Written Testimony of
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Chairman Waxman, Ranking Member Barton, and members of the Committee, I am Ken Ferree, President of the Progress & Freedom Foundation, which is a think tank focused on the digital economy. Thank you for inviting me to discuss the renewal of the Satellite Home Viewer Act.

I. The Video Market Is Extremely Competitive And Growing More So Everyday.

The watchword among policy-makers dealing with the communications infrastructure industries for the past twenty-five years has been competition. As compared to regulated monopolies, competitive markets provide more consumer choice, lower prices, and faster technological innovation. Since the breakup of the Bell monopoly, U.S. communications policy has been focused on bringing these benefits to video, voice, and data communications.

The evolutionary path has not always been smooth, but competitive markets have emerged in each of these broad areas. In consumer video services, the success of Direct Broadcast Satellite (DBS) service has been of singular importance. Today, nearly one-third of multichannel video consumers subscribe to a DBS service (see attachment 1). Of the remaining two-thirds, the vast majority subscribe to a cable service, though telephone company video services have gained a foothold in the market and are growing. Some analysts predict that telephone companies will enjoy a 10% share of the multichannel video market by 2012.

At the same time, the degree of vertical integration in the market is shrinking rapidly. While the number of cable programming services has grown from approximately 70 in 1990 to nearly 600 today, the percentage of those programming services affiliated with a cable operator has plummeted from 53% in 1992 to less than 10% (see attachment 2). As my colleague, Adam Thierer, has written, "with more independently owned networks, there is a greater diversity of niche programming on cable and satellite TV today than ever before. There really isn't any human interest or hobby that is not currently covered by some video network."

In sum, the video marketplace is a competition success story; Congress deserves some credit for that success. As history has shown, the passage of the Satellite Home Viewer Act ("SHVA") and its progeny (the Satellite Home Viewer Improvement Act of 1999 ("SHIVA") and the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")), allowing satellite carriers to retransmit local broadcast signals, have played an important role in the evolution of the video market. It is time to take the next step in that evolution.

II. Congress can help increase competition and enhance viewer satisfaction with multichannel video services by dealing with some incoherencies that result from the distribution of broadcast television DMAs.

While Congress considers renewal of SHVERA, it should take the opportunity to make minor amendments that would increase consumer choice on the edges of several markets throughout the country. In particular, I refer to marketplace oddities that can occur when consumers reside in a broadcast television Designated Market Area (DMA) that predominately covers an adjacent state.

Because DMA boundaries and state political boundaries are not coterminous, there are numerous instances throughout the U.S. in which television viewers receive their "local" broadcast services via satellite from neighboring cities and states rather than their home state. As Chief of the FCC's Media Bureau from 2001 to 2005, I heard numerous complaints about just this problem.

Worse, from my perspective, was that it was nearly impossible, at least for one of my poor learning, to explain the arcane system of DMAs, copyright limits, and broadcast exclusivity that required DBS companies to deprive viewers of access to what they regarded as their home stations while carrying stations from distant cities in other states. Whatever the legal justification, the outcome simply does not harmonize with common sense.

Congress appropriately has addressed specific instances of this sort of marketplace incoherence, but the time is ripe for a more general solution. At minimum, viewers who reside in a DMA such that their local broadcaster is licensed to a neighboring state should be allowed to receive programming from in-state stations in adjacent markets.

III. More Broadly, Consumers Should Be Permitted To Access Whatever Programming They Desire So Long As Distributors And Rights-Holders Can Negotiate An Agreement In The Marketplace.

As I outlined above, the video marketplace is more competitive than ever, and growing more so every day. Indeed, I did not even mention Internet video and the disruptive affect it will have on business models, consumer behavior, and legal/regulatory classifications. As a practical matter, technological innovation will render obsolete many

of the restrictions that we accept as necessary to protect marketplace exclusivity within specific geographic regions.

Most importantly for these purposes, it is apparent that the large-scale delivery of *television* content online is becoming a reality. A new class of rapidly-growing Internet Video Programming Distributor (IVPD) websites and services, including Netflix, Hulu, Amazon Video on Demand, iTunes, Vuze, Sony Playstation Store, and the Microsoft Xbox 360 Marketplace, are changing the way we view and think about broadcast television. These IVPDs already offer a staggering library of currently-airing and archived content—as much as 90% of broadcast shows and 20% of cable shows. It is increasingly easy for consumers to use IVPDs to view content from any geographic market directly on Internet-ready televisions or through the use of set-top devices (*e.g.*, Netflix Player by Roku, TiVo, Slingbox) and wildly popular game consoles (*e.g.*, Microsoft Xbox 360, Sony PlayStation 3). In short, time and geography increasingly are meaningless concepts with respect to video content.

