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United States House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Delivered by email to: commactupdate@mail.house.gov

Dear Chairman Upton and Chairman Walden:

Attached please find CCIA's response to some of the questions posed in the Committee's December 2014 white paper on video content and distribution policy. We appreciate this opportunity to participate in the Committee's process of updating federal laws governing video distribution.

Respectfully submitted,

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Response of the Computer & Communications Industry Association (CCIA)

To White Paper on Video Content and Distribution
House Committee on Energy & Commerce

Pursuant to the request for comments[1] issued by the House Energy and Commerce Committee, CCIA submits the following comments on video content and distribution.

The Computer & Communications Industry Association ("CCIA") represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $465 billion in annual revenues. CCIA is dedicated to innovation and enhancing society's access to information and communications. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries. CCIA's membership includes online content providers and distributors, but no broadcasters or cable TV operators.[2] As such, we focus our comments on Questions 1(b), 4 and 5.

Question 1(b): Access to Broadcast Content

The television landscape has changed dramatically since the Cable Act of 1992 was enacted, establishing the current system of retransmission consent. In those early days, the playing field was closer to level. The broadcaster negotiated with a single cable company that was likely the only pay-TV provider in the same market. Not reaching a retransmission consent agreement was mutually assured destruction for both sides of the negotiating table. Today, by

[1] Available at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20141210WhitePaper-Video.pdf.

[2] A list of CCIA members is available at https://www.ccianet.org/members.

[3] *See* Prepared Statement of Melinda Witmer, Executive Vice President and Chief Video and Content Officer,

contrast, cable operators no longer enjoy local monopolies for TV programming. Unlike 1992, broadcasters can now pit potential suitors against one another, all to the detriment of consumers. This is *not* a free market.

Congress' original intent in 1992 was for retransmission consent fees to support local programming.[3] Today, however, localism is threatened because most local broadcasters are owned either by large station groups, private equity or other financial investors, or major media conglomerates. As a result, local broadcast stations are being forced to pay "reverse retransmission consent" to broadcast networks (CBS, NBC, ABC, FOX) in exchange for national programming.[4] So, in reality, retransmission consent fees are being used to subsidize national networks, and not local news and information. The original purpose of enhancing localism for consumers has been subverted by these realities in the industry. Even Sinclair Broadcasting Group recently stated that rapidly increasing "reverse retrans fees" are damaging the ability of broadcasters to invest in local programming.[5]

In order to promote both localism and competition, Congress could implement the bipartisan Local Choice proposal developed in the last Congress.[6] Local Choice would enhance localism because the local station that foregoes must-carry and elects retransmission consent will

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[3] *See* Prepared Statement of Melinda Witmer, Executive Vice President and Chief Video and Content Officer, Time Warner Cable, "The Cable Act at 20," Hearing before the Senate Committee on Commerce, Science, and Transportation, July 24, 2012, *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg86916/html/CHRG-112shrg86916.htm (expressing the view that Congress "intended [for retransmission consent fees] to subsidize local stations to ensure the continued viability of local broadcasting").

[4] *See* Brian Stelter, *Networks Want Slices of a New Pie*, N.Y. TIMES, July 3, 2011, *available at* http://www.nytimes.com/2011/07/04/business/media/04retrans.html (explaining reverse transmission consent fees).

[5] Sinclair Broadcast Group, Inc., Petition to Deny, MB Docket No. 14-57 at 8 (Aug. 25, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521819260.

[6] *See Rockefeller, Thune Issue Joint Statement on Committee Passage of the Satellite Television Access and Viewer Rights Act*, Office of Sen. John Thune (Sept. 17, 2014) *available at* http://www.thune.senate.gov/public/index.cfm/2014/9/rockefeller-thune-issue-joint-statement-on-committee-passage-of-the-satellite-television-access-and-viewer-rights-act (explaining how the Local Choice provision was ultimately removed from the STAVRA bill that passed the Senate Commerce, Science, and Transportation Committee).

need to compete with the other stations and provide compelling content that entices subscribers to keep the channel. It will force broadcasters to deliver relevant, quality local programming that consumers want to watch.

