Written testimony of

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Subcommittee on Communications, Technology, Innovation, and the Internet

Regarding

"The State of the Television and Video Marketplace"

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INTRODUCTION

Thank you Chairman Wicker, Ranking Member Cantwell and members of this Committee for inviting me to testify today on this important topic.

My name is Craig Aaron. I am the president and CEO of Free Press and Free Press Action. Free Press is a national, nonpartisan, nonprofit organization focused on issues at the intersection of media, technology and democracy. I'm here today representing more than 1.4 million of our members in all 50 states, Puerto Rico, and Washington, D.C.

Since Free Press was founded in 2003 to give the public a voice in the crucial decisions shaping the media, the landscape has changed dramatically. More than ever, media and technology are now intertwined in our daily lives, vital to the health of our communities, and essential to a functioning democracy.

The decisions and policies made by this Committee, and the agencies it oversees, will have far-reaching consequences beyond any single company or industry. A thriving television and video marketplace should spur competition, encourage innovation, amplify diverse voices and viewpoints, empower creators, and provide communities with the local news and information they need, to know what's happening where they live and here in Washington.

So often when we come together in these halls to talk about the state of the media, we talk about industry versus industry, broadcasting versus cable, old media versus new. Missing from these debates are those who should matter the most: the audience, the viewers, the public.

As Congress long has recognized, companies allowed to control the public airwaves, dig up city streets to run wires, put up towers, or launch a satellite into orbit must have public responsibilities. What the public needs is more competition, more choices, more diversity, more transparency, and — especially — lower prices. These should be the Committee's priorities as it renews and refreshes the laws shaping our communications system.

The powerful and still very profitable cable and broadcasting companies come to Washington touting their commitments to localism and diversity but seeking special favors to evade those public commitments, undercut their competitors, and consolidate at all costs. They want all of the benefits of dominating local media but none of the obligations.

Yes, the TV and video marketplace is evolving. But the reality is that Americans still spend far more time watching traditional cable and broadcast TV than they do on social media and other computer and smartphone applications. People want to watch TV, and they are willing to pay for it. They just don't want to be gouged on the price or forced to buy a bunch of things they'll never watch to get the shows they want. In a healthy market, we would see lower prices and better service. But we are getting the opposite.

Cable prices have risen steadily at nearly three times the rate of inflation despite the advent of online video. Deceptive and hidden fees continue to spread. Pay-TV customers everywhere are spending a fortune for channels they don't want, locked in by all-or-nothing channel bundles and onerous contracts. While getting rich off their local monopolies, the cable industry is shamefully trying to shirk their duty to provide local PEG channels and to fund community media centers.

At the same time, both broadcast retransmission-consent and political-advertising revenues are at record levels. Broadcasters aren't reinvesting this influx of new money in localism or better journalism. Instead, the public continues to be underserved as revenues flow out of local communities and into the bank accounts of distant executives and investors.

Years of runaway consolidation have pushed local owners out of the broadcast market, creating insurmountable barriers to entry that shut out local and diverse voices from access to the public airwaves. Despite repeated warnings and widespread public outcry, the FCC continues to gut national and local TV and radio ownership limits, erase public-interest obligations, and replace independent and local owners with giant chains that are shrinking newsrooms and pushing the same cookie-cutter content from coast to coast.

When these big broadcasters and cable companies fight over carriage, contracts or retransmission consent, when their conflicts leave TV screens blacked out before the big game, there's no one to root for on either side. While the winners in these disputes may vary, the losers are always the same: those of us in the audience.

It doesn't have to be this way. For too long, the scales have been tipped in favor of the biggest players, and they must be rebalanced. On the pages that follow, I go into greater detail about the state of the TV and video marketplace, chronicle the failure of regulators to protect the public, identify areas ripe for reform, and suggest sensible and concrete policies designed to foster a healthy media system grounded in competition, diversity and localism.

THE STATE OF TRADITIONAL TV: STRONG VIEWERSHIP AND FINANCES, BUT QUESTIONABLE PUBLIC BENEFITS

Rumors of traditional television's death have been greatly exaggerated, even as more people choose to watch content they've always gotten from giant studios, TV networks, and cable channels online rather than just on pay TV or over the air. Viewership remains high, and revenues continue growing as "old" media companies continue to consolidate and expand their reach. Yet the diversity of viewpoints and number of local voices they offer aren't keeping pace. Congress should preserve viewers' existing choices and empower them to make new ones.

Traditional Video Delivery Still Dominates Viewing Time in the United States

Traditional media companies love to talk about how much competition they face in the internet era from social media and search platforms. But U.S. viewers still spend far more time watching traditional cable and broadcast TV than they do on social media and other computer and smartphone applications. And though people are slowly finding new methods to watch online video (such as via a connected device like Roku), they're still basically watching as much video as they always have. What's more, the production of the video content is increasingly concentrated in the hands of a few giant corporations, as regulators continue to approve mergers that consolidate an already highly concentrated media market.

According to Nielsen, the average U.S. adult spent 5 hours and 24 minutes per day consuming video during the 3rd quarter of 2018, only 3 minutes lower than the year prior.[1] Of this 5 hours and 24 minutes, 4 hours and 13 minutes was spent watching "traditional" live or time-shifted (*i.e.*, DVR) video. During this same period, U.S. adults averaged 45 minutes per day on social networks, down from 46 minutes the year prior (and certainly a portion of this time is likely spent sitting on the couch while watching traditional TV).

It is important to note that there are significant demographic differences in time spent consuming video. For example, Nielsen reported that Black adults consumed 7 hours and 25 minutes of video in Q3 2018, with 6 hours of this time on traditional live and time-shifted TV.

[1] *See* The Nielsen Company, "The Nielsen Total Audience Report - Q3 2018" (Mar. 19, 2019).

But even though Black adults consume far more video programming than the average, as we discuss in greater detail below, there is still a serious lack of Black representation in the ownership of the production and distribution of this content at the national level and the local level, too.

Multichannel Subscriptions Have Declined, But Viewers Generally Still Watch the Same Content from the Same Companies Online

