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to

Committee on Commerce, Science and Transportation
US Senate
Washington, DC 20510-6125

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Dear Senators Rockefeller, Thune, Pryor, and Wicker:

Thank you for the opportunity to respond to the Committee's questions on these important topics. The Technology Policy Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts careful and independent analyses that employ contemporary economic scholarship to assess legislation and regulation from the perspective of the public interest. Therefore, this response does not represent the views of any particular affected party or special interest group but is designed to assist the Committee as it explores these issues. Some questions I have not answered because the question presumes the continued existence of most television regulations and, since my position is that the television marketplace needs comprehensive regulatory reform, my answer would be largely hypothetical and only marginally helpful. Other questions I did not answer because the dynamic video marketplace makes predictions difficult.

Current television law makes programming agreements circuitous and distorts market forces. The Congressional Research Service says that "the negotiations between programmers and distributors, although private, are strongly affected by statutory and regulatory requirements and *cannot be properly characterized as free-market*."[1] Every television industry segment has received some regulatory favors though the decades. Most concerning is that there is "a thicket of communications law requirements aimed at protecting and supporting the broadcast industry,"

[1] Charles B. Goldfarb, "A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations," 20, *CRS Report for Congress*, July 9, 2007 (emphasis added).

as the Copyright Office has said.[2] This thicket arises largely because Congress and the FCC have aspirations for broadcast—namely localism, free television, competition, and diverse voices—that are often in tension with each other.[3] These conflicting goals also tend to disadvantage pay-TV providers, particularly smaller operators.[4] Incremental or minor reforms tend to simply create the need for yet more fixes in the future, further distorting market processes. My comments below rely on the premise that Congress will reexamine its public interest obligations for broadcast television and overhaul several television policies, including compulsory licenses, retransmission consent, and network nonduplication.[5]

1. **Should Congress reauthorize STELA? If so, for how long?**

Congress should sunset the compulsory license portion of Satellite Television Extension and Localism Act of 2010 (STELA). The purpose of the Satellite Home Viewer Act of 1988 (SHVA) and its later iterations, including STELA, was to grow the then-fledgling satellite television and direct broadcast satellite (DBS) industry and extend television signals to unserved households. After 26 years, that goal has been achieved and STELA can and should be repealed. With the 2010 passage of STELA, Congress directed the Copyright Office to issue a report regarding the possible phase-out of compulsory licenses. The Copyright Office responded with a report encouraging Congress to eliminate the compulsory copyright provisions.[6] Today, Dish provides local broadcast channels to every media market and DirecTV provides local broadcast channels to around 99 percent of households.[7] DBS providers now serve about one-third of MVPD subscribers.[8] Clearly, DBS providers provide local broadcast television to the vast majority of households and provide a significant competitive check to cable systems.

A small number of households are considered "unserved" according to earlier definitions. Those households should receive satellite signals according to commercial contracts, not congressionally created licenses. Hundreds of channels are distributed nationwide without a

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[2] US Copyright Office, *SHVERA § 109 Report*, 65 (2008), http://www.copyright.gov/reports/section109-final-report.pdf.
[3] Charles B. Goldfarb, "A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations," 20, *CRS Report for Congress*, July 9, 2007.
[4] Charles B. Goldfarb, "A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations," 10, *CRS Report for Congress*, July 9, 2007.
[5] For more explanation, see Brent Skorup & Adam Thierer, *The Future of Video Marketplace Regulation* (Mercatus Center working paper, forthcoming April 2014).
[6] US Copyright Office, STELA *§ 302 Report* (2011), http://www.lawupdates.com/pdf/postings/copyright/Report_on_Marketplace_Alternatives_to_Replace_Statutory_Licenses.pdf.
[7] FCC, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 52, MB Dkt. No. 12-203 (released July 22, 2013), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf.
[8] FCC, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12, MB Dkt. No. 12-203 (released July 22, 2013), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf.

compulsory license regime,[9] and satellite carriers and broadcasters should be freed to negotiate the terms and conditions of television distribution.