Congress should fix the broken and outdated retransmission consent regime that is harming consumers with broadcast blackouts and rising fees. The growing frequency with which broadcasters are using blackouts as a routine negotiating tactic is alarming evidence of a broken system. There were 107 broadcaster blackouts in 2014, 127 in 2013, and 91 in 2012.[7] In contrast, there were only 51 blackouts in 2011 and just 12 blackouts in 2010.[8]

Broadcasters hold exclusive rights to most premium live sporting events and "must-have" national broadcast network programming,[9] but the vast majority of consumers no longer rely on free over the air broadcast signals to watch those events and programs. Rather, they purchase pay TV bundles that include their major local TV stations and are reluctant to switch to an online TV service that does not carry them.

Online TV distributors lack enough subscribers to yield the market negotiating power necessary to obtain volume discounts, and so they must pay dramatically more for broadcast retransmission rights than major cable operators pay. This is a significant barrier to entry for new distributors or MVPDs.[10]

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[7] *Astronomical increases in broadcaster blackouts*, AMERICAN TELEVISION ALLIANCE, *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2014/04/ATVA_Planets.pdf.

[8] *Id.*; *see also TV Blackouts Hit All-Time High*, AMERICAN TELEVISION ALLIANCE, *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA_FactSheet_Blackout_Map_v10.pdf (showing 12 blackouts in 2010).

[9] *See FCC Releases Tenth Annual Report on Competition in Video Markets*, Fed. Commc'ns Comm'n at 5, (Jan. 28, 2004) *available at* http://www.fcc.gov/document/fcc-releases-tenth-annual-report-competition-video-markets (describing how many non-cable MVPDs claim difficulty accessing sports and regional news due to "exemptions to the program access rules").

[10] *See* Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Fed. Commc'ns Comm'n, 80 Fed. Reg. 2078, 2079 (Jan. 15, 2015) (stating that "extending program access protections to Internet-based providers would allow them to 'access[] critical programming needed to attract and retain subscribers.'")

To promote facilities-based broadband and video competition, the Committee should explore ways of lowering the entry barriers posed by inferior access to local broadcast stations, which were and are licensed to serve the public interest, and were once fully supported by advertising revenue.[11]

For example, Congress could authorize the FCC to impose standstill requirements or allow MVPDs to import distant network signals during the pendency of retransmission consent disputes.[12] Congress could clarify FCC authority to grant interim carriage rights during broadcaster blackouts. Further, Congress could prohibit mandatory bundling as a condition for retransmission consent, so that broadcasters could not require that MVPDs contract for or carry affiliated non-broadcast programming networks.

To promote uninterrupted access to broadcast network programming, Congress could amend the definition of "antenna" for the purpose of determining over-the-air broadcast signal availability so that indoor antennas are included and more homes will qualify for importation of distant signals during blackouts.

Question 4: Relationship between Content and Distributors

Cable TV operators enjoy legacy monopoly leverage that derives from their originally exclusive local government franchises that protected them from competition.[13]

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[11] *See* Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Fed. Commc'ns Comm'n, 80 Fed. Reg. 2078, 2089 (Jan. 15, 2015) (explaining how Sections 614 and 615 of the Communications Act, along with the FCC's rules, "entitle commercial and noncommercial television broadcasters to carriage on local cable television systems;" moreover, it is in the public interest for customers to access local broadcasts).

[12] *See* In the Matter of Sky Angel U.S., LLC: Emergency Petition for Temporary Standstill, Fed. Commc'ns Comm'n (Apr. 21, 2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-10-679A1.pdf (declaring the FCC's Media Bureau's decision that Sky Angel was denied a temporary standstill for program access relief in its dispute with Discovery Communications because Sky Angel failed to show a likelihood of success that it would be entitled to relief under the FCC's program access rules.).

[13] *See FCC Releases Tenth Annual Report on Competition in Video Markets*, Fed. Commc'ns Comm'n at 5, (Jan. 28, 2004) *available at* http://www.fcc.gov/document/fcc-releases-tenth-annual-report-competition-video-markets (explaining how ten years after the FCC's first report on video market competition, MVPDs still had difficulties

Program access rules should be retained to allow new entrants' access to cable programming networks and other content affiliated with a major national cable operator at reasonable prices, terms and conditions.

