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Hearing on
"Lights, Camera, Subscriptions: State of the Video Marketplace"

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Consumer Reports[1] (CR) thanks Committee Chair Cathy McMorris Rodgers, Subcommittee Chair Bob Latta, Ranking Members Frank Pallone and Doris Matsui, and the Members of the Communications and Technology Subcommittee for inviting me to testify on the current state of the video marketplace.

At today's hearing, we will no doubt hear that the video marketplace has dramatically changed, with the pace of that change accelerating in just the past two or three years. On this point, many of us will agree. The once dominant providers of pay-TV, cable and satellite television companies (classified as multi-channel video programming distributors or MVPDs), have lost millions of consumers; streaming services, a novelty a decade ago, have signed up millions of subscribers, with some services providing live streaming television equivalent to what a traditional MVPD offers; Free over-the-air (OTA) local broadcasting importantly still exists, but many consumers have no memory that television once meant receiving three or four local broadcast channels in addition to public television via an antenna (or "bunny ears") just forty or fifty years ago.

How consumers *view* content is equally important and game changing as how they *receive* content. With the introduction of the iPhone and other smartphones in 2007, the rapid proliferation of screens began, allowing consumers to watch video content whenever they wanted, wherever they wanted by simply pulling out their phone or tablet. The obvious bears mentioning that none of these changes would have been possible without the availability of an affordable, fast, and reliable broadband internet connection. But with the arrival of mobile screens and computing power

[1] Consumer Reports (CR) is an independent, nonprofit membership organization that works side-by-side with consumers to create a fairer, safer, and healthier world since 1936, and has been actively engaged with policymakers on a range of telecommunications and technology issues facing consumers in today's marketplace.

sufficient to reliably deliver video over a broadband connection, the internet was set to revolutionize the video marketplace much like it had the newspaper and music industries earlier in the decade.

That said, some commentators point out that although the great mobility provided by smartphones sparked change in this marketplace, it was the introduction of "app stores" a year later and the streaming video apps available on those platforms that truly disrupted the video marketplace—a disruption that continues to this day.[2] Both the rise of internet-connected devices and the video streaming apps that provide content created a market shift away from watching television at a set time (so-called linear programming), and empowered consumers to watch content on their own schedule. This democratization of viewer choice started to chip away at the long-dominant business model of cable television, significantly altered consumer behavior, and fueled the changes to be discussed at today's hearing.

As we consider the many changes and policy debates in the current video marketplace, it is important to understand the basic forces at play to help recognize and predict both industry and consumer behaviors as this market continues to evolve. Ultimately, the success or failure of any video service provider rests on three sequential principles. One, does the content (delivered in any form) attract the *attention* of consumers. Two, is the attention significant enough to engage consumers for more than a fleeting moment? That is, does it compel *eyeballs* to watch only one or two episodes, or is it "must-watch" content (like following one's weekly NFL team) that a provider

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[2] Derek Thompson, *How Hollywood Drove Its Business Model Off a Cliff*, The Ringer (July 19, 2023). *Available at:* https://www.theringer.com/2023/7/19/23800849/hollywood-drove-its-business-model-off-a-cliff-disney-streaming. The link to the full podcast can be found at the top of the article.

can rely on for sustained consumer attention. And three, how can this attention be monetized and converted into *dollars*.

At the risk of oversimplification, this business model (i.e. attract attention, hold attention, monetize attention) can help explain everything from the old over-the-air broadcast television model reliant on advertising to the latest streaming video application. Of course, other factors like whether a provider has a monopoly market position or whether or not it engages in practices that alienate consumers can also impact consumer behavior, namely whether they will stick to a service or make an alternative choice.

The Current Video Marketplace: How We Got Here

For many years, consumers had very little, if any, choice for how to view video content. Local broadcast networks could be reliably viewed over-the-air for free by consumers who lived close enough to urban areas and were satisfied with a limited number of channels. That programming was free and supported by advertising that consumers became accustomed to as part of the viewing experience.

Cable (and later direct broadcast satellite television or DBS) rose to prominence in the 1980s with many more channels and exciting content available on new networks like MTV, CNN, Nickelodeon, and of course, ESPN. Even better, those over-the-air broadcast channels that consumers valued for local news, weather, and sports were also offered in the cable line-up reliably and without an antenna. The only catch was the cable company was, in nearly all markets at the time, a monopoly, sticking consumers with a “take or leave it” paradigm if they did not like price increases, rental fees for set-top boxes paid *ad infinitum*, or package line-ups that included many channels they did not view, and by extension, would prefer not to pay for if they had a choice.

