March 17, 2014

Via Electronic Mail to STELA_Comments@commerce.senate.gov

The Honorable John D. Rockefeller IV
Chairman
Committee on Commerce, Science, and Transportation
531 Hart Senate Office Building
Washington, DC 20510

The Honorable John Thune
Ranking Member
Committee on Commerce, Science, and Transportation
511 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Mark L. Pryor
Chairman
Subcommittee on Communications, Technology, and the Internet
Committee on Commerce, Science, and Transportation
255 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Roger Wicker
Ranking Member
Subcommittee on Communications, Technology, and the Internet
Committee on Commerce, Science, and Transportation
555 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Rockefeller and Chairman Pryor and Ranking Members Thune and Wicker:

The American Cable Association ("ACA") commends the Committee and Subcommittee for its thoughtful and searching questions concerning the reauthorization of the Satellite Television Extension and Localism Act contained in your letter of February 25, 2014, and is pleased to submit the attached answers with this letter. We look forward to working with you on these important issues.

Please do not hesitate to let me know if you or your staff requires additional information or clarification on any of our responses.

Sincerely,

Matthew M. Polka
President and CEO
American Cable Association

2014 Satellite Television Extension and Localism Act (“STELA”) Reauthorization

Responses of the American Cable Association to Questions for Comment

STELA-specific Issues:

(1) Should Congress reauthorize STELA? If so, for how long?

ACA believes Congress should reauthorize STELA. STELA reauthorized the Satellite Home Viewer Extension and Reauthorization Act of 2004, which kept in place through December 2014, the direct broadcast satellite (DBS) providers’ distant broadcast station copyright license and the good faith rules which govern negotiations between multichannel video programming distributors (MVPDs) and broadcasters for retransmission consent.

It is important, in ACA’s view, that Congress renews the DBS providers’ distant broadcast station copyright license because the public benefits from receiving distant stations, and the statutory license continues to serve as the most cost-effective mechanism for clearing the necessary rights. Moreover, it is important that Congress ensure continuity of service to customers, including approximately 1.5 million households that receive one or more out-of-market broadcast stations from DIRECTV or DISH, who would likely lose this service if STELA is not reauthorized before the end of the year. For all of these reasons, if Congress were to consider elimination of the statutory license permitting cable operators to offer out-of-market broadcast signals to its customers, ACA would similarly oppose such action.

Many ACA members, like DBS providers, serve customers in areas that are outside of the geographic limits of network non-duplication and syndicated exclusivity rights, and the distant signal copyright license makes it easier for these smaller rural MVPDs to offer out-of-market broadcast stations that their customers value. In some cases, these signals, which are technically considered “distant” according to Nielsen-defined designated market areas (DMAs), may actually be geographically closer to the viewer than the in-market station, and therefore provide more relevant weather information, which is particularly important during weather emergencies. In other cases, the out-of-market station might provide the viewer with more extensive coverage of their in-state news, particularly their in-state political news, than the signals deemed “local” to the DMA, which may cross state boundaries and predominantly include counties from a neighboring state.

Without the distant station copyright license, it is likely that millions of households in smaller markets and rural areas would lose access to their distant network stations. Even after nearly forty years, the distant signal statutory license still works as Congress intended, benefitting consumers, broadcasters, distributors and the vast majority of rights holders with a cost-effective mechanism for clearing rights to protected content. Regulatory stability and predictability in copyright clearance are critical to the continued provision of distant broadcast television service by MVPDs, and the avoidance of disrupting consumers who have received these stations for years or decades.

For this same reason, ACA is concerned with the recent trend of broadcast networks prohibiting their affiliates, as part of their network-affiliate contracts, from granting retransmission consent to MVPDs who operate outside of the station's local market. Despite Congress providing an efficient mechanism for clearing copyright to content on distant broadcast signals, and broadcast exclusivity rules that do not permit local broadcast stations from blocking the importation of out-of-market stations beyond the estimated reach of their over-the-air signals, broadcast networks have been finding ways to contractually deny consumers access to out-of-market broadcast stations that they have grown accustomed to receiving.

It is equally important that the good faith negotiation rules be reauthorized. These rules, while far from perfect, provide important guidance to broadcasters and MVPDs on what's considered appropriate conduct in negotiations, and a regulatory backstop when one party falls out of line. As discussed in more detail in Question (3) under STELA-Specific Issues and Question (1)(b)(iv) under General Video Policy Issues, these rules can be further improved in two important ways. First, by clarifying that the coordination of retransmission consent negotiations by separately owned, top-four rated broadcast stations in a single market is a *per se* violation of the good faith rules. Second, by clarifying that a broadcaster that blocks 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 is also a *per se* violation of the good faith rules.

ACA has no specific recommendation for the length of the STELA renewal period, but generally believes at least five years to be an appropriate period for periodic examination of statutory requirements.

(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?

Congress should strive to create regulatory parity to the greatest extent possible for MVPDs who compete against one another in the intensely competitive video distribution market.

A broadcaster's television market for purposes of cable carriage is determined by the FCC, which currently relies upon a system of geographic viewing markets determined by Nielsen Media Research. Nielsen divides the nation into a series of coterminous DMAs, and assigns counties to DMAs based upon station viewer ratings. Specifically, Nielsen assigns the nation's counties, regardless of their state, to television markets based on the market whose stations receive the largest share of viewing in the county. DMAs often cross state boundaries. Nielsen reevaluates its decisions periodically to ensure that they continue to accurately reflect television-viewing patterns.

A television station, or a cable operator, who believes a particular Nielsen assignment is wrong can petition the FCC for a market modification. Pursuant to Section 614 of the Act, the FCC is directed to evaluate the request against four statutory factors and other relevant information, giving particular attention to the value of localism.[1] The purpose of the market modification process is to ensure television stations are carried on cable systems in its natural economic market. Under the market modification process, a television station, for example, can ask the FCC to add a community to its television market despite Nielsen's assignment of that community's county to another DMA. Cable systems are similarly able to petition to exclude or include a station from carriage on their systems by demonstrating how the station lacks the necessary nexus to their communities under the statutory factors and other pertinent evidence.

