally, from the perception that a vertically integrated firm will use any market power it may have at any stage of production to protect or extend market power in other stages.

Abstract economic models predict that when allocation within a firm replaces what had been decentralized market exchanges, consumer welfare (present and also future, because of incentives for innovation) may increase or decrease. In other words, the economic incentive to expand horizontally or vertically is usually, though not always, compatible with the social interest in maximizing long-run consumer welfare. We have two tools to deal with the possible bad outcomes: antitrust and regulation.

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[3] Section three of the Act to Regulate Commerce (February 4, 1887, c. 104, 24 Stat. 379, 380).

[4] Local telephone companies were generally assumed to be natural monopolies until at least the 1990s. AT&T Corp. et al. v. Iowa Utilities Board et al. 525 U.S. 366, 371 (1999).

Antitrust policy works by seeking to prevent, directly or through deterrence, welfare-reducing expansions in the scope of firms without indirectly and inadvertently deterring expansions that benefit consumers. This is easy to say, but very tough to accomplish in practice. The requisite information is difficult to assemble and assess and the same tools (e.g., statements of enforcement policy and appellate precedents) can have indirect deterrent effects on both good and bad changes in the scopes of firms.

Hard as it is to calibrate antitrust policy, calibrating regulation is even more difficult. Aimed at improving serious long-term incompatibility between private incentives and social welfare, regulators intervene continuously and directly in firm decisions. The simplest case is the incentive of a monopolist to restrict output in order to maximize profit. Traditionally, public utility regulators set maximum prices and required utilities to serve all comers at or below those prices. In principle, this might achieve an efficient level of output. But in practice, the constraint itself almost invariably produced incentives that distorted internal allocation decisions of regulated firms, raising costs. In addition to and generally worse than those distortions, regulatory agencies themselves frequently have been more concerned with the welfare of the firms they regulate than with the economic welfare of the consuming public. In many cases, consumers would have been better off without regulation. The starkest evidence: deregulation of airlines, trucking, and most rail rates actually produced lower prices and more efficient industry structures.

This brings us to net neutrality. I suppose most of the people who favor net neutrality have no very specific idea what it means. Net neutrality is a slogan, not a policy. Perhaps deliberate vagueness explains the term's popularity. Of course, it is a rare curmudgeon who opposes fairness and favors unfair discrimination. Journalists tend to explain net neutrality as a condition in which all users pay the same for Internet access, no one gets inferior service, and no one is denied service, "for the same content." Regulation is thought to be required to ensure this, even though there is no significant evidence of anticompetitive discrimination today.[5] The fear is that such behavior may develop in the future. Specifically, cable operators have long had a reputation for dubious service quality and increasing prices, and well-publicized media and telephone mega-mergers are often regarded as signs of impending threats. The most specific fear apparently is that cable television providers that currently offer both conventional "linear" TV networks and also Internet access service will discriminate against or deny service to competing providers of competing on-line video services, such as Netflix, in order to protect their profits from the traditional part of their businesses.

[5] In fact the FCC after trying and failing twice to enact lawful versions of net neutrality (see Verizon v. F.C.C., D.C. Cir. No. 11-1355, decided Jan. 14, 2014), only last week announced that it was opening an inquiry to see if it could find evidence that would justify such a policy, the week *after* it announced pursuit of yet a third version of net neutrality. Edward Wyatt for the New York Times, "F.C.C. to Investigate Agreements Between Content Companies and Net Service Providers," June 13, 2014 http://nyti.ms.1qbObFG

What is Discrimination?

The Internet is an interconnected set of facilities (fiber optic cables, servers, routers) owned by many different companies that provide services to each other and to end users. These facilities are used for many purposes, not just Internet service. Examples include ordinary telephone service and capacity leased to cell phone companies and large businesses that use private networks to interconnect plants and offices. Each Internet user negotiates terms with the owner of whatever hardware is used to connect to the greater Internet. That owner in turn negotiates terms with other networks with which it seeks to exchange traffic. Large facilities providers with roughly equal demands for each other's capacity may exchange traffic without any payment (the payments roughly cancel out, so why bother?) This is known as "peering." When demands are not symmetric, one party typically pays the other for interconnection service. The negotiation involves prices and service quality, including "bandwidth" (speed in bits per second). Prices vary with, among other things, the amount of capacity (bandwidth) supplied. This is because more capacity costs more to produce. Notably, as with telephone service, users pay both to initiate and to be able to receive communications whether open circuits or digital packets. Even retail users of the Internet often negotiate both price and service quality. New or renewing cable and telephone subscribers are typically offered various discounts (or months of free service); subscribers threatening to terminate service also may be offered discounts.

Providers typically offer different Internet connection speeds or bundles of services at different prices. For example, business users may demand and be willing to pay more for faster speeds, and this is also true for some residential users. The actual performance of any interactive system using shared facilities varies according to capacity utilization. Each user's traffic varies, and at peak times or days capacity utilization in one or more parts of a network may approach 100%. Traffic then stops or slows as longer alternative routes (if any exist) are taken. Providers offering such service must invest in enough capacity to maintain the minimum service quality promised to each user even as overall traffic grows.

Digital communications capacity is fungible, in the sense that capacity used for any given purpose can be repurposed for a different use. These changes require time and may involve new equipment; they are not costless. In this context, one must be very precise in defining "discrimination." In antitrust and economic analysis it is **not** discriminatory to charge different customers different prices unless the services provided are identical in all respects and also cost the same to produce. Note even then, discrimination may increase consumer welfare, enabling consumers with lower values to be charged lower prices.

Internet users, whether residential or industrial, should expect to pay more for goods and services that cost more to produce, even when the "content" is identical or similar. Competitive markets produce that result and economic efficiency requires that result. The reportedly adverse popular reaction to the FCC's most recent proposal on net neutrality, which essentially took the position that charging more for higher speed service was not by itself discriminatory, suggests a widespread misunderstanding of how competitive markets work. A moment's reflection should make it plain that buying more of almost any good or service, or a better quality of service, will cost more to supply and for that reason alone carry a higher price. If regulators forbid charging more for the more costly service the result will simply be that the service will not be provided. On the other hand, charging a price significantly higher than cost creates profitable opportunities for competitors or entrants to expand their market shares. Competition provides this discipline automatically. Regulation does not.

Further, the "equal prices for all who provide the same content" interpretation of net neutrality rests on no coherent theory of social justice. Some regulatory interventions are at least nominally intended to benefit disadvantaged groups such as minorities, the elderly, or the poor, and thus to justify reductions in efficiency. There is no such argument favoring net neutrality. Unlimited Internet access at a below-cost price should not be an inalienable right. Its beneficiaries are not minorities, the elderly or the poor.

Discrimination against competitors

What about the fear that cable television operators that also offer Internet access will discriminate against suppliers of competing online video programmers? Several lines of analysis are helpful here.

First, denying access to a competing supplier of a vertical service is not necessarily profitable, even if the cable company (for example) is the only local supplier of Internet access. Such a monopoly operator can charge a monopoly price for access. If it excludes a competing program supplier, however, it gives up the increased monopoly revenue that would come from the competitor's use of the access service. Charging users a higher price for programming is not guaranteed or even likely to offset the loss of monopoly revenue from transmission. Generally, a monopolist can only charge one monopoly price. Some exceptions exist. The old Bell System was an exception because its profits were regulated, and not at monopoly levels at a time when local telephone service was assumed to be a natural monopoly. Excluding competitors raised costs but also permitted higher prices to offset the costs of exclusion. The Bell monopoly lasted for many decades in part *because* of regulation.

Second, it simply is not true that cable television operators have monopolies in the distribution of video programming, online or otherwise. Most U.S. households have access to at least three established providers of linear video services—one cable operator and two satellite companies. In addition, wireless broadband internet service is growing very rapidly, largely because of the popularity of smart phones and tablets, which can be and are used to watch online video. A growing number of individuals use such services as their chief source of video entertainment. This adds three or four additional wireless video and Internet access providers to the three pre-existing video suppliers and the one or two Internet access providers already serving many large cities. (The largest landline telephone companies, AT&T and Verizon, offer fiber optic broadband service to residential users in several densely populated areas.) This amount of competition is sufficient to make regulation a truly bad bet for improving consumer welfare and stimulating innovation.

Further improvements in wireless broadband services lie in the future, even for relatively low-population-density areas: low earth orbit micro satellites are one such possibility. Today's large broadcast satellites are in geostationary orbit, much too far away for interactive Internet services because of delays in transmission. Low earth orbit satellites are not stationary with respect to the Earth, so more of them are required to ensure that at least one is always serving a given area, but they are much less expensive to build and launch. Miniaturization, economies of scale, and private launch services continue to reduce costs. This technology may eventually offer an opportunity for even more competition in video and other broadband services. Also, suppliers in other nations, such as South Korea, are already developing so-called "5G" technology to harness new frequency ranges for terrestrial wireless services.[6]

The presence of competition in local digital transmission services means that, going forward, cable operators cannot successfully exclude video competitors from the market through discriminatory pricing or otherwise. It would be pointless to discriminate against or exclude rival program suppliers from access to digital cable subscribers. The FCC has traditionally ignored this conclusion by regulating each transmission technology as if the others did not exist. This Alice in Wonderland approach is rationalized by the structure of the Communications Act, which also takes a technology-based approach to communications law. Whatever the legal basis for the regulatory silos used by the FCC, the effect is anticompetitive. Regulation generally impedes competition.

Third, even if anticompetitive behavior took place on a broad scale (hypothetically making antitrust solutions impractical) the FCC has the power to provide a competitive rather than a regulatory solution. Virtually all of the growing competition in broadband Internet service involves use of the radio spectrum. The FCC controls the amount of spectrum available for each use. The FCC can and should make more spectrum available for wireless broadband services and also permit licensees in other bands to repurpose their spectrum for wireless broadband. Indeed, it is now clearer than ever, from the FCC's spectrum auctions and subsequent market transactions, that markets rather than regulators should be deciding how spectrum should be allocated and assigned, using a property rights system.

The bottom line here is that if a cable operator or other transmission entity is accused of attempting to exclude competitors through discriminatory tactics there should not be a high index of suspicion, and there should not be a prophylactic regulation. If what appears to be anticompetitive discrimination takes place it is more likely to be because the entity is pursuing a competitive advantage resulting from cost reductions or product improvements than because the intent is to harm consumers. In any case, exclusion is unlikely to be successful. Such situations rule out regulatory regimes and blanket prohibitions because they are likely to result in handicapping rather than encouraging competition. In contrast, antitrust law that treats each case on its merits is well-suited to the task of deterring or penalizing discriminatory behavior in the unusual situations where it may arise. Finally, if the FCC wants

[6] "EU, South Korea to Ally on Faster Mobile Access," Wall Street Journal Online, June 16, 2014. http://online.wsj.com/articles/eu-south-korea-to-lay-out-plan-for-5g-networks-1402844523?KEYWORDS=5G+wireless

to ensure that Internet access is priced competitively, efficiently, and at the lowest possible prices, it can accomplish that goal best by eliminating its longstanding competitive restraints in spectrum markets. For example licensees are presently forbidden to use their spectrum assignment for anything but the narrow purpose specified in their licenses, even if the alternative use creates no interference problems and increases competition.

As noted above, a relevant example of regulatory distortion is the incentive to expand the scope of the firm vertically into the sale of unregulated products, and a concomitant incentive to exclude competitors from such markets. This was the central economic basis for the Justice Department litigation, seeking to disintegrate the old AT&T vertically, that was commenced in 1974 and led to the 1982 settlement and the actual breakup in 1984. One policy basis for the lawsuit was the failure of the FCC, despite many years of effort, to prevent AT&T from finding ways to keep competitors out of potentially competitive markets into which it had integrated vertically. One way to characterize the problem is that because the Bell system owned the local telephone monopolies, it could force them to accept the lost revenues and lost profits that resulted from exclusion of AT&T's long distance and equipment competitors. Some of the loss would be made up by rate-of-return regulation and another part from paying supra-competitive prices for the goods and services supplied exclusively by AT&T to the local companies. FCC staff officials testified in the trial of the case that, despite strenuous effort, their attempts to prevent exclusionary conduct had failed.