The emerging video world is one unfamiliar to old folks of my generation, but exciting to my children's: It is a world in which the power of the consumer is paramount and market dynamics, not arbitrary physical or legal boundaries, are the only limit. I would caution that, if established video providers are to thrive in this brave new world, they will need to be freed from unrealistic and outdated regulatory strictures.

IV. Expanding The Must-Carry Obligations Of Satellite Carriers Would Be Bad Policy And Unconstitutional.

The nature of legislation is that it sometimes requires, or results in, uneconomic commercial activity. Such legislation is troubling in good times when business activity is

robust, companies are flush, and unemployment is low. It is inexcusable, however, when times are tough, as they are now; when credit is tight, the economy is contracting, and unemployment is on the rise.

I have read recently of legislative proposals that would require satellite operators to carry local TV stations in even the smallest markets. Because Congress cannot repeal the laws of physics, there are only two ways in which a satellite company might comply with such a mandate: 1) it may add capacity (*i.e.*, launch new satellites and build associated ground equipment), or 2) it may convert capacity currently used for other purposes to local television carriage in the most sparsely populated parts of the country. Neither approach makes economic sense. That is, these proposals, if they were to become law, would impose considerable costs on satellite operators while generating no appreciable revenue.

Building and launching new satellites in order to carry local television stations in the smallest markets would of course cost hundreds of millions of dollars, while the return on such an investment, without any doubt, would be negligible. On the other hand, satellite television operators make capacity decisions in order to maximize net revenue. If they are required to delete program services that are profitable to make room for those that are less so, they necessarily lose in the transaction. Indeed, if delivering local television signals in the smallest markets made sound business sense, the satellite companies would be doing so already and no legal mandate would be necessary.

Moreover, and fatally for any such proposal, requiring DBS companies to provide local signals (effectively adopting a satellite must-carry requirement) would almost certainly be unconstitutional. Cable must-carry was upheld by the Supreme Court by a

bare majority only because there was a voluminous record suggesting that weaker broadcast stations would fail absent a cable must-carry requirement, thus depriving over-the-air viewers of additional video programming choices. There is no similar record, nor any reason to believe that one might be assembled, suggesting that the same would hold true absent some enhanced satellite carriage rule.

Carriage requirements impose significant burdens on the commercial and First Amendment rights of those bound by them. In the current environment, imposing enhanced carriage mandates on DBS operators would be unwarranted, economically indefensible, and unconstitutional.