In some instances, the process of modifying Nielsen DMAs through the FCC has worked to achieve Congress' goal that television broadcast stations be carried by cable systems serving communities comprising the station's natural economic market. ACA notes, however, that the cost of petitioning for or objecting to a market modification is burdensome and in some cases prohibitive for smaller cable operators.

To the extent that the Committee is interested in helping its members' constituents who are unable to watch in-state broadcast TV programming from affiliates of all four networks, the current market modification process is not a viable remedy. The current market modification process is only effective at making very small adjustments to the boundaries of DMAs for individual stations. In fact, the Commission requests that petitioners seek changes on a community-by-community basis rather than county-by-county, and only with regard to a particular station rather than all stations in a market.

If increasing access to in-state programming through the market modification process is an objective of policymakers, the Congress could direct the FCC to give far greater weight to the promotion of the availability of in-state broadcast television stations in its review of market modification petitions. Moreover, the process should consider adding provision for county-based modifications. Finally, Congress should instruct the FCC to also take steps to increase the accessibility of the process to small and medium-sized cable operators that serve rural areas and whose customers would benefit most from receiving more in-state broadcast stations, by finding ways to decrease the costs for them to use the process.

Despite the flaws in the market modification system, as a matter of fairness, there is no reason why the FCC should not have the ability to modify markets with respect to all MVPDs, including DBS providers.

[1] In considering market modification requests, the statute instructs the FCC to afford particular attention to the value of localism by taking into account such factors as: (1) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; (2) whether the television station provides coverage or other local service to such community; (3) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and (4) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community. 47 U.S.C. § 534(h)(1)(C)(ii)(I)-(IV).

(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 is means to negotiate retransmission consent in good faith? If so, how?

Yes. The good faith rules that govern negotiations between broadcasters and MVPDs should be clarified in two important ways.

First, the good faith rules could better protect MVPDs and their subscribers from a current practice of local broadcast stations that is inconsistent with competitive marketplace conditions, a measure of good faith already embodied in Section 325. ACA has documented 48 instances of separately owned, same market broadcasters affiliated with a Big 4 network simultaneously negotiating retransmission consent with an MVPD using a single representative in 43 different television markets. Collusion by broadcasters in the sale of a product like retransmission consent rights reduces competition, thereby giving the colluding sellers undue bargaining leverage and permitting them to raise prices above the level each seller could obtain by negotiating individually. Available evidence from small cable operators shows that average retransmission consent fees are between 18 and 43 percent higher when a single entity negotiates for more than one Big 4 affiliate in the same market compared to average fees for individual negotiations. The United States Department of Justice, in a January 20, 2014 submission to the Commission regarding its media ownership rules, argued that coordination of retransmission consent negotiations by separately-owned broadcasters in the same market should be deemed *illegal* unless reasonably necessary for some other efficiency-enhancing benefit. In the same filing, the DOJ doubted such efficiencies could ever possibly exist. To address the problem of colluding local broadcasters, the good faith rules should more clearly prohibit coordination of retransmission consent negotiations by specifying that it is a *per se* violation of the duty to negotiate in good faith for top four rated non-commonly owned broadcast stations in the same market to coordinate their retransmission consent negotiations.[2] Although ACA believes the FCC already has authority under the Act to declare this practice to constitute per se bad faith, amending the good faith rules to clearly prohibit this practice will better ensure that retransmission consent negotiations are conducted consistent with competitive marketplace considerations, which do not include collusion.

[2] In particular, these four practices should be deemed a per se violation of the good faith rules:

- delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA;
- delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party;
- any informal or formal agreement pursuant to which one broadcaster would enter into a retransmission consent agreement with an MVPD contingent upon whether another separately owned broadcaster in the same market is able to negotiate a satisfactory retransmission consent agreement with the same MVPD; and
- any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

Second, the good faith rules should clarify that a broadcaster that blocks 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 is a *per se* violation of the rules. This issue is discussed in more detail in response to Question (1)(b)(iv) under General Video Policy Issues.

(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?

If changes are made to the standard by which households are determined to be "unserved" by broadcast TV signals with respect to DBS service, Congress or the FCC must ensure these changes do not undermine the competitive MVPD marketplace by permitting households to receive broadcast television services from DBS providers that they are not allowed to obtain from other MVPDs.

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

ACA has no specific recommendations to share with the Committee concerning technical issues in STELA at this time.

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.

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

Yes. The video market has changed in the 20 years since Congress enacted the Cable Consumer and Competition Act of 1992, yet the laws have not. Today, DBS and telephone providers offer robust competition to cable; online video delivery services, like Netflix, Amazon and Hulu, are estimated to have grown to more than 40 million customers; and the programming market has consolidated into five media conglomerates who control the Big 4 networks (ABC, NBC, CBS, and Fox) and dozens of the most popular cable channels. Despite this fundamental change in the video market, much of which was never anticipated by Congress, the existing rules governing the market have not changed and today fail to either recognize or address market problems for MVPDs and their subscribers.

In particular, the retransmission consent regime is now broken. Retransmission consent fees are rapidly escalating. According to SNL Kagan, broadcasters' retransmission consent revenue is over 15 times greater in 2013 than it was in 2006 (from $215 million to $3.3 billion in 2013 and projected to go to $7.6 billion in 2019). Broadcaster induced blackouts are also proliferating at an accelerating rate. In 2013, millions of Americans went without access to their local broadcast signals after station owners cut off programming 127 times. This was a nearly 40% increase over 2012 when there were 91 blackouts, a nearly 250% increase over 2011 when there were 51 blackouts, and an over 1000% increase over 2010 when there were 12 blackouts. As of the date of this letter, customers of an ACA member in Toledo, Ohio have been without access to their local NBC affiliate for 91 days due to the broadcaster's decision not to grant a contract extension to the cable operator. In recent years, broadcasters who have pulled their signals from MVPDs as part of retransmission consent disputes have started also blocking MVPDs' broadband Internet service customers' from accessing their online content that is otherwise freely available. Moreover, there has been a widespread and growing practice of separately owned, same market broadcast station owners engaging in the anticompetitive practice of coordinating their retransmission consent negotiations, a fact recently reaffirmed by the U.S. Department of Justice. Unable to absorb the higher costs, subscription TV providers must pass retransmission consent fees increases along to their customers.