Behind the failure of the FCC's attempts to control AT&T's anticompetitive behavior were AT&T's control of the information (about, for example, its costs) required by regulators to monitor and control the company's behavior, AT&T's control of the definitions and pricing of its services, and the inherent constraints of administrative law on agency behavior. A leading example of those problems is the series of regulatory proceedings called Computer Inquiries I, II, and III. In those proceedings, the FCC sought to find an effective method to permit the old AT&T to provide services in unregulated competitive markets while ensuring that AT&T would not or could not engage in anticompetitive behavior by favoring its own subsidiaries.

Among the regulatory strategies explored was the concept of the "fully separated subsidiary," a corporate unit organized to provide competitive services that was separated by an accounting firewall from the monopoly side of the business. But it became apparent that a meaningful accounting separation was impossible so long as the benefits from permitting AT&T to continue to supply inputs both to its own competitive downstream businesses and to the competitors it faced in those businesses arose from economies of scope or scale in the joint provision of inputs to both monopoly and competitive markets. For example, there exists no unique, economically legitimate method to allocate joint and common costs. In any case, so long as AT&T owned both the regulated monopoly business and the related competitive business, anticompetitive incentives would persist. The Computer Inquiry rulemakings ended in morasses of complex, unworkable, and ineffective or self-defeating regulations.

Remarkably similar problems arose in negotiations between AT&T and the Antitrust Division to settle the Section 2 antitrust litigation. The negotiations took place in the last days of the Carter administration and the early days of the Reagan administration. The talks ended with complex regulatory proposals ultimately abandoned by both sides as unworkable. They were referred to by the parties as Quagmire I and Quagmire II. AT&T chairman Charles Brown later explained his decision to accept the relief sought by the government in the antitrust case. The quagmires of unworkably detailed regulatory solutions that seemed inevitably to emerge from efforts to solve the underlying problem of incentive incompatibility (not his phrase) led him to conclude that isolation of the monopoly portion of the business from its competitive components was the only way AT&T would be able to escape endless private and public disputes with competitors and regulators, and become free to focus on its business of providing communication services. AT&T therefore capitulated.

Unfortunately, Judge Harold Greene had not had the benefit of the Computer Inquiries and Quagmire experiences. When the government and AT&T filed the proposed settlement, with its stark and permanent isolation of the monopoly local service companies from participation in any competitive business requiring use of their monopoly facilities, Judge Greene rejected the platonic solution in favor of regulation by the court. He made exceptions for certain "information" services and he insisted on a waiver process, permitting the local monopolies to enter competitive lines of business on a case by- case basis with the court's consent. Predictably, the court was subsequently bogged down in massive and bitter multiyear waiver proceedings, most of which recapitulated the lessons of the Computer Inquiries and the Quagmires.

The AT&T settlement ultimately was undone by the 1996 Telecommunications Act, which sought to solve the problem of competitive access to monopoly local telephone facilities by, among other policies, providing for the further (accounting) disintegration of local telephone facilities into "network elements," each to be offered and priced separately to businesses seeking to compete with the local Bells. The resulting FCC implementation procedures were repeatedly challenged by the Bells, resulting in several trips to the Supreme Court. The 1996 Act failed to induce facilities-based entry into local wire line telephony. Instead, market forces took an end-run around the Bell bottleneck.

Despite Judge Greene's misstep, the temporary isolation of the Bell companies from long-distance service, combined with growing competition from wireless telephone providers and VOIP services such as Skype was sufficient to permit competition to develop both in long-distance and local telephone service. About forty percent of the U.S. population has now abandoned wireline telephone service entirely. The arrival of competition in local telephony (and, as it turned out, video services) was made possible by the advance of digital and wireless technology and continuing reductions in the hardware costs of providing such services. Competition has finally come to local telephone service, not because of a century of government regulation, but in spite of it.

We need not repeat history

The history of attempts to regulate the old Bell System under traditional utility regulation principles (common carrier access rules and maximum price regulation) and the ICC's even less successful experience in eliminating discrimination in transportation suggest some lessons for communications policy today. Those lessons recapitulate the story of the earlier attempts to control discrimination in rail service.

First, as the examples above attest, there is little clear evidence that traditional regulation ever achieved even its narrow objective of making nondiscriminatory service available to all at cost-based prices. On the contrary, discrimination on the basis of factors correlated with price elasticity has been a commonplace of regulation from the time of the 1887 Act to the present. The FCC, if it is to enforce what appears to be its version of net neutrality, will have to compare prices with costs for cable television systems and other multimedia providers. Joint and common costs are an inherent feature of the provision of Internet access and transmission. The task is simply beyond the FCC's abilities.

Second, the regulation remedy makes the disease worse. Regulators and regulation often have served as deterrents to technical innovation, both by incumbent monopolists and potential entrants. Bell Labs was a famous source of *invention*, but AT&T was a ponderous and reluctant *innovator*—that is, implementer of new technology. The framework of regulation and the principles of administrative law gave incumbent producers great leverage in preventing entry by competitors. This, in turn, reduced the incumbent's own incentive to innovate.

Third, there is no body of learning or experience from other contexts suggesting that these failures might be remedied significantly by "better" regulatory practices. The long run interests of consumers arguably are better served by unregulated (and therefore hopefully shorter-lived) monopoly than by regulated (and therefore likely semi-permanent) monopoly. In Internet access, fortunately, there is no incumbent monopoly and every chance that the extent of competition will increase—if the regulators act in consumers' rather than in incumbent suppliers' interest.

With the possible exception of the platonic isolation approach of the original, never-implemented 1982 Justice Department/AT&T settlement agreement, no approach to controlling anticompetitive behavior by vertically integrated, regulated monopolists in the communications industry or in transportation has been successful, and most have injured consumers' interests. If consumers really did face the imminent prospect of last-mile monopoly and anticompetitive access discrimination in broadband services, the sad lesson of history is that the "net neutrality" remedy is a cure far worse than the still hypothetical disease.

Supplementary Testimony

I would like to comment on two points mentioned by Professor Wu. The first is Professor Wu's assertion that the question of Internet regulation was "too important" to be left to economists or economics alone. The second point is that, even if there is no "economic" evidence justifying Internet regulation today, there remains a need to regulate in order to preserve freedom of expression and competition in the marketplace of ideas.

Professor Wu's testimony reveals a misunderstanding of the role of economics in policy analysis. Economics is a collection of tools and methods useful in approaching any policy goal, not just those conventionally labelled "economic." Economics is focused on the allocation of scarce resources among competing objectives.

Economic policy analysis is a well-established branch of economics concerned with the well-being of humans. Economic welfare refers not merely to income or wealth as measured in dollars but to all aspects of human well-being as judged by individuals themselves. Thus, well-being includes anything and everything that people value, including freedom of expression and other political rights, environmental amenities, health, education, aesthetic goods, procedural fairness, social justice and so on. Many of these things are difficult to measure, and it is true that dollar income is often used as a rough proxy for well-being. In recent years, however, economists and other social scientists have become increasingly confident in estimating consumers' willingness-to-pay for non-market goods and also increasingly willing to rely on happiness surveys as measures of well-being.

Given limited resources, not everything that contributes to human well-being can be provided in sufficient measure to make everyone content. Trade-offs are inevitable, and understanding how to create the most well-being from limited resources is the essence of economic science. An economist is no less concerned with freedom of speech than with guns or butter. The extent of that concern is measured by the degree to which people in the aggregate are willing to trade off freedom of speech (or any other given value) against guns, butter, or other sources of happiness, along with analogous trade-offs in production.

Economists do not decide how much values such as freedom are worth. It is up to individual citizens to make those decisions, and also to decide what it is that increases their own well-being. Just as "we the people" are in principle the ultimate source of political power in our republic, economists take "we the people" to be the ultimate judges of their own well-being and sovereign over the economizing choices by which they exercise the "inalienable right" to pursue happiness.

Professor Wu's second point concerns competition in the marketplace of ideas, a notion that is at least as old as John Milton's famous *Areopagitica* (1644), a petition to the Long Parliament calling for freedom of the press. The claim is that "truth will emerge victorious" in a contest of ideas. If so, that is an additional reason—beyond the usual benefits of economic competition—to apply antitrust enforcement to the Internet. Clearly competition among ideas is not a reason to impose federal regulation on the Internet. The Founders of the American Republic, having experienced censorship of the press by royal governors, drafted the press and speech clauses of the First Amendment precisely to forestall federal regulation of the media. Our experience with federal regulation of radio and broadcast television over many decades and even today has resulted in censorship and restriction of freedom of the press, both in economic media markets and in the marketplace of ideas. Regulation has seldom in American history been a friend to competition. If we want to preserve a free and open Internet, regulation should be our last not our first resort.

Appended Online Materials

"Antitrust and Vertical Integration in 'New Economy' Industries with Application to Broadband Access," *Review of Industrial Organization* 38:4 363-386, 2011. DOI: 10.1007/s11151-011-9291-y

"Antecedents to Net Neutrality," *Regulation,* Fall 2007
http://www.cato.org/pubs/regulation/regv30n3/v30n3-3.pdf

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http://www.cato.org/pubs/regulation/regv27n2/v27n2-2.pdf

Could private control of access and standards lead to a balkanization of the Internet?

Assigning Broadband Rights

BY BRUCE M. OWEN
Stanford University

SOME INTERNET SERVICE PROVIDERS (ISPs) and portals like Yahoo! and Earthlink are concerned that cable television and telephone companies that now provide residential high-speed Internet access may branch out into the provision of content or enter into exclusive deals for content. Their fear is that this might result in current ISPs and content providers being cut off from access to existing and new customers.

Meanwhile, some legal scholars have expressed concern that the provision or control of content by local broadband providers will create incentives for them to adopt proprietary technical standards that would, even if inadvertently, exclude certain kinds of content and information sources. They worry that this would undermine the very incentive and opportunity for innovation that led to the creation and growth of the Internet.

Those concerns have led to various policy proposals. For example, cable television companies providing broadband Internet access might be required either to stay out of the content business or to accept transmission requests from all ISPs without discrimination. My Stanford colleague Larry Lessig's "net neutrality" proposal, although not well-defined, would seek to preserve what he sees as an existing "commons" in which Internet technology and standards are neutral among service providers, users, and content.

Solutions to complex policy debates like these must incorporate ideas from economics, law, and technology. One way to integrate and focus those approaches is by using the idea of property rights. In the present case, we can think of the right to control access to a local broadband system or the right to determine the technical standards that describe which transmissions will or will not be processed for local distribution, as property rights. Such rights can then be assigned to someone, or to some group, or to no one. We then ask which of those assignments produces the greatest net economic benefit for society, and how that assignment might be accomplished.

The policy issue of assigning rights of access to local broadband facilities is no mere academic exercise, partly because of the inconsistencies, noted above, in how technologies and providers are treated. Furthermore, various commercial interests with a stake in the debate have invested in advocacy by lobbyists and economists. The issue also remains alive because of academic support for a collective approach in which no facilities investor would control access.

PROPERTY RIGHTS AS COMMODITIES

Economics students learn about the Coase Theorem. What they remember, usually, is Nobel laureate Ronald Coase's argument that property rights will end up in the hands of the most efficient owners or users if such rights are clearly defined and can be traded freely and cheaply.