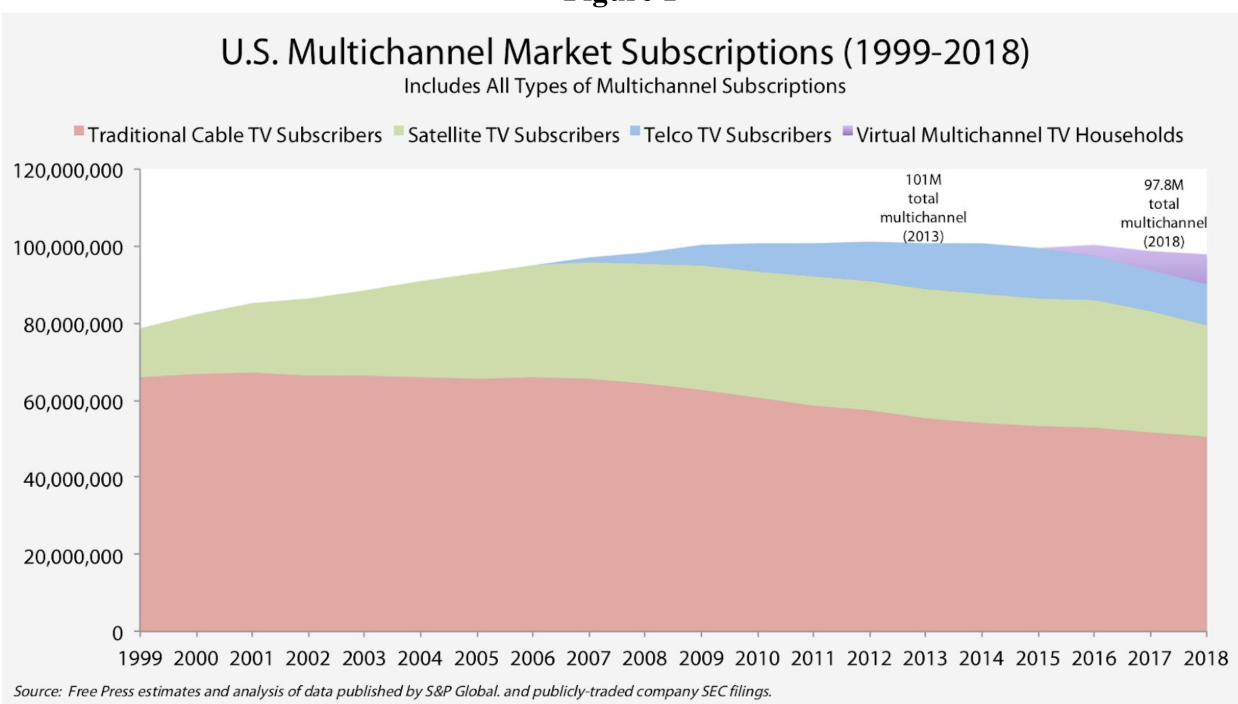
The U.S. video market is changing, but this is a change largely of type not degree. Users of all ages still have high demand for video content, and a high willingness to pay for it, even among those with lower incomes. This should not be surprising. Video is compelling and easily consumed. Video can deliver entertainment as well as the news and information our society needs to function. Much ink is spilled on how the internet is disrupting old business models. But when it comes to video, subscription multichannel services remain dominant, even as a very small but growing share of viewers rediscover the benefits of over-the-air television as well as online video content that isn't produced by the largest Hollywood programming conglomerates.

It is true that in recent years there has been a decline in subscriptions for traditional multichannel video program distributors ("MVPDs"), including cable, satellite, and telecom companies with a pay-TV business. The total number of pay-TV subscriptions peaked at 101 million in 2012 and declined to 90 million by 2018. This decline is largely the industry's fault — the result of greedy programmers to greedy distributors unwilling to give consumers anything other than expensive bloated channel bundles full of stations that few want to watch.

But the recent rise in "virtual" multichannel subscriptions (*e.g.,* Sling, DirecTV Now) has almost made up for the losses in the traditional space (see Figure 1). Many users aren't actually cutting a cord. But they are dumping the bloated traditional bundles in favor of the more flexible services offered by the half a dozen or so over-the-top, virtual multichannel providers.

A growing number of households rely on a combination of over-the-air antennas for their local stations, supplemented with online video services such as ad-supported platforms like Hulu and commercial-free packages from Netflix, Amazon and others. Indeed, according to data from S&P Global, over the past five years the number of households buying a so-called subscription video on demand (SVOD) service like Netflix but *not* a traditional or virtual multichannel service has doubled, from 6.5 million to 13 million. Nielsen estimates that there are 16 million over-the-air homes, with about 8 million of these also using SVOD services but no virtual or traditional multichannel services.[2]

Figure 1



[2] *See* The Nielsen Company, “The Nielsen Local Watch Report - Q2 2018” (Jan. 14, 2019).

Thus, the alleged decline of the “cable TV” industry is vastly overstated. Programmers are thriving. Traditional cable TV distributors are thriving, due in large part to their dominance in the broadband market (even as their legacy pay-TV business loses some subscribers, those people must still subscribe to broadband to get any online programming at all). AT&T-owned DirecTV remains the top satellite TV provider, and AT&T is working to adapt to the new market realities with its DirecTV Now and forthcoming Warner Media SVOD service, even as it purposefully deprioritizes its U-Verse telecom TV offering. Dish is still profitable, and it pioneered the virtual multichannel market with Sling TV. Verizon’s FiOS service has a healthy share in the markets in which it is available.

Local TV broadcasters are doing well in the internet-era, too. As discussed below, broadcasters continue to break revenue records. They are seeing substantial growth in over-the-air use and are able to negotiate carriage on the traditional MVPD platforms and the newer virtual multichannel services. And the forthcoming ATSC 3.0 broadcast standard promises to bring broadcasters newfound targeted advertising revenues — whether or not that’s a good thing for people already losing their privacy to internet companies and telecommunications providers alike.

Congress Must Address the Relationship Between Broadcasters and MVPDs Without Taking Away Viewers’ Existing Rights

In light of the continued health of these industries, particularly the ones represented in today’s hearing, it’s hard to take seriously all their cries for regulatory relief. In warring talking points about the Satellite Television Extension and Localism Act Reauthorization of 2014 (or STELAR), lobbyists on both sides treat the needs of viewers — especially rural ones — as little more than buzzwords and bargaining chips to chase regulatory reforms best suiting their bottom lines. But there is good reason to renew this bill for another five years and much worth preserving here.STELAR, and the importation of distant TV station signals for which it allows, is not outdated. Broadcasters rightly point to the fact that one of the two major direct broadcast satellite providers (AT&T-owned DirecTV) does not provide local-into-local service for 12 of the smallest Designated Market Areas in the country, while DISH does indeed offer local signals in all 210 Nielsen DMAs. But the solution for that problem is to require local-into-local carriage and spur retransmission of those local signals whenever possible, including in those 12 markets — not to rip away channels and choices that hundreds of thousands of people have today in those areas and in many others historically or currently unserved by an over-the-air broadcast signal.

Likewise worth renewing are the other expiring provisions in STELAR: the satellite distant signal statutory license that is coupled with the unserved-areas provision described above, and the obligation for broadcasters and all MVPDs alike to negotiate retransmission consent in good faith. Obviously this "good faith" prescription has never been a panacea, and even though the FCC does have in its rules some guidelines, there are questions about whether the agency has the tools it needs to enforce them. But ditching the framework in its entirety is not a panacea either, at least without even more comprehensive overhaul of United States copyright law and even deeper intervention in private contracts between giant sports leagues, Hollywood studios, broadcast networks and their local affiliates.

Pay-TV viewers are spending too much for traditional multichannel video, including and perhaps especially for the "free" broadcast TV they actually pay to get when it's retransmitted by cable and satellite providers. We describe below the skyrocketing rate of increase for MVPD subscription prices and the retransmission consent revenues received by broadcasters that help drive those price hikes. MVPDs even resort to hiding these charges as they pass them along to viewers by putting them “below the line” instead of accounting for them in the prices they advertise and quote to customers.

But it is not just the retransmission-consent provisions in the Communications Act that necessitate or generate these payments. Wiping the retransmission-consent statutes and FCC rules off of the books could change the current framework, and impact the bargaining power and incentives that networks and local TV affiliates have. It would not change the fact that broadcasters are (and should be) compensated for the content they create, and in which they hold a copyright, when it is retransmitted to paying MVPD customers. Nor would it interfere with or directly disrupt the network affiliation agreements that dictate when and where television affiliates can even negotiate for carriage in the first place.

In other words, it’s not the retrans provisions in the Communications Act that prevent a TV station in Seattle from negotiating for cable carriage in Mississippi. The affiliation agreement between that Seattle station and its broadcast network are the primary reason that carriage of “distant” signals is not allowed, and not likely to happen unless lawmakers truly put the exclusivity provisions in those agreements under the microscope and move to toss out private contract clauses just as readily as federal rules.

