Written Testimony of

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regarding

**"Reauthorization of the Satellite Television Extension and Localism Act"**

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## INTRODUCTION

Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee, thank you for inviting me to testify on the Satellite Television Extension and Localism Act (STELA).

My name is Matt Wood, and I am the Policy Director for Free Press and the Free Press Action Fund. Free Press is a nationwide, nonpartisan and nonprofit organization with more than 700,000 members. We promote public interest media and technology policies, working to strengthen democracy by strengthening the tools we use for free expression and economic activity. We advocate for diverse media viewpoints and quality journalism. And we focus especially on promoting open, universal and affordable communications platforms for all.

In this testimony, I will comment first on the need to extend current laws that serve those same diversity and competition goals, including STELA and related provisions. Second, I will offer answers to the Committee's questions about whether present law does enough to protect and promote a video market responsive to consumer demands and expectations. Specifically, I will describe failures that permeate the industry, and address legislative proposals (in addition to STELA) that would allow consumers to enjoy more choices and more affordable services.

Some industry stakeholders today call for total "reform" of video marketplace rules – or, to describe their calls more accurately, for self-interested changes to benefit themselves and hamper their competitors. Their arguments suggest that a free market could exist for multichannel video programming distributor (MVPD) services or online video in the absence of any safeguards. But the truth is that many current measures actually promote competition and consumer choice that simply would not exist otherwise. Deleting some provisions and allowing others to expire (in the absence of a comprehensive, consumer-focused overhaul) would be especially harmful. So would ignoring the market power of established players.

Whether a particular statute or rule provision is necessary today is not an automatic binary choice, where public oversight is always bad and removing it is always good. The determination depends instead on the nature and the effect of the provision in question. Some rules actually work to limit the scope of copyright and contractual exclusivity provisions. So, like STELA, they make available certain types of content that it would be difficult or impossible to obtain in the absence of such rules.

Other existing provisions, like the good faith negotiation obligations in the retransmission consent context, are necessary to prevent anticompetitive behavior by incumbent providers and distributors. These provisions could be clarified, strengthened, or supplemented by new laws, such as the Consumer Choice in Online Video Act (CCOVA) (S.1680), sponsored by Senator Rockefeller; the Television Consumer Freedom Act of 2013 (TCFA) (S.912), sponsored by Senators McCain, Blumenthal and Whitehouse; and the Video CHOICE Act of 2013 (H.R.3719), sponsored by Representatives Eshoo and Lofgren.

The Free Press Action Fund supports these bills because they would increase consumer choice among the offerings already on the market today. The CCOVA also would prevent harmful conduct leveled against new entrants in the video market by incumbent MVPDs that also offer broadband and, in some cases, control vertically integrated content companies as well.

**PRESERVING AND EXTENDING SATELLITE VIEWING OPTIONS**

STELA and its predecessors, starting in 1988 with the Satellite Home Viewer Act (SHVA), were designed to address a technical gap and remedy the resulting limitation on viewer choice. SHVA and other STELA forerunners were intended to ensure that viewers who are unable to receive a local "over-the-air" broadcast signal could still have access to broadcast programming through their satellite television subscription.

Congress should continue to offer this assurance to such individuals, and should reauthorize STELA to provide continued satellite viewing options for unserved households. Prior reauthorizations of the satellite home viewing laws have narrowed the definition of "unserved households" and their eligibility for distant signals. Those bills have reduced opportunities for distant signal importation in favor of local-into-local carriage for in-market broadcast TV stations affiliated with the same network as the distant station.[1]

Free Press Action Fund takes no position on whether further legislative or regulatory action may be needed to implement these changes. We note, however, that direct broadcast satellite providers have testified that as many as 1.5 million homes still rely importation of distant signals for their broadcast content.[2] There is no reason to reduce these viewers' options by taking away signals they receive today.

STELA and other satellite laws should preserve and increase viewers' choices, not reduce them. Yet it remains the case today that any of many of your constituents are unable to watch in-state broadcast TV programming with their satellite subscription. That is because Nielsen draws its Designated Market Area (DMA) television market boundaries, on which the FCC relies, without regard for state lines. Certain counties are thus "orphaned" from the television stations located in the same state in which those themselves counties are located. This means that residents of a Nebraska county, for example, may be able to receive via satellite *only* television signals that originate in Iowa or Colorado; or that residents of a Wisconsin county may be eligible to receive only Minnesota broadcast television station signals.

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[1] *See* 17 U.S.C. § 119(a)(3).