The Coase Theorem is an elegant extension of the concept of competitive markets and the power of the "invisible hand." Indeed, the idea is not limited to property rights, but extends to any legal entitlement. The key insight is that legal entitlements are, for some purposes, best understood as economic goods to be bought and sold in the market. Just as competitive markets can allocate other scarce resources efficiently, they can do so with rights.

The Coase Theorem has two policy implications. The point that people tend to remember is that laissez faire policies generally advance consumer welfare. The other implication, less often remembered, is that when transactions are not cheap and

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easy, it is important to assign property rights as nearly as possible to their most efficient users. Otherwise, unless the hard-to-transfer rights happen to land naturally in the hands of efficient users, opportunities for welfare gains will be lost. The recognition and initial assignment of property and other legal rights are, of course, roles for the state.

Determining who are the most efficient holders of a given property right is not easy, which is why it is a relief to let the market work out the answer whenever possible. But when transaction costs are high, the task cannot responsibly be avoided. A thorough analysis of the costs and benefits of various assignments is required, and both static (resource allocation) and dynamic (investment and innovation) issues must be addressed.

ACCESS The present example of this problem arises in the case of access to facilities used for broadband transmission of digital information, including Internet access, to and from consumers. Control of such access could be assigned to those who invested in the hardware (e.g., telephone companies or cable operators) or reassigned to others such as users or organizations of providers, or to no one at all as in a "commons."

The issue is not hypothetical. The facilities used by cable operators to provide digital video services already are subject to laws that reassign certain access rights from cable operators to broadcasters and others. This property rights reassignment was upheld by the Supreme Court in the 1994 *Turner* case that found TV broadcasters have the statutory right to send their signals over local cable systems without charge. Similar rights reassignments affect digital video services provided by telephone companies. Although the distinction between video and other digital services is artificial, access rights policies for "non-video" services such as Internet access are still being resolved. The Federal Communications Commission, for example, has, at least until recently, declined to permit telephone companies to control access to digital facilities that provide an Internet access service called "DSL." Instead, the FCC has granted users

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a common carrier right of access to DSL. In contrast, the same FCC has so far declined to grant ISPs a right of access to cable systems. The Federal Trade Commission did create, with FCC approval, such a right with respect to Time Warner cable systems when Time Warner was acquired by America Online. Lobbying on those issues is ongoing in Washington.

TRAGIC COMMONS One of the principles of efficient allocation of scarce resources through markets is that every scarce resource must be owned by someone. If this principle is violated, a "tragedy of the commons" results, in which the resource is ill-managed and over-used. Ocean fisheries are often used as an example. No one owns the fish until they are caught. Therefore, no one has an incentive to ensure there is a sustainable catch. A true commons is a Hobbesian nightmare.

Very often, however, resources in a commons are not really owned by no one, as the term implies, but by some collective or corporate body. The common grazing land in English villages, for example, would have been defended against use by non-residents; its use by residents was not anarchic. Any "tragedies" in such cases have to do not with property rights but with organizational, political, or management failures.

Lessig and other advocates of a "commons" as a solution to broadband Internet and other policy issues probably have in mind not anarchy but collective control. Indeed, the interconnection of electronic networks requires that someone set standards, and from the beginning that has been the case with the Internet. In this sense, the Internet today is not a commons but a collective, managed by committees, "open" to all who comply with its standards, and closed to all who do not. An irony of Lessig's position is that the Internet protocols, like any standards however "open," do exclude. They exclude users and services that might exist but do not, because the present standards prevent their existence.

DOES IT MATTER?

The balance of this article is devoted to analysis of the costs and benefits of alternative rights assignments in the cases of, first, access to broadband facilities, and second, the right to define and use technical standards that establish interconnection and transmission possibilities. However, in the spirit of Coase, we must first ask whether it matters what the government does. If any rights assigned or reassigned by the government could subsequently be traded without difficulty, the market will take care of the efficiency analysis.

Unfortunately, it is clear immediately that a market reassignment cannot be relied upon in the case of rights of broadband access or standard-setting. True, if access rights were granted initially to facilities investors, they could easily sell the rights to, say, content providers if the potential revenues from such sales exceeded the profit from vertical integration. But the reverse is not true. An initial assignment of access rights to "content providers" or any other open group generally means that it would be impossible for facilities investors to purchase such rights in the market, for two reasons: First, there is no way to identify all the owners of the rights, because new ones can declare themselves at will. Second, there is an incentive for false claimants to come forward. Every letter-to-the-editor writer and every college film student, for example, is a content provider.

> If content providers are not the most efficient holders of access rights, then government should not assign them those rights and rely on Coase to sort things out.

Unless content providers are indeed the most efficient holders of access rights, it would be an error—potentially grave and costly—for the government to assign access rights to them and rely on the Coase Theorem to sort things out. This point is important because the political stakes in the policy debate may be driven chiefly by the greed of the interest groups for economic rents rather than their concern for efficiency. Policymakers ought not to have the impression that they can safely ignore efficiency. At least in this case, the overall size of the pie available to be divided by the politicians among the interest groups will be affected by their assignment decisions.

REASONS FOR REASSIGNMENT OF RIGHTS

The "natural" or default initial assignment of rights to control the use of a commercial facility is with the person who invested in its creation. Otherwise, the facility is unlikely to be constructed. Any other (involuntary) assignment requires state intervention, which obviously is both costly and susceptible to error. Nevertheless, as described above, there may be reason to disturb the "natural" assignment if market transfers to more efficient holders are difficult and expensive. (Note that we ignore the political or legal legitimacy of disturbing the initial pattern of rights in what might be called a state of nature. These are compensation-for-takings or distribution-of-wealth issues rather than efficiency concerns.)

One obvious reason for reassignment is market power. A monopolist may increase prices and profits by restricting access to its facility. Public utility and railroad regulators classically responded to such problems by transferring the right of access to users and placing a ceiling on the price charged for service. If regulators do their work well, this may increase consumer welfare while retaining a sufficient incentive for the monopolist to maintain and expand its investment.

Regulatory interventions of this kind carry serious risks.

One risk is that the policy intervention simply is mistaken. Another is that, even if the policy is not mistaken, the potential cost of being subject to such mistakes will unduly stifle new investment by anyone with dreams of vast commercial success. Such dreams may be common among risk-taking entrepreneurs. Still another risk is distorted incentives. Regulated monopolists, of course, seek to escape their regulatory constraints. One escape strategy is to integrate vertically into an unregulated, related business that then receives preferential treatment from the monopoly facility. That was the problem that led to the dissolution of the old Bell System in 1983 — a major property rights reassignment.

A second reason for favoring reassignment of initial property rights is spillover effects, or "externalities." The full marginal costs and benefits of facility operation may not fall naturally on the investor. For example, there may be pollution problems. Or, there may be benefits from the facility for which the investor is unable for technical reasons to identify or charge beneficiaries. In those cases, the facility investor may invest either too much or too little. Reassignment of some initial rights to or from those who are affected by the facility may "internalize" the external effects of operation. Efficient investment results from better alignment of private incentives with social outcomes. Where that is not feasible, the rights in question may have to be reallocated to the state at some level, or taxed or subsidized.

A third reason for intervention to reassign initial property rights may be that leaving those rights where they fall can lead to technical decisions that inadvertently discourage innovation and investment by others. While this really is a species of externality, it is an important one in the broadband "commons" debate.

A facility investor makes technical or engineering decisions so as to maximize its profits. It would be difficult for the investor to assess and charge for the benefits created by its choice of a set of standards especially conducive to experimentation and invention or to investment in and use of others' facilities. Hence, the facility investor may have too little incentive to take account of the social benefits or costs. Transfer of the right to set technical standards, such as interconnection protocols, to user groups or industry-wide collectives may help solve such problems. In some cases, those transfers may not take place voluntarily. In practice, when it comes to the Internet, facilities investors act as if they had transferred standard-setting rights to industry associations.

Those three conceptual rationales for reassigning rights away from facilities investors each calls for a policy analysis that is partly technical and partly economic. The information used in the analyses will be imperfect, particularly regarding future events. It seems sensible to insist, in view of the likely margin of error, that the expected net benefits of intervention be quite large. Solutions involving permanent government involvement are often inflexible and difficult to change, even when a policy turns out to be based on erroneous assumptions. In contrast, bad market outcomes can change spontaneously without recourse to due process or political consensus.

BROADBAND ACCESS RIGHTS

Should rights of access to local broadband facilities be reassigned from investors and, if so, to whom: users, ISPs and content providers, a collective, or no one? As noted above, a prominent reason for considering such a policy would be to eliminate a barrier that prevented the voluntary transfer of such rights in response to a differentially higher valuation by someone other than the initial investor. No such barrier appears to exist. Indeed, access to broadband facilities is now routinely offered for sale and broadband facilities investors adhere, not surprisingly, to the prevailing technical standards that permit their transmission services to be useful for transmission.

MONOPOLY Market power in local distribution is a more serious matter. Local telephone companies have long enjoyed a monopoly, and cable television systems have also been viewed by the FCC as monopolists of multi-channel video services. This era, however, is ending. Local wireline telephone service is increasingly competitive as a result of wireless telephony. Internet telephony appears poised to further increase competition by making digital cable facilities fully substitutable for local telephone loops and by undermining the anticompetitive regulatory system of cross-subsidies among telephone services. Direct broadcast satellites now compete with cable systems in providing multi-channel video distribution. Thus, the traditional local monopolies in telephone and video service are disappearing.

In local broadband Internet access, there never was a monopoly. Cable systems compete now with telephone companies, and both face competition to a much lesser but increasing extent from wireless and satellite providers.

Even if competition in local broadband service were not present, this business is too new (about five years old, with less than a quarter of U.S. households signed up, although service is available to about three-quarters) to meet the usual strict standard for reassignment of access rights. For example, in antitrust law the so-called "essential facilities doctrine" imposes an obligation to provide access (to competitors) only as a last resort, in the absence of reasonable alternatives, and after the incumbent monopolist has engaged in a sustained pattern of anticompetitive abuses and exclusions. Neither local cable systems nor telephone companies have met this test in their digital broadband offerings, whatever the case may be in their older services.

There is a tradeoff involved in making an assessment of this sort. On one side there are the potential costs to consumers from a monopolist's incentive and opportunity to exclude or raise the costs of its competitors, or to stifle competitive innovation. On the other side is the harm to consumers from creating a disincentive for a monopolist to invest in expanding or maintaining its own facilities. The investment disincentive arises from restricting the monopolist's ability to receive part or all of the benefits of its investments. This disincentive can extend not only to a firm that has acquired a monopoly already, but also to any firm that might acquire a monopoly if it competes more vigorously. Clearly, at the very least, one should make sure that a firm from whom certain access rights are to be taken really is an entrenched monopolist. If it is not, then there probably are not going to be any consumer benefits from the reassignment of access rights, and thus nothing to weigh against the costs of impaired investment incentives.

Finally, a decision to separate access rights from investment and operation carries with it the necessity to engage in regulation. The (hypothetical) monopolist will still wish to use whatever means are at its disposal to maximize its profits, reducing the user value of access rights. Courts or public utility regulators must seek to limit those efforts or the whole exercise may be pointless. Unfortunately, regulatory intervention can introduce other costly distortions. Effective regulation of monopolists is harder than herding cats. Policymakers should try very hard to seek competitive solutions before resorting to structural remedies, especially those that require continuing regulation.

> Effective regulation of monopolists is harder than herding cats. Policymakers should seek competitive solutions before resorting to structural remedies.

Overall, local broadband access meets none of the criteria for state intervention to transfer rights away from facilities investors involuntarily. We turn next to the question of standards.

