Testimony of

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and the
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"Oversight: Time Warner Cable, CBS and the Consumers Stuck in the Middle"

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Good morning. My name is David Donovan. I am President of the New York State Broadcasters Association, Inc. (NYSBA). NYSBA is a not for profit trade association representing approximately 59 local television stations and 360 radio stations throughout the state of New York.

Thank you for the opportunity to appear before you and discuss the important role that retransmission consent plays in ensuring that consumers receive the highest-quality service from local television stations. As a trade association we do not become involved in specific negotiations. Nonetheless, we believe we can offer some perspective regarding the retransmission consent process that will hopefully place the current dispute in context.

It is important to recognize that the retransmission consent process established by Congress in 1992 was designed to help consumers. Its fundamental objective was to correct an economic imbalance caused by previous government policies, and insure that consumers maintained access to a viable local television service. By creating marketplace negotiations for the retransmission of broadcast programming over cable and other multichannel video systems, Congress helped to insure that consumers maintained access to quality broadcast content, especially local news. Moreover, maintaining an economically viable local broadcast service was not only important for cable subscribers, but it insured that consumers would continue to receive local television stations free over-the-air with an antenna. Unlike pay subscription service, local television broadcasting is universally available to all New Yorkers, rich and poor, throughout the five boroughs. A viable free over the air TV option remains critically important as an option for consumers. For example, approximately 640,000 viewers in the New York City TV market, many of whom are considered vulnerable populations, utilize this option every day. Moreover, this option became very important for all New Yorkers during Superstorm Sandy.

Broadcast television stations remained on the air serving the devastated areas of New York City while large segments of various cable systems were off line.

To understand the retransmission consent issue, it is important to reflect on its history. Due to a confluence of communications and copyright law, cable systems were able to access and retransmit local broadcast signals for decades essentially for free.

From a communications law perspective, the Radio Act of 1927 and later the Communications Act of 1934 included a provision that barred one station from retransmitting the signal of another station without consent. Senator Dill, the chief sponsor of that legislation, explained that this section would prevent use without its consent of a radio station's signal by "the wired wireless," a reference to early cable radio systems.[1] Despite this legislative history, the FCC in 1959 found that nascent cable systems did not need to obtain television station's consent before retransmitting its signal.[2]

From the copyright perspective, local cable systems were allowed to retransmit broadcast signals without payment.[3] The 1976 Copyright Act, Congress attempted to correct this situation and imposed limited copyright liability on cable retransmission of broadcast signals. Nonetheless, recognizing the difficulties that would be created if a cable system had to bargain separately for the thousands of separate copyright interests included in television signals, Congress established a compulsory license for signals carried by cable systems in accordance with FCC regulations. However, the fees paid by cable operators under the local compulsory

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[1] 68 Cong. Rec. 2880 (1926).

[2] *CATV and TV Repeater Services*, 26 FCC 403, 429-30 (1959).

[3] *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974). In these cases the Supreme Court held that cable systems retransmitting broadcast signals did not incur any copyright liability because, the Court found no difference between a consumer receiving a signal over the air by means of his or her own antenna or over a wire from an antenna erected by someone else

license were negligible and cable systems were retransmitting local signals essentially for free. That structure remains in place today.[4]

By 1992, Congress recognized that, with the growth of cable and the creation of cable-only programming, the system had tilted too far in favor of cable systems which could carry local TV stations without having to negotiate with or compensate the owners of those signals. Nonetheless, they charged their subscribers for access to those signals, and a Merrill Lynch study concluded that fully *one third* of the cable industry's total revenues were the result of a compelled subsidy from broadcasters. Congress decided to overturn what it concluded had been a mistaken FCC decision exempting cable systems from the requirement to obtain consent to use broadcast signals.[5] The Senate Commerce Committee explained:

> Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. . . . [The Committee] does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors. . . . Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services on a broadcast channel should not be treated differently.[6]

Rather than have the government set the terms for carriage of television signals, Congress chose to require a marketplace negotiation, recognizing that cable systems and local stations provided benefits to each other, and that if a station were dropped from a cable system, both

[4] Notably, Congress in 1976 addressed only the copyright interests in the programs carried on television signals, not the separate rights in the signal that it had always recognized belonged to broadcasters.