In addition to the other specific possible reforms identified in Question (1)(b) under General Video Policy Issues, ACA recommends that Congress clarify the FCC's existing authority to provide for alternative dispute resolution and standstill obligations in the event of negotiating impasses between top-four rated local broadcast television stations and MVPDs. Although ACA believes the FCC already possesses such authority under the Act, it has been reticent about using its ability to govern the exercise of retransmission consent in this manner. The FCC has used this same approach in conditioning license transfer/assignment approvals involving MVPDs that control programming, and most recently employed it in the context of the Comcast-NBC Universal (Comcast-NBCU) transaction. In that case, the FCC required that Comcast-NBCU agree to permit aggrieved MVPDs to submit their negotiating disputes concerning Comcast-NBCU controlled programming to commercial arbitration under a set of arbitration rules established by the FCC. Once an aggrieved MVPD requests arbitration, Comcast-NBCU is required to immediately allow the MVPD continued carriage of the programming, under the terms and conditions of the expired agreement, if any, for as long as the arbitration lasts. To ensure that this remedy is equally available to large and small MVPDs, the FCC specified that smaller MVPDs can appoint a bargaining agent and created a one-way fee shifting mechanism whereby Comcast-NBCU would pay the arbitration costs of a smaller MVPD that prevails on the merits in the arbitration. This approach of commercial arbitration combined with standstill relief, with some modifications and additional special considerations for smaller operators, would be useful in the case of retransmission consent disputes between top-four rated stations and MVPDs.

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

(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).

Protecting MVPD viewers from the deleterious effects of broadcast blackouts is a critical and necessary reform. Although ACA believes the FCC already has authority under the Act to order interim carriage of a broadcast signal or particular programming carried on such signal in the event of negotiating impasses,[3] Congress should clarify this authority. That is, Congress should explicitly preclude broadcasters from withdrawing their signals during retransmission consent disputes by requiring interim carriage pending resolution of such disputes, such as through an alternative dispute resolution mechanism like the one described in the previous question. Specifically, Congress should direct the FCC to adopt a rule mandating that broadcasters and MVPDs continue to offer a broadcast signal to consumers after an existing retransmission consent agreement expires and while the terms of a new agreement are pending resolution of a dispute. Under this proposed rule, the parties' existing retransmission consent agreement would automatically be extended past its expiration date, and an MVPD would continue to pay the broadcaster for retransmission consent rights per such contract. At the time that the dispute is resolved and a new agreement is signed, the prices and terms of the new agreement would retroactively apply to begin immediately after the previous agreement's expiration date and any required true-up of prices would be applied.

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

In addition to clarifying that coordinating retransmission consent negotiations is a *per se* violation of the good faith rules as fully discussed in Question (3) under STELA-specific Issues, Congress can direct the FCC to clarify that this practice creates an attributable ownership interest between the coordinating broadcast stations under the FCC's multiple ownership rules.

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

Mandating refunds for consumers in the case of a programming blackout and apportioning the ultimate responsibility for the cost of such refunds is both unnecessary and potentially counter-productive. There is sufficient competition in the market for delivered video programming that MVPDs are and have to be responsive to their customers in the event that they are unable to deliver the full slate of programming under subscription. We have already seen the competitive market at work. For example, subscribers of ACA member Buckeye Cablevision have been experiencing a programming blackout by Sinclair Broadcast Group's NBC affiliate in the

[3] ACA notes that Congress has incorporated the notion of standstill relief to protect consumer access to signals in the must carry provisions of the Act, where cable operators are prohibited from deleting from carriage the signal of a commercial television station during the pendency of any market modification proceeding.

Toledo, OH designated market area since December 16, 2013. In response, Buckeye has refunded a portion of its subscribers' fees.[4] Other operators have chosen to give blacked-out subscribers access to other programming, such as video on demand programming, for free.[5] Yet others have given credits to consumers who have been particularly disrupted by a blackout.[6] These market-driven initiatives are more efficient and cost-effective than regulatory mandates, particularly if refunds are to be dependent on an apportioning of ultimate responsibility for the cost of the refund. Such a determination of responsibility will necessarily be both difficult and time-consuming and will only serve to drive up providers' costs and delay refunds to consumers.

(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.

Both broadcast television stations and their affiliated broadcast networks should be prohibited from blocking access to their online content that is otherwise freely available to other Internet users for an MVPD's subscribers while the MVPD and station/network are engaged in retransmission consent negotiations. Broadcaster blocking of online access to subscribers of select broadband Internet service providers (ISPs) because the ISP's video service has reached an impasse in its retransmission consent negotiations is the antithesis of broadcast licensees acting in the public interest and contrary to Congress' goals in enacting the retransmission consent regime of preserving the public's access to free over-the-air television service.

During the recent Time Warner Cable (TWC)/CBS dispute in which CBS' owned and operated stations were pulled from TWC's customers, CBS not only blacked out TWC's Internet subscribers in the areas in which CBS owned and operated local television stations, but all TWC Internet subscribers nationally, and also blacked out the Internet subscribers of TWC's negotiating partner, Bright House Networks across the nation. In a dispute with Cablevision, News Corporation also employed this tactic extending its blackout of the Fox Broadcasting network to Fox.com and to Fox content on Hulu.