THE RIGHT TO SET AND USE STANDARDS

Should local broadband facilities investors be able to control the technical standards according to which they will accept and deliver transmissions, or should the right to specify those standards be reassigned to others? This question is much more difficult than the access question just discussed. Economists lack "invisible-hand theorems" when it comes to the decentralized adoption of standards.

Standards are peculiar. They have features that make them like non-rivalrous consumption goods, so that prices should not be used to exclude marginal users. Standards may be subject to network effects, becoming more useful as more users adhere to them. Standards may contribute to inefficient monopolization, and yet they may be under-produced in competitive markets. Based on economic research to date, it appears that competitive, decentralized markets may sometimes adopt inefficient standards, or no standards at all, as may a monopolist or a government agency or an industry committee — although the reasons for the error may differ in each case.

Standards for transmission on the Internet — the descriptions of the various Internet and Web communication protocols with familiar acronyms like FTP, HTTP, SSL, SMTP and so on — were set initially by the United States Department of Defense. The DOD invented DARPAnet, the ancestor of the Internet, to provide convenient electronic communication between government officials and defense contractors. The scientists hired to construct DARPAnet inadvertently created a system that also made a very useful platform for civilian communication. As communication technologies have evolved, so have the protocols. The standards are now defined by committees. This happened first under the aegis of various civilian government agencies and, after the Internet was privatized, by industry associations such as ICANN.

The Internet protocols are not proprietary — they are not secret or patented, and anyone can use them free of charge. Nevertheless, the protocols are not established today by a "commons." They are established by industry committees representing a variety of user and supplier economic interests, but with a common interest in promoting the growth of Internet use.

The distinction between control of the standards and use of the standards is important. Even entities that do not participate in setting a standard nonetheless benefit from its use because those who control the standard voluntarily assign use rights to everyone. Perhaps they do so out of goodwill. But it is no accident that increased use of the Internet benefits the equipment and service suppliers and corporate or agency users whose employees staff the standard-setting committees.

So far, there does not seem to be any obvious flaw in this picture, except for the exclusion of users and uses that do not or cannot utilize the established standards. It is a system that obviously has supported the explosive growth of the Internet and the many innovative services that now rely in part on Internet transmission of data. No one knows what would have happened but for the decisions made by the government early in the game or the collective more recently; the outcome of some other set of decisions could have been either better or worse than the Internet that we actually observe.

PROPIETARY STANDARDS Nevertheless, Professor Lessig and many others have argued that there is a danger in permitting local broadband service companies to provide unregulated high-speed residential Internet services. The danger they see is that those companies will choose not to adhere to the established standards, but will instead adopt new proprietary standards.

In property rights terms, the danger that Lessig sees is that both the right to create and the right to use certain (as yet undefined) future communication protocols will be owned by facilities investors rather than industry committees and users, respectively. To avert that danger, the proposed remedy is to forbid broadband providers to establish their own standards, requiring them instead to adhere to some specified set of outside standards. This would, according to Lessig, protect the standards "commons" that has served so well as a platform for innovation and investment in new digital services.

The policy analysis starts with the Coase Question: Does it matter? If rights to set and use Internet standards are left to lie where they fall (on facilities investors), can investors easily transfer those rights to others, such as users or industry committees? Answer: Yes, it is the norm today. How about the reverse: If standard-setting and use rights were assigned initially to open industry committees and to users, respectively, could they easily be transferred back to facilities investors? Answer: No, for the same reasons as with access rights — with whom does a facilities investor negotiate in an open collective? Therefore, as with access, it does matter to whom rights are assigned initially.

The next step, given this answer, is to ask who the most efficient holder of those rights is. In practice, given the facts, we can ask a narrower question: If the rights are left to lie where they fall, which as we know is with a holder who can easily transfer them to others if that is profitable, is there reason to believe that the incentives provided by private profit-seeking differ from socially optimal incentives? Is there market power, for example, or some externality that suggests the necessity for an involuntary transfer?

Clearly, market power on the scale required to justify property rights transfers is not an issue. As explained above, cable companies do not have a monopoly of local broadband facilities; neither do DSL providers such as telephone companies, and more competitors using wireless transmission methods probably are on the way. On the real-world spectrum from iron-clad monopolists to atomistic competitors, local broadband providers are too competitive to justify regulation. Therefore, it is reasonable to assume that the principal reason why such an investor would wish to establish its own standards, or not to accept all prevailing industry standards, would be a desire to attract more customers by offering a service that was in some way improved — in other words, to compete. After all, proprietary standards drive off at least some users, putting the provider at a competitive disadvantage. Indeed, the advantage to any supplier of adhering to established standards in a network setting usually is overwhelming. One would expect it to be abandoned only if necessary in order to offer some innovation that would provide huge benefits to the remaining users. Why would we want to discourage such innovation?

NETWORK EFFECTS Leaving market power behind us, is there some other economic pathology justifying an involuntary transfer of standard-setting or use rights? Two possibilities are apparent.

First, standard-setting is potentially subject to network effects, as noted above. That is, the value of a standard to a given user depends in part on how many other users have adopted the standard or a compatible one. For example, life might be better for everyone if all humans agreed to speak one common language. Because every culture or country adopts its own language, the world is in some ways less efficient than if there were a central language-setting organization to which language-setting rights had been reassigned. On the other hand, a monolithic language would have costs, such as the potential loss of all the creative works, specialized ideas, and social constructions that might not exist but for the variety of human languages. Whether humankind is better off without a single tongue is an open question.

While ultimately each case is a very complex empirical question, there are good reasons to doubt that it is often correct to reassign standard-setting rights away from competitive facilities investors on account of network effects. The very factors that create those effects also create powerful pressures for decentralized adoption of common standards. It makes little sense, for example, to produce automobiles that do not run on widely available standard fuels unless the automobiles have such overwhelming advantages to consumers in some other dimension as to make them worth the trouble. But we should want to preserve, for the benefit of consumers, providers' option to reach for innovations so advantageous as to justify the inconvenience of a proprietary standard.

The second possible justification for reassigning rights pertains to standards-use rights. Standards are, from a user perspective, non-rivalrous goods; they are not scarce. The cost of producing a standard is not affected by how many people use it. Hence, it is inefficient to exclude any users by, for example, charging a fee for using the standard. The problem is not with those who pay the fee but with those who do not, and who thereby are excluded from using something that costs nothing to supply to an additional user. Of course, suppliers of standards have little incentive to charge for use when users have alternatives, so that competition will drive prices to the correct level — zero, or at least to price schedules in which the marginal price is zero.

In sum, we cannot rule out the possibility, a priori, that involuntary reassignment of use rights with respect to interconnection standards might be justified on economic welfare grounds in some situations. But there certainly is no general argument for reassignment, and there appears to be no case at all when it comes to broadband access to the Internet because those rights are now free to all, and vertical integration has thus far produced no threat to this pattern.

CONCLUSION

Property rights assignments, like the allocation of other scarce resources, can be evaluated with the tools of economic analysis. Fortunately for everyone, letting property rights stick where they fall initially, combined with subsequent free trade in them, will usually promote social welfare. But that is not always the case. Sometimes, to overcome a market failure, state intervention is required to reassign property rights to more efficient holders. When considering such intervention, it is important to remember how common is human error and how difficult it is to correct such error once enshrined in political institutions. Accordingly, the burden of proof required for intervention should be high.

If local broadband Internet services were supplied by an entrenched monopolist, and if that monopolist sought to integrate vertically into Internet content and standards creation or to restrict use of its proprietary standards in order to extend or perfect its market power, there would be a case for reassignment of access (and/or standard-setting) rights to users or others. But those conditions are not yet met, so such intervention is not justified. R

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Net Neutrality and Title II of the Communications Act

By Bruce M. Owen

Summary

President Obama recently urged the Federal Communications Commission to impose common carrier regulation on the Internet access industry. The industry has been the focus of rapid technological change characterized by movement from analog to digital transmissions, from fixed to mobile service and from lower to higher speeds or bandwidths. One consequence has been to increase the number of alternative providers available to most households. While it is always possible that various threats to competition and economic efficiency may arise down the road, there is little current evidence to support a call for Title II regulation. Indeed, such regulation in the past has caused more consumer harm than good, partly by enhancing industry influence on politicians and regulators, and partly by distorting prices and discouraging investment and innovation.

President Obama, who has long supported "net neutrality," recently made headlines by urging the Federal Communications Commission (FCC) to impose Title II (common carrier) regulation on the industry that supplies Internet access services to homes and businesses.[1] What does this mean, and what are the economic policy issues that the President's message addresses? Chances are that the new Republican majorities in both Houses of Congress will oppose

1 http://www.whitehouse.gov/net-neutrality

continued on inside...

About The Author

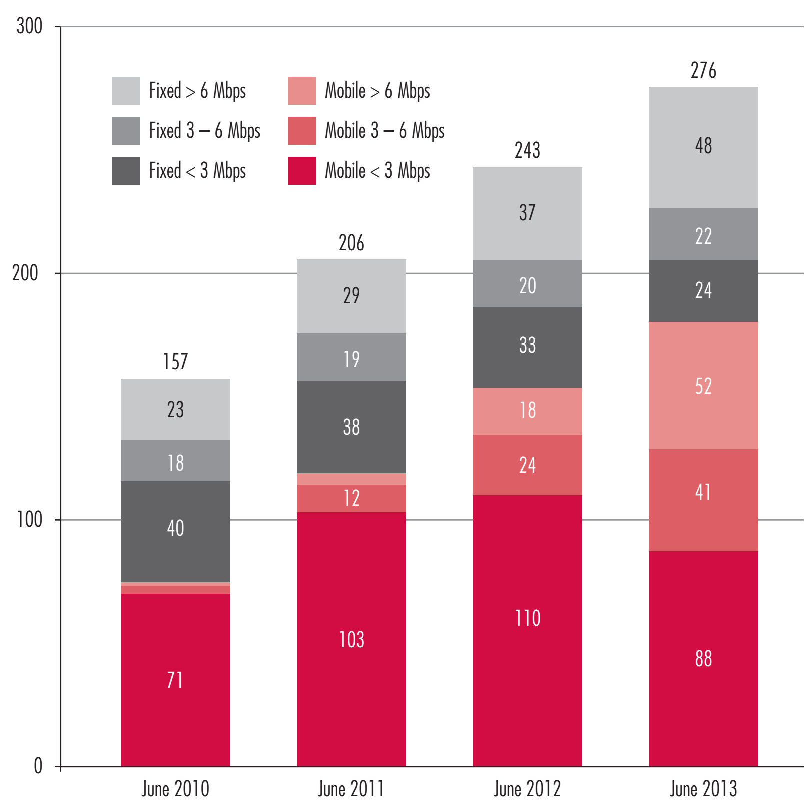
Bruce M. Owen is the Doyle Professor of Public Policy (Emeritus) at Stanford and a SIEPR Senior Fellow. He has studied and written about telecommunications and mass media policies since 1966. He was invited to testify on net neutrality before the House Judiciary Committee in June 2014. This policy brief is based in part on that testimony.

the President's position, putting the FCC—an "independent [of the president] regulatory agency"—in the middle of a political struggle. How will this affect the outcome of the FCC's deliberations? This policy brief provides background on the economic policy issues raised by calls for net neutrality.

Title II of the Communications Act of 1934 (as amended) was designed to permit federal regulation of the old Bell System monopoly of long distance telephone service. It still gives the FCC the power to regulate prices and terms of service offered by telecommunication "carriers" that the Commission has decided to classify within the Title II category, although it does not compel the Commission to do so. Title II also authorizes the FCC to require carriers to offer service to all comers at published rates and to require carriers to interconnect with each other. Interconnection rates and terms are also subject to FCC regulation under Title II. Title II regulation was modeled on railroad and trucking regulations, which have since been repealed because of their anti-competitive effects. Such deregulation (which also encompassed airlines and various financial institutions) generally has led to lower prices and increased output. The major exception is risk-taking in financial markets, where deregulation clearly was unwise.