Congress tried to address these problems in the 1990s with three laws that attempted to constrain cable rates, promote competition and protect pay-TV consumers. The 1992 Cable Act did many things but at its core regulated cable rates (for a time), ensured local broadcast channels were carried by cable operators, prohibited most exclusive programming (again, for a time) and also required cable companies to offer a low-cost “basic service tier” package of those local broadcast channels.[3] These measures tried to address consumer complaints about high cable rates and broadcaster concerns that cable companies would abandon local networks and refuse to carry their channels. The law also introduced “retransmission consent” as a new bargaining structure for broadcasters and cable operators to negotiate carriage of local networks outside of the traditional copyright licensing regime.[4] The 1996 Telecommunications Act permitted telephone companies to offer video service, leading to the creation of competitors like Verizon Fios.[5] Finally, the 1999 Satellite Home Viewer Improvement Act (SHVIA) permitted DBS operators to offer local broadcast channels with the hope that satellite television would better compete with cable by offering a comparable service.[6]

Though these measures led to some competition and more choices for consumers, cable’s near-universal grip on the video marketplace was broken only when faster, more accessible

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[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (*hereafter* Cable Act).
[4] *Id.*
[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. (1996)
[6] SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by DBS operators, codified in sections of 17 and 47 U.S.C.), Pub. L. No. 106-113,113 Stat. 1501, Appendix I (1999).

broadband connections made the aforementioned changes (mobile screens and streaming video apps) possible. Early streaming applications, notably Netflix, offered a mix of licensed content (e.g.. Hollywood movies, syndicated television series, etc.) and original content (e.g. the hit series, Orange Is the New Black) on a solely on-demand basis. That is, live programming was not offered. However, when streaming applications began to offer live content that provided local networks (and crucially, live sports) along with a package of popular cable channels that looked and felt like cable television—a cable equivalent service—policymakers in the 90s could only dream of the competitive effect it would have on the established cable industry.

It was one thing to cut the cord ten years ago and get by on Seinfeld reruns and binge watch series on Netflix or Amazon Prime, and either supplement that programming with local channels over-the-air or forego them altogether. However, the rise of live streaming, cable equivalent services offered by YouTube TV and others (known as virtual MVPDs or vMVPDs) offers modern consumers a choice to watch their favorite local channels, live sports, and cable networks without having to subscribe to cable.

And there are also consumers who may satisfy their video viewing preferences entirely online and outside what most of us consider traditional video programming (live broadcast and cable networks, hit movies on-demand, catalogs of popular series, documentaries, etc.) via applications like YouTube, TikTok, Instagram, Facebook, and other others. Of course, as mentioned earlier none of these choices would not be possible without an affordable broadband connection, but rare is the consumer who subscribes to cable television and not internet service, so consumers are likely to be paying for broadband in either scenario.

Positive Impact of Video Marketplace Changes on Consumers

What have these changes in the video marketplace meant for consumers? On balance, these changes have benefited consumers in numerous ways. More consumer choice for video programming is a good thing, and there are more choices for video content and more ways to access that content than ever.[7] Consumer behavior bears this out. According to CR's nationally representative American Experiences Survey of 2,097 U.S. adults in February 2023, roughly half of American households say they subscribe to four or more streaming services. And almost 1 in 10 subscribe to nine or more.[8] Another survey from Nielson reveals that 72 percent of Americans say "I love my user experience with video streaming services," and 93 percent plan to increase their streaming options or make no changes to their existing plans.[9]

Furthermore, most streaming applications allow consumers to easily cancel anytime during a given month, meaning consumers are only obligated to pay for one month in which they can view as much content as they like during that time and then cancel, switching to a new application the next month. This sort of "service hopping" is quite common, which describes the 36 percent of consumers who subscribed to streaming services, switched, then resubscribed multiple times over a period of 12 months.[10]