It is imperative that Congress not permit the broken retransmission consent regime to metastasize onto the Internet. Although the FCC has never ruled whether blocking access to a station's online content that is otherwise freely available to other Internet users only for an MVPD's Internet subscribers while the MVPD and station are engaged in retransmission consent negotiations is a violation of the good faith rules, the agency has sought to prevent such blocking in another context. To preserve viewer access to both linear and online programming subject to

[4] See Chip Towns, Toledo Blade, *Buckeye offers viewers credit; Cable company, broadcast firm continue talks over Channel 24*, Jan. 16, 2014, http://www.toledoblade.com/TV-Radio/2014/01/16/Buckeye-offers-viewers-credit.html.
[5] See Duane Dudek, Journal Sentinel, *Day 28: Time Warner offers blackout customers free antennas, VOD, gift cards,* Aug. 22, 2013, http://www.jsonline.com/blogs/entertainment/220668901.html CBS-Journal); Time Warner Cable Conversations, Update on CBS and Showtime Blackouts, http://twcconversations.com/dispute/cbs/ (describing TWC-provided preview of premium programming from Starz Kids & Family; a free movie on demand or an Amazon gift card; free antennas to those that chose to take them.)
[6] See Tom Jicha, Sun Sentinel, *Is DirecTV giving you a deal for blackout?* http://blogs.sun-sentinel.com/tv/2012/01/is-directv-giving-you-a-deal-for-blackout.html.

a carriage dispute that has been taken to arbitration under its Comcast-NBCU license conditions, the FCC imposed standstill requirements pending resolution of the dispute to avoid the harm to consumers that may result from removal of free online video programming in the event of a carriage dispute.

Permitting broadcasters to block access to their freely available content on the Internet to certain users as part of a retransmission consent dispute also seems at odds with the policy rationales underpinning the FCC's Open Internet rules. The FCC and the courts have accepted the view that an "open Internet" is critical to maintaining innovation and investment in Internet content, applications and services and broadband infrastructure investment and deployment. Depriving only the broadband Internet subscribers of a particular MVPD of access to that programming as leverage in an unrelated business negotiation over retransmission consent rights when it is made freely available online to all other Internet users is unreasonably discriminatory, morally indefensible and contrary to the goals of an open Internet

Although ACA believes the FCC already has authority under the Act to deem it a per se violation of a broadcast station's obligation to negotiate in good faith to block access to its freely available Internet content during a retransmission consent blackout, ACA believes Congress should either clarify that a broadcast station blocking access to its freely available Internet content during a retransmission consent blackout is a *per se* violation of the good faith rules, or direct the FCC to do so to ensure that this consumer-unfriendly practice ceases forthwith.

(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.

Regulatory parity again requires either that the "sweeps" exception to channel repositioning that applies to MVPDs be removed or that it be extended to prevent broadcasters from withholding their signals or certain programming carried on such signals during periods of time that are as important to MVPDs and their subscribers as the four annual ratings periods are to television stations. However, ACA believes that the better policy choice for consumers and the competitive market would be to extend the rules.

As discussed in Question (1)(a) under General Video Policy Issues, broadcasters are increasingly pulling their signals from MVPDs during retransmission consent negotiation impasses. Existing law prevents an MVPD from removing a broadcast station from its lineup during the sweeps period if its retransmission consent agreement expires during sweeps. Such periods are the four national four-week ratings periods – generally including February, May, July and November. While MVPDs are prohibited from pulling broadcast signals during periods of time *financially important to broadcasters* there is no constraint on broadcasters pulling signals from cable operators during these same periods or other times *important to consumers* (i.e. marquee events). In fact, broadcasters often pull signals from MVPDs during periods of time *important to consumers* in order to extract higher retransmission consent fees (e.g. ABC pulls signal from Cablevision prior to Academy Awards, Fox pulls signal from Cablevision during baseball

playoffs). For this reason, Congress should adopt a new rule preventing broadcasters from pulling signals from cable operators during sweeps periods if the retransmission consent agreement expires during sweeps, or other times important to consumers as Congress deems appropriate (i.e. marquee events).

(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.

By combining the retransmission consent negotiation for a top four-rated broadcast station with the negotiation for a bundle of popular cable networks, the negotiator can increase his bargaining power and can extract higher prices and/or better carriage from an MVPD than if the television station and the cable networks were negotiated separately. The negotiator is able to increase his bargaining power because he can threaten to simultaneously withhold two types of highly popular (must have) programming. In retransmission consent deals involving owned and operated broadcast stations, MVPDs almost always end up agreeing to carriage of the national cable networks owned, affiliated with or controlled by the station owner, demonstrating how this programming is often bundled together in negotiations.

The FCC has recognized that a programming vendor can have more market power when it simultaneously negotiates for more than one block of highly popular (must have) programming than it does when negotiating for each block individually. Specific examples of must have programming recognized by the Commission include top four-rated broadcast stations, regional sports networks, and a bundle of popular national cable networks. With respect to the FCC's review of the Comcast-NBCU deal, the agency acknowledged this matter as a legitimate concern and imposed license conditions permitting aggrieved MVPDs to utilize commercial arbitration to ameliorate the effects of the combined entity's additional leverage when negotiating simultaneously for Comcast-NBCU's popular (must have) programming. Under the FCC's remedy, aggrieved MVPDs could seek separate arbitrations for Comcast-NBCU's broadcast stations and their bundle of national cable programming.

Because the top-four national broadcast networks already own both types of programming, the best way to remedy this problem would be for Congress to provide MVPDs who must deal with the national broadcast networks a right to commercial arbitration for either the broadcast stations or the bundle of national cable programming, if the MVPD feels that the content provider is charging fees above-fair market value.

(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?

ACA will answer this question in conjunction with Question (3) under General Video Policy Issues, which raises a related issue. As part of the STELA reauthorization, ACA does not advocate for allowing cable subscribers to purchase a cable package without also receiving must-carry and noncommercial local broadcast channels. As discussed in the next question, ACA does

advocate for the elimination of government rules that require broadcast channels electing retransmission consent to be made available in this same manner.

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

No. Cable operators are required by Section 623(b)(7) to offer a basic service tier that includes all local broadcast television stations that all subscribers must purchase before subscribing to additional video programming. The Commission has interpreted this to mean that cable operators are required to offer a single basic tier of service, rather than permitting multiple basic tiers whereby cable operators could offer the must carry stations on one basic tier and the stations electing retransmission consent on another basic tier. In 1995, the D.C. Circuit Court of Appeals affirmed the FCC's determination that the basic tier rule was a form of rate regulation that does not apply to cable operators subject to effective competition. At the same time it concluded that the FCC's single basic tier requirement constituted a "permissible" interpretation of the 1992 Cable Act. Following this decision, the FCC expressed its belief that following the court's reasoning, cable systems subject to effective competition are not required to carry a broadcast station's digital signal on the basic service tier because Section 623(b)(7) is one of the rate regulation requirements that sunsets once competition is present in a given franchise area. ACA believes this is correct, but some interpretations of the law would call this understanding of the court's decision into question.