[2] *See, e.g.*, Testimony of Alison A. Minea, Director and Senior Counsel of Regulatory Affairs, DISH Network LLC, on "Reauthorization of the Satellite Television Extension and Localism Act," Hearing Before the United States Senate Committee on the Judiciary, at 3 (Mar. 26, 2014).

This poses a problem because broadcast TV is a primary means by which residents get news and other information that is culturally relevant to their communities. Broadcasting also provides a medium through which elected officials communicate with their constituents, and through which those individuals can gather information about their representatives at the statehouse and in Congress too.

Under Section 614(h) of the Communications Act, 47 U.S.C. § 534(h), the Federal Communications Commission has the power to modify DMA boundaries for purposes of determining broadcast TV carriage rights on cable systems. The FCC's market modification processes under Section 614(h) would serve as a good precedent for addressing the issue of potentially misaligned boundaries that prevent residents from receiving any in-state broadcast signals either over-the-air or through their satellite provider. Use of the FCC's market modification procedures would not necessarily result in changes to television market boundaries, or in the deletion of signals originating in the same DMA as the orphan county. This process would simply give the Commission a chance to make the determination based on the facts, and perhaps to "determine that particular communities are part of more than one television market."[3]

**KEEPING THE FAITH FOR RETRANSMISSION CONSENT NEGOTIATIONS**

Another expiring provision in STELA is the obligation under Section 325(b)(3)(C) of the Communications Act for broadcast television stations and MVPDs to negotiate retransmission consent agreements "in good faith." The Satellite Home Viewer Improvement Act (SHVIA) enacted in 1999, and the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), added these good faith negotiating requirements to the Communications Act – first for broadcasters, and then with a reciprocal good faith obligation for MVPDs as well.

[3] 47 U.S.C. § 534(h)(1)(C)(i).

Congress should extend these protections. It also could adopt additional specifications explaining what the good faith standard requires, or direct the FCC to provide such additional specifications in Section 76.65 of the Commission's rules. For instance, some have suggested that a broadcaster blocking access to its online content during a retransmission dispute – specifically aimed at broadband customers of an MVPD with whom the broadcaster's retransmission deal has expired – should be considered a bad faith negotiating tactic.[4]

Congress also should clarify the FCC's authority to order interim carriage of a television signal during the pendency of such retransmission consent disputes. Free Press supports the availability of a "standstill" period to ensure continued carriage when negotiations reach an impasse, so that viewers are not subjected to loss of service as a negotiating tactic.[5] Clarifying the FCC's authority to require carriage during the pendency of any such dispute would help hold viewers harmless and prevent them from bearing the brunt of such breakdowns in negotiations.

The brinksmanship and more frequent blackouts that go along with retransmission consent renewals deprive viewers of content they have already paid to watch. A better remedy than allowing importation of distant signals when a blackout begins, requiring refunds to MVPD subscribers after it is over, or creating a counter-productive "parity" to let MVPDs *delete* broadcast signals during ratings periods, would be to prevent loss of service in the first place.

Different parties have offered up persuasive if not definitive arguments about the FCC's *existing* authority to require interim carriage.[6] Clarifying the agency's authority (as Rep. Eshoo's

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[4] *See, e.g.*, Harold Feld, Public Knowledge, "Escaping the Black Hole of Television Blackouts" (Aug. 6, 2013), http://www.publicknowledge.org/news-blog/blogs/escaping-black-hole-television-blackouts.

[5] *See, e.g.*, Comments of Free Press, Parents Television Council, and Consumers Union, MB Docket No. 10-71, *Petition for Rulemaking to Address the Federal Communications Commission's Rules Governing Retransmission Consent*, at 6-7 (filed May 18, 2010).

[6] *See, e.g.*, Letter from Public Knowledge, OTI, and the Benton Foundation, MB Docket No. 10-71, at 5-7 (filed Jan. 4, 2011); Letter from Public Knowledge, DISH, New America Foundation, DIRECTV, Charter Communications, American Cable Association and Time Warner Cable, MB Docket No. 10-71, at 1-4 (filed Dec. 11, 2013).

Video CHOICE Act proposes) would remove any doubt about the FCC's ability to hold consumers harmless during a retransmission consent dispute. Such measures would preserve choice and rein in costs, but without scrapping retransmission consent compensation to broadcasters and content creators for use of their materials by the MVPDs who sell these signals to their own customers.[7]

Of course, to acknowledge that retransmission consent fees remain valid in principle is not to deny for a second that these fees are spiraling out of control. There are actions that the FCC has already undertaken to check these skyrocketing prices, and there are additional steps that Congress should take as well. These negotiations are not just a business disputes with no ramifications for consumers: the increased fees that MVPDs pay in such circumstances invariably are passed through to cable and satellite subscribers.