Some advocates of net neutrality argue that in the absence of FCC regulation large Internet access providers such as Comcast, Verizon, and (the new) AT&T will use market power to favor certain content suppliers, especially those in which they have an ownership interest. The concern is that favored content suppliers will pay lower rates and/or receive preferential allocations of bandwidth (speed) compared to smaller or less favored users. If so, this would disadvantage new entrants who wish to compete with larger users. For example, Netflix—a leading supplier of popular online video content

Figure 1
Fixed and Mobile Internet Connections by Download Speed, 2010-2013 (in millions)



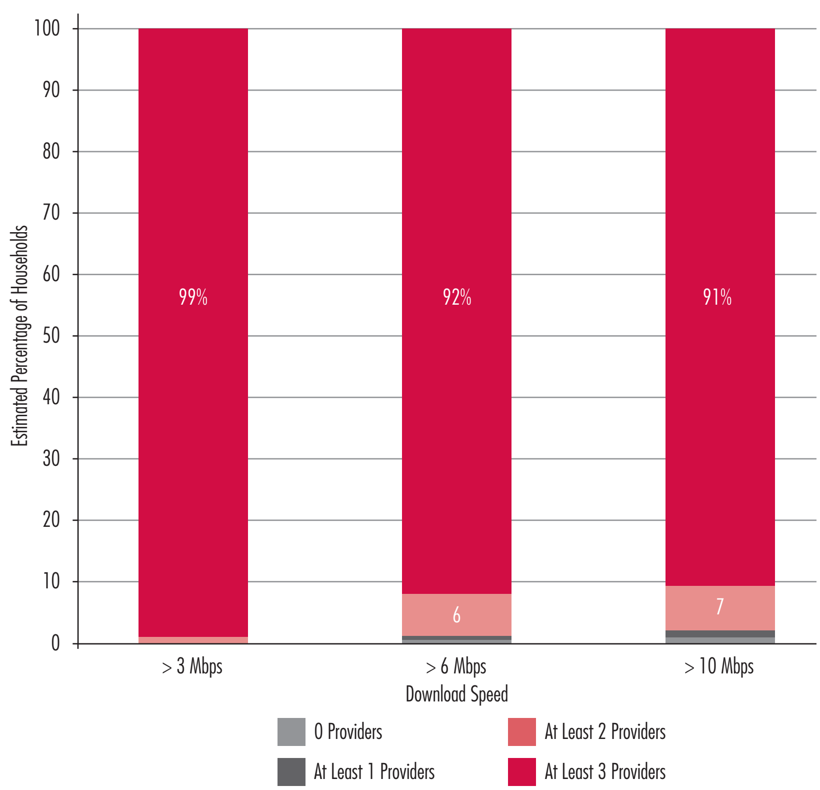
Source: Federal Communications Commission, "Internet Access Services: Status as of June 30, 2013," Industry Analysis and Technology Division, Wireline Competition Bureau, June 2014. https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.pdf directly to viewers—entered a deal with Comcast that removed various technical obstacles to rapid distribution of its signals. The result reduced latency for Netflix video streams and improved the quality of Netflix service to viewers. Presumably Netflix compensated Comcast for these concessions.

Net neutrality proponents argue that everyone should get the same service quality, regardless of the quantity and characteristics of their transmissions. Heavy users should pay the same monthly rates as light users and every user should receive the same quality of service. Put simply, many net neutrality proponents apparently propose that it should be unlawful to pay extra for faster or heavier transmissions, even if higher service quality costs more to provide. Of course, Internet service providers will not offer costly service improvements to anyone if they cannot recover the costs. At least on the surface, it seems that net neutrality would condemn all users to the same not terrific and slow-to-improve service.

The history of regulation provides evidence of similar calls for regulation and of the resulting impacts on consumers. Theodore Vail, an early president of the old Bell System, is said to have leveraged Bell's long distance monopoly to take over local telephone service. Multiple competing telephone companies offered local service in many cities in the late nineteenth century. Often they did not interconnect with each other. Vail hastened the trend toward consolidation of local exchanges by acquiring local telephone companies in each city and denying long distance interconnection to any competing exchanges. By the time of the 1934 Communications Act and other, earlier, federal interventions, Vail had already succeeded in monopolizing local as well as long distance service in most U.S. metropolitan areas. This pattern offers apparent support for policies akin to net neutrality.

Figure 2

Percent of Households Located in Census Tracts Where Providers Report Residential Fixed Connections or Mobile Availability at Various Download Speeds June 30, 2013



Source: Federal Communications Commission, "Internet Access Services: Status as of June 30, 2013," Industry Analysis and Technology Division, Wireline Competition Bureau, June 2014. https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.pdf

Other net neutrality proponents put the argument in terms of price discrimination. The earliest federal regulatory statute, enacted in 1887, provided for regulation of railroads. One of the complaints that led to the Act to Regulate Commerce was the railroads' practice of offering lower prices per ton-mile to large shippers located in urban centers than to rural shippers. At the time, rural shippers were farmers who generally had no alternative to using the nearest railroad. Urban manufacturers in contrast often had a choice of several rail routes to other urban destinations. Competition among railroads led to lower rates for urban shippers than for farmers, who faced monopoly railroads. Agrarian lobbies and progressive reformers favored railroad regulation in order to limit such demand-elasticity-based price discrimination. Although the 1887 Act did not deal with railroad price discrimination, a later amendment gave the Interstate Commerce Commission (ICC) the power to limit "unreasonable" discrimination. Nevertheless, both railroads and interstate trucking companies under ICC jurisdiction eventually developed elaborate elasticity-based discriminatory rates, with the ICC's blessing. Cost-based price differentials were also permitted, although the allocation of fixed and common costs has always been contentious.

Regulation of the Bell System under Title II was almost unique in the federal regulatory arena because, unlike banks, trucks, railroads, stock exchanges, and airlines, Bell really was a monopoly. Indeed, the FCC believed that monopoly in this industry was useful and necessary, and for decades protected the Bell System from any attempt by others to enter the business. Most other federal regulators dealt with industries that were at least partially competitive. In general, these regulators also tended to restrict competition and entry, often on the basis that "too many" competitors would impair the ability of incumbents to provide service to the public. The experience of deflation during the Great Depression—blamed on excessive competition—reinforced these attitudes.

By the end of the 20th Century a broad consensus developed among economists that price regulation, even of monopolists, and certainly of industries with multiple competing suppliers, is unlikely in practice to improve consumer welfare.[2] Maintaining efficient prices and providing incentives for progressive management of regulated firms rarely works. This is partly because the political economy of regulatory interventions tends to favor producers, not consumers. Using Title II of the Communications Act to reach the goals of net neutrality (non-discrimination) requires price regulation of competing suppliers of Internet services.

The claim that Internet access service is offered by competing suppliers may sound surprising. Many people think of cable television companies, and perhaps telephone companies, as the only such providers, and two suppliers is not very many. (Of course, if the concern is with video services specifically, then satellite companies like DirecTV and DISH would also need to be counted as competitors.) But a focus on cable television companies as potential threats to Internet freedom is misplaced. The next generation of Internet access service has already arrived, in the form of broadband mobile providers.

2 See William J. Baumol, et al., "Economists' Statement on Net Neutrality," AEI-Brookings Joint Center for Regulatory Studies (2007), available at http://ssrn.com/abstract=976889

continued on flap…

The FCC surveyed Internet access services in June 2013 and issued a report one year later. Tables 1 and 2 highlight some of the Commission's findings. According to the Commission, of 276 million U.S. Internet connections, 52 million were mobile connections with download speeds greater than 6 Mbps, compared to only 48 million traditional fixed connections offering such speeds. Fixed connections use wires or coaxial cables; mobile connection use the same frequencies set aside for cell phones. In other words, mobile devices such as smart phones and tablets provide many consumers with access to the Internet at speeds comparable to those offered by cable companies. Further, the trend is for video content viewers to "cut the cable" by turning to online video providers such as Netflix.

The situation today, as it is relevant to policies intended to guide future events, is not accurately captured by the picture of large cable TV companies dominating both local video and also local Internet access service. Even traditional TV and cable channels are available to the vast majority of households from at least three suppliers—one cable company and two satellite suppliers. But the movement to online video content and the development of broadband mobile service means that access to Internet content, including video, is available increasingly, at least in urban areas, from three or four additional suppliers, namely cell phone companies. To its credit, the FCC has been trying to support increased competition by reallocating spectrum from broadcast television to mobile services. An industry with this many competitors is likely to behave competitively, responding to consumer needs and investing in new technologies that improve and expand service. An industry with this many competitors is unlikely to have its performance improved by regulatory interventions of the types associated with Title II regulation.

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CONSUMER WELFARE AND TV PROGRAM REGULATION

Bruce M. Owen

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ABSTRACT

GETTING RID OF obsolete regulation of the broadcast and distribution of video programming is essential to the efficient operation of a market that has the potential to greatly increase the benefits to consumers. Services that increase video program distribution capacity have been delayed and suppressed for many years, and consumer benefits were lost as the Federal Communications Commission (FCC) pursued ill-defined and ephemeral "public interest" and "localism" objectives.

It is past time to stop extending interventions originally intended for old technology to a range of new competitive media. No longer is there any rational public policy basis for a government agency to dictate how much or what content the viewing public can see, any more than there ever has been for printed media. There is no market failure to which the current regulatory framework is responding and no longer any reason for FCC bureaucrats to decide how much of the spectrum should be used for each of many existing and future commercial services. Spectrum reform, along with the repeal of other broadcast programming restrictions contained in the proposed Scalise-DeMint Next Generation Television Marketplace Act, provide a roadmap for the necessary reform. With an adequate supply of tradable rights in spectrum, we will find out how much additional competition is possible among traditional wired and wireless, analog and digital, and fixed and mobile delivery services.

There are few alleyways of the administrative state more obscure or more littered with obstacles to efficient markets and improvements in consumer welfare than the interventions regulating ownership and licensing of TV stations and programs. What distinguishes TV programs from other mass media content, including both traditional print and new online media, is the extreme eagerness of Washington to engage in efforts to prevent markets from working freely, often in response to interest group pressures and opportunities for political advantage and with almost complete indifference to the welfare of consumers.

This paper first briefly describes some unusual economic features of media content and the characteristics of free markets in media content and then lists some of the legacy interventions that prevent video markets from operating to the advantage of consumers. Lastly, it considers what reforms will be required to eliminate the distortions currently impairing these markets.

The occasion for this discussion is the Scalise-DeMint Next Generation Television Marketplace Act, a bill recently introduced in both Houses of Congress to repeal numerous provisions of mass media regulatory law.[1] This bill would eliminate various distortions in video content markets caused primarily by two categories of interventions: copyright law and video program distribution restrictions. Scalise-DeMint deals with these directly. The bill would repeal compulsory licenses, must-carry rules, retransmission consent, and a variety of other mandates on regulated entities, including broadcast ownership rules that have become irrelevant in the Internet age. However, there are background distortions to deal with as well, chief among them the nationalization and allocation of spectrum by bureaucrats rather than markets. Spectrum auctions, while a step in the right direction, do not establish free markets in spectrum. Today, licensees can buy and sell licensed rights to use various parts of the spectrum, but they cannot decide what use to make of a given spectrum assignment. That needs to change.

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1. *Next Generation Television Marketplace Act of 2011*, S. 2008, 112th Cong., 1st sess.