Notwithstanding whether cable operators that have been deemed subject to effective competition are obligated to offer a basic service tier that includes broadcast stations that elect retransmission consent, there is good reason to eliminate the requirement for all cable operators. First, the rule, which was enacted in 1992, no longer seems necessary. The rule does not apply to satellite providers, and yet broadcasters appear to have no problems negotiating with DIRECTV and DISH Network for the same level of distribution that broadcasters obtain from cable through Section 623(b)(7). It is also noteworthy that in over a decade since the FCC expressed its belief that the basic tier composition rule sunsets with a determination of effective competition, ACA is not aware of any operators deemed to be subject to effective competition removing retransmission consent stations from their basic service tier. ACA believes this observation reflects, in part, that broadcast stations are capable of negotiating for carriage on the basic tier with the typical large cable system that generally has received an effective competition determination even without rules or regulations requiring it. Second, non-broadcast programmers highly value lower tier placement and higher subscriber penetration, and cable operators who provide lower tier placement and higher subscriber penetration pay lower carriage fees. By providing broadcasters who elect retransmission consent an automatic right to appear on the basic service tier and obtain 100 percent cable subscriber penetration, Congress has taken off the table a critical term of negotiation that cable operators could leverage with broadcasters to obtain lower rates, which would benefit consumers. Third, as a matter of parity, Congress should eliminate the basic service tier buy-through obligation imposed only on cable operators but not DBS providers.

(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?

Given the dramatic increase in the level of competition for video distribution since 1992, Congress should consider deeming all cable operators as facing effective competition, or at least smaller operators and those serving rural areas that often face the greatest competition from DBS operators. Otherwise, Congress should modify Section 623 to make the effective competition process more efficient and accessible, particularly for smaller cable operators.

In 1992, Congress was concerned that cable systems did not face "effective competition" in their markets, and adopted a series of rules, including rate regulation, to protect consumers. For purposes of rate regulation, Congress divided cable programming into three categories: (1) the basic service tier (the tier required as a condition of access to all other video services and containing, among other services, local broadcast station signals and public, educational, and public access ("PEG") channels); (2) pay or "premium" channels (channels for which there is a specific per-channel (e.g. HBO) or per-program charge (e.g. pay-per-view); and (3) cable programming services and associated equipment (all services except basic and pay channels). Rates for the basic service tier and associated equipment were subject to regulation by local or state governments ("local franchising authorities"). Rates for premium channels were not regulated. Finally, rates for cable programming services and associated equipment were subject to regulation by the FCC, which has since ceased regulating this programming and equipment.

With respect to cable systems that do not face "effective competition" the basic service tier rate regulation rules required all cable systems to offer a basic service tier that includes all local broadcast television stations that all subscribers must purchase before subscribing to additional video programming. The rule applied to all cable systems immediately following the passage of the 1992 Cable Act, and includes basic service tier carriage of broadcast stations electing must carry or compensation in exchange for carriage under retransmission consent as well as public, education and governmental (PEG) channels required by local franchising authorities. Moreover, the rules permit local franchising authorities to regulate, subject to FCC oversight, cable system's basic tier rates, charges for equipment such as set-top boxes and remote controls, and installation and hourly service charges. In addition, the rules required cable systems to offer a uniform rate structure throughout a franchise area and were prohibited from engaging in "negative option billing" -- that is, charging a subscriber for services that the subscriber has not affirmatively requested by name.

Moreover, the cable rate regulations include the "tier buy-through" prohibition, in which cable operators generally are prohibited from requiring customers to subscribe to specified tiers of programming on their cable system, other than the basic service tier, as a condition of subscription to video programming offered on a per-channel or per-program basis. In other words, a cable operator is not allowed to require a customer to subscribe to expanded basic service or any tier of digital cable service before that customer is permitted to buy a premium channel like HBO or pay-per-view movies.

At the same time, Congress established a process where cable systems could be relieved of these basic cable rate regulation rules, with a showing at the FCC that they face "effective competition." As discussed in more detail in the response to Question (3) under General Video Policy Issues, although the obligation to offer a basic tier of service that all subscribers must purchase is ostensibly part of the rate regulation that sunsets upon a finding of effective competition, there is some uncertainty as to whether this is the case in practice. To demonstrate that a cable system faces "effective competition" a cable operator must petition the FCC and make a community-by-community showing.[7]

In recognition of the disproportionate burdens of rate regulation on smaller cable operators, in 1996, Congress amended the Cable Act as part of the Telecommunications Act of 1996 to provide relief to the small cable operators.[8] This relief prohibits local franchise authority basic tier regulation under Sections 623(a), (b) and (c) (including the basic service tier obligation and tier buy-through prohibition),[9] without a finding of effective competition, in franchise areas in which the smaller cable operator serves 50,000 or fewer subscribers, but only to the extent that the operator provided only a basic service tier as of December 31, 1994. ACA does not believe this definition fully covers the class of smaller operators and smaller systems that need and would benefit from having this form of relief today. Moreover, the small operator relief does not extend to the uniform rate structure, discrimination and negative option billing rules under Section 623(d), (e) and (f). The only way for small operators to relieve themselves of these rate-related requirements is to file an "effective competition" petition like large cable operators.

Over the past few years, many larger cable operators have sought and been granted designations of "effective competition" by the FCC, and escaped these outdated regulations. The majority of petitions have sought determinations under the second criteria – that the franchise area is "served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50% of the households in the franchise area; and (ii) the number of households subscribing to multichannel video programming other than the largest MVPD exceeds 15% of the households in the franchise area." Generally, these cable operators have argued that the two DBS providers meet this criteria because they offer comparable programming to the entire franchise area via its satellite delivered signal and its penetration in the franchise area exceeds 15% of the households.