Proactive Policies to Strengthen and Expand Upon Gains Made Under STELAR

What can Congress do instead? Several things. STELAR added a market-modification provision for satellite carriage to the law, which was the right step. Rather than fixating on distant-signal issues, Congress could do more to help nearby neighbors get along. While viewers in so-called orphaned counties in the Nielsen DMA system can get signals from their home state rather than just being stuck with signals from the city and state next door, making that process easier for viewers to use (and tougher for industry players to evade) would go a long way toward increasing choices and reducing pressure to raise retransmission-consent fees, too.

STELAR also added a prohibition on joint negotiation of retransmission-consent agreements by broadcasters in a local market unless they are "under common de jure control permitted under the regulations of the [FCC]" 47 U.S.C. § 325(b)(3)(C)(iv). That was a modest attempt to curb the appeal of broadcasters' "sharing agreements" that allow large broadcast conglomerates to exercise de facto control over "sidecar" stations they cannot formally own and stash in shell companies instead. But however effective that joint retrans negotiation ban has been, it will become even less meaningful if the current FCC follows through on its plans to tear down all local broadcast-ownership limits, as I discuss at greater length below. A prohibition on joint retransmission-consent negotiations unless stations are commonly owned won't do very much if a single company is in fact routinely allowed to own multiple top-four network affiliates in local markets.

One more thing that STELAR did not address is the scourge of blackouts. When broadcasters and MVPDs reach an impasse in their negotiations, viewers are treated like pawns in a game that ultimately enriches those big companies at their customers' expense. Congress should solve this problem by finally clarifying and strengthening the FCC's good-faith negotiations authority. Senator Blumenthal's FANS Act is a smart but rather narrowly targeted solution that lays much of the responsibility for these negotiating breakdowns where it belongs:

at the feet of the sports leagues that command such a high price and drive up costs for everyone. Congresswoman Anna Eshoo's proposals in the House would go even further: preserving the status quo and keeping content on the air by guaranteeing interim carriage while the parties negotiate and proposing arbitration measures designed to bring both parties to the table with reasonable offers in hand.

THE STATE OF BROADCASTING: MAKING MONEY, BREAKING PROMISES

Broadcasters' pleas of poverty, based on supposed competition from internet companies, are belied by data showing broadcasters' continued fiscal growth despite changes in how people in the United States spend their free time. Broadcasters say they need government-imposed protections on other industry players in many cases, but total deregulation and freedom for themselves in others, all in order to preserve localism. This simply is not true.

Broadcast TV Revenues Continue to Grow

As we show just below, broadcast television advertising, online, and retransmission consent revenues have all grown recently, with the retransmission-revenue growth exploding in the past few years. Broadcast television advertising remains strong, even as internet advertising grows in magnitude and importance. Broadcasters take a portion of that online ad money too, of course. And retransmission-consent revenues are an entirely new source of revenue — a gigantic source — that sprung up over the last decade.

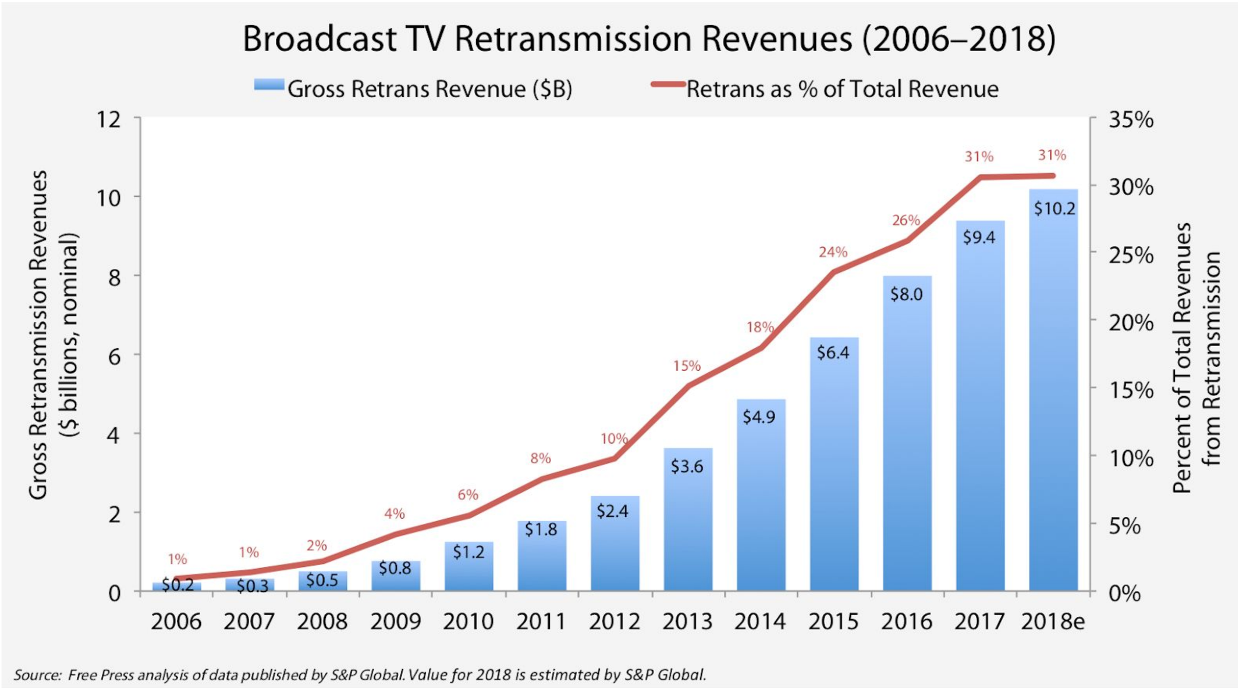
Despite this influx of new money, there is no evidence that television broadcasters invested this capital in localism, particularly in local journalism. And there is no reason to think that the regulatory changes broadcasters want, such as increasing local affiliates' leverage or their take in retransmission-consent negotiations, would lead to a flowering of local content either. In fact, as the broadcast market has become more concentrated at the national level, and in local markets, too, those revenues just continue to flow out of local communities.

For instance, local stations today generally pay a hefty portion of the retransmission-consent fees they earn for local carriage back to their affiliated networks. This phenomenon, known as "reverse retrans," sure is a backwards one. It takes money paid to local broadcasters, all under a regulatory regime supposedly designed to keep local content on the air, and sends it back to networks for the decidedly non-local content they broadcast nationwide. That is one of many reasons that retrans fees keep going up and that broadcasters also aren't meeting the public's information needs with more community-oriented and responsive content.

In recent years, broadcasters have profited handsomely from the retransmission-consent rights Congress granted them. Payments from cable, telco, and satellite MVPDs to local broadcasters reach record levels every fiscal quarter, in many cases despite declining ratings. Indeed, broadcasters' retrans revenues have seen — and are expected to continue seeing — explosive growth during this so-called Netflix era, a period in which viewership of ad-supported linear content is in decline.