MARKETS IN VIDEO CONTENT

Video programming, like music and other recorded performances distributed on a variety of media, can be easy to steal. It should be obvious that few producers will have much interest in making attractive video or audio products that are easy to steal and can be stolen with impunity. The prospect of earning a return on investment for video programs, at least on average, is what motivates commercial program production. Sadly, much programming distribution, particularly on the Internet, is pirated.[2] Private and collective efforts to detect or prevent theft of electronic video property have not been very successful, and this has led to avoidance of vulnerable distribution channels and other restrictions on supply that reduce consumer welfare.[3] This is a problem for both audio and video programming, which share the characteristic of being nonrivalrous goods.[4]

Free and efficient markets in video programs and spectrum require a role for government—to define and enforce tradable property rights. Depending on the costs and technologies of theft, government enforcement of property rights may be essential to the very existence of markets. Protection of property rights, long considered an essential role of government, is a necessary condition for promoting consumer welfare. Economic activities such as investment and work take place because of incentives. If the potential rewards (or costs) from such activity accrue to others, we will invest or work too little or too much. Efficiency requires that both the costs and the benefits of economic activity "belong" in the first instance to those who engage in the activity. This belonging is a right that is meaningless in the absence of defense by the state. (The alternative is self-help in defense of asset values, generally by resort to acts or threats of violence.[5]) Also essential for efficiency is that these rights be exclusive (that is immune from initial problems such as free riding

2. See Government Accountability Office, "Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods" (report, GAO-10-423, Washington, DC, April 2010), 3-5.

3. Ibid., 9–13.

4. A nonrivalrous good is one that can be consumed without reducing the available supply. Video programming does not degrade or disappear upon consumption, as candy bars or automobiles do. Instead, video programming remains available at zero marginal production cost for other potential consumers. Of course, sometimes there are nontrivial marginal costs of physical reproduction, packaging, and distribution, as there are with music CDs, DVDs, and all printed media. But for TV programs sent out over the air or distributed on other electronic media, marginal reproduction and distribution costs are close to zero.

5. Some libertarian thinkers dispute the necessity for a government role in the defense of private property rights. See, for example, Bruce L. Benson, *The Enterprise of Law: Justice without the State* (San Francisco: Pacific Research Institute, 1990); David Friedman, "Private Creation and Enforcement of Law: A Historical Case," *The Journal of Legal Studies* 8, no. 2 (1979): 399–415; David Friedman, "A Positive Account of Property Rights," *Social Philosophy & Policy* 11, no. 2 (1994); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1990); Murray N. Rothbard, *Conceived in Liberty* (Auburn, AL: Ludwig von Mises Institute, 1975); and Paul R. Milgrom et al., "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs," *Economics and Politics* 2, no. 1 (1990): 1–23.

and the tragedy of the commons) and alienable[6] and traded in competitive markets. These characteristics also require state action, such as enforceable contracts and antitrust law.

Competitive markets typically contribute most to economic welfare when prices reflect marginal costs. Clearly no one is going to spend millions of dollars making a TV show or movie without charging viewers anything to watch it, unless advertisers are willing to pay the freight. Markets for nonrivalrous goods tend to emphasize price discrimination. If a producer charges a uniform price to each viewer of a TV show, many viewers will not be willing to pay that price and will be excluded. That makes little sense from the producer's perspective because it would cost nothing to supply the TV show to those excluded viewers at a lower price. Any uniform price leaves money on the table. Producers would like to offer each viewer a price just low enough to sell the product to that consumer. This produces greater revenue and creates incentives for more production. Price discrimination in these and other circumstances can increase economic welfare. For this to work, viewers who purchase access at relatively low prices must be discouraged from arbitrage, that is, engaging in resale competition with the producer.

Competitive markets in nonrivalrous goods can also work by bundling or packaging products. TV programs can be sold, for example, as bundles in a monthly subscription. Consumers purchase access to the bundle and then can view each program at a zero marginal price. The monthly subscription can be viewed as an option to consume any or all of a large collection of TV shows at a zero price. If there are competing packagers or distributors producing substitutable bundles, the result can resemble the outcome of discriminatory pricing for each program. That is, the bundling approach and the discrimination approach are each capable of welfare-enhancing outcomes, although neither is likely to be perfect.[7] Bundling often reduces costs for the consumer by transferring assembly functions to a packager who can perform assembly more efficiently.

Advertising adds another dimension to this description of potentially efficient free markets in nonrivalrous TV programs and similar products and brings into the

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6. Richard A. Posner, *Economic Analysis of Law* (Boston: Little Brown, 2011), 39–111. As Posner points out (at 40, n. 1), property law has ancient roots.

7. There are numerous economic models of the effects of bundling and various definitions of what constitutes bundling. These models generally find that whether bundling is welfare-enhancing or not depends on various assumptions about cost and demand conditions. See, for examples, W. J. Adams and J. L. Yellen, "Commodity Bundling and the Burden of Monopoly," *Quarterly Journal of Economics* 90, no. 3 (1976): 475–98; Yannis Bakos and Erik Brynjolfsson, "Bundling Information Goods: Pricing, Profits and Efficiency," *Management and Science* 45, no. 12 (1999): 1613–30; Mark Armstrong, "A More General Theory of Commodity Bundling," MPRA Paper No. 37375, posted March 15, 2012, http://mpra.ub.uni-muenchen.de/37375/. The models supply no support for a presumption that bundling in the real world should be discouraged by policymakers. For an antitrust perspective, see *Brantley v. NBC Universal*, 9th Circuit Court of Appeals, slip opinion filed March 30, 2012, http://www.ca9.uscourts.gov/datastore/opinions/2012/03/30/09-56785.pdf.

discussion a variety of online nonvideo content and service providers. In general, media markets are two sided. Media firms purchase or produce, and then distribute, content to attract audiences. Audiences are valuable not only because they may be a direct source of revenue but also because their "eyeballs" can be sold to advertisers. The prices audiences pay (if any) are lower than they would otherwise be to increase the number of eyeballs that can be sold to advertisers. There is a tradeoff between the negative effect of commercial interruptions on audience size and viewer willingness to pay and advertiser willingness. Both extremes exist together in the market. Viewers pay relatively high prices for commercial-free, high-quality programming on networks such as HBO, while other networks combine advertising revenues with revenues from multichannel video programming distributors (MVPDs) who bundle programs into tiers and sell options to view individual programs at a zero incremental price. MVPDs include cable television operators, satellite television providers, local telephone companies, and others who buy or produce programming and then provide bundled services to individual TV households.

Markets for TV programs have many of the same characteristics as markets for printed content. Perhaps the best way to imagine how TV markets would work in the absence of government regulations is by analogy with older but much freer markets for print content. Periodical and book-publishing markets are highly competitive and robust and respond rapidly to changing consumer tastes and to technological change. Daily newspapers, now in rapid decline, are characterized by economies of scale in printing and distribution relative to the extent of local markets and, accordingly, have been less competitive. Still, no one has seriously suggested economic regulation of daily newspapers.

Of course, all print media today are beset by additional competition from online content and online distribution of traditional formats. Life in a competitive market can be tough for suppliers but highly rewarding for all but the most inflexible or nostalgic consumers. The decline of print media is the result of innovation by suppliers and free choices by consumers. Many of us sigh at the demise of the corner bookstore, while welcoming the greater convenience of portable access to virtually every book in print and many that are out of print. Traditionally, nothing of the sort was allowed to happen with regulated media such as television. Instead, regulation retards innovation, blocks entry by more efficient competitors and technologies, and transfers welfare from consumers to producers. A good example is the contrast between the rapid adoption of digital technology in computing and Internet-related industries and the very slow adoption of digital technology in television broadcasting—where FCC regulators and industry-wide committees, rather than entrepreneurial competitors, set the pace of change.

FEDERAL INTERVENTIONS IN TV MARKETS

Federal nationalization of the electromagnetic spectrum occurred in 1927. Since that time, the spectrum has been allotted by the FCC together with the Department of Commerce, which coordinates federal and state agency spectrum uses.[8] Whatever may have been the case in 1927, most economists agree that the spectrum can be allocated by private markets, provided that adequately defined property rights are first allocated to private owners by auction or other means.

In making spectrum allocation decisions, the FCC has been heavily influenced by industry interests, both directly and through congressional patrons of the broadcast and broader entertainment industries. For example, for decades the FCC made first radio and then TV licenses artificially scarce to protect the economic interests of broadcast networks and big-city stations.[9] The evidence for this is found in the extremely high prices at which broadcast licenses were bought and sold, reflecting the capitalization of scarcity rents.[10] This artificial scarcity of a crucial input to broadcasting resulted in massive losses of consumer welfare, both in programming that was never produced or viewed and (probably) in the costly construction of cable television—and later satellite television—facilities by the private sector to mitigate the continuing unmet consumer demand for video programming. The argument is that in a free market for spectrum, broadcasting would have been a more efficient way to satisfy the demand for advertiser-supported video programming than cable and satellite television, which require enormous investments in physical capital and ongoing maintenance. Proving such a counter-factual is notoriously difficult, and no one has quantified the welfare loss, but the construction of (probably) unnecessary cable and satellite facilities alone cost many tens of billions. The untapped consumer willingness to pay for additional video content, over many decades, doubtless was a far greater welfare loss.

This primal intervention—nationalization of the spectrum and allocation

8. Thomas W. Hazlett, "The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's 'Big Joke': An Essay on Airwave Allocation Policy," *Harvard Journal of Law & Technology* 14, no. 2 (2001): 348.

9. That regulators sought to promote broadcasting by restricting entry and reducing competition is the best explanation of regulatory policy choices during most of the history of the industry. See generally, Bruce M. Owen and Ronald Braeutigam, *The Regulation Game*, (Boston: Ballinger 1978); Bruce M. Owen, *Economics and Freedom of Expression*, Boston: Ballinger 1975. This explanation of the economic effects of broadcast regulation is not necessarily the only possible explanation. For example, regulators simply may have made, inadvertently, a long series of bad choices. A more general theory of broadcast regulation fits nicely into interest group models of "Type 2" political corruption. See Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—And A Plan To Stop It* (New York: Hachette 2011); Bruce M. Owen, "The Costs of Political Corruption in America," Stanford Institute for Economic Policy Research, Stanford, CA, Policy Brief, May 2012.

10. See Harvey J. Levin, *The Invisible Resource: Use and Regulation of the Radio Spectrum* (Washington, DC:, RFF Press, 1971); and Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge, MA: Harvard University Press, 1992), 15.

designed to create an artificial scarcity—led to ever-increasing intervention as outside suppliers attempted to circumvent the blockade, often with new technologies.[11] For example, when cable television systems began to compete with local TV stations in the 1960s by "importing" signals from distant cities, the FCC suddenly asserted jurisdiction over cable systems—despite the absence of statutory authorization—and froze distant-signal imports. This was done explicitly to protect broadcaster profits and in spite of the fact that viewers were thereby denied an increased supply of programming and diversity.[12] Nevertheless, the FCC's rhetorical defense was that its move would protect viewers' interest in diverse programming—particularly local programming.

The emphasis on local programming arose initially from the FCC's decision to accommodate as many members of Congress as possible with a TV station in each congressional district.[13] As it turned out, viewers preferred relatively expensive national network programs to cheaper local programs, and stations quickly learned to comply by affiliating with networks and broadcasting national network programming, especially in prime time. Most locally produced programs and programs about local issues attract relatively few viewers and consequently are confined to hours of the day and week when few households use television. Still, the FCC has never abandoned the localism fiction, which has long served as the principal rationale for FCC regulations protecting broadcasters from competition.