Diagram 1

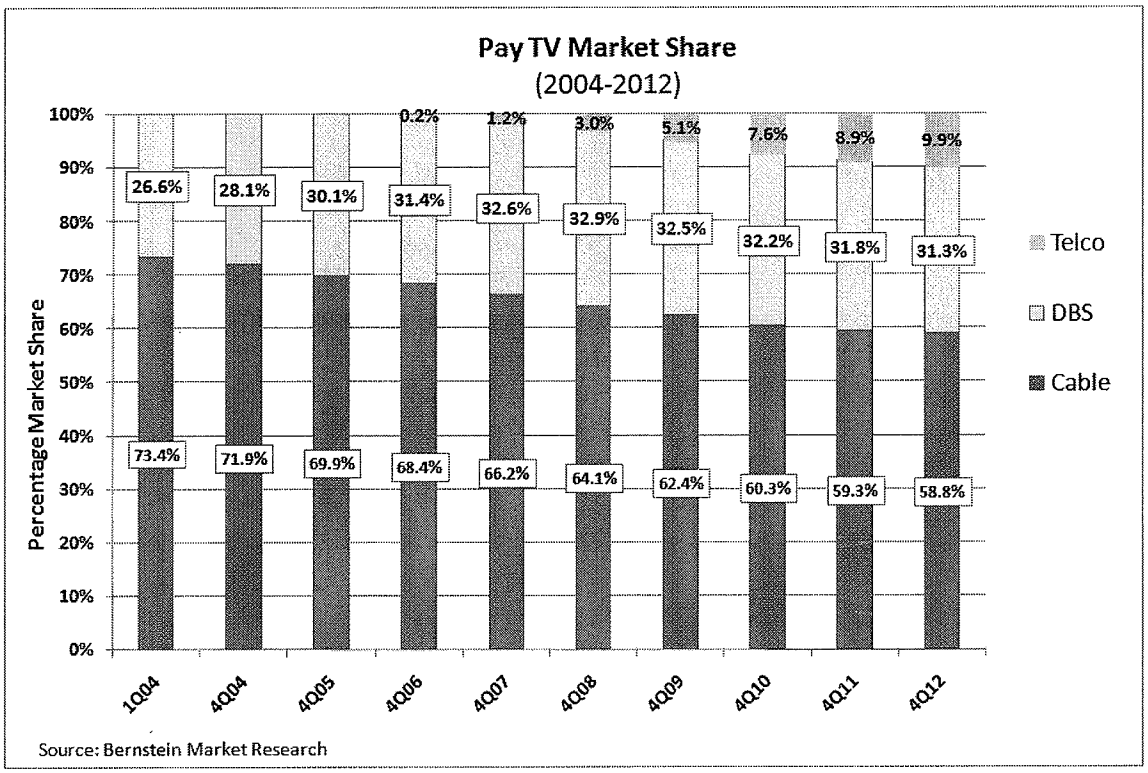
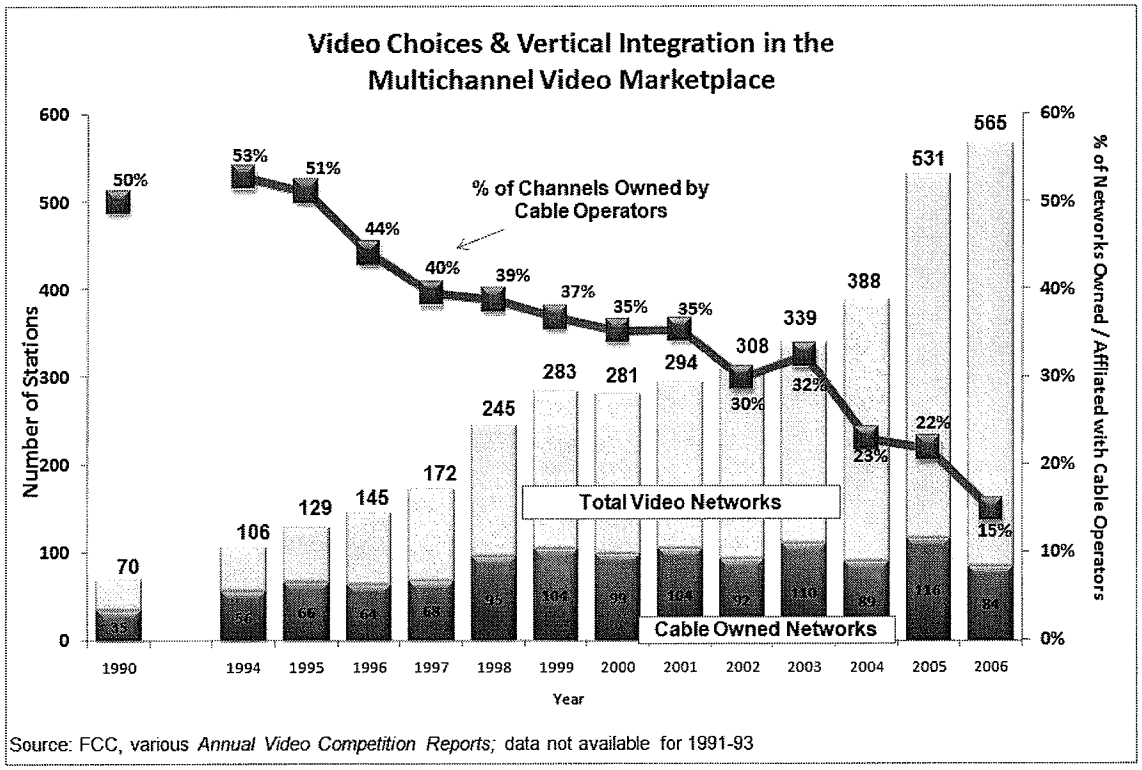
Diagram 2