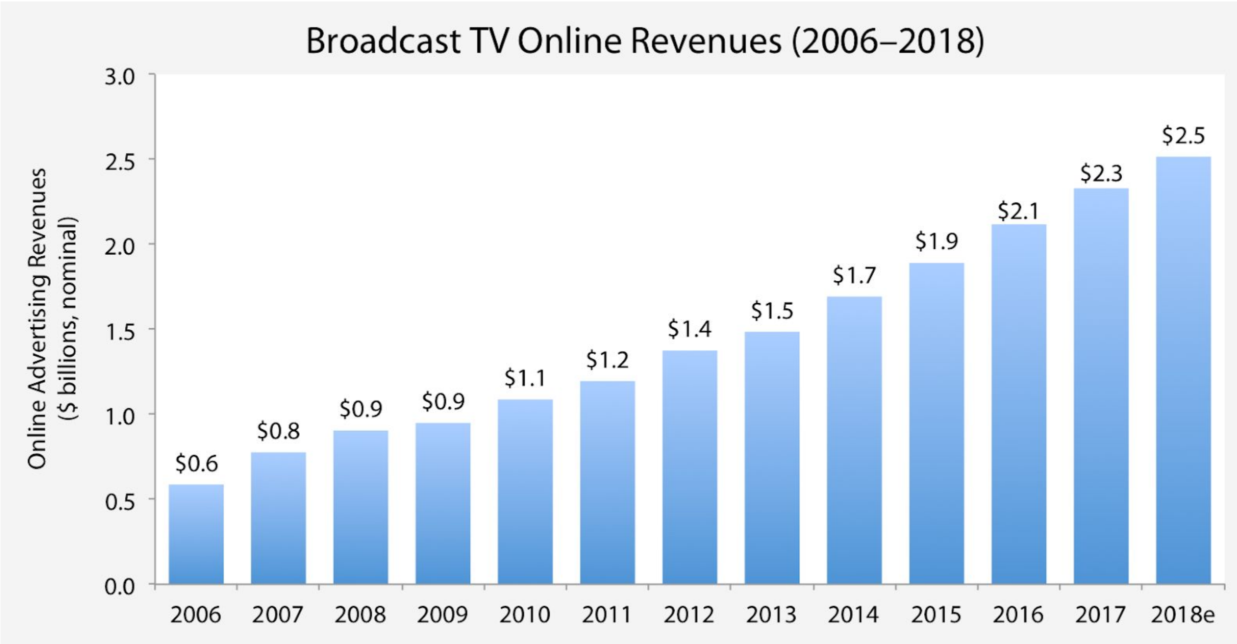
Just a decade ago, retransmission-consent revenues made up less than 5 percent of broadcast television industry revenues. Now they account for approximately one-third of the broadcast TV revenue pie, at $10.2 billion and growing (see Figure 2).

Figure 2



But TV broadcasters have also found themselves flush with new cash from their online properties too. While broadcast television online revenues amounted to just $587 million in 2006, they had increased four-fold to $2.5 billion in 2018 (see Figure 3).

Figure 3



Source: Free Press analysis of data published by S&P Global. Value for 2018 is estimated by S&P Global.

This growth in these two new revenue streams for broadcasters comes at a time when advertising revenues have rebounded from their recession-era decline (see Figure 4). And even in today's era of hyper-targeted social media ad campaigns, local TV remains dominant. Broadcast TV political ad revenues broke the $3 billion barrier in 2018, exceeding 2012's record of $2.9 billion (see Figure 5).

Figure 4

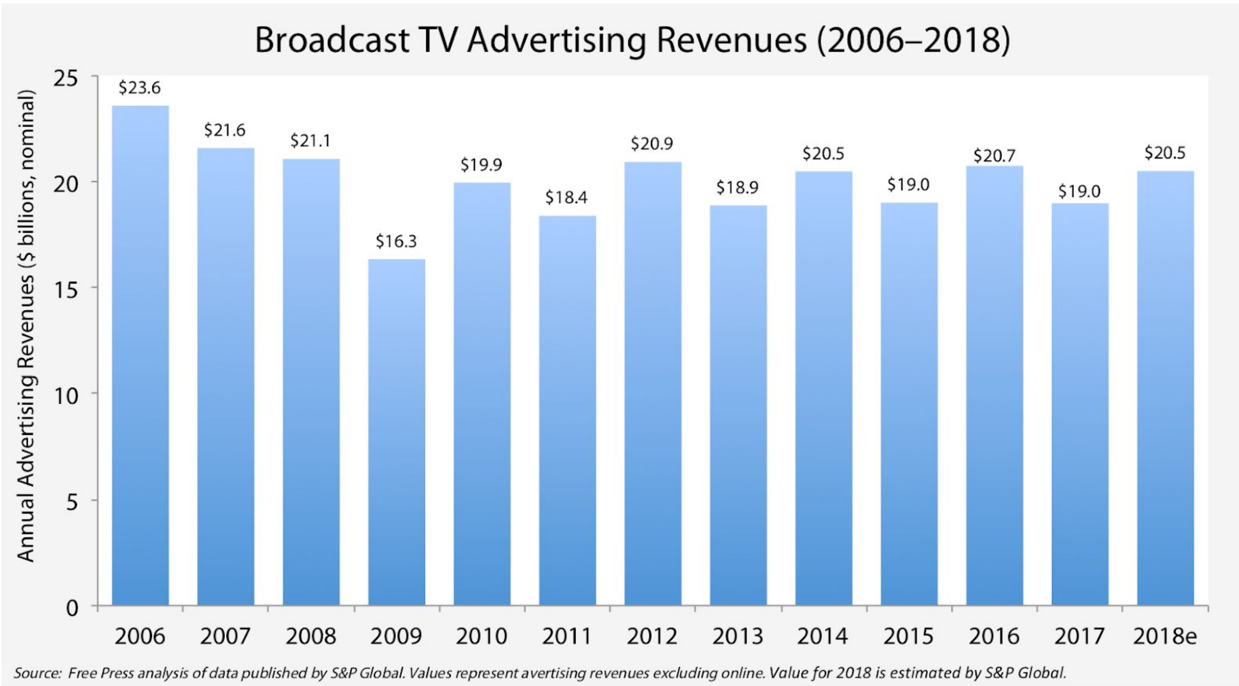
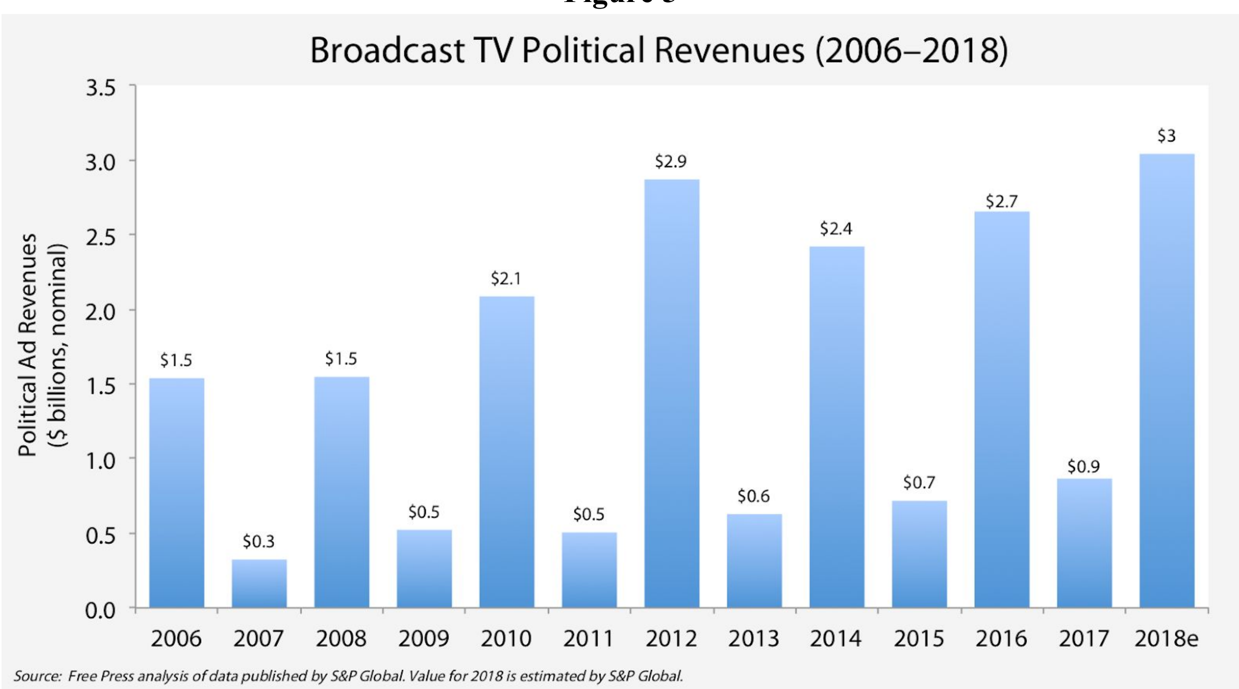
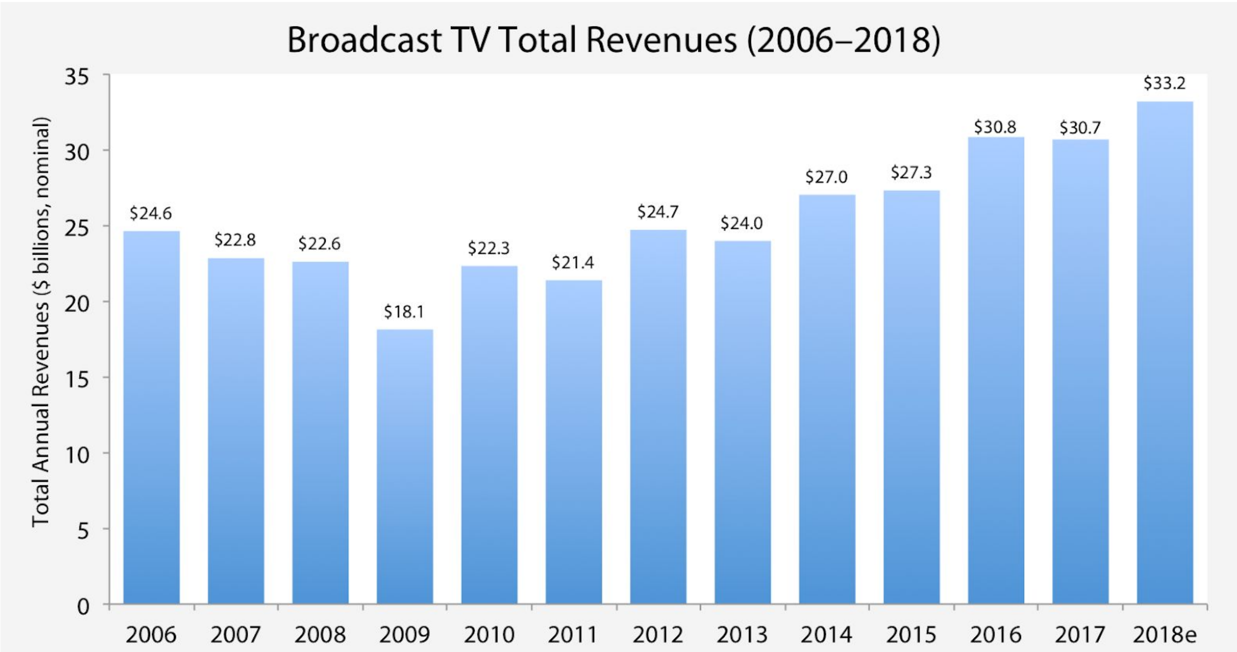