2. **Members of the Committee have heard from constituents who are unable to watch in-state broadcast TV programming. Under Section 614(h) of the Communications Act, the Federal Communications Commission (FCC) has the power to modify Designated Market Areas (DMAs) for broadcast TV carriage on cable systems. Should the FCC have a similar power with respect to satellite pay TV providers to address DMA issues? Are there other ways to address these issues?**

I have no recommendation on that matter.

3. **One of the expiring provisions in STELA is the obligation under Section 325(b) of the Communications Act for broadcast television stations and multichannel video programming distributors (MVPDs) to negotiate retransmission consent agreements "in good faith." Should the Congress modify this obligation or otherwise clarify what it means to negotiate retransmission consent in good faith? If so, how?**

As I favor repeal of the retransmission consent framework, I have no recommendation on that matter.

4. **As part of STELA, Congress changed the statutory standard by which households are determined to be "unserved" by broadcast TV signals. Does Congress or the FCC need to take further action to implement this previous legislative amendment?**

I have no recommendation on that matter.

5. **Are there other technical issues in STELA that have arisen since its passage in 2010 that should be addressed in the current reauthorization?**

I am not aware of any technical issues that should be addressed through reauthorization. I will only note that DBS providers now serve every market and nearly every household with local broadcast signals. That welcome advance in technology means the aims of Congress's satellite regulations have largely been accomplished, and sunsetting existing regulations should be implemented.

General Video Policy Issues

1. **Some have suggested that Congress adopt structural changes to the retransmission consent system established under Section 325 of the Communications Act (Act). Others have indicated that the retransmission consent system is working as Congress intended when it was developed as part of the Cable Television Consumer Protection and Competition Act of 1992.**

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[9] *Hearing on the Cable Act at 20, Before the Senate Committee on Commerce, Science and Transportation*, 112th Cong. (July 24, 2012) (testimony of Preston Padden, senior fellow, Silicon Flatirons Center), http://siliconflatirons.com/documents/publications/policy/PaddenTestimony.pdf.

a. Should Congress adopt reforms to retransmission consent? If so, what specific reforms could best protect consumers? If not, why not?

Yes, Congress should not simply reform retransmission consent but eliminate it. Retransmission consent is the legal fiction that gives value to a broadcaster's over-the-air signal, as opposed to the underlying content—which is quite valuable. Since between 80 to 90 percent of households subscribe to pay-TV,[10] broadcast television, by and large, is "simply a means of delivering program content to the head-end" of a cable, satellite, or telco distributor.[11]

Legal fictions can be useful, of course, but the existence of the retransmission consent right primarily directs pecuniary benefits to broadcast station owners despite the fact that it is not clear that broadcast stations add value to the underlying television content.[12] Certainly, broadcast stations should be fairly compensated for their copyrighted and produced content. However, copyright owners of broadcast programs do not directly benefit from retransmission consent,[13] and consumers suffer from this convoluted arrangement. Eliminating retransmission consent does not mean broadcasters will not profit from transmitting popular television content. Alternative solutions are available. Congress should, for instance, allow broadcasters to sell subscriptions to individual customers as this would rationalize the television marketplace and inject market forces into television distribution.[14]

b. Please comment on the following possible reforms that have been suggested by various parties:

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[10] Leightman Research Group, "86% of TV Households Subscribe to a Multi-Channel Video Service," news release, August 8, 2013, http://www.leichtmanresearch.com/press/080813release.html.

[11] Glen O. Robinson, "Regulating Communications: Stories from the First Hundred Years," *Green Bag Journal* 13 (2010): 303, 314.

[12] US Copyright Office, *SHVERA § 109 Report*, 65 (2008), http://www.copyright.gov/reports/section109-final-report.pdf ("The value assigned to the carriage of a station, apart from the performance right of the programming retransmitted on a signal, cannot be parsed out because of this regulatory entanglement.").

[13] US Copyright Office, *SHVERA § 109 Report*, 65 (2008), http://www.copyright.gov/reports/section109-final-report.pdf ("Copyright owners of programs carried on such stations do not benefit financially from [retransmission consent] agreements between broadcasters and cable operators or satellite carriers.").