A series of measures beneficial to broadcasters followed in the wake of restrictions on distant-signal importation. Cable operators were forbidden to charge subscribers for individual programs in order not to "siphon" popular programs from broadcast to cable—in other words, to protect broadcasters from having to compete for popular programming. Cable operators, and later satellite TV operators, were required to carry all local stations at no charge (must-carry rules).[14] In other words,

11. The political economy of agency capture is the subject of numerous academic writings. For examples and reviews, see Ernesto Dal Bó, "Regulatory Capture: A Review," *Oxford Review of Economic Policy* 22, no. 2 (2006): 203–225; Jean-Jacques Laffont and Jean Tirole, "The Politics of Government Decision-Making: A Theory of Regulatory Capture," *Quarterly Journal of Economics* 106, no. 4 (1991): 1089–1127; Michael E. Levine and J. L. Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis," *Journal of Law Economics & Organization* 6 (1990): 176–98; and George Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21. The entry for "Regulatory Capture" in Wikipedia (http://en.wikipedia.org/wiki/Regulatory_capture) includes numerous examples.

12. See Owen and Wildman, *Video Economics*, 17–18. The "Carroll doctrine" was an FCC policy providing that a broadcast licensee can contest a grant of a competitive license by the FCC on grounds that the new licensee could cause economic injury to an incumbent. The standard was set in *Carroll Broadcasting Co. v. Federal Communications Commission*, 258 F.2d 440 (DC Cir., 1958). It was repealed by the FCC 30 years later in *Report and Order in MM Docket No. 87-68*, 3 FCC Rcd 638 (1988), clarified 4 FCC Rcd 2276 (1989).

13. Hazlett, "The Wireless Craze."

14. The FCC must-carry rules (first adopted by the Commission in 1972) were later made into law as part of the Cable Television Protection and Competition Act (1992) and ultimately approved by the Supreme Court (in the face of First Amendment challenges) in *Turner Broadcasting v. FCC* 520 U.S. 180 (1997).

broadcasters received for free a service that increased their audiences and profits by improving local reception quality; cable operators were forced by law to offer that service to broadcasters for free, only charging subscribers.

Broadcasters eventually ceased to rely on over-the-air signals to reach local audiences, because the vast majority of viewers no longer use antennas to receive local stations.[15] Nevertheless, the FCC has permitted broadcasters to retain their still-valuable but unneeded (for broadcasting) spectrum licenses, which do not permit other uses of the spectrum. That spectrum would be of great value to consumers if made available for mobile communications and other potential uses that we cannot now foresee. But broadcasters retain their dedicated spectrum allocations and the FCC continues to forbid repurposing the broadcast spectrum to other uses. The FCC substitutes its bureaucratic judgment for market forces in deciding which uses are best for all parts of the spectrum. In doing so, it relies on no information regarding private sector willingness to pay for alternative uses. It is therefore virtually certain that overall spectrum utilization is economically inefficient.

The FCC generally permits its licensees to buy and sell spectrum use rights (that is, licenses), subject to FCC review and approval. Thus, the feasibility of market transactions in spectrum rights is not in question. About all that is needed to create efficient markets in spectrum rights is to permit licensees to use their assignments for purposes other than the use originally designated, subject to noninterference with adjacent users. Providing adjacent spectrum users with a legal remedy for interference (trespass) would provide incentives to reallocate spectrum through market transactions.

Other inscrutable policies have unfolded with respect to property rights in video content, as Congress and the Supreme Court have defined new copyright regulations and definitions in response to changes in technology that threaten incumbent industry interests. Some of these copyright provisions are predicated upon, and thus tend to lock in, legacy FCC regulations. For example, when cable systems began to import TV signals from distant broadcast stations in the 1960s, program suppliers protested that their copyright interests were being infringed. Producers of TV programs generally sell TV stations nothing more than a license to broadcast programs locally. Cable systems at first paid nothing to the distant stations or to program suppliers. This reduced the value of the program producer's property, because the program imported from the distant market could not be sold to TV stations in the local market. The Supreme Court resolved this dispute in cases during the 1960s, declaring in Forthnightly Corp. v. United Artists that cable systems were nothing more than "extended antennas" and hence did not engage in "performances" of

15. Thomas W. Hazlett, "The U.S. Digital Transition: Time to Toss the Negroponte Switch," (working paper, AEI-Brookings Joint Center, no. 01-15, 2001).

the copyrighted material.[16] This ruling effectively expropriated program producers' property rights and reallocated them to cable operators. The effect was to reduce the incentive to invest in TV program production.

Economic efficiency requires that exclusive tradable property rights exist for all scarce goods. But property rights alone may not be sufficient to ensure the existence of adequate supply in a competitive market in cases where transaction costs are high. High transactions costs could prevent rights from being transferred to their most valuable uses and users. High transactions costs may require that the initial allocation of rights be targeted to the most efficient users—users who otherwise may be unable to purchase the rights in the marketplace. In *Fortnightly* the Court did not rely on fair use or claims of high transaction costs; it simply allocated ownership rights to cable systems rather than to program producers or distant broadcast licensees on the basis of a physical analogy between household antennas and cable operator antennas. Surely this was an economic error.

Among the effects of *Fortnightly*, as noted, was a reduction in the incentive to produce programming. Further, the allocation to cable operators of the right to import and perform a program freely meant that a program producer would have to pay the cable operator not to import its program to retain its right to sell the program to local broadcasters. As there were thousands of cable operators versus hundreds of stations, this possibility faced high transaction costs. Broadcasters derived the ability to pay for the program from advertiser demand for audiences, whereas the value of the right to cable operators was based on the willingness to pay of potential cable subscribers attracted by the program. In the aggregate, for typical broadcast and cable programming, a given audience is willing to pay more for TV programming than advertisers are willing to pay for access to the audience. If the *Fortnightly* rights had been awarded to program producers, they could readily have licensed those rights to cable operators or cable networks instead of competing local stations. This would have yielded a larger and more efficient supply response than the allocation made by the Court.

The Supreme Court's property right allocation was revised by the Copyright Act of 1976, in which Congress granted cable operators a compulsory license to rebroadcast programs airing on distant TV stations (but only to the extent imported distant signals were permitted by the FCC) in return for a fee to be established by an arbitration panel stationed at the Library of Congress. Compulsory licenses to video content, with congressional administrative agency arbitration of rates, became increasingly popular with Congress in other situations. The scheme was later applied to copyrights in broadcast content conveyed by satellite to home receivers in rural areas and to a variety of online content distribution, and for such "digital rights" as

16. *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968); and United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

ring tones for mobile phones.[17] In all of these cases, Congress intervened in property rights markets that did not yet exist (and, because of the intervention, would never be permitted to exist) on the tacit assumption that transactions costs of setting up and trading in the market would be so expensive as to prevent efficient trades.

There was never empirical evidence, however, that trading would face prohibitive transaction costs, justifying the compulsory license. The issue of how and when initial free market institutions would be established is a more difficult problem. Congress might have attempted to facilitate the establishment of such markets, but industry pressures led Congress to overreach, preempting private market formation and allocating rights in response to the effectiveness of rival industry lobbying.[18] In fact, cable operators made the argument in the run up to the 1976 Copyright Act that a compulsory license was essential to carriage of distant broadcast signals because of the transaction costs and uncertainty of obtaining licenses from individual program rights owners. Given that in 1976 a vigorous market already existed in which hundreds of TV stations individually purchased first-run and off-network syndicated programming from dozens of licensors, this cannot be regarded as more than a start-up issue. One solution has been the establishment of cable networks that intermediate or aggregate individual programs into multichannel packages purchased by cable operators. Start-up problems more generally can be dealt with by providing for a reasonable transition period to the new regime.

Much later, in 1992, a quite different episode of property rights allocation was undertaken by Congress. According to the FCC's current (2012) website,

> The Communications Act prohibits cable operators and other multichannel video programming distributors from retransmitting commercial television, low power television and radio broadcast signals without first obtaining the broadcaster's consent. This . . . "retransmission consent" may involve some compensation from the cable company to the broadcaster for the use of the signal. Alternately, local commercial and noncommercial television broadcast stations may require a cable operator that serves the same market as the broadcaster to carry its signal. A demand for carriage is commonly referred to as "must-carry." If the broadcast station asserts its must-carry rights, the broadcaster cannot demand compensation from the cable operator. While retransmission consent and must-carry are distinct and function

17. *Digital Millennium Copyright Act*, Public Law 105-304, U.S. Statutes at Large 90 (1976): 2541, codified at U.S. Code 17 (1998) § 101 et seq.

18. The phenomenon of rival interest group influence on congressional and agency market interventions is discussed at more general level in Bruce M. Owen, *Type 2 Political Corruption: Sources, Impacts, Solutions* (draft book manuscript, forthcoming).

> separately, they are related in that commercial broadcasters are required to choose once every three years, on a system-by-system basis, whether to obtain carriage or continue carriage by choosing between must carry and retransmission consent.[19]

The result of the new retransmission "right" is that cable operators must pay fees in cash or kind to broadcast networks and their owned stations and strong network affiliates and independent stations, while weaker TV stations may demand cable carriage for free. Cable operators already pay for copyright owners' program content through the compulsory license arbitration mechanism. As part of that mechanism, stations are compensated for programming they produce, such as local news.

"Retransmission consent" is a brand-new property right—in addition to the rights of program producers that are licensed to local broadcast stations or networks and then (under the current compulsory license) to MVPDs. An argument in favor of creating this right is that networks and stations select programming and promote their schedules in a way that makes the value of the bundle higher than the sum of the stand-alone values of the individual programs, because it increases overall viewing of the signal. (A somewhat analogous "compilation copyright" exists for printed materials.) On a much larger scale, performing rights societies such as ASCAP and BMI perform a similar "whole is greater than sum of parts" function in music licensing.[20]

In contrast to music blanket licensing in which user fees pay for the content as well as the compilation, retransmission consent corresponds only to the compilation, and the compilation is of a few hundred programs or series rather than hundreds of thousands of songs in the case of music blanket licenses. In a free market, it seems doubtful that broadcast stations would act as intermediate compilers of, and therefore receive compensation for, content used by cable networks or MVPDs, other than content produced by the station itself. For starters, the most valuable programs—the ones broadcast in prime time—are selected, compiled, and promoted by broadcast networks, not affiliated stations. There are hundreds of nonbroadcast MVPDs today and many more online video content providers, and all of them either produce their own content or license it from original producers. A best guess is that local broadcast station compilation value would be small to none in a free market for video content.

If the preceding argument is correct, retransmission consent is equivalent to a law giving broadcasters a right to tax cable operators. Its principal economic effect may be to give broadcast networks a competitive advantage in establishing new cable networks, carriage of which is often exchanged for retransmission consent.

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19. FCC, "Cable Carriage of Broadcast Stations," last updated May 26, 2011, http://www.fcc.gov/print/31951.
20. *Broadcast Music, Inc. v. CBS*, Inc., 441 U.S. 1 (1979).

It may also lead to more frequent breakdowns of contract negotiations between broadcaster-owned cable networks and cable and satellite operators, evidenced by program "blackouts" during bargaining impasses.[21]

There are even more FCC regulations substituting for markets in video programming. For example, there is the network nonduplication rule, the syndicated exclusivity rule, and the sports blackout rule.[22] Upon the request of a television station with exclusive local rights to distribute a network or syndicated program, an MVPD generally may not carry a duplicating program broadcast by a second (distant) station into the first station's market. The sports blackout rule prohibits MVPDs from carrying a sporting event if the event is blacked out on local broadcast television stations in a given market.

One method for marketing TV programs that does not work is having the exact same content marketed to the same potential customers in the same area at the same time by competing distributors. Marketing efforts by one distributor tend to spill over to the benefit of the other, creating free-rider problems and discouraging effort. Price competition in the sale of a nonrivalrous good leads to disaster for sellers, because marginal cost is zero. Almost all TV programs (and other types of media content) are sold in unregulated markets through distributors with exclusive rights to particular territories and marketing windows.