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[7] Meaghan Kirby, *There Are Now 817,000 Individual Tv Shows for Viewers to Choose From*, Nerdist (April 8, 2022). *Available at:* https://nerdist.com/article/nielsen-state-of-play-report-tv-show-numbers-streaming-future-of-television/.
[8] *February 2023 American Experiences Survey (AES)*, CR Survey Research Department (February, 2023). *Available at*: https://article.images.consumerreports.org/image/upload/v1677852467/prod/content/dam/surveys/Consumer_Reports_February_2023_AES_Toplines.pdf. *See also*: James K. Wilcox, *How to Save Money on Streaming Services*, Consumer Reports (August 12, 2023). *Available at*: https://www.consumerreports.org/electronics-computers/streaming-media/how-to-save-money-on-streaming-services-a7950600930/.
[9] Report, *State of Play: The Video Streaming Industry Has Reached a Tipping Point,* Nielsen (April, 2022). *Available at:* https://www.nielsen.com/insights/2022/state-of-play/.
[10] James K. Wilcox, *How to Save Money on Streaming Services*, Consumer Reports (August 12, 2023). *Available at*: https://www.consumerreports.org/electronics-computers/streaming-media/how-to-save-money-on-streaming-services-a7950600930/.

With respect to equipment requirements for video streaming, all a consumer needs (in addition to some sort of screen and a broadband connection of course) is a device that can either host streaming applications (e.g., a smartphone, tablet, or some smart TVs) or hardware that connects to a television to host those applications (e.g., Roku streaming stick, a video game console, or Apple TV plug-in), many of which are less than $50.[11] This represents a departure from the days of having to rent a set-top box from a traditional MVPD. Finally, the vast majority (though not all) of streaming applications and vMVPDs are free of add-on fees that litter a comparable cable offering.

Negative Impact of Video Marketplace Changes on Consumers

When surveying the current video marketplace and parsing out the consumer benefits and harms associated with it, the old adage “less is more” may apply to some consumers. Despite the many ills documented by CR that plague the traditional MVPD marketplace, there is some convenience still to be had to bundle one’s broadband and video services, often at a discount, from a cable provider. Local channels are offered along with hundreds of popular cable networks.

Unfortunately, for reasons discussed below, a cable bill in 2023 will be riddled with expensive company-imposed fees, notably a “broadcast TV fee” that now exceeds $20 for many subscribers of Charter (Spectrum) and Comcast (Xfinity), the two largest cable companies in the country.[12] These fees (including set-top box fees) add a significant cost to the advertised price, determined to be 24 percent in a 2019 CR report, but likely higher now because of many increases

[11] Consumer Reports’ *Streaming Device Buying Guide* published in April, 2023 includes a list of “recommended” streaming video devices. Of the 16 devices recommended, half were priced at $50 or less. *Available at*” https://www.consumerreports.org/electronics-computers/streaming-media/buying-guide/.

[12] *See* Comments of Consumer Reports and Public Knowledge, *All-In Pricing for Cable and Satellite Television Service*, MB Docket No. 23-203, (June 20, 2023), at 14-18 (filed July 31, 2023), *Available at:* https://www.fcc.gov/ecfs/search/search-filings/filing/1073174142455.

of fees created by the cable industry to offset their costs paid for content, mainly local broadcast networks.[13] As a result, high prices and less than transparent pricing continue to bedevil consumers subscribed to traditional MVPD services.

But subscribing to multiple streaming platforms in addition to a broadband connection—a CR report published in 2022 found the average U.S. consumer pays $75 for broadband—which makes streaming possible can also be expensive.[14] In this respect, the many choices offered by streaming require consumers to be more conscious of their purchasing decisions in real time, and cognizant of how much they are spending across the many streaming apps they are subscribing to each month.[15] Moreover, because of the losses (caused in part by low introductory rates to attract consumers and monthly churn caused by consumers app switching practices) incurred by large content providers (e.g, Disney) to stand up their streaming platforms, price increases have been announced that will further increase costs for consumers who enjoy streaming.[16]

Perhaps the biggest harm facing consumers in the video marketplace is the prevalence of blackouts, which are no more complicated than content not being available to consumers (despite paying for it) because an agreement was not reached between a content provider (e.g., a broadcast

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[13] Jonathan Schwantes, *How Cable Companies Use Hidden Fees to Raise Prices and Disguise the True Cost of Service (CR Cable Bill Report 2019),* Consumer Reports Advocacy (October, 2019). *Available at:* https://advocacy.consumerreports.org/wp-content/uploads/2019/10/CR-Cable-Bill-Report-2019.pdf.