Figure 5



All of this means that, in total, U.S. broadcast television industry revenues exceeded $33 billion in 2018, smashing the historical record set in 2016 (see Figure 6). The election-year-fueled revenues for 2020 are expected to easily top this total.

Figure 6



Source: Free Press analysis of data published by S&P Global. Value for 2018 is estimated by S&P Global.

In sum, local TV broadcasters are thriving. They are awash in advertising revenues and retransmission revenues. But there's simply no evidence that this massive growth in revenues has resulted in more or better quality local news.

Broadcast Television Ownership Diversity: A Shameful National Policy Failure

Though the U.S. population is rapidly diversifying, ownership of our media is not. This lack of ownership diversity is particularly appalling in our local broadcast media, a market where the local nature of the business should in theory support more diversity than in the giant national studio market dominated by conglomerates. But years of pro-consolidation policies at the FCC have pushed local owners out of the broadcast market, creating insurmountable barriers to entry that shut out diverse voices from access to the public airwaves.

In the early 1990s, at the dawn of an unprecedented era of local media consolidation, people of color comprised approximately one-quarter of the U.S. population. Today that figure is approaching 40 percent and will continue to grow. But according to the latest FCC analysis, people of color[3] collectively owned 7 percent of all U.S. full-power commercial broadcast television stations, or just 98 of the nation's 1,388 stations.[4] (Though we note that a significant number even of these stations are only nominally owned by people of color, with broadcasters like Sinclair using shell companies headed by people of color to evade FCC ownership rules).[5]

This low level of local ownership persists despite years of supposed FCC attention to the matter, including a U.S. Appeals Court remand requiring the FCC to adequately study this issue and the impact of its policies on ownership diversity. Free Press's econometric research has shown that the probability of a media market having an owner of color is significantly lower as that market becomes more concentrated, even controlling for a variety of other factors.[6] Despite

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[3] People of color are defined as those holding attributable interests in FCC-licensed stations and indicating on FCC Form 323 that their race or ethnicity is one or more of the following: American Indian/Alaska Native, Asian, Black, Native Hawaiian/Pacific Islander, and/or Hispanic.

[4] *See* Federal Communications Commission, "Report on Ownership of Commercial Broadcast Stations (Data as of Oct 1, 2015)" (rel. May 10, 2017). We note that the FCC's definition of ownership for the purposes of race/ethnicity and gender classification is the share of voting interest in a station license. If persons of color and/or women have a collective voting share total exceeding 50 percent, that station is assigned to a particular race/ethnicity and/or gender. Because the FCC's ownership forms only require disclosure by owners holding 5 percent of more of the voting interest, some stations owned by publicly traded corporations will not have any identifiable race/ethnicity or gender for owners with a controlling interest.

[5] With the rise in the use of so-called Shared Service Agreements ("SSAs") there are a number of stations nominally owned by people of color or women that are not operated by these nominal owners, but by existing broadcasters (such as Sinclair or Nexstar, two of the largest firms employing SSAs as a method for evading FCC ownership rules). Thus while the FCC's most-recent data show a remarkably low level of ownership diversity, the "true" ownership diversity levels are even lower than these dismal figures.

[6] *See, e.g.*, Testimony of S. Derek Turner, Research Director, Free Press, before the United States House of Representatives Committee on the Judiciary, regarding Media Consolidation: The Impact on Minority Ownership & Localism (Dec. 12, 2007).

this finding that indicates the harm to diversity from continued consolidation, as opportunities for diverse owners and new entrants disappear when incumbent broadcasters can purchase all of the stations, the FCC has never adequately studied the impact of its policies on ownership diversity.

It is important to note that only 37 of the 98 full-power commercial TV stations owned by people of color are in the top 50 U.S. media markets, where the U.S. population is significantly more diverse. This reflects the reality of the barriers to entry in our nation's over-consolidated broadcast market: Entry into the market (or staying in the market if you're not a giant conglomerate) is essentially impossible. Access to capital is of course a major barrier for would-be entrants. But the reality is that the loosening of ownership limits and the outright refusal of the FCC to enforce its ownership rules have created a market where only the biggest existing companies can own stations.