The nonduplication rules were adopted to undo some of the damage caused by the distant-signal compulsory license. Most unregulated TV programs are licensed by producers or rights owners to local stations and MVPDs on an exclusive basis, both as to territory and time. Given this free market outcome, duplication of programming in a market due to importation short circuits the market for video programming. Recognizing the inefficiency (reduced output) that results, the nonduplication rules mitigate the welfare loss associated with the compulsory license. Once the compulsory license is repealed under Scalise-DeMint, the nonduplication rule will become moot.

Sports blackouts occur when professional sports team owners decide that their interest in gate receipts exceeds their interest in TV licensing revenues, based on the belief that TV coverage reduces live attendance. Live attendance, of course, depends on the team's popularity (largely explained by win–loss records) and on

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21. I have argued elsewhere that such blackouts can be a kind of market failure because neither licensors nor licensees internalize the third-party losses of viewers. The same observation also applies to impasses resulting in labor strikes and management lockouts and to many other supply disruptions stemming from contract disputes.

22. Network nonduplication and syndicated exclusivity rules, 47 C.F.R. §§ 76.92(f) and 76.106(a); sports blackout rule 47 C.F.R. §§ 76.111, 76.120, 76.127-130. These and other rules were mandated by the 1999 Satellite Home Viewer Improvement Act of 1999 ("SHVIA"). The SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Pub. Law No. 106-113, 113 Stat. 1501, Appendix I (1999).

ticket prices. Some observers argue that team owners' beliefs on this score are mistaken or that anticompetitive league rules produce inefficient incentives with regard to blackouts. This is not the place to review these contentious issues. In any event, when a team owner chooses to refrain from licensing TV coverage to local video media, that decision can be undone when either local stations or MVPDs are required to carry signals or networks that include video coverage of the blacked out game originally intended for other markets. This can happen in some cases under must-carry rules and in other cases because of FCC ad hoc program access requirements imposed in certain merger transactions.[23] The effect of the sports blackout rule, as with nonduplication, is to reinstate property rights taken from team owners or leagues by the operation of other FCC interventions.[24] The blackout rule also becomes moot under Scalise-DeMint because the underlying interventions would be removed.

REFORM OF TV PROGRAM MARKETS

The Scalise-DeMint Next Generation Television Marketplace Act was introduced at the end of 2011 in both houses of Congress to deregulate broadcast programming affected by the must-carry and retransmission-consent rules, among other provisions of the Communications Act of 1934. The question addressed here is whether the provisions of Scalise-DeMint are sufficient to render the market for TV programs competitive and efficient. Any such analysis is hampered by the difficulty of predicting how competitive markets would work but for the present interventions. To illustrate, no one (including academic specialists) foresaw that airline deregulation would lead to the phenomenon of hubbing by airlines seeking to minimize operations costs due to postderegulation competition. How video program markets will be reformed by deregulation remains to be seen.

Still, largely unregulated online video content markets are already taking shape. Online video distribution involves the purchase of online rights from the content producer or its assignee, the invention of a site through which the content is marketed to online viewers in various forms—such as bundles, packages, channels, or

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23. The FCC's order in the *Adelphia* case gave competing MVPDs a right of access (at arbitrated prices) to certain programming owned by the parties to a vertical merger transaction involving MVPDs and regional sports program suppliers. The same rights transfer mechanism has been used in subsequent cases. See FCC, "MB Docket No. 05-192: Memorandum Opinion and Order" (report, FCC 06-105, Washington, DC, July 21, 2006), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-105A1.pdf.
24. Different sports leagues have different ways of distributing TV revenues, and this leads to different incentives of the owners to seek blackouts. The NFL and the NBA distribute revenue equally to all teams. Thus, an owner gets the same revenue whether his team is blacked out or not. That owner would prefer to be blacked out if it generates a few more dollars of revenues in the stands. However, MLB has TV rights controlled by each team, and there are no blackouts for local games because the owner gets TV revenues only if the game is shown.

subscriptions—and a method of generating revenue from viewers, advertisers, or both. YouTube and Hulu are early examples of such sites, employing very different content and marketing strategies. Many networks and stations also maintain websites, generally emphasizing complementary content rather than the same content made available to viewers.

Online video markets are nascent because online distribution rights for existing content are being licensed cautiously and experimentally by their owners, and made-for-online-distribution video content is just developing. Traditional video content owners are seeking to define an online distribution window for content designed to be released sequentially to a series of distribution windows. It is perhaps too early to tell whether online distribution is amendable to this use as an outlet for content in the format of popular TV series. It may turn out that online video distribution is best suited for new content formats or genres more akin to YouTube than to current cable or broadcast networks. Early experience with both nonvideo and video content shows that small-scale content suppliers can compete effectively by sharing advertising revenue with large-scale advertising aggregators. A similar mechanism may permit small content suppliers to tap into user willingness to pay, if piracy issues can be solved. In any case, there is no reason to believe that online and traditional multichannel video distribution will not remain at least as competitive as it is today. There is already as much or more competition than in most markets for other, unregulated, consumer products.

Successful online marketing of online video requires effective packaging or bundling of subsets of the many thousands of individual video productions. The marketing identity of the packager must be promoted as a signal for a certain level of quality or category of content. Alternatively, it is possible that general-purpose or specialized search engines will eventually supply such information as or more efficiently than specialized, heavily promoted aggregators. If so, then individual content producers could engage in direct marketing. If advertising is involved, some aggregation of advertiser demand will also be required. Google and other firms already offer advertisers access to multiple sites. MVPDs such as cable systems and telephone companies have been moving to try to acquire online rights to the content they already deliver over traditional broadband video channels so that their current content will be available on both media.

While online video distribution may well describe the future, it is not clear whether that future involves wires, wireless, or both. The answer depends in part on spectrum allocation. The portion of the spectrum currently allocated to broadcasters is, from a technical perspective, ideal for mobile broadband distribution. If there were free markets in spectrum, it is quite likely mobile broadband providers such as AT&T, Verizon, Sprint, and T-Mobile would find it profitable to purchase spectrum rights from broadcasters in order to provide sufficient capacity to distribute (among other services) online video, possibly at a price competitive on the margin with landline broadband. If the FCC auctions off a significant amount of former broadcast spectrum, as now seems likely given recent congressional action, there would be at least four terrestrial multichannel video distributors, plus the two satellite companies DirecTV and Dish Network, competing for fixed service subscribers, and at least four competing for mobile subscribers. All eight are suppliers or potential suppliers of online video services. If current MVPDs are not performing competitively, mobile operators will have stronger incentives to emphasize online video among their mobile services. Online video is already available for smart phones and mobile tablet devices. In short, this is a competitive market that does not require regulation, and it should not be constricted by legacy regulations.[25]

As indicated above, the distortions in TV broadcasting are caused primarily by two categories of interventions: copyright laws and program distribution restrictions. Scalise-DeMint deals with these directly. The bills would repeal compulsory licenses, must-carry rules, retransmission consent, and a variety of other mandates on regulated entities, including ownership rules. However, there are background distortions to deal with as well: spectrum property rights reform is an important element in ensuring an efficient and competitive market in video programming. All FCC licensees (not just broadcasters) should be free to use their spectrum for any commercial purpose.

The practical effect of spectrum reform plus Scalise-DeMint would be to eliminate the special legacy privileges of broadcasters because they are classified for obsolete regulatory purposes as over-the-air broadcasters. Both reforms are necessary. The repeal of compulsory licensing of distant signal and other broadcast content used by MVPDs is of course an immediate boon to broadcasters, but probably not for long. The market will likely move toward direct deals between program producers or broadcast networks and MVPDs. Cable systems that have upgraded to offer digital services are no longer chiefly dependent on distant signals, given the availability of hundreds of cable networks. The end of compulsory licensing offers no real threat to cable operators or other MVPDs.

This would not necessarily mean local broadcasters would disappear from the ranks of content providers. MVPDs generally lack facilities to produce local news and sports programming. Former local broadcasters will have a unique position in offering local content, which they can exploit both in deals with local MVPD outlets and direct to subscribers online, with or without local and national spot advertising. Although broadcast networks will eventually seek to bypass local stations and deal directly with MVDPs, this will happen slowly, not least because of the complications involved in negotiating with content providers for rights. Also, there remains

25. Most urban and suburban households now have at least two available terrestrial (cable and telephone company) MVPDs and two satellite MVPDs (DirecTV and Dish Network). With sufficient spectrum transferred from broadcasters, at least the four major wireless telephone companies (AT&T, Sprint, T-Mobile, and Verizon) should be able to provide comparable broadband video service to mobile and perhaps fixed devices.

a demand for local content, especially news and sports. The local broadcasters are positioned to continue to provide these and even expand because of access to subscriber and advertiser-derived revenues. To the extent such programming is produced by local broadcasters, it is already delivered primarily by cable or satellite, not over the air. Turning off the transmitter, or using it to provide mobile or other services, will actually save considerable sums now spent for electric power.

Getting broadcasters to accept such a reform requires, at a minimum, that they get to keep at least a chunk of the revenue from their sale of their spectrum rights. Congress has now approved "incentive auctions" that award broadcasters a relatively small share in the proceeds from the sale of broadcast spectrum.[26] Contrary to news reports, broadcasters did not receive this spectrum for free. Most broadcasters paid full market value for their spectrum rights, purchasing them from prior licensees. It remains to be seen whether broadcasters will be willing to accept Congress's offer.

CONCLUSION

From the public's perspective, getting rid of obsolete regulation of broadcast and MVPD video programming is essential to the efficient operation of a market that has long been an important (but could have been a much more important) source of consumer welfare. Consumers today pay more than $100 billion annually for MVPD services,[27] implying a willingness to pay (actual payments plus consumer surplus) well in excess of that amount.[28] MVPD or equivalent services that increase video program distribution capacity were delayed and suppressed for many years, and this consumer value was lost. This was in the effort to protect initial broadcast licensees from competition in the (nominal) pursuit of ill-defined and ephemeral public interest and localism objectives.

It past time to stop extending interventions originally intended for an old technology (broadcasting) to a range of new competitive media. Even if one thought the restrictions on competition and entry that have existed from 1927 to the present day were originally justified by assumptions about spectrum scarcity and vague notions of the public interest in local content or sources, it is now clear these assumptions are incorrect. No longer is there any rational public policy basis for a government agency or its legislative overseers to dictate how much or what content the viewing

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26. Amy Schatz and Siobhan Hughes, "Wireless Firms to Gain More Access to Airwaves," *Wall Street Journal*, February 17, 2012; and Edward Wyatt and Jennifer Steinhauer, "Congress to Sell Public Airwaves to Pay Benefits," *New York Times*, February 16, 2012.
27. National Cable & Telecommunications Association, "Industry Data," http://www.ncta.com/Statistics.aspx.
28. Every consumer has some maximum amount they would be willing to pay rather than go without a particular program. These amounts differ across consumers. If the supplier charges a uniform price, most buyers pay less than the maximum amount they would be willing to pay. The difference is called consumer surplus, a measure of each consumer's net gain from buying the program.

public can see, any more than there ever has been for printed media. There is no market failure to which the current regulatory framework is responsive. There is no reason to think that regulators can improve on even less-than-perfect market outcomes in this sector of the economy. Most important, there is no reason for FCC bureaucrats to decide how much of the spectrum should be used for each of many existing and potential commercial services.

Program producers, aggregators (cable and former broadcast networks), and local distributors (MVPDs) should be allowed to reach agreements among themselves for the creation and delivery of programs and audiences in competitive markets without regard to which technology is used to produce or deliver their goods. Their freedom of contract will promote an efficient and expanding supply of video content to compete for advertising revenue and viewers' dollars. An adequate supply of tradable rights in spectrum will reveal how much competition is possible among traditional wired and wireless, analog and digital, and fixed and mobile delivery services. Judging by the patterns of history, regulating in the expectation that competition will be inadequate will only help ensure that very result.