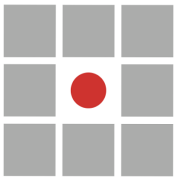

Public Knowledge

Testimony of
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Before the
United States House of Representatives
Committee on Energy and Commerce

Subcommittee on
Communications and Technology

Hearing on:
STELAR Review: Protecting Consumers in an Evolving Media Marketplace

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Congress must reauthorize STELAR or, even better, make it permanent. 870,000 satellite subscribers should not be a bargaining chip in the decades-long disputes between broadcasters and MVPDs.

This law, of course, has gone by many names. But whether it is called SHVA,[1] SHVIA,[2] SHVERA,[3] STELA,[4] or STELAR,[5] it has ensured that satellite television companies can continue to retransmit local broadcast stations to all of their customers. It is an important building block of video competition, allowing viewers who live in unserved areas to continue receiving a full range of national programming.

Satellite television 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. Public policies that ensure that new distributors can access content on fair terms benefit the public interest, and the success of satellite 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 programming without interruption.

Given the importance of STELAR to maintaining competition and protecting viewers, Congress should reauthorize it permanently. There is no reason for Congress to create artificial crises every few years to ensure that satellite remains a competitor. The reasons why Congress enacted this provision in the first place remain unchanged and are unlikely to change in the foreseeable future. A "clean" reauthorization of STELAR 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 STELAR for only a few years, it should tie its expiration to the expiration of other video marketplace protections, such as distant signal rules, basic tier buy-through, and similar provisions.

Public Knowledge is aware that a number of industry stakeholders feel that STELAR should simply expire. But if we are to consider broad reforms of video marketplace rules they should benefit consumers, not one industry sector at the expense of another. For years, Public Knowledge has believed that this is an instance where a predominantly deregulatory approach is needed at first, and that a bipartisan approach has a good chance of success. In particular, we would like to recognize Representatives Anna Eshoo and Steve Scalise for their leadership on video marketplace reforms.

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[1] Satellite Home Viewer Act of 1988, Pub. L. No. 100-667; Satellite Home Viewer Act of 1994, Pub. L. No. 103-369.

[2] Satellite Home Viewer Improvement Act of 1999, Pub L. No. 106-113, App. I.

[3] Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447.

[4] Satellite Television Extension and Localism Act of 2010, Pub L. No. 111-175.

[5] STELA Reauthorization Act of 2014, Pub. L. No. 113-200.

A promising approach would be to replace the cumbersome and duplicative compulsory copyright license / retransmission consent system with a regime based purely on copyright. This would better align the interests of programming creators and distributors, and eliminate duplicative negotiations. It would ensure that the local broadcasters have incentive to produce original, relevant, local programming they would own the rights to, which they could then license to MVPDs and online video distributors. And it would make it much easier for non-MVPD video distributors to access programming, by eliminating the current two-track system, where online video rights are negotiated one way, MVPD rights another way, and where incumbent MVPDs have a structural advantage. To eliminate viewer black-outs, such an approach would keep good faith requirements in place, as well as institute dispute resolution mechanisms. A gradual phase in would avoid industry and consumer disruption. Additionally, it is time to eliminate network nonduplication and syndicated exclusivity protections, as the elimination of the sports blackout rule has proven that such measures are unnecessary and that the video industry can manage its affairs via private contracting alone.

Ambitious reforms of this kind are the best way to streamline the video marketplace and curb bill inflation. To the extent that content costs and consumer bills continue to go up, other measures can be considered (such as reasonable rate requirements, increased antitrust enforcement, and other measures to increase competition), but it is better to first clear away unnecessary, industry-protective rules that have outlived any usefulness they may once have had.

While Public Knowledge supports bold changes to the video marketplace rules, incremental reforms should not be off the table if they are more politically feasible in the short term.

The retransmission consent regime could be improved through the adoption of clear standards of good faith, and through the prohibition of certain actions that should be considered bad faith per se. Such actions should include bundling different broadcast stations, or broadcast and cable channels together as part of one negotiation. At a minimum, broadcasters could be required to make a standalone offer of just the broadcast station. Broadcasters should also be prohibited from charging distributors on the basis of customers who do not even subscribe to the station in question, and from timing blackouts to coincide with marquee events. Additionally, during programming disputes, carriage should continue on an interim basis under the terms of the expired agreement.

Congress or the FCC could also reduce the leverage some large broadcast companies have over smaller MVPDs, which leads to ever-increasing bills, by restoring the top-four prohibition, and making sharing arrangements attributable. These steps would help bring our media ownership policies back into balance.

Congress should also consider protecting and promoting competitiveness in the video marketplace in several ways. It can ensure that the “Next-Gen TV” ATSC 3.0 technologies are available on reasonable and non-discriminatory terms, and do not require that viewers unnecessarily upgrade their TV sets. Additionally, such technologies should

protect consumer privacy, and not become yet another way for consumers to be invasively tracked. It can direct the FCC to end the basic tier buy-through rule, an unjustified policy intervention that makes à la carte offerings unlawful. It can also 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 as well. Also, restrictive most-favored-nation (MFN) contracts can unfairly limit the ability of smaller programmers to distribute via new outlets. They harm competition and the diversity of programming available to consumers, and Congress and the FCC should address them.

More generally, Congress should promote Internet openness and prevent discriminatory billing practices that hold back online video. In addition to supporting strong open internet rules under Title II of the Communications Act, Congress should examine whether discriminatory data caps and zero-rating hold back online video competition, and the extent to which these risks are exacerbated by vertical integration. If Congress takes action against anti-competitive and anti-consumer conduct, it will lead to lower prices, better services, and more flexibility and control for consumers.

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 they want on the device of their choice. At the same time, it would ensure that creators and distributors are 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. Public Knowledge is aware that the needed reforms will be controversial, and may take time. Congress can begin by making STELAR permanent, or at least tying its sunset to the expiration of various other video marketplace rules.