[14] Critics will argue that eliminating retransmission consent harms Congress's twin goals of localism and free over-the-air television. "Localism," to the extent it is a worthwhile goal in the Internet Age, can be achieved in other, direct ways, such as targeted subsidies for local news and reporting. Free over-the-air television is not actually free at all since the spectrum could be repurposed for more valuable uses, like mobile broadband. Glen O. Robinson, "Regulating Communications: Stories from the First Hundred Years," *Green Bag Journal* 13 (2010): 303, 314–15. We are not aware of any studies showing that low-income populations rely on over-the-air broadcast television more than other groups, but direct subsidies—similar to SNAP vouchers for groceries—would also ensure that vulnerable populations are not losing their "free" television if broadcast spectrum is repurposed. Economist Thomas Hazlett estimates it would cost about $3 billion per year to give low-cost cable or satellite service to every household without an existing cable or satellite subscription. See Richard Thaler, "The Buried Treasure in Your TV Dial," *New York Times*, February 27, 2010, http://www.nytimes.com/2010/02/28/business/economy/28view.html?_r=0 (citing Hazlett's research).

i. Providing the FCC authority to order interim carriage of a broadcast signal or particular programming carried on such signal (and the circumstances under which that might occur).

While ordering interim carriage may decrease blackouts, it likely forces broadcast and MVPD negotiators to bargain harder initially. Because broadcasters will lose leverage as they will not be able to withdraw their signal from cable distribution during an impasse, they will likely demand higher payment or in-kind consideration upfront to compensate for that risk, potentially driving up distribution costs. I have no opinion as to whether fewer blackouts offsets this risk of harder bargaining.

ii. Prohibiting joint retransmission consent negotiations for multiple TV stations at the same time.

Television markets, as stated before, should be liberalized. Therefore, the retransmission consent regime should be eliminated, in addition to the compulsory license and exclusivity rules. Broadcasters should be freed to sell their content to customers and to MVPDs in any manner they wish.

iii. Mandating refunds for consumers in the case of a programming blackout (and apportioning the ultimate responsibility for the cost of such refunds).

Apportioning the cost (and blame) of blackouts would be impossible for a regulator to accomplish because blackouts result from bilateral negotiations. When a blackout takes place, presumably the FCC would have to make a determination of whether it was the fault of the broadcaster or the MVPD. Even if the FCC could reliably identify the more "blame-worthy" party (a dubious proposition), it would be a costly and politically rancorous exercise. Further, some MVPDs already provide refunds simply to mitigate public relations backlash.[15] Legal mandates of refunds are likely unnecessary as well as costly to implement.

iv. Prohibiting a broadcast television station from blocking access to its online content, that is otherwise freely available to other Internet users, for an MVPD's subscribers while it is engaged in a retransmission consent negotiation with that MVPD.

Broadcasters should be free to distribute their content in any way they wish, just like any other content distributor. Non-broadcast and broadcast programmers have developed innovative online distribution strategies in the absence of regulation. Congress should not extend television regulations to online video, which is distributing quality programs, and risk stultifying the dynamic distribution strategies of content creators.

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[15] See, e.g., Todd Spangler, "Time Warner Cable Will Credit Showtime Subs for Blackout, But Nothing for Loss of CBS," *Variety*, August 2, 2013, http://variety.com/2013/biz/news/time-warner-cable-will-credit-showtime-subs-for-blackout-but-nothing-for-loss-of-cbs-1200573053/.

v. **Eliminating the "sweeps" exception that prevents MVPDs from removing broadcast TV channels during a sweeps period, or alternatively extending that exception to prevent broadcasters from withholding their signals or certain programming carried on such signals under certain circumstances.**

I have no recommendation on that matter.

vi. **Prohibiting retransmission consent agreements that are conditioned on the carriage by an MVPD of non-broadcast programming or non-broadcast channels of programming affiliated with the broadcast license holder.**

Prohibiting the conditional sales of bundles of broadcast and non-broadcast channels is not advisable. It would be difficult to implement and would insert the FCC into complex commercial contracts. The economic consensus is that bundling products, like television channels, is usually efficient behavior.[16] Certainly, such behavior should be scrutinized by antitrust agencies or competition experts within the FCC, but a prohibition of tying broadcast and non-broadcast programming would likely harm competition. The antitrust agencies have decades of precedent to rely on when investigating whether program bundles harm competition or consumers. It would be counterproductive to have special bundling prohibitions for broadcast content. If excessive market power of broadcasters is the concern, that market power can be reduced through repeal of, say, network nonduplication and syndicated exclusivity rules.