[14] Jonathan Schwantes, *Broadband Pricing: What Consumer Reports Learned from 22,000 Internet Bills*, at 23-24, Consumer Reports Advocacy (November 17, 2022). *Available at*: https://advocacy.consumerreports.org/wp-content/uploads/2022/11/FINAL.report-broadband.november-17-2022-2.pdf. Worth mentioning is the Affordable Connectivity Program (ACP), enacted as part of the 2021 Infrastructure Law, has made broadband more affordable for low-income households. As of September 4, 2023, 20.7 million households are currently enrolled in ACP. *See* getinternet.gov and https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/ for more details.

[15] James K. Wilcox, *How to Save Money on Streaming Services*, Consumer Reports (August 12, 2023). *Available at*: https://www.consumerreports.org/electronics-computers/streaming-media/how-to-save-money-on-streaming-services-a7950600930/. For more advice on how to stream video for less, *see also*: James K. Wilcox, *How to Replace Cable TV for Only $25 a Month*, Consumer Reports (August 4, 2023). *Available at:* https://www.consumerreports.org/electronics-computers/streaming-media/how-to-replace-cable-tv-for-only-25-dollars-a-month-a6798410203/.

[16] Sara Fischer, *Almost Every Big Streaming Service Is Getting More Expensive*, Axios (July 24, 2023). *Available at*: https://www.axios.com/2023/07/25/streaming-prices-2023-comparison-raise.

station group like Nexstar, or media conglomerates such as Disney) and a video distributor. Both traditional MVPDs and vMVPDs have been affected by the disturbing and anti-consumer practice of blackouts, but have been overwhelmingly prevalent in the traditional MVPD marketplace.[17] An advocacy group for the cable industry, the American Television Viewer Alliance, estimates that more than 1000 station blackouts of varying duration have occurred since 2010.[18]

To be crystal clear, these disputes are all about money and universally harm consumers. Though not timed to coincide with today's hearing, the recent dispute between content powerhouse Disney and Charter (which brands its cable product as Spectrum), the second largest cable company in the country, serves as exhibit A for understanding this problem. Because two multi-billion companies could not come to an agreement on a price for carrying Disney's content, 15 million Charter cable subscribers were denied ABC, ESPN and other channels owned by Disney for more than a week. Some observers suggest its fallout will predict the very future of the video marketplace.[19]

Who's to blame for these blackouts and the all-too-common disputes like Charter-Disney? The answer goes back more than three decades when the struggle was set into motion by the 1992 Cable Act, which required cable companies to carry local broadcast channels in one of two ways. A broadcaster may simply demand carriage, and the cable company is obligated to provide it under what is called the "must-carry" rule.[20] Alternatively, when it is clear that the cable company wants

[17] Karl Bode, *Stupid Cable TV Retrans Feuds And Blackouts Make Their Way To Streaming TV*, Techdirt (December 10, 2020). *Available at:* https://www.techdirt.com/2020/12/10/stupid-cable-tv-retrans-feuds-blackouts-make-their-way-to-streaming-tv/.
[18] The American Television Viewer Alliance maintains a database of blackouts that have occurred since 2010 caused by carriage disputes between broadcast station owners and the channels affected. It can be accessed at: https://americantelevisionalliance.org/blackouts-in-your-area/.
[19] David Marcelis and Joe Flint, *Disney Fight Marks Cable' TV's Last Stand,* The Wall Street Journal (September 8, 2023). *Available at*: https://www.wsj.com/business/media/disney-spectrum-espn-charter-dispute-9147744b.
[20] Cable Act, Pub. L. No. 102-385, 106 Stat. 1460, 1471 (1992)

to carry the broadcast channel, a broadcaster can negotiate carriage in exchange for money—that is, the broadcaster grants the cable company "retransmission consent" for a price, or a retransmission consent fee, the law having moved these negotiations out of the world of copyright licensing normally used to reimburse content holders.[21]

These changes in the law led to cable companies being locked in a battle with broadcast networks over the cost of video programming content. Over the past 20 years broadcasters have demanded higher retransmission consent fees for their programming, and cable companies have had little choice but to pay up. If the two parties cannot negotiate a consent deal before the previous one expires, a broadcaster can insist that its signal be "blacked out" and removed from the MVPD's service.[22] Though the number of station blackouts in recent years has also risen, cable and satellite companies have generally been unwilling to anger their customers by letting a blackout continue for too long in most cases, choosing instead to cut a deal and then pass the costs on to their customers, in the form of the ever-increasing broadcast TV fee and the related regional sports fee. In either scenario, consumers are the biggest losers. What was striking about the Charter-Disney stand-off is that Charter suggested it may exit the video marketplace altogether in the future, as other MVPDs have already done.[23]

Policy Considerations and Recommendations

The fractured nature of retransmission consent negotiations and the larger challenges facing the video marketplace can be addressed in a way that would better benefit consumers.

