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BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

"THE CABLE ACT AT 20"

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Mr. Chairman and Ranking Member Hutchison, thank you for the opportunity to participate on this panel.

As I prepared for today's event, I reviewed recent hearings and comments from the members of this Committee and am pleased that so many of you recognize what I and my fellow small cable operators also know:

TODAY'S COMMUNICATIONS MARKET HAS MOVED ON WHILE THE 20-YEAR-OLD LAWS THAT GOVERN IT HAVE STAYED THE SAME.

While the 1992 Cable Act may have worked for the realities of the early '90s, it has been bypassed by a technological revolution that it never anticipated and is ill-equipped to handle.

Today, we have smart phones, laptops, tablets, and other smart devices that access rich video content via Internet technologies, yet the law that governs video distribution assumes we still live in a world of one local broadcaster working with one local cable franchisee.

I appreciate your awareness that the law is outdated, and I am excited about the benefits that consumers will see through updating the law.

CONSUMERS ARE HARMED BECAUSE THE LAWS HAVE NOT KEPT PACE WITH THE TIMES.

Specifically, the 1992 Act lags behind profound technological developments and business innovation. (Truthfully, the 1996 Telecommunications Act lags behind too.) As a result, outdated laws applied to a rapidly changing marketplace create serious problems for consumers.

These consumer harms manifest themselves in a number of ways:

- Programming and retransmission consent negotiations are failing, causing blackouts.
- Retransmission consent fees, for what the broadcasters call "free over-the-air TV," are skyrocketing, and consumers pay the increased price.
- Broadcasters collusively coordinate agreements with other broadcasters in the same market, driving retransmission consent rates even higher.
- Growing media consolidation by the large networks and programming owners has led to rampant tying and bundling of unwanted, unwatched and unmarketable programming.
- Because tying and bundling is forced on Multichannel Video Programming Distributors (MVPDs) by the media giants, there is hardly any difference today in the price and packages of video services offered by cable, satellite, municipal and telco video providers, let alone any choice for the consumer.

- Access to online video distribution rights is being slow-rolled by the big content providers, giving consumers little choice for online video.

On the retransmission consent front, there is even more evidence of consumer harm. For instance, in the retransmission consent market today:

  - There are regular breakdowns in negotiations between broadcasters and MVPDs, leading to a record number of blackouts. In fact, 69 blackouts have already occurred in 2012, affecting dozens of television markets across the country and literally tens of millions of TV viewers.
  - Retransmission consent blackouts in 2012 are up 35% over 2011, and this year is hardly even half over.
  - It is now the standard practice of big broadcast networks to agree to pay astronomical fees for sports programming, in part because they can force down the cost to consumers through reverse compensation and retransmission consent payments.
  - The outdated retransmission consent rules give big media companies the means to require the carriage of additional, less desirable cable programming.

THE IMPACT ON SMALLER, INDEPENDENT MVPDS IS MAGNIFIED, AND SYSTEMS IN RURAL AMERICA ARE BEING LOST.

Distortions caused by these outdated rules are serious and not without consequences, particularly for smaller cable operators.

My colleagues and I within the American Cable Association have a unique view of the pay-television marketplace as compared with larger MVPDs.

Our members include the smallest operators in the market. In fact, 82% of ACA's members serve fewer than 5,000 subscribers, and 30% serve fewer than 500 subscribers. Since 2008, nearly 800 of these small systems have closed across the country due in large part to escalating retransmission consent and programming costs that cannot be passed along to consumers, a trend I fear will continue in many rural communities. And the loss of a business that offers video programming often means the devastating loss of broadband services as well, because an operator needs a healthy business model on both ends to survive.

HOW DID WE GET HERE?

I would like to present a view of how the video marketplace has changed over the last 20 years, and why your sense is accurate that these changes demand modernization of the Cable Act, particularly with respect to the rules governing retransmission consent. As Chairwoman of the Board of the American Cable Association ("ACA"), I provide my perspective on behalf of a group of 850 cable operators, including Wide Open West!, for which I serve as Chief Executive Officer.

Retransmission consent was crafted to give broadcast stations control over the redistribution of their signals in a marketplace that existed before cable faced competition from:

- Direct broadcast satellite companies, such as DIRECTV and DISH Network, providing an all-digital video service that includes local channels;

- Telephone companies, like Verizon, AT&T, and mid-sized and smaller companies, providing a wireline video service that also includes broadband and phone;
- Online video distributors, such as Netflix, Amazon, and Hulu, providing a streaming and on-demand video service, including broadcast content over the Internet, not just to TV sets but also to laptop computers, tablets like the iPad, and an assortment of hand-held mobile devices.

Moreover, the provision was written before a tidal wave of media consolidation that has left the Big 4 broadcast networks (ABC, NBC, Fox, and CBS) in the hands of media giants like Disney, Comcast, News Corp., and Viacom's Sumner Redstone, all of whom own many of the most popular cable channels. And now too retrans cash is king for CBS and the others as they predict annual earnings of billion dollar retransmission consent fees to come.

Today, retransmission consent rules fail to reflect the wide disparity in bargaining power between a pay-TV provider and a local broadcast station affiliated with a Big 4 network. In the distant past, negotiations were between one local broadcaster and one cable operator, each having exclusivity within its service territory. Although today there is still only one local station affiliated with a broadcast network per market, in nearly every market there are many multichannel video programming distributors in each market competing against one another. The original delicate balance between the two parties was predicated on the fact that both sides needed each other in roughly equal measure. However, unanticipated consolidation and business practices have transformed this situation into one in which the broadcaster can now extract evermore egregious fees from MVPDs and their subscribers as a result of government

sanctioned protections that may have made sense in a completely different business environment, but not today.

