Testimony of John Bergmayer
Senior Staff Attorney
Public Knowledge

Before the
U.S. Senate
Committee on the Judiciary

Hearing On:
Reauthorization of the Satellite Television Extension and Localism Act

Washington, DC
March 26, 2014

Testimony of John Bergmayer
Senior Staff Attorney
Public Knowledge

Before the
U.S. Senate
Committee on the Judiciary
Hearing on "Reauthorization of the Satellite Television Extension and Localism Act"
March 26, 2014

Good morning Chairman Leahy, Ranking Member Grassley, and members of the Committee. I am John Bergmayer, Senior Staff Attorney at Public Knowledge, a public interest nonprofit dedicated to the openness of the Internet and open access for consumers to lawful content and innovative technology. I am pleased to have the opportunity to appear before you to discuss the reauthorization of the Satellite Television Extension and Localism Act, also known as STELA, and the opportunity before Congress to make a positive impact on the video marketplace through its policies. Today, I'm going to talk about two things. First, I have a few remarks on issues specific to STELA. Then I will present a few broader ideas that will make the video marketplace more competitive and affordable.

Congress must reauthorize STELA by the end of 2014. This law ensures that satellite television companies can continue to retransmit local broadcast stations to their customers, and it is an important building block of video competition. Congress may choose to consider various video reform proposals, but it must not let these proposals keep STELA from being reauthorized. Satellite has been a success story, where action by Congress and the Federal Communications Commission (FCC) ensured that a new distribution technology could access content and reach viewers. It should be a lesson for

policymakers about the importance of fostering new modes of video competition. Congress should not put the video competition we have already achieved at risk by failing to ensure that satellite viewers can continue to access popular programming without interruption.

Given the importance of STELA to maintaining competition on the video marketplace, Congress should reauthorize STELA indefinitely, without sunset. There is no reason for Congress to create artificial crises every few years to ensure that satellite remains a competitor. A "clean" or noncontroversial reauthorization of STELA indefinitely would not prevent Congress from revisiting the provision at a later date, perhaps along with other video reforms. If Congress does choose to reauthorize STELA for only a few years, it should work to tie its expiration to the expiration of other video marketplace protections, such as distant signal rules, basic tier buy-through, and similar provisions tying the protection of other competitor distribution models to the satellite industry.

STELA reauthorization also presents the opportunity to give consumers more reliable and relevant programming with two simple reforms. First, Congress can protect consumers from the increased rate of programming blackouts due to retransmission consent negotiations by revising Section 325 of the Communications Act. The simplest reform would be to eliminate retransmission consent altogether, eliminating the statutory middleman in content negotiations. Retransmission consent negotiations have been compared to a fight between two elephants where the consumers are the grass. However, a broad reform like this would require a gradual phase-in, coupled with the elimination of compulsory copyright licenses. This would take time. In the short term, if Congress

maintains the current system of retransmission consent, it should act to prevent consumers from being trampled.

Directing the FCC to adopt rules proscribing conduct during negotiations that would be deemed in violation of the "good faith" provision would force the FCC to use its current power to protect consumers from harms unrelated to negotiations, such as the removal of online content during negotiations. Additionally, when retransmission negotiations are at an impasse, Congress should clarify that the FCC has existing statutory authority to mandate arbitration and interim carriage, and direct it to enact rules to that effect. The consumer benefit from these reforms is twofold. First, they would prevent blackouts ensuring that TV viewers are not held hostage as a negotiating tactic between media companies. Second, they would slow down the rate of increases in carriage fees paid by Multichannel Video Programming Distributors (MVPDs) to broadcasters, in turn sowing the rate at which consumer pay TV bills increase.

A second simple reform to STELA would be to update the Communications Act to allow the FCC to modify Designated Market Areas (DMAs) for broadcast TV carriage on satellite, as is already allowed with cable. For too long, satellite customers in so-called orphan counties have found that they are not able to receive broadcasts of local content due to DMAs drawn without local community interests taken into account. After years of study, Congress should empower the FCC to make these corrections.

The success of the satellite TV industry and the legislation that enables it, such as STELA, points to the best long-term approach for improving the video marketplace. That is to promote competition from new providers. Technology has dramatically changed the possibilities for how the public can watch television. But despite all of the great programming and groundbreaking devices, many Americans are locked into a television business model that limits competition and choice: the expensive bundle of channels. Most of the most popular programming is not available except through traditional subscription TV services, and these grow more expensive year after year. Two years ago, the monthly fee for cable TV (*not* including broadband) hit $86 per month, and is projected to rise to $200 per month by 2020—that is, unless Congress does something about it.[1] By contrast an online video-on-demand service like Netflix or Amazon Instant Video costs less than $10 per month.

The ongoing dominance of the MVPD model is made possible largely by an outdated regulatory structure created by broadcast, MVPD, and content incumbents to gain competitive advantages and to cement their place in the video ecosystem. Moreover, people get their broadband through Internet service providers that are also video distributors, and who have the motivation and the means to discriminate against online video services. It is time for Congress and the FCC to revamp the rules of the video industry to promote the public interest. A video marketplace that served the public interest would give viewers more choice of providers and the ability to watch any programming whenever

[1] NDP Group, *Pay-TV bills continue to increase by 6 percent, year-over-year, as consumer-spending power remains flat*, Apr. 10, 2012, https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410.

they want on the device of their choosing. At the same time, it would ensure that creators and distributors could continue to get paid a fair price. A video marketplace that served the public interest would align the interests of viewers, creators, and distributors, not set one against the other.

Online video is a success story that can provide much needed competition to the video marketplace. At the moment it is not driving down cable prices because outdated rules and anti-competitive practices have forced online video to serve as a supplement to cable and satellite, not a replacement. Congress and the FCC can help online video develop into a full competitor in a three easy ways. First, they can clear away some of the outdated rules that slow down the evolution of the video marketplace. I've already discussed one example in the dysfunctional retransmission consent system, but it would also include protectionist policies like the sports blackout rule and prohibition on distant signal importation. Congress should be cautious not to eliminate parts of statute that promote competition and choice. For example, section 629 of the Communications Act allows for the FCC to enforce rules that create innovation in set-top boxes and competition against high priced cable boxes. Congress and the FCC should continue to enforce the current CableCARD implementation of that statute while moving to a more modern implementation that fixes some of CableCARD's shortcomings. The current proposal in the House to eliminate the "integration ban" would be counter to this end.

Second, they can extend the successful policies that protect providers from anticompetitive conduct to certain online providers. For example, if a large cable system is

prohibited by law from acting anti-competitively towards a satellite provider, there is no reason why it should be able to take the same actions against an online video provider. Measures such as program access and program carriage rules are designed to mitigate this form of market power by certain large video providers. These rules should be extended to online video and should not be repealed until effective competition develops.

Third, they can protect Internet openness and prevent discriminatory billing practices that hold back online video. In addition to supporting the FCC in preserving Open Internet rules, Congress should encourage the FCC to examine whether discriminatory data caps hold back online video competition. This will increase competition, meaning lower prices, better services, and more flexibility and control for consumers.

Thank you, again, for inviting me to speak and I look forward to your questions.