Figure 7

Majority Voting Interest in Full Power Commercial TV Stations as of 10/1/2015	Number of Stations	Percent of All Commercial Full Power TV Stations
Women (any race/ethnicity)	104	7.5%
Amer. Ind./AK Native (any ethnicity)	12	0.9%
Asian (any ethnicity)	10	0.7%
Black (any ethnicity)	12	0.9%
Nat. Haw/Pac. Isl. (any ethnicity)	1	0.1%
Two or More Races (any ethnicity)	1	0.1%
Hispanic (any race)	62	4.5%
All People of Color	98	7.1%
Total Full Power Commercial Stations	1,388	

Source: FCC Analysis of Form 323 filings as of October 1, 2015. Figures include all stations indicating majority-female or majority-person of color ownership voting interest, which includes a number of stations that are operated by different companies under Shared Services, Local Marketing, and Operating Services Agreements.

More Consolidation Is Not the Answer to the Harms of Consolidation

How did we get to this point then, where the population continues to diversify but broadcast ownership diversity simply does not budge? As Free Press documented in a 2014 report, the broadcast industry continued to concentrate even when the FCC, under the previous presidential administration, claimed to be keeping some of its local broadcast ownership limits in place.[7] The agency failed to police what we call "covert consolidation" by waving through more deals that depended on shell companies and so-called shared-services agreements to hide the true ownership and control of local TV stations. And while the last FCC did take a few important steps, like repealing the obsolete "UHF Discount" that lets broadcasters pretend their UHF signals only reach half of their actual audience for purposes of the 39% national broadcast ownership cap, it was not enough to stem the wave of consolidation already occurring.

The current FCC's response, under Chairman Ajit Pai, has been to remove every last safeguard rather than to repair the damage of runaway deregulation. Quickly after assuming office, Pai reversed the last quadrennial-review decision issued under the prior administration. He rapidly eliminated the longstanding prohibition against newspaper-broadcast cross-ownership, while opening the door to more broadcast TV duopolies. Free Press and others challenged Pai's decisions, and arguments in the case before the U.S. Court of Appeals for the 3rd Circuit will take place next week.

The FCC has been stuck in court for well over a decade now on its string of failed quadrennial-review decisions because the agency refuses to study the glaringly obvious, detrimental impact of its policy changes on broadcast-ownership diversity. Rather than fulfill its

[7] S. Derek Turner, Free Press, "Cease to Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation" (Mar. 2014), https://www.freepress.net/sites/default/files/legacy-policy/Cease_to_Resist_March_2014_Update.pdf.

statutory duty and follow the court's instructions to do so, it continues to follow a "repeal first, ask questions later" mentality that prolongs legal uncertainty while compounding the loss of diverse viewpoints on the air.

Rather than do those studies, or at least wait and see how the court case comes out when the FCC has stubbornly refused to do its homework again, the Pai FCC charged ahead with its latest quadrennial review late last year. Looking to finish the job it started and get rid of essentially every meaningful local ownership rule (for both TV and radio), the Pai FCC now proposes to eliminate the last vestiges of ownership rules against local-TV duopolies, including combinations of top-four affiliates.

This FCC's assault on localism has not been limited to repealing the local ownership rules either. Almost immediately upon becoming Chairman, Pai reinstated the UHF Discount rule that even he admits is technically obsolete. Born in an analog era when UHF signals traveled poorly and covered fewer viewers than their VHF counterparts, there is simply no justification for keeping this 50% "discount" on audience reach now as digital UHF signals actually are <u>better</u> than VHF. But the Pai FCC has bent to broadcasters' wishes, put the discount back in place, and even proposed raising the 39% cap that Congress wrote into the statute on the basis of dubious claims regarding the agency's authority to make that change.

Last but not least, the Pai FCC repealed the "Main Studio Rule" that required local broadcasters to actually maintain a physical presence in the communities they're licensed to serve. Broadcast lobbying claims that abandoning the community will somehow improve local reporting and news coverage barely merit a response. Suffice it to say, we need more reporters on the ground in the communities they're supposed to cover, not fewer.

It's time for Congress to step in and end this onslaught on localism already underway at the FCC. Congress should also restore the local ownership limits recently jettisoned by the FCC, and in fact strengthen them, aiming for a world in which broadcasters can multicast multiple networks on a single channel but not own or control more than one TV station in each market. Congress should prevent the FCC from raising the national ownership cap to benefit a few giant broadcast conglomerates like Sinclair and Nexstar, and instead lower the cap in statute to 15%. And instead of only waiting for the FCC to get the doomed quadrennial-review process right some decade, Congress should repeal the quadrennial-review statute altogether and prevent this constant rush to deregulate a broadcast industry that is already highly concentrated and insufficiently local.

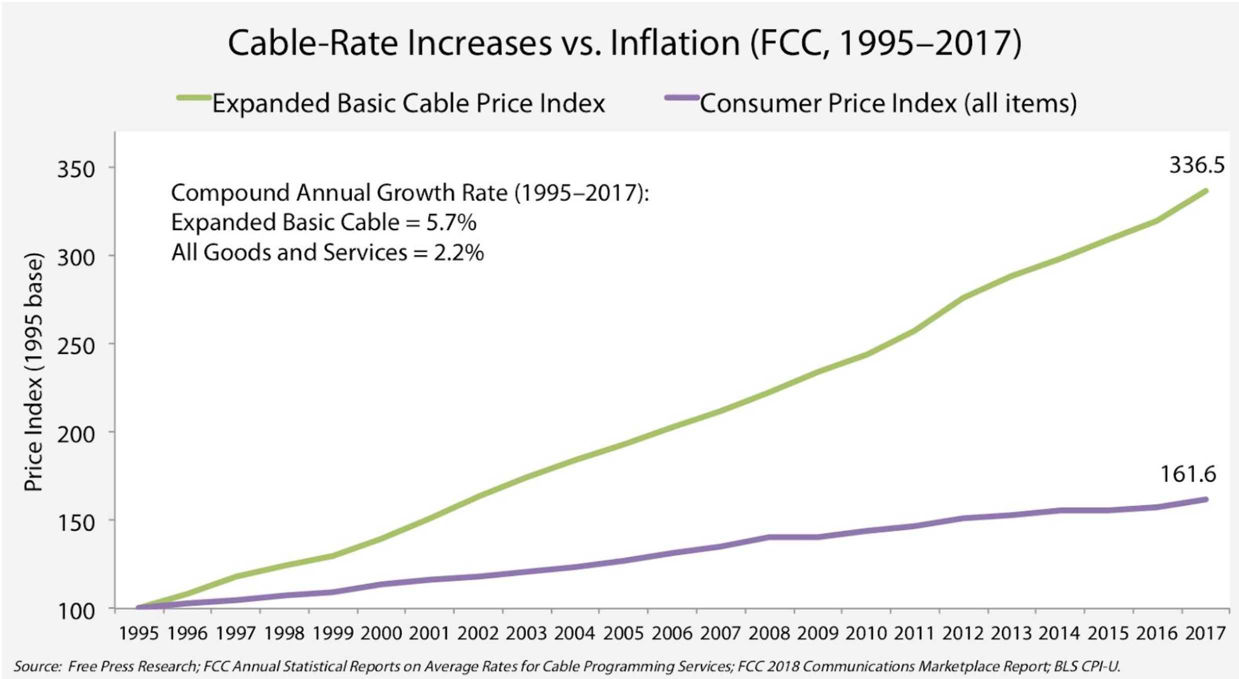
CABLE PERFORMANCE REMAINS STRONG EVEN AS ONLINE VIDEO GROWS

Cable Television Industry Revenues and Prices Continue to Increase

Since 1996, when Congress relaxed the protections adopted in the Cable Television Consumer Protection and Competition Act of 1992, cable prices have risen steadily at nearly three times the rate of inflation (see Figure 8). And this trend is not showing any sign of improvement despite the rise of online video. Between 2012 and 2017, the average annual rate of inflation was 1.4 percent, but the price of expanded basic cable service has increased by an annual average of 4.1 percent.[8] Plus, these figures do not include mandatory equipment rental costs, which continue to skyrocket (compare Figures 9 and 10).