[21] *Id.* at 1482.
[22] Karl Bode, *Broadcaster, Cable Bickering Leads To Record Number of TV Content Blackouts*, Techdirt (January 22, 2016). *Available at*: https://www.techdirt.com/2016/01/22/broadcaster-cable-bickering-leads-to-record-number-tv-content-blackouts/
[23] Oliver Darcy, *Disney's Battle with Charter Could Pose an Existential Threat to the Cable Bundle*, CNN (September 5, 2023). *Available at*: https://www.cnn.com/2023/09/05/media/disney-charter-reliable-sources/index.html.

First and foremost, Congress has the authority to cure the ills of the retransmission consent regime by doing away with it altogether. Such solutions have been considered during Congressional hearings, and legislative proposals have been floated in the past, including the introduction of the Modern Television Act of 2021 by Representatives Anna Eshoo and Steve Scalise introduced last Congress.[24] Among other things, this bill would scrap the current retransmission consent system in favor of private market copyright negotiations as the better way for MVPDs to obtain programming from broadcasters and others. The legislation would also enact new measures to protect consumers from station blackouts caused by failed negotiations, and allow for binding arbitration as a way to broker deals between cable companies and broadcasters when all else has failed.

In the same vein, Congress and the Federal Communications Commission (FCC) should resist efforts to apply retransmission consent requirements which have clearly failed consumers to vMVPDs as some have suggested.[25] Applying a law drafted and passed at the time the internet was barely known and its effects not even dreamed of would be hugely damaging to consumers in the form of more station blackouts and higher prices. What in the past decade would suggest any different?

Alternatively, because of the many changes to the now dynamic video marketplace, Congress would be wise to assess what is working, what is not, what we value in a healthy video

[24] Press Release, *Scalise, Eshoo Introduce Modern Television Act of 2021*, Office of Congressman Steve Scalise (March 11, 2021). *Available at:* https://scalise.house.gov/media/press-releases/scalise-eshoo-introduce-modern-television-act-2021.
[25] *See* Letter from Senator Chuck Grassley to FCC Chairwoman Jessica Rosenworcel. *Available at:* https://docs.fcc.gov/public/attachments/DOC-392235A1.pdf. Senator Grassley highlights concerns he received from Iowa broadcasters who "explain that severe and lasting harm will be done to the local video programming ecosystem if "virtual" MVPDs that provide linear local television programming to their subscribers are not treated as MVPDs for the purposes of retransmission consent."

marketplace, and then act to level the playing field for all video providers in the marketplace to best serve and benefit consumers. The time for creative policy solutions to improve the video marketplace is now.

For example, with the input of all stakeholders (consumers, MVPDs, vMVPDS, broadcasters, the FCC, content owners, and content creators including writers and actors), Congress should begin with establishing a consensus of priorities that we collectively value in a video marketplace. Though not exhaustive, CR would suggest those priorities should include the following:

- ➢ low-cost, stand-alone options for local broadcast networks akin to a “basic service tier” required by the 1992 Cable Act to ensure low-income households have access to broadcast programming and local news and public television;
- ➢ price transparency in the form of all-in pricing or a ban on certain company-imposed fees for video service plans;
- ➢ availability of local broadcast networks and continuity of service free of blackouts;
- ➢ transparent and predictable procedures to ensure carriage deals (ideally via privately-negotiated copyright licensing agreements) that fairly compensate content holders;
- ➢ privacy protections afforded consumers by the Cable TV Privacy Act;
- ➢ continued educational and public access programming; and a
- ➢ reexamination of media ownership rules and media diversity goals important to sustain a variety of viewpoints in a modern democracy.

Though these issues are complicated, they are not impossible to resolve. To be sure, clinging on to law dating back to the early 1990s that has outlived its utility and actively harms consumers is not the way forward. We would do better to start with a blank slate and devise a new law that reflects the current realities of the video marketplace, and realizes the effect that broadband and streaming video have had upon it and the consumers who are vital to its survival.