2. **Should Congress maintain the rule that cable subscribers must buy the broadcast channels in their local market as part of any cable package? If the rule is eliminated, should an exception be made for non-commercial stations?**

Congress should eliminate the rule that cable subscribers must purchase a cable tier containing local broadcast channels. It is an anticonsumer provision intended to benefit local broadcasters in a way that would be objectionable in other circumstances. For instance, it would be obviously problematic for Congress to force consumers to purchase a yearly subscription to their local newspaper with their broadband connection in the name of protecting the financial viability of local newspapers. It is just as troublesome that Congress forces consumers to purchase local broadcast channels with their cable subscription. The requirement is a costly subsidy to broadcasters and should be discontinued.

3. **Should Congress maintain the rule that cable systems include retransmission consent stations on their basic service tiers?**

No, Congress should eliminate the requirement that cable systems include retransmission consent stations on their basic service tiers. Cable companies should be free to create their own service

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[16] See David Evans & Michael Salinger, "*Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*," *Yale Journal on Regulation* 22 (2005): 37.

tiers and respond to changing customer demands. Including retransmission consent stations on the basic tier gives broadcasters leverage and a captured audience, and it hinders market transactions with distributors. Furthermore, the increased costs of providing broadcast channels on basic service tiers are partially passed onto consumers. While broadcast channels contain popular content, many cable subscribers do not watch broadcast channels yet are required to pay for the channels in every cable package.

4. **Section 623 of the Act allows rate regulation of cable systems unless the FCC makes an affirmative finding of "effective competition." Should Congress maintain, modify, or eliminate these provisions?**

Congress should eliminate the provisions related to effective competition. One fact alone reveals that, practically speaking, cable operators face effective competition: cable operators have lost over 10 million subscriber households since 2002 (they currently have around 57 million subscriber households[17]). While television provision is inherently local, these national statistics are prima facie evidence that non-cable MVPDs provide significant competition to cable operators.

The FCC's regulations presume that cable operators are not subject to effective competition,[18] and cable operators bear the burden of rebutting that presumption. The considerable losses of subscribers show this presumption to be ill conceived. That presumption appears nowhere in the relevant statute[19] and is unnecessarily onerous. Typically, an operator rebuts that presumption by showing that at least 15 percent of households in a cable franchise area subscribe to a DBS provider (Dish or DirecTV).[20] To evade rate regulation in franchise areas, major cable operators have filed hundreds of petitions. Each one necessarily requires investigation into Census data, DBS subscriber information, and other relevant information for the locality. This process, needless to say, is time-consuming and costly.

The presumption of no effective competition was sensible in the early 1990s when most households had only one choice for pay TV: their local cable company. Today, market dynamics have changed dramatically because of deregulatory actions by Congress and cable operators must compete with, at least, two nationwide DBS operators. No longer a pay-TV monopoly, cable systems have lost substantial market share to DBS and telco television systems. In mid-

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[17] Compare FCC, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11, MB Dkt. No. 02-145 (released December 31, 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-338A1.pdf (recording 68.8 million cable households) with FCC, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 60, MB Dkt. No. 12-203 (released July 22, 2013), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf (recording 57.3 million cable households).

[18] 47 CFR § 76.906.

[19] See 47 USC § 543.

[20] See, e.g., FCC, *In the Matter of Comcast Cable Communications, LLC, Petition for Determination of Effective Competition in Salisbury Massachusetts* (Dec. 2, 2008), http://www.mass.gov/ocabr/docs/dtc/catv/fccorders/da-08-2632a11.pdf.