[8] Average annual rates of inflation described herein represent the Compound Annual Growth Rate ("CAGR"). *See 2018 Communications Marketplace Report*, GN Docket No. 18-231, Report, 33 FCC Rcd 12558, App. B at Attachment 8 (2018).

Figure 8



In fact, as Free Press has documented, the "effective competition" standard in Section 623 of the Communications Act has not succeeded in disciplining cable prices.[9] Congress should modify that standard to make the FCC determine accurately whether effective competition really exists, rather than letting the FCC pretend the mere presence of MVPDs other than incumbent cable provides "effective" competition even where cable's market share remains as high as 85 percent. This test simply does not measure whether competition actually occurs in such highly concentrated markets. That's the main reason that FCC's most-recent report on the cable industry found that "the average price of basic service in the effective competition group is 51.5 percent higher than the average price of basic service in the noncompetitive group."[10]

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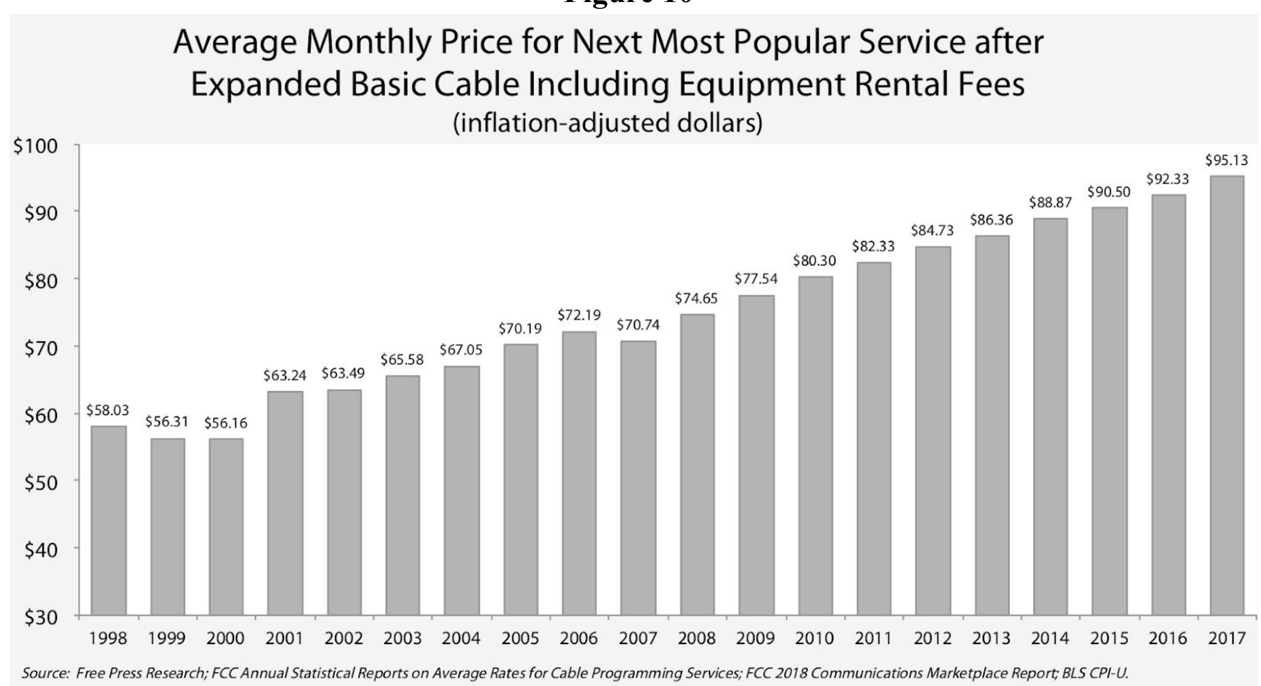
[9] *See, e.g.*, S. Derek Turner, Free Press, "Combating the Cable Cabal: How to Fix America's Broken Video Market," at 10-11 (May 2013), https://ecfsapi.fcc.gov/file/60001009214.pdf.

[10] *See 2018 Communications Marketplace Report*, App. B, ¶ 27 (emphasis added). We note that the 1996 Telecom Act sunset the Commission's authority to regulate rates of tiers above basic as of March 31, 1999. While the 2017 survey results finally show lower prices for expanded basic tiers in effective competition communities when compared to those for non-competitive communities ($75.19 vs. $77.24), this is only a recent reversal of the historical trends. For example, in the 2015 survey the average price of expanded basic programming in effective competition markets was $70.31, versus $67.85 in so-called non-competitive markets. In the 2012 survey, the

Figure 9

Figure 10



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average price of expanded basic programming in effective competition markets was $62.49, versus $60.99 in non-competitive markets.

The data in Figures 9 and 10 comes from FCC annual surveys of what cable television providers charge, which is not the same as the average price that consumers actually pay. To get a better sense of the latter, we present data from the Bureau of Labor Statistics measuring what urban consumers spend on cable and satellite television services.[11] The trends are similar, but the differences are important for the purposes of measuring the impact of public policies,[12] particularly the effect of Congress passing the 1992 Cable Act but subsequently weakening it.

In 1992, consumers were giving Congress an earful about their cable bills.[13] A decade of deregulation prior to that meant cable subscribers had to fend for themselves in a monopoly multichannel market where cable TV companies used their pricing power. A super-majority of Congress heard their complaints and took up the cause to enact the 1992 Act over a presidential veto. The political will was there because, as the 1992 Act noted in its findings, the "average monthly cable rate has increased almost three times as much as the Consumer Price Index since rate deregulation."

That 1992 law, which once more subjected cable distributors to at least some limited rate regulation on their basic and expanded-basic tiers, was far from perfect. For example, the law's "effective competition" standard mentioned above does not actually measure whether there is actually any effective competition in terms of prices or other marketplace results. It assumes instead that the mere presence of additional distributors with small market shares would be

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[11] *See* Bureau of Labor Statistics, Cable and satellite television service in U.S. city average, all urban consumers, not seasonally adjusted, Series ID CUUR0000SERA02.