For instance, retransmission consent negotiations conducted jointly by broadcast TV stations allegedly under separate control – but in reality coordinating all of their operations – are one driver for this rising price of retransmitted broadcast signals. American Cable Association members have shown the increase in retransmission consent fees paid when stations employ these joint negotiating mechanisms. These small cable operators documented four instances in which the average impacts of joint negotiations on their own retransmission consent costs were increases ranging from 21.6 percent to 161 percent.[8] MVPDs also have found more than 40 instances, representing more than 20 percent of all TV markets, in which a single broadcaster

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[7] *See, e.g.*, Testimony of Ellen Stutzman, Director, Research and Public Policy, Writers Guild of America, West, Inc., on "Reauthorization of the Satellite Television Extension and Localism Act," Hearing Before the United States Senate Committee on the Judiciary, at 3 (Mar. 26, 2014).

[8] *See, e.g.*, *Ex Parte* Comments of SuddenLink Communications, CSR Nos. 8233-C, 8234-M, at 5-6 (filed Dec. 14, 2009) (21.6% increase); USA Companies Letter to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed May 28, 2010) (133% increase); Cable America Letter to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed May 28, 2010) (161% increase); Pioneer Long Distance Letter to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed June 4, 2010) (30% increase).

negotiates retransmission consent for more than one "big four" network affiliate – a number that will only grow in light of the continued pace of broadcast transactions.[9]

Free Press does not believe that congressional action is necessary at this time to prevent such joint negotiating tactics, so long as the FCC continues its progress towards renewed enforcement of the local television multiple ownership limits in Section 73.3555 of the Commission's rules. The FCC can prevent such coordination among alleged competitors by ensuring that separate broadcast licenses really do remain under separate control. That would prove a more effective remedy than a standalone ban on joint negotiations, while also working to promote competition, localism and diversity in other ways in local media markets.

Yet, breakdowns in retransmission consent negotiations do not exist in a vacuum, and the excesses and failures of the current video market would not disappear even if Congress and the FCC implemented all of the measures outlined above. Better faith bargaining, interim carriage requirements, and an end to joint retransmission consent negotiations would improve outcomes, but these steps would not by themselves allow consumers more freedom to choose their own video content – either on traditional MVPD platforms or from "over-the-top" alternatives.

That is why further congressional action *is* necessary, whether taken in conjunction with this reauthorization or not. Congress must address the real culprit for rising retransmission fees and myriad other failures in the video marketplace: the traditional cable business model, which too often centers around how to divide the spoils from captive customers rather than how to improve consumers' choices and lower their prices in the first place. These problems are not confined to the "traditional" video marketplace either, and they are now spilling over into online video and into our nation's broadband communications market as well.

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[9] *See, e.g.*, Notice of *Ex Parte* Communication of American Cable Association, MB Docket Nos. 10-71, 09-182, at 2 (filed June 24, 2013).

## ADDITIONAL STEPS FOR FIXING AMERICA'S BROKEN VIDEO MARKET

America's video market is broken. Since 1996, when Congress relaxed the protections adopted in the Cable Television Consumer Protection and Competition Act of 1992, cable prices have risen steadily at nearly three times the rate of inflation. And this trend is only getting worse. Since the 2008 recession, the average annual rate of inflation has been 1.4 percent, but the price of expanded basic cable service has increased by an annual average of 5 percent. Plus, these figures do not include mandatory equipment rental costs, which continue to skyrocket too.

In fact, as Free Press has documented, the "effective competition" standard in Section 623 of the Communications Act, 47 U.S.C. § 543(*l*), has not succeeded in disciplining cable prices. Congress should modify that standard to make the FCC determine accurately whether effective competition really exists, rather than finding the mere presence of MVPDs other than incumbent cable to be "effective" even where cable's market share remains as high as 85 percent. This test simply does not measure whether competition actually occurs in such highly concentrated markets. That's the main reason that the FCC's own statistics show prices in markets deemed subject to effective competition under this test are 3 percent *higher*.[10]

While no one industry segment is responsible for all of these out-of-control price increases, there is plenty of blame to go around. Broadcast and cable channel owners such as Disney, Fox and Viacom, and multichannel video distributors like Comcast and Time Warner Cable, are the two factions of what Free Press has described as a comfortable cabal[11] that earns monopoly profits from consumers who are deprived of any real choice in the pay-TV market.