Today, the MVPD still needs the Big 4 signal on its channel line-up just as much as before, but, unlike in 1992, the broadcaster no longer needs any single MVPD quite so much. In my situation, I know, and my local broadcaster also knows, that if I do not carry its signal my customer will easily go to one of my competitors to get it.

RETRANSMISSION CONSENT FEES ARE OUT OF CONTROL.

To put all of this into context, but without violating the non-disclosure requirements embedded in the contracts we all must sign, I have calculated that the retransmission consent costs for WOW!, starting in January of this year, have increased at an appalling year-over-year pace of almost 90%. And that's in this grim economy for a product that Congress has legally obligated broadcast licensees to provide free and over-the-air to the public. This exorbitant rate hike follows on the heels of a 117% increase from the fees just prior to this round of retransmission consent.

According to SNL Kagan research, retrans fees will increase 18-fold by 2015, and we're talking BILLIONS per year taken from consumers. Imagine the political reaction to that kind of increase if it was forecast for corn, gasoline, clothing, or any other consumer product.

CABLE CONSUMERS ARE FORCED TO PAY FOR INTERNET CONTENT THEY DON'T ACCESS.

Let me shed light on another disturbing trend that should concern you. Some major content distributors continue to deny ACA member companies like WOW! fair and equitable

Internet distribution rights for their high-value programming. Or, they unfairly tie these media rights to access to their core programming, requiring that our customers pay for what is often also available for free on the networks' proprietary websites. In one situation with a very well-known entity, we must charge EVERY customer on our system a fee for the right to access that company's online content over the subscriber's own broadband Internet connection, even though the programmer's audits reveal that, on average, less than two-tenths of one percent of our subscribers visit its website on any given day. If that kind of trend continues, both cable and broadband service will be priced out of reach for most consumers. This situation highlights the looming problem you will face if you do not in the very near future get ahead of the consumer and MVPD concerns surrounding video programming content and how it is distributed.

COORDINATED NEGOTIATIONS BY BROADCASTERS STIFLE COMPETITION.

I believe the problems that WOW! and other MVPDs face are best illustrated by understanding the sheer unfairness of coordinated retransmission consent negotiations. Broadcasters have perverted what they call "marketplace negotiations" for retransmission consent by engaging in collusive coordinated negotiations. A longstanding fundamental policy goal of our local broadcast television licensing system is the promotion of competition among top rated, same-market broadcasters licensed by the Federal Communications Commission.

Today, there are at least 46 instances where separately owned, same-market broadcasters affiliated with a Big 4 network coordinate their retransmission consent negotiations. The practical impact of these collusive alliances is that local broadcasters, who

are supposed to be competing against one another, are using a single representative to negotiate carriage rights for two or more competing stations. And consumers pay the price for this kind of collusion.

Evidence ACA members presented to the FCC shows that broadcasters who coordinate their retransmission consent charge fees that are at least 21 percent higher than the fees collected by broadcasters who negotiate carriage separately. Just imagine if the reverse were to occur. Imagine the outrage you would hear from the local broadcasters if Comcast, WOW!, Direct TV, DISH Network, and AT&T U-Verse all decided to negotiate as one block with the TV stations in a single broadcast market in which we operate. We shouldn't do that and neither should the broadcasters.

ACA brought the issue to the FCC's attention on multiple occasions, beginning as early as May 2010 in response to the FCC's request for comment on a Petition for Rulemaking to reform the rules governing retransmission consent. Each time we argued that the FCC should deem coordinated negotiations by broadcasters to be a *per se* violation of its good faith rules. More than two years later, we are still awaiting action. Our hope is that Congress will find a way to convince the FCC to act or will itself prohibit this practice in making revisions to the Cable Act.

THE GOOD NEWS: THERE'S NO SHORTAGE OF SOLUTIONS!

But there is good news. After years of hearings, industry discussions, and constant debate, it's clear the time for Congress to act is now. And when it does, there will be many

solutions to consider that will improve the situation for consumers and, in combination, have a material benefit. As you begin your rewrite of the 1992 Cable Act, I urge you to consider:

1. Prohibiting coordinated negotiations by separately owned broadcasters in the same market;
2. Ensuring continued carriage of signals during a retransmission consent dispute in order to stop consumers from being held hostage by blackouts;
3. Requiring binding baseball-style commercial arbitration of such disputes; and,
4. Authorizing consumers and pay-TV providers to employ new and innovative technologies that allow consumers to receive broadcast signals over-the-air as an alternative to receiving and paying for that content through retransmission consent.

These are but a few possibilities, and I urge you to consider them all.

As you have noted, the broadcast signal carriage rules codified in 1992 are antiquated and have escaped reform for far too long. They reflect neither the realities of MVPD competition today engendered by the 1992 Act, nor the impact of the pervasive consolidation in the broadcast and media industry, not to mention the advent of the Internet as a platform for video programming delivery.

Mr. Chairman, if you want to provide your constituents with the best services and options that a 21st Century telecommunications network can provide, then it is time to reform and overhaul the 20th Century law that prevents cable operators from delivering them.

The status quo is unacceptable.