2013 IHS reported that telco television systems have taken 11 percent of the pay-TV market, satellite has 34 percent, and cable has 55 percent.[21] Since nearly half of subscribers receive pay TV from a non-cable system, placing the burden on cable operators to show they face effective competition is unnecessary and diverts resources away from improving their product offerings.

5. **Should Congress repeal the set-top box integration ban? If Congress repeals the integration ban, should Congress take other steps to ensure competition in the set-top box marketplace both today and in the future?**

Congress should repeal the set-top box integration ban. The integration ban was intended to create a large market for set-top cable boxes, but that effort, implemented by the FCC under the CableCARD program, has largely failed.[22] While the FCC has attempted to enforce the integration ban since 1998, there has been little progress but substantial costs to cable companies and consumers.[23] Many popular set-top devices that do exist—like the Chromecast, X-box, Apple TV, and Roku—are outside of the CableCARD regime. What's more, the second- and third-largest MVPDs, DirecTV and Dish, are exempt from this mandate. The ineffectual ban simply imposes a costly burden on cable operators.

The tremendously competitive mobile phone market is evidence that innovative devices produced by several electronics companies can arise in the absence of legislative mandates. As recently as 2009, for instance, Motorola and LG had almost half of the US mobile phone market.[24] Today, Motorola and LG combined have less than 15 percent market share.[25] The set-top box industry dynamics are different than the mobile phone market, but firms in both markets do not know in advance what future services customers will desire and how device competition will evolve. Firms need some control over devices on their network, but the appropriate level of

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[21] Ian King, "How 'Cord Never' Generation Poses Sales Drag for Pay TV," *Bloomberg Businessweek*, September 18, 2013, http://www.bloomberg.com/news/2013-09-18/how-cord-never-generation-poses-sales-drag-for-pay-tv.html (reporting on IHS pay-TV data).

[22] FCC, *Comment Sought on Video Device Innovation*, GN Dkt. Nos. 09-47, 09-51, 09-137 (December 9, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2519A1.pdf ("The Commission's CableCARD rules have resulted in limited success in developing a retail market for navigation devices."). To wit, in 2009 there were only 14 non-leased set-top boxes on the market. Nate Anderson, "FCC admits CableCARD a failure, vows to try something else," *Ars Technica*, December 4, 2009, http://arstechnica.com/tech-policy/2009/12/fcc-admits-cablecard-a-failure-vows-to-try-something-else/.

[23] See Sarah K. Leggin, "It's Time to Remove the Costly Integration Ban," *Free State Foundation Perspectives* 8, no. 29 (November 8, 2013), http://www.freestatefoundation.org/images/It_s_Time_to_Remove_the_Costly_Integration_Ban_110713.pdf. CableCARD added an estimated $50 to the price over every set-top box. Ibid., 9.

[24] ComScore, "comScore Reports December 2009 U.S. Mobile Subscriber Market Share," news release, February 8, 2010, http://www.comscore.com/Insights/Press_Releases/2010/2/comScore_Reports_December_2009_U.S._Mobile_Subscriber_Market_Share.

[25] ComScore, "comScore Reports August 2013 U.S. Smartphone Subscriber Market Share," news release, October 4, 2013, http://www.comscore.com/Insights/Press_Releases/2013/10/comScore_Reports_August_2013_US_Smartphone_Subscriber_Market_Share.

control over network hardware is a complex business strategy that is only hindered by mandates like the integration ban.[26]

6. **Should Congress limit the use of shared services agreements (SSAs) and joint sales agreements (JSAs) by broadcast television ownership groups, and if so, under what circumstances?**

Shared services agreements and joint sales agreements should be allowed and limited by generally applicable competition laws, contingent on repeal of rules that might give broadcasters excessive local market power, like carriage obligations, network nonduplication, and syndicated exclusivity. Broadcasters are constrained in their use of SSAs and JSAs because of their public interest obligations and ownership limits.[27] Perhaps those obligations were sensible at the advent of broadcast television to prevent excessive concentration of market power in local media markets. Today, the scarcity rationale for imposing ownership limits on broadcasters is problematic. Broadcasters now compete against cable, satellite, telco, and Internet companies for provision of video services. These competitors to broadcast are subject to competition laws when making horizontal agreements, and broadcasters are thereby handicapped by specialized FCC regulations regarding horizontal SSAs and JSAs.