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[10] *See* S. Derek Turner, Free Press, "Combatting the Cable Cabal: How to Fix America's Broken Video Market" (May 2013), http://www.freepress.net/sites/default/files/resources/Combating_The_Cable_Cabal_0.pdf.

[11] *See id.*

The recent recession took a brutal toll on many businesses. However, the cable, satellite and telco TV multichannel distributors kept making money. From 2007 to 2011, the multichannel distributors collectively increased the price of expanded basic cable service by 22 percent. These rate hikes and other fee increases helped the industry boost its video-service revenues by 27 percent, an impressive performance considering that during this same period there was almost no growth in the total number of pay-TV subscribers.[12] Indeed, the traditional wired cable providers' total video revenues grew by 11 percent during this timeframe, even though these companies lost 11 percent of their subscribers.[13]

But these distributors are just that: distributors of (most often) someone else's programming. As the owners of that programming raise their fees, distributors either have to pass those higher costs along to their subscribers or accept lower profits on video. For many years, the distributors simply passed along all of these increased programming costs. As impressive as the multichannel video distributors' fiscal performance was through the recent economic downturn, it pales in comparison to the revenue growth experienced by cable programmers. From 2007 to 2011, total cable programmer revenues rose at a compound annual growth rate of 8 percent, a result analysts characterized as particularly impressive given the recession.[14]

Cable channels are not the only ones profiting from increased fees, as broadcasters also make extensive use of their retransmission consent rights today. Payments from multichannel video distributors to local broadcasters reach record levels every fiscal quarter, in some cases despite declining ratings. As one broadcast executive bragged to analysts: "[T]he reality of retransmission is it enables the broadcast business to be a healthy business…. [W]e have had a

[12] *See id.* at 12.

[13] *See id.* at 2.

[14] *See id.* at 2.

very disappointing year ratings-wise but our broadcast business is up [in] profitability."[15] Retransmission consent fees have risen across the board and become a larger and larger percentage of broadcasters' revenues. The industry saw retransmission revenues increase more than 10-fold in six years, from $215 million in 2006 to $2.4 billion in 2012.[16] They jumped to $3.3 billion in 2013, and current projections predict them more than doubling again to $7.6 billion in just five more years.[17]

While they often find themselves at odds over rates today, programmers and distributors still might work together to prevent consumers from truly "cutting the cord" for pay-TV services, or to keep customers from paying only for the programming those consumers want to watch. Many programmers leverage their ownership of high-demand channels (such as ESPN or HBO) and force MVPDs to purchase the less-desired channels controlled by these same programmers. Distributors long accepted this practices of wholesale bundling as acceptable or even beneficial for them as well, because they could pass the whole bundle on to customers. So MVPDs could grow their own revenues and create an illusion of value with ever-expanding channel lineups.

Recently, as programming fees continued to balloon, many consumers decided that either they couldn't or they wouldn't absorb the rate increases – leading to the decline in MVPD video subscribers documented above. As a result, MVPDs have been forced to absorb at least a portion of these increased programming costs. But cable companies are using their captive broadband customers to help shoulder the burden. Because the wired providers bundle video service with broadband, they are able to spread the programming-cost increases across each service in the bundle – maintaining healthy overall margins even as their video margins decline.

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[15] *Id.* at 19-20 (quoting News Corp. Q2 2013 Earnings Call, Feb. 6, 2013).

[16] *See id.* at 20.

[17] *See* "Retrans Rev Projected To Hit $7.6B By 2019," *TVNewsCheck*, Nov. 22, 2013, http://www.tvnewscheck.com/article/72202/retrans-rev-projected-to-hit-76b-by-2019.

Lawmakers, including those on this Committee, have introduced or co-sponsored legislative solutions in the last year to these twin problems: limited choice in the TV channels that MVPD customers must buy, whether or not they watch them; and limited choice in the online alternatives that consumers have, both for watching broadcast and cable programming online and for utilizing alternative video sources. Free Press Action Fund has supported three such bills aimed at fixing these problems during the current Congress: Senator Rockefeller's CCOVA; the TCFA put forward by Senators McCain, Blumenthal and Whitehouse; and the Video CHOICE Act sponsored by Representatives Eshoo and Lofgren.