[5] "The amendments to section 325 [of the Communications Act], therefore, close a gap in the retransmission consent provisions which, in the Committee's view, was not intended by the drafters of the 1934 Act." S. REP. NO. 102-92, 102d Cong., 1st Sess. 36 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 [hereinafter *Senate Report*].

[6] *Id.* at 35.

parties would suffer. Congress also declined to set the terms for negotiations, predicting that some stations might seeks carriage of other programming on a cable systems, while others would negotiate for cash compensation. "It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[7]

Thus, through the retransmission consent process, Congress restored some balance to the marketplace to prevent the diminution of the local broadcast service. This is a process that has been largely successful in insuring local broadcast television remains as a viable video option to consumers.

This system has worked well. In the almost 20 years since the retransmission consent rules went into effect, thousands and thousands of retransmission consent agreements have been reached between broadcasters and cable systems and other multi-channel video programming distributors (MPs) with no interruption to the public's access to local signals.

For many years, most broadcasters did not receive direct cash compensation for the use of their signals. That is largely because the large cable operators, such as Time Warner, categorically refused to negotiate for cash compensation. This was a viable option so long as a cable system remained the sole multichannel video provider in a community. In effect cable was not only the sole provider of multichannel service to the public in a given area, but also a monopsony purchaser of local broadcast programming. In recent years, however new multichannel services such as Verizon, DirecTV, DISH, and others have entered the marketplace. As these other providers entered into the video distribution market, they did not

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[7] *Id.* at 36.

join cable's refusal to consider negotiation for cash compensation, and stations began to seek more straightforward compensation for the value their signals bring to cable systems.

You will hear today that cable systems oppose broadcasters' requests for cash compensation because they want to protect consumers from price increases. You should view these claims with considerable skepticism. Even in the many years when cable systems did not pay to carry local television stations, cable rate increases vastly exceeded the rate of inflation. For example, the FCC reported that in 2002, average cable rates went up 8.2%, while overall consumer prices increases 1.6%. In 2009, while consumer prices went down, cable rates still increased 3.7%.

You will also hear exaggerated claims of the rate of proposed increases in retransmission costs. First, since many stations received nothing in exchange for retransmission consent and others very little, even a small increase in actual costs can be made to seem huge when expressed as a percentage. While the rate of growth of retransmission consent payments did increase sharply a few years ago, cable experts conclude that the rate of growth has decreased markedly and will continue to decline over the next years.[8]

While cash retransmission compensation has increased, it still represents only a tiny portion of the cable video revenues and remains dwarfed by the payments cable systems make to basic cable networks, even though those networks attract far fewer viewers than local television stations. For example, in 2013 the average cable system paid $31.67 billion to non-broadcast basic cable tier programming services. Cable's payment of local broadcast retransmission fees amounted to roughly $3 billion or 9.5% of the fees paid to basic cable networks. The cable

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[8] SNL Kagan, *Broadcast Retransmission Fee Projections 2012-18.* For some systems which are operating under old retransmission agreements, a larger percentage may be asked now to bring them into line with rates that are now typical in the industry.

industry's arguments ignore the value that their own subscribers place on local broadcast content. In terms of viewing share and ratings, the content provided by local television stations remains the most popular on cable systems. Approximately 95 of the top 100 shows on cable systems were broadcast programs. Despite local stations overwhelming contribution to the popularity of a cable systems line-up, local broadcast retransmission fees remain a fraction of the fees paid by cable operators to basic cable programming networks.

Another way to look at this relationship is to examine retransmission fees as a percentage of fees charged to subscribers for basic cable service. In 2011, the average cable system charged consumers $42.18 for basic tier service each month; the average system paid broadcasters only $1.76, or roughly *four percent* of the revenue it received.

It is simply untrue that retransmission consent fees have any significant effect on consumer prices. Rather, cable wants you to pressure broadcasters to keep its costs down, without any commitment to reduce the costs consumers must pay.