Congress and the FCC understand these dynamics, as both have liberalized broadcasters' ownership rules over several decades. However, these deregulatory trends reveal the increasing tension between the view that broadcasters are "public trustees" deserving of regulatory protection and the economic reality that broadcasters are simply a competitive platform for distributing television content.[28] At a time when local news stations in small and mid-size markets are struggling, these agreements can ease financial pressures and provide more local media voices.

Since broadcasters have exclusive rights to broadcast network content, however, there are potential competitive problems if SSAs and JSAs are liberalized and pay-TV operators are still constrained by existing regulations. To remedy this regulation-created imbalance in market power, as mentioned before, pay-TV operators should correspondingly be freed from carriage mandates, syndicated exclusivity rules, and network nonduplication obligations.

7. **Should Congress act in response to concerns that the increasing cost of video programming is the main cause behind the consistent rise in pay TV rates and that programming contracts contribute to the lack of consumer choice over programming packages? If so, what actions can it take?**

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[26] For scholarly discussion of these complex dynamics in mobile phone markets, see Thomas W. Hazlett et al., "Walled Garden Rivalry: The Creation of Mobile Network Ecosystems," (George Mason Law & Economics Research Paper No. 11-50, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963427##.
[27] See 118 Stat. 3, 99-100 (2004) (prohibiting a single entity from owning television stations collectively reaching more than 39 percent of the national audience).
[28] See Benton Foundation, "The Public Interest Standard in Television Broadcasting," available at http://benton.org/initiatives/obligations/charting_the_digital_broadcasting_future/sec2.

Probably not. The nature of rising costs raises concerns, but Congress should only act in response to rising pay-TV rates after careful study of the causes. First, as the Congressional Research Service has reported, it is quite possible that rising rates are due in part to the retransmission consent regime.[29] Furthermore, quality programming is expensive, and there is evidence that the quality of television shows is at a historically high level.[30] Presumably it is not a concern that subscribers are paying more for superior content, just as it would not be concerning to find that consumers pay more for safer cars or larger homes.

Additionally, it is important to recognize that cable bundles are not dispositive evidence of excessive market power.[31] Most restaurants bundle menu items—steak and potatoes, soup and fish, salad and a main course—and don't necessarily offer every item a la carte. There is a tendency to view bundled cable channels as evidence of market power abuse,[32] but, as restaurants reveal, bundling is accomplished even in very competitive markets because there are efficiencies, which are passed onto consumers in terms of higher quality and lower prices.[33]

8. **With consumers increasingly watching video content online, should Congress extend existing competitive protections for the traditional television marketplace to the online video marketplace? If so, what types of protections?**

Online video has developed in the absence of regulation and content mandates. Extending television regulations to Internet video is premature and would likely stymie innovative online distribution strategies.

9. **The Consumer Choice in Online Video Act, S. 1680, is one approach to fostering a consumer-centric online video marketplace. Are there elements of that bill that should be considered in conjunction with the STELA reauthorization?**

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[29] Charles B. Goldfarb, "A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations," 20, *CRS Report for Congress*, July 9, 2007 ("[T]he current retransmission consent process may be allowing programmers to siphon off funds that might, from a public policy perspective, be better left to cable operators to expand their broadband infrastructure capabilities.").

[30] See David Carr, Barely Keeping Up in TV's New Golden Age, *New York Times*, March 9, 2014, http://www.nytimes.com/2014/03/10/business/media/fenced-in-by-televisions-excess-of-excellence.html, ("The vast wasteland of television has been replaced by an excess of excellence . . . ."); Lee Cowan, "Welcome to TV's second 'Golden Age'," *CBS News*, Oct. 1, 2013, http://www.cbsnews.com/news/welcome-to-tvs-second-golden-age/; Adam Thierer, "We Are Living in the Golden Age of Children's Programming," Progress & Freedom Foundation, *Progress Snapshot*, Release 5.6, July 2009, http://www.pff.org/issues-pubs/ps/2009/ps5.6-childrens-television-golden-age.html.