Congress should consider allowing the FCC to impose mandatory binding arbitration for program access complaints, with strict time limits on the disposition of any appeal to the FCC. Congress should also expressly authorize the FCC to impose standstill requirements to avoid blackouts and promote continuous program carriage during contract renewal disputes. If necessary, new contracts could include "true-up" provisions. Forced bundling of cable-affiliated programming networks should be considered *per se* anti-competitive during program access negotiations. MVPDs should be able to curate their own packages of video programming unburdened by programming they do not wish to purchase for their customers.

Question 5: Over the Top (OTT) Video Services

Internet TV distribution remains in its infancy, and regulatory creep should not be allowed to overwhelm it. Sources of OTT Video in general should not be classified as multichannel video program distributors (MVPDs), a category of pay TV providers that traditionally carry bundled packages of broadcast signals and national cable networks and have regulatory obligations that go along with that type of enterprise.[14] At the very least single channels of video and Video on Demand (VOD) services should remain outside such a regulatory construct. Even if Internet video providers offering linear, subscription-based

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with franchises from local governments); *see also James Cable Partners, L.P. v. City of Jamestown*, 43 F.3d 277, 280 (6th Cir. 1995) (affirming an award of an exclusive franchise because "[n]othing in the language of section 7(a) [of the 1992 Cable Act, codified at 47 U.S.C. 541(a)] compels retroactive application. Indeed, if the Act is not retroactive, the existence of an exclusive franchise is an eminently 'reasonable' ground to refuse to award an additional franchise.").

[14] *See* 47 U.S.C. 522(13) (defining "multichannel video programming distributor" as "a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming").

programming packages are treated like facilities-based MVPDs, other providers of online video content such as on-demand movies or user generated content should not be automatically subject to MVPD regulation. On the other hand, if an OTT provider chooses to opt-in to the MPVD category with both its program access rights and its obligations, that might not be objectionable.

Access to programming is essential for over-the-top providers if they are to be able to offer a service that will become a viable competitive alternative to current MVPD offerings. Broadcasters should be required to negotiate in good faith with qualifying OTT providers to enable consumer access to "must-have" content over their Internet connections. Programming networks affiliated with cable operators should be prohibited from withholding programming from OTT providers or from extracting unreasonable prices, terms, and conditions from them.

TV Navigation Devices

Consumer access to OTT services requires a broadband connection. That broadband connection may be provided to the consumer by the same vendor from whom that consumer buys pay TV services. Lack of access to commercial retail TV navigation equipment remains an impediment to new entrants in the MVPD and OTT space. Device options that are independent from one's cable provider are few. Renting proprietary TV boxes monthly from MVPDs is still the norm.

The FCC is forming its Downloadable Security Technical Advisory Committee (DSTAC) to identify and recommend new industry standards for interoperable TV navigation devices by September of this year so that a commercial market for new TV devices at reasonable prices has a chance to develop.[15] Development of open standard protocols that allow for devices that let

[15] *See* Public Notice: FCC Seeks Nominations for Membership for the Downloadable Security Technical Advisory Committee, Fed. Commc'ns Comm'n (Dec. 4, 2014), *available at* http://www.fcc.gov/document/fcc-seeks-nominations-downloadable-security-advisory-committee.

consumers fully benefit from their MVPD subscriptions while integrating content accessed from the Internet is key to market competition in video.

Consumers should have a real choice of whether to lease a navigation device from their MVPD or to use their own device purchased from a consumer electronics vendor or other third party.

Access to Local Infrastructure

Again, access to OTT services requires a broadband connection. Traditional cable and telecom MVPDs have established rights to essential local infrastructure like utility poles, ducts, and conduits.

Lack of similar access to local infrastructure limits deployment of broadband networks by new entrants. The inability to get timely and dependable access to such infrastructure at reasonable and predictable rates creates a barrier to entry.

Congress should modernize Section 224 to include facilities based wireline broadband providers as well as all franchised video service providers.