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[7] Cable operators must demonstrate the existence of effective competition under one of the following conditions: (1) fewer than 30% of the households in its franchise area subscribe to the cable service of a cable system; (2) the franchise area is: (i) served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50% of the households in the franchise area; and (ii) the number of households subscribing to multichannel video programming other than the largest MVPD exceeds 15% of the households in the franchise area; (3) an MVPD, operated by the franchising authority for that franchise area, offers video programming to at least 50% of the households in the franchise area; or a local exchange carrier or its affiliate (or any MVPD using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area. 47 U.S.C. § 543(l).

[8] For this purpose, a small cable operator is an operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the U.S. and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250 million.

[9] It also prohibited FCC regulation of cable programming services (i.e. the cable programming service tier or "expanded basic") and associated equipment. Although, as previously discussed, such authority has since sunset for all cable systems, rendering this relief moot.

However, while nearly all small cable operators face "effective competition" today due to the higher penetration of satellite TV service in rural areas where smaller cable operators most often provide service, and evidence exists to support this fact, the effective competition determination process has not been accessible to these operators due to its time-consuming and resource-intensive requirements.

Accordingly, given the dramatically increased level of competition for video distribution since 1992, Congress should deem all cable operators as facing effective competition. Alternatively, Congress should adopt a more limited remedy by expanding the definition of small cable operator and system under the Act to cover the full class of smaller operators and systems that need and would benefit from this form of relief today, and provide that all small operators and systems are not only relieved of basic service tier rate regulation, but all rules and regulations that are eliminated when a cable system is deemed to face "effective competition." As a backstop to either proposal, Congress could allow local franchising authorities to petition the Commission for a determination that effective competition in a particular community does not exist. Congress could also amend the rule to permit the filing of petitions on a county-by-county basis or a region-by-region basis by groups of cable operators or their trade associations, particularly for smaller operators of systems serving rural areas where the two national DBS providers have a particularly strong presence.

(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?

Yes. The Telecommunications Act of 1996 directed the FCC to adopt regulations to assure the commercial availability of set-top converter boxes and other navigation devices (*i.e.*, devices used by consumers to access services offered by multichannel video programming distributors). The FCC first implemented this provision in 1998 by establishing a deadline for cable operators to provide navigation devices with a "separable" security element from the basic navigation device and also mandated that they cease placing into service new "integrated" navigation devices that perform both conditional access and other functions. On July 1, 2007, the integration ban became effective, and cable operators began deploying set top boxes with a "CableCARD," which was the form of separable security agreed to by the cable and consumer electronics industries.

The purpose of the integration ban was to compel cable operators and equipment manufacturers to rely on a "common" separated security solution that could be used by subscribers to access encrypted services over a retail device – a policy known as "common reliance." The FCC feared that if cable operators could continue to deploy integrated boxes, a retail market for CableCARD-enabled boxes would never develop. In the time since the integration ban was implemented, cable operators have deployed over 30 million leased set-top boxes with CableCARDs.

Despite the Commission's success in establishing a "common reliance" on the CableCARD, the retail market for devices that employ this form of separable security has not developed as the FCC had hoped. By the FCC's own admission, the integration ban has been ineffective in creating a retail market for cable set top boxes.

While small and medium-sized cable operators understood the purpose of the FCC's integration ban, they suffered due to the significantly higher costs of obtaining and deploying set-top boxes to their customers after the ban took effect. Relying on CableCARD-enabled boxes and CableCARDs proved disproportionately more costly for small and medium-sized cable operators than for larger cable operators. Moreover, no such integration ban mandate applied to small cable operator's DBS rivals, which put smaller operators at a competitive disadvantage. As part of the STELA reauthorization, small and medium-sized cable operators support the elimination of the integration ban, and remain willing to continue to be subject to regulation that would require them to continue providing all necessary CableCARD technical support to subscribers that either lease operator-supplied non-integrated boxes or customer-purchased third party CableCARD devices (e.g., TiVo DVRs).

(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?

The practice of coordinating retransmission consent negotiations among separately owned Big 4 network-affiliated broadcast stations in the same market should be prohibited. As discussed earlier, this can be achieved by declaring the practice to be a *per se* violation of the good faith rules. It can also be curtailed by deeming the practice to create an attributable ownership interest under the media ownership rules so that two top four-rated stations in a local television market would not be able to engage in the practice. While ACA's advocacy has been focused on prohibiting the coordination of retransmission consent negotiations, research conducted by the ACA shows that coordinated retransmission consent negotiations predominantly occurs when the stations are also in some form of coordination arrangement, including shared services agreements (SSAs) and joint sales agreements (JSAs).

(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?

Yes. A familiar and troubling situation is re-emerging in the subscription television industry. It is referred to as vertical integration, a term that applies where one company or individual controls cable systems and very popular cable programming. Under unified control, a cable-affiliated programmer has the incentive and ability to engage in unfair practices, such as charging its cable systems' rivals much more for its networks than it charges its non-rivals. Unless the program access protections that Congress intended are in place to mitigate these harms, consumers and the competitive MVPD market overall stand to be harmed. This trend toward vertical re-integration requires the immediate attention of policymakers, particularly in light of Comcast Corp.'s $45 billion agreement to merge with TWC.

The latest outbreak of vertical integration started in early 2011 when Comcast acquired NBC Universal ("NBCU"), a deal bringing together the nation's largest cable operator, Comcast, with one of the nation's largest programmers, NBCU. Nationally distributed networks owned or effectively controlled by Comcast-NBCU include USA Network, CNBC, Golf Channel, Syfy, Bravo, E!, MSNBC, and NBCSN, among others.

The trend continued in early 2013 when Liberty Media purchased a controlling interest in the nation's fourth largest cable operator, Charter Communications. Because John Malone holds a substantial interest in Charter through his stake in Liberty Media, as well as interests in Discovery Communications and Starz, all of the companies are now effectively operated under unified control. National cable programming networks that are vertically integrated through Malone include: Discovery Channel, TLC, Animal Planet, OWN: The Oprah Winfrey Network, and the premium service Starz.