**Increasing Consumer Choice on Pay-TV Platforms**

The TCFA and the Video CHOICE Act address many of the same problems. The bipartisan TCFA in particular could shake up the industry and give consumers a real measure of control over the price they pay for the cable and broadcast channels made available to them. That bill virtually ensures that consumers would be offered an "a la carte" option alongside bundled-channel packages, allowing viewers to take and pay for only the channels they actually want to watch. This would save consumers money in the short run and, in the long run, help create a more competitive television market both online and on traditional MVPD platforms.

The Video CHOICE Act introduced by Reps. Eshoo and Lofgren seeks to prevent retransmission consent-driven blackouts by (1) enabling consumers to purchase cable service without subscribing to retransmitted broadcast stations and (2) prohibiting programmers from directly or indirectly condition retransmission consent on the carriage of additional, affiliated cable channels. (For example, prohibiting CBS from requiring carriage of Showtime to get the CBS signal.) The TCFA would go even further by providing incentives for retail a la carte for *all* pay-TV channels, including broadcast and cable programming alike.

Passage of these bills would promote competition between traditional MVPD services and online video alternatives, and increase market transparency and consumer agency in the purchase of traditional MVPD programming. If Congress does not pass such measures, large programmers will continue to tie less popular channels to their marquee content – crowding out capacity and opportunities for independent channels while making consumers foot the bill for an entire bundle of channels they don't want. Our research shows that the chief beneficiaries of forced bundling are not diverse programmers serving underserved communities, but sports and entertainment channels owned by Fox, Viacom, Comcast, Disney and the major sports leagues.[18]

In the absence of legislative action, retransmission consent and cable licensing fees will stay high because they are undisciplined by any real measure of demand. It's no surprise to see prices increase when the viewers ultimately purchasing this content have little to no knowledge of the price they pay for each channel, let alone the power to decide whether or not they purchase them. Such hidden prices are perhaps the most tangible sign of a failed market. Distributors sell inflexible, more-than-you-can-eat programming bundles full of channels that no one watches. This model completely obscures actual demand, making consumers appear to be far less price sensitive than they actually are for any given channel or group of channels.

Senator Rockefeller's CCOVA offers alternatives to the retransmission consent structure as well, by expressly authorizing antenna rental services (such as Aereo) and resolving doubts and ongoing litigation about the legitimacy of such services. But Senator Rockefeller's bill offers even more promise for video consumers because it expands not only the choices that viewers have with their current pay-TV subscriptions, but protects online content and distribution alternatives as well.

[18] *See* Turner, "Combatting the Cable Cabal," at 22-27.

**Increasing Video Options Online**

The CCOVA would help online video content companies and distributors compete with traditional pay-TV channels and MVPDs. In no uncertain terms, it would prevent broadband Internet service providers from trying to squelch alternatives to their legacy video services. The bill would give online video providers more rights to negotiate access to popular content. It would keep broadband providers from degrading online video services that compete with traditional cable TV offerings. And it would clarify broadband billing to guard against discriminatory pricing, and to let consumers know what they are paying for.

The Free Press Action Fund endorsed the CCOVA because the bill would extend nondiscrimination and program access-style protections to online video providers, and more generally guard against anticompetitive practices (such as the use of data caps, forced bundling and exclusivity) when such practices are aimed at diminishing competition from online video sources. The bill notes the substantial First Amendment interest in “promoting a diversity of views” and would prohibit Internet Service Providers affiliated with MVPDs from favoring their own offerings.

These tactics harm not only the video market, including new entrants, innovators, and consumers in that market. They also harm broadband as well, as some MVPDs use their broadband service – a product subject to very little competition in a market with insurmountable entry barriers – to cross-subsidize their video business. Some large distributors like Comcast actually use predatory pricing (*e.g.*, selling a video-data bundle for less than the price of stand-alone data service) to discourage competition from new video providers. And some distributors like Comcast and AT&T use data caps and veiled threats against Internet openness to thwart competition from over-the-top competitors.

## CONCLUSION

Congress should reauthorize STELA, in the process preserving and expanding choices available to satellite viewers, while extending and strengthening good faith negotiating rules for retransmission consent. Yet the ultimate answer to preventing blackouts, and loss of service for consumers who already pay too much for video in the first place, is to empower those consumers with the ability to make decisions for themselves. Whether it takes up such reforms in this reauthorization process or not, Congress should allow the FCC to continue implementing its own retransmission consent and local ownership reforms. Congress also should enact new legislation to preserve and promote video choice both online and on traditional pay-TV platforms.