[31] David Evans & Michael Salinger, "*Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*," *Yale Journal on Regulation* 22 no. 37 (2005) ("Tying is a common practice in markets in which the tying good is competitive (so leverage is not possible) and in which the tied good is competitive (so leverage is not profitable).) (citation omitted).

[32] See, e.g., Matthew Yglesias, "The Real Problem With Supersizing Comcast," *Slate*, February 19, 2014, http://www.slate.com/articles/business/moneybox/2014/02/comcast_merger_with_time_warner_broadband_competition_at_risk_without_regulation.html ("In an uncompetitive [pay-TV] market, providers are essentially forcing consumers to swallow a much bigger and more expensive bundle than they otherwise would buy.").

[33] David Evans & Michael Salinger, "*Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*," *Yale Journal on Regulation* 22, no. 37 (2005) ("Tying in competitive markets presumptively occurs because it is efficient—it reduces costs or improves quality.").

Comprehensive video reform is necessary to achieve before deciding on the regulatory treatment of online video providers. Video regulations should be technology-neutral but current law is decidedly non-neutral. For that reason, I have no recommendation regarding the need to address the online video marketplace through STELA. I only note that online video distribution is in its infancy and has been instrumental in developing innovative business models and in improving consumer access to content.

10. Would additional competition for broadband and consumer video services be facilitated by extending current pole attachment rights to broadband service providers that are not also traditional telecommunications or cable providers?

I have no recommendation on that matter. I only emphasize that this is a complex area involving federal, state, and local laws and numerous regulatory bodies.

11. Would additional competition for broadband and consumer video services be facilitated by extending a broadcaster's carriage rights for a period of time if they relinquish their spectrum license as part of the FCC's upcoming incentive auction?

I have no recommendation on that matter.

12. Are there other video policy issues that the Congress should take up as part of its discussions about the STELA reauthorization?

As stated before, the video marketplace is in desperate need of comprehensive reform. Basic assumptions about the social value of broadcast television need to be questioned. The continual layering of regulations that attempt to perfect competition between distribution technologies has created a regulatory quagmire. Despite this, the vast majority of television content distribution is negotiated outside of the retransmission consent and compulsory license regimes. Rights aggregators have evolved business models that ensure timely and efficient acquisition of copyrighted television material. The parallel regulatory regime for broadcasters is wholly unnecessary, distorts the television marketplace, and raises costs for consumers.

Reform needs to address several critical issues. Piecemeal reform likely only creates demand for more regulation later. Broadcasters should be freed to sell subscription service in order to freely compete with MVPDs. Having a nationwide network of local broadcasters providing free over-the-air television by virtue of regulatory mandates is no longer tenable.[34] Many local broadcasters are inefficiently small, especially in the Internet and Smartphone Age when large amounts of global, national, and local information is at our fingertips. Many broadcasters exist only because they can extract rents through the regulatory protections they enjoy. Congress and the FCC should repeal the anticompetitive regulations relating to network must-carry, nonduplication, and syndicated exclusivity. Networks and programmers are large, financially

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[34] If Congress finds that televised local news are socially important but underproduced, it should subsidize local reporters and news operations directly, not through the inefficient system of local broadcasters and their inherent protections. Likewise, Congress could subsidize the purchase of pay TV for those unable to afford it.

savvy organizations; they do not require the FCC to write their exclusivity contracts through these regulations. While most recommendations here relate to broadcasters, there is also evidence that MVPDs are not paying market value for content under the compulsory license regime.[35] Compulsory licenses should also be eliminated so that MVPDs and broadcast networks can enter into private contracts, just as MVPDs and non-broadcast networks currently do every day.

Sincerely,

Brent Skorup

[35] US Copyright Office, *SHVERA § 109 Report*, 67–71 (2008), http://www.copyright.gov/reports/section109-final-report.pdf ("The [Copyright] Office continues to find that copyright owners are under-compensated for the use of their works under the distant signal licenses. Only if Section 111 and Section 119 were repealed would copyright owners be able to realize the true worth of their programming.") (citation omitted).