The cable operators and programmers involved in these recent deals do not comprise the entire universe of programming that is cable-affiliated. For instance, the AMC Networks, which include AMC, home of the hit series "The Walking Dead," are also cable-affiliated through the Charles F. Dolan family that effectively controls Cablevision.

Congress has long been concerned about the perils of vertical integration in the cable industry. In 1992, it adopted the program access rules to foster and protect competition in the MVPD marketplace by preventing cable operators that are vertically integrated with programmers from attempting to disadvantage MVPDs, including their buying groups, by overcharging them for programming. Conditions imposed on Comcast's acquisition of NBCU by the Commission and the U.S. Department of Justice in 2011 demonstrate that these authorities remain concerned about the incentive and ability of a vertically integrated cable operator to disadvantage other MVPDs in the sale of cable programming.

It is likely the cable industry soon will become even more vertically integrated as a result of the Comcast-NBCU-TWC merger. This transaction, if approved, will result in TWC's cable systems becoming vertically integrated with the Comcast-NBCU networks, significantly expanding the footprint of subscribers served by a vertically integrated cable operator.

Given that we have entered an era of renewed vertical integration, it is more important than ever that the Commission carry out its statutory mandate to protect competition and consumers against discrimination in the sale of cable-affiliated programming. Accordingly, Congress should direct the Commission to act on the nearly two-year-old request by the American Cable Association to close a loophole in its program access rules that has left small and medium-sized MVPDs with significantly less protection from cable-affiliated programmers than Congress intended.

Nearly every small and medium sized MVPD – a group that numbers nearly 900 companies – purchase the bulk of its programming through a buying group called the National Cable Television Cooperative (NCTC). Although Congress explicitly instructed the Commission to adopt program access rules that provide protection to buying groups, the agency has failed to

carry out this statutory directive by defining a "buying group" in a manner that effectively excludes NCTC. Because NCTC has no means of utilizing the program access rules for redress against discrimination, all NCTC members, have essentially no protection from cable-affiliated programmers, in stark disregard of Congress' intent.

In response to ACA's highlighting this issue, the Commission initiated a rulemaking well over a year ago, tentatively concluding that its definition of a "buying group" needs to be modernized to include NCTC, and sought comment on a couple of related issues meant to ensure cable-affiliated programmers stay true to the intent of the rules. ACA has since made repeated requests of the FCC to act on this rulemaking. Yet, as the Commission soon considers whether to approve one of the largest vertical cable mergers ever, involving about 12 million TWC customers, small and medium-sized MVPDs are left waiting and wondering whether they will ever be given the full protections that Congress intended.

As the trend toward vertical integration increases, so will grow the likelihood that hundreds of small and medium-sized MVPDs that depend upon NCTC, will be treated in a discriminatory manner. With the recent increase in vertical integration combined with the likelihood of yet more integration to come through the Comcast-NBCU-TWC transaction, it is more important than ever that the Commission moves forward with its pending rulemaking to modernize the agency's rules to ensure that small and medium-sized MVPDs have the protections that Congress intended. It is particularly important for the Commission to take this action before it begins consideration of the Comcast-NBCU-TWC transaction. Congress can help by urging the Commission to take immediate action.

(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?

Extension of existing rules to online video distributors is an important issue for Congress to consider and deserving of full debate separate from the STELA reauthorization. ACA looks forward to working with the Committee to find rules that work best for all providers, and most importantly consumers in today's dynamic market.

(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?

There are many problems today with the existing marketplace for multichannel video distribution that require the Committee's immediate attention and resolution. Online concerns are important, complex and best left to separate consideration.

(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?

Yes. Again, the principle of regulatory parity should be applied to extend current pole attachment rights to broadband service providers that are not also traditional telecommunications or cable providers. At the same time, the current pole attachment rules, which apply only to privately-owned telephone and utility poles, should be extended to apply to telephone and utility poles owned by government entities such as electric cooperatives and municipally-owned utility and telephone systems. The theory underscoring the Pole Attachment Act of 1978 that public ownership would act as a check on prices and attachment practices, has not proven true as public owners charge pole attachment rates that are some of the highest rates in the market. Equalizing the treatment of poles across all types of pole owners will foster additional competition for broadband and consumer video services alike by lowering costs and ensuring access to place broadband facilities on reasonable terms and conditions.

(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?

No. ACA is not aware of any time limit today on a broadcaster's carriage rights if they relinquish their spectrum as part of the FCC's upcoming incentive auction so nothing would be gained by extending such rights for an additional period of time.

Pursuant to the spectrum portion of the "Middle Class Tax Relief and Job Creation Act" (Spectrum Act), the FCC has begun efforts to permit channel-sharing by full-power and Class A TV licensees for the purposes of the incentive auctions that Congress has authorized. The channel-sharing concept, under which multiple TV licensees participating in the auction would share a single six MHz channel, is an integral component of the FCC's plans to repurpose a substantial amount of the spectrum currently used for over-the-air television broadcasting with the goal of freeing up UHF spectrum for broadband use by repacking the TV band. It is envisioned that each sharing station retains enough capacity to operate at least one standard definition-programming stream at all times. While stations sharing a single channel will utilize a single common transmission facility, each will continue to be licensed separately. Each sharing licensee will keep its original call sign, retain all rights of an FCC licensee, and remain subject to the full panoply of FCC rules, policies, and obligations.

The FCC has made clear that the sharing rules will have no effect on broadcaster's current cable and satellite carriage rights. Each separately licensed station will be entitled to the same carriage rights at the shared location as it would have at that same location if it were not sharing, and only so long as it meets the technical requirements for cable carriage from that location (e.g., delivery of a good quality signal). Similarly, the same would be true for the "local-into-local" "carry one, carry all" requirement for satellite broadcast signal carriage. The FCC expects that stations will take into account technical obligations that could affect their continuing carriage rights when designing their voluntary channel sharing arrangements (i.e. a move that takes a station more than 35 miles away from cable headends – that is outside the limit within which Class A stations

are entitled to must carry). There is no time limit on a station's must carry rights, so long as it meets the requirements for such carriage.