Occasionally MVPDs and broadcasters have been unable to reach agreement. Nonetheless, the fact that negotiations may sometimes fail is not evidence that the system does not work. The essence of any free market negotiations means that there are times when the parties find it difficult to reach an agreement.

While cable interests assert that the number of these disruptions is rising, two things must be remembered about this claim. First, even today, the chances of a cable subscriber losing access to a particular program because of a failure of retransmission consent negotiations is far less than that subscriber's chance of losing access to that program because of an electric outage or a breakdown of the cable system. Second, and unfortunately for New York, at the national level a significant number of these controversies involved – Time Warner Cable and

Cablevision. Of course this pattern is not necessarily limited to fights over local broadcast retransmission fees. For example in September 2011, Cablevision and the Tennis channel were locked in a dispute, which resulted in the network being dropped during the US Open.

The primary issue is how to protect consumers when there is a disagreement between a cable operator and a local broadcasters or any video programming service. As Congress noted, it becomes extremely difficult for any government entity to micromanage private negotiations. To the contrary, experience has shown that the potential for government intervention may have the unintended consequence of delaying a resolution, as the parties attempt to exert political leverage and wait for government action.

We believe the key is to increase consumer choice. No consumer need lose access to any broadcast program.

First, an important element in local television broadcasting is the ability to reach individual viewers directly with over-the-air signals by using an antenna. As noted above, nearly 640,000 viewers in the New York City market already use this free, antenna TV option. For a one time investment of $15-30, consumers will always have access to free local television signals. In fact, the antenna option has become increasingly popular in recent years as consumers end their subscription pay services and "cut the cord." Many younger viewers are returning to the antenna option and combining it other services such as Netflix.

The purchase of an antenna is not simply a hedge against potential retransmission consent disputes. It is essential for emergencies. As New York City learned during Superstorm Sandy, local cable, wireless and telephone service wet out during the storm. In some areas, service was not restored for weeks. However, throughout the storm local New York City television stations remained on the air providing service throughout the City and Long island.

Local stations such as WCBS (CBS), WLNY (Long Island/CBS), WABC (ABC), WNBC (NBC), WNYW (Fox), WPIX (CW) and WXTV (Univision) each provided more than 100 hours of live life-saving news and information during the storm.

Second, New Yorkers are fortunate in that they have the ability to subscribe to a number of multichannel providers including cable systems, Verizon (Fios), DISH and DIRECTV. If a multichannel provider is not providing a particular program service or local broadcast programming, consumers should have the ability to easily switch providers. For example, regulations or contracts which impair the ability of a building to provide multiple services should be examined. This could include the reestablishment of an antenna based master antenna service. In addition, many multichannel video services have early termination fees. These fees often trap a consumer who may wish to switch services.

Third, as the negotiation deadline approaches, both sides should inform viewers in advance. This will allow consumers to make alternate plans to insure they will not lose access to their favorite local TV station.

Finally, we must reiterate why the government established the retransmission consent regime. Congress believed that, if the benefits of broadcasters' investment in quality programming continued to be syphoned off by cable operators, the ability of broadcasters to invest in quality programming and local news and information gathering would decline, harming the public. Broadcasters operate in an increasingly competitive market, facing alternatives for programming and advertising from cable and other video providers, as well as online providers. None of these competitors provide the universal service that broadcasters do, and none provide the hours and hours of local news, weather and other information that the public has come to expect from local television stations. When bad weather is on the horizon, such as New York's

experiences with Hurricanes Irene and Sandy, local television stations are the public's main source of up-to-date information. When they want to see premier programming like the SuperBowl™ or the World Series, it is available to them on local TV. These things cost money, indeed a lot of money. If broadcasters must in effect give away their signals to their biggest competitors, who will continue to charge consumers for product broadcasters create, stations' ability to provide quality programming and service will decline. That is what worried Congress in 1992, and its decision to allow for a free market for broadcast signals has worked exactly as it expected.

I look forward to answering your questions.