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

Yes. Small and medium-sized cable operators are burdened by many regulatory obligations that were enacted long ago to address marketplace problems that no longer exist. For example, many provisions found in Title VI of the Act stem from an out-of-date 1992 Cable Act. When enacted, these provisions addressed the specific concern of Congress that larger cable multiple system operators had sufficient market power that could be exercised downstream to increase consumer rates. However, that is no longer the case because the market has become significantly more competitive over the past two decades. Today, consumers have their choice of multiple MVPDs, including DIRECTV and DISH Network, and can also obtain video through online video distributors, like Netflix, Amazon, and Hulu. Accordingly, for example, as discussed above, the provisions related to basic cable rate regulation, the composition of the basic tier of service, and mandated cable customer service standards are clearly out of date and should be re-examined and either modified or eliminated as appropriate. Even the means by which Congress provides cable operators to be relieved of basic cable tier rate regulation is outdated in that it requires cable operators to file a costly Petition for each of its cable systems in order to obtain formal confirmation from the FCC that their system faces "effective competition," a finding that the general public would consider quite obvious today.

However, not all rules enacted in 1992 need updating; many have and continue to stand the test of time. For example, rules limiting the incentives and abilities of cable-affiliated programmers, like program access, continue to remain important in today's marketplace.

At the same time, there are gaps in Title VI that permit other entities – *e.g.* television broadcasters through retransmission consent, and regional and national programming networks, particularly those carrying sporting events – to exercise market power that harms competition and consumers. Congress should consider addressing these problems as part of the reauthorization of the Satellite Television Extension and Localism Act or as part of an update to the Act in the years ahead. Specific actions concerning video policy that would improve outcomes for MVPDs and their customers are as follows:

<u>Enactment of Rules Concerning Access to National and Regional Sports Programming</u>. National sports networks aggressively bid against one another (as do regional sports networks) for the rights to air the most popular sports leagues' events. These networks bid extraordinary amounts knowing they can pass on their costs to MVPDs, who feel compelled to make available these sports networks to their customers to remain competitive in the market. Accordingly, ESPN is the most expensive cable network at $5.54 per subscriber/month in 2013 according to SNL Kagan. The fee is expected to grow to $7.40 per subscriber/month by 2017. Similarly, the average regional sports network received $2.64 per subscriber/month in 2013 according to SNL Kagan. This fee is expected to increase to $3.57 per subscriber/month by 2017. Due to the market power that programmers who have rights to the most popular sports leagues events have over MVPDs, particularly small and medium-sized operators, these programmers demand and

receive carriage on cable's most widely distributed tiers, and these costs are passed along to consumers whether they want to receive the sports programming or not.

To address the rising cost of sports programming, Congress should consider adopting rules that better protect MVPDs, and most importantly consumers, from rapidly escalating sports programming costs. These rules should: (i) impose a duty to negotiate in good faith on both regional sports networks (RSNs) and national programming networks that carry live sporting events; (ii) prohibit exclusive contracts, unless the RSN or national programming network that airs live sporting events demonstrate that an exclusive contract is in public interest; (iii) provide mandatory final offer arbitration at the request of the MVPD (consistent with FCC-imposed Comcast-NBCU arbitration conditions with additional special consideration for smaller MVPDs) when negotiations with an RSN or national programming network that carries live sporting events reach an impasse. Additionally, during the pendency of the arbitration, MVPDs should be granted the right to interim carriage under the rates, terms and conditions of an expiring agreement.

Providing the FCC More Regulatory Authority over Video Programming Owners. Congress has placed several regulatory obligations on MVPDs that are more properly directed to the entity with primary control over the video programming at issue – the video programming owner. Lacking direct authority over the party most directly responsible for a problem, the Commission has found it necessary to achieve statutory goals indirectly by imposing regulations on cable operators rather than on the entities that are responsible at the first instance. For example, commercial television stations are obligated to air a certain amount of programming that serves the educational and informational needs of children (KidVid) but the obligation is enforced indirectly through the MVPDs that merely distribute the programming. Similarly, the CALM Act regulates the relative loudness of commercial inserts, which are set in the first instance by the programming owners, by imposing obligations on MVPDs who merely pass the programming through to their subscribers. Both of these regulations have imposed an unwarranted and often undue burden on cable operators to act as go-betweens, particularly on smaller operators that lack leverage in the market to regulate programmer behavior themselves. To address this problem, the Committee should provide the FCC with additional direct authority over video programming owners as it has for specific purposes under the ADA (television closed captioning) and the CVAA (IP closed captioning), and direct the Commission to eliminate all rules where MVPDs are regulated as a surrogate for regulating video programming owners, and reapply them directly to the video programming owners.

Title VI Forbearance. In enacting the Telecommunications Act of 1996, Congress recognized that once the Act's market-opening, pro-competitive program for telecommunications common carriers under Title II had taken hold, the FCC should have the ability to selectively deregulate upon a showing that a particular rule was no longer necessary. Specifically, Section 10, "Competition in the Provision of Telecommunications Service" – the "forbearance provision" – mandates that the Commission "shall forbear" from applying any regulation or statutory provision if the agency determines enforcement of such requirement "is not necessary" to ensure that a telecommunications carrier's charges and practices are reasonable and "not necessary for the protection of consumers," and that forbearance is consistent with the public interest. Under

the provision, if the Commission does not deny a forbearance petition within the requisite statutory period, it is "deemed granted."

Congress failed to include such a deregulatory provision in the Cable Television and Consumer Protection and Competition Act of 1992, despite the inclusion of similar market-opening provisions intended to spur the development of multichannel video programming distribution (MVPD) competition. The result is that although MVPD competition has reduced cable’s market share from well over 90% to less than 60% of the market, rules that have long outlive their usefulness remain on the books. To address this problem, Congress should either amend Section 10 to broaden its reach to cover MVPDs regulated under Title VI, or should add a similar forbearance provision to Title VI that is targeted to the MVPD market and regulation.