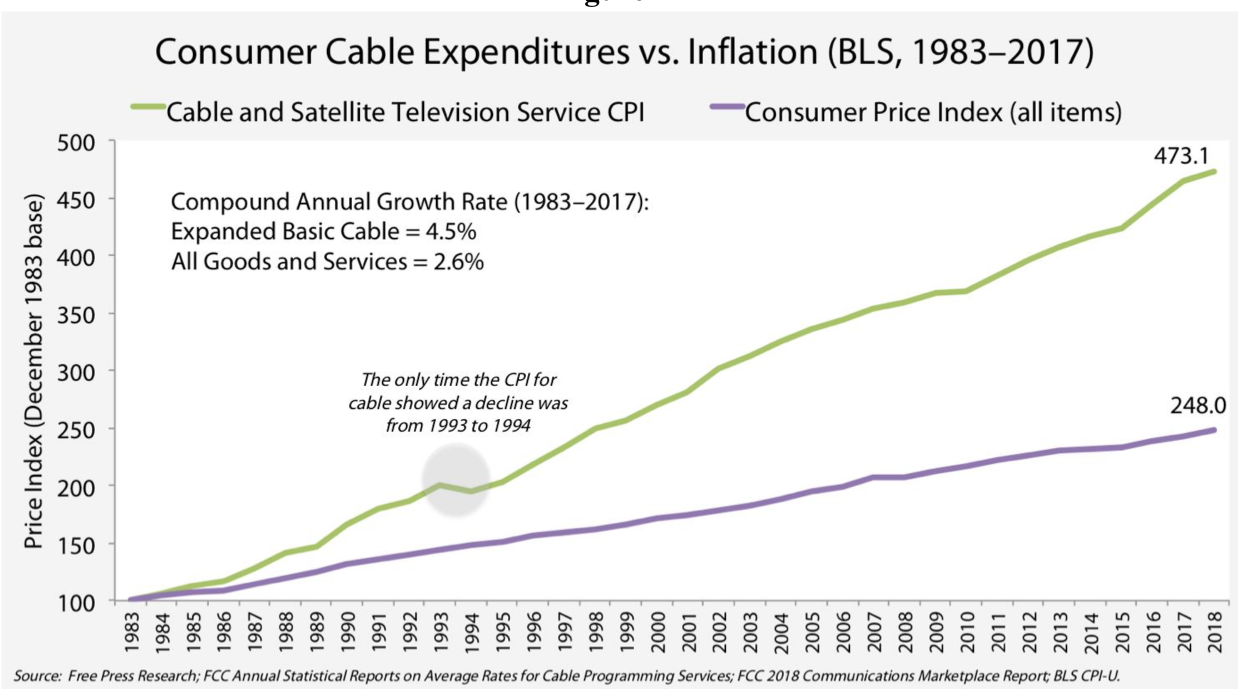
[12] For example, the BLS data show a flat line for cable CPI during the most-recent recession, but the FCC data do not. This is because during the recession consumers cut back on expenditures like cable TV, but multichannel distributors did not cut their prices.

[13] *See* Dissenting Views of Reps. Markey, Studds, and Klink on H.R. 1555 (1995) ("Markey-Studds Dissent").

enough to warrant rate deregulation.[14] Senator Markey, then still in the House of Representatives, rightly noted that the law was working exactly as intended. After the 1992 law's implementation, cable rates had declined — a first for the industry (see Figure 11). And though the cable industry claimed that rate caps were harming investment, it turned out this was not the case.[15]

But less than two years after the 1992 law was implemented, many in Congress on both sides of the aisle were lining up to let the cable industry return to its rate-hiking ways. The new members who came into Congress during the 1994 "Republican Revolution" were eager to deregulate, and many Democrats were willing to go along.

Figure 11



Supporters of the 1992 Act were unable to get their colleagues to hold the line on rate regulation even in the face of consistent rate hikes by dominant cable providers. Many in

[14] 47 U.S.C. § 543(l)(1). In general, a franchise area will be deemed effectively competitive if "the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent," or a local exchange carrier offers multichannel service.
[15] *See* Markey-Studds Dissent.

Congress believed the emergence of new video-distribution platforms — namely satellite and telco — would remove the need for rate regulation. They argued that the additional competition from these distributors would solve the monopoly-pricing problems.

The theory was plausible, but incomplete, as it ignored the stumbling blocks posed by vertical integration and the programming industry's own market power. It didn't help that the FCC completely bungled the new law's implementation. But with members on both sides of the aisle embracing this competitive theory during the drafting of the 1996 Telecom Act rewrite, Congress moved to loosen some of the cable regulations it had adopted less than three years earlier — regulations that in their first 15 months of existence had already saved consumers $3 billion.[16]

Though it maintained the 1992 Act's structure for regulating basic cable rates,[17] the 1996 Telecom Act eliminated rate regulation of all enhanced tiers.[18] The new law also amended Title VI of the Communications Act to deem a local video market competitive as soon as a Local Exchange Carrier began offering video services, regardless of its market share.[19] And Congress stripped individual consumers of their ability to challenge a rate as unreasonable, reserving that power for the local franchising authority.[20]

Even though the mantra of the 1996 Telecom Act was "competition before deregulation," the cable industry got just the opposite. It got the rate relief it asked for — regardless of marketplace conditions and even in the absence of effective competition. Not surprisingly, FCC

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[16] *Id.*
[17] Small cable systems, however, were deregulated even on basic tier rates. *See* 47 U.S.C. § 543(m).
[18] The FCC's ability to regulate these "upper" tier rates sunset on March 31, 1999. See *id.* § 543(c)(4).
[19] *Id.* § 543(l)(1)(D).
[20] *Id.* § 543(c)(1)(B).

data show that expanded basic cable rates once again began rising annually at three times the rate of inflation, with a sharp uptick in 1999.[21]

Cable's Below-the-Line Fees for Regional Sports Networks and Local Broadcasting

One of the more-frustrating trends for pay-TV subscribers is the substantial increase in the amount of their total monthly bill that is pushed "below-the-line." Such fees include now-commonplace local broadcasting and regional sports network ("RSN") "recovery" fees. MVPDs favor this practice because it allows them to advertise a lower price, knowing that subscribers are unlikely or unable (because of long-term contracts) to switch to a different video provider once they get their surprisingly higher monthly bill.

The amount of these fees differs by market and distributor. In large urban markets that have multiple professional sports teams, the RSN recovery fee can climb to double digits on a monthly basis. For example, in Chicago MVPD subscribers are forced to shell out about $9 per month for RSNs that many never watch, a fee that is slated to rise to $13 after Sinclair's recent acquisition of the RSNs formerly-owned by FOX.[22] This hidden fee is already on top of a local TV fee that is $10 per month on some Chicago-area cable systems.

It is important to note that as high and annoying as the hidden RSN fee is, it only represents a fraction of the customer's bill that is used for sports channels, regardless of which — if any — sports they actually watch. According to S&P Global, in 2018 "the average cost per subscriber for sports networks" <u>excluding RSNs</u> was $13.30 a month, "while the weighted

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[21] From 1998 to 1999, expanded basic rates increased by 3.8 percent. From 1999 to 2000, these rates increased by 7.9 percent. In contrast, from 1999 to 2000 the rates for basic cable increased by 2.1 percent. *See 2018 Communications Marketplace Report*, App. B at Attachment 8.

[22] *See* Robert Channick, "Diehards and non fans alike to foot the bill for new Cubs pay TV network," *Chicago Tribune* (May 24, 2019).

average for all networks was just $5.83."[23] ESPN and ESPN2, which are on almost all expanded basic plans, account for more than $9 per subscriber. With the $4-$5 average cost per RSN factored in, it is no surprise that in some markets sports channels can account for about half of a customer's monthly bill.[24]

Retransmission fees have made so-called free television quite expensive for viewers watching it on a pay-TV platform. But instead of putting these fees into the advertised price of their service, MVPDs are shoving them into below-the-line fees. And what initially was a $1-$2 annoyance is now for many customers yet-another double-digit surprise. According to S&P Global, "The weighted national average broadcast fee [was] $8.84" as of February 2019.[25] But this average is just that, and the fees are far higher for millions of video subscribers. For example, Comcast's current maximum broadcast fee is $10 per month and has increased nearly seven-fold in just the past five years. And this practice isn't limited to traditional cable operators. Dish charges $12 per subscriber on average.

In a market that was actually "effectively" competitive, sellers would not be able to saddle buyers with such giant hidden fees. If policy makers are interested in helping video consumers, they can start by regulating the use of below-the-line fees and requiring MVPDs to advertise the real price customers must pay. Senator Markey's and Representative Eshoo's TRUE FEES Act would go a long way in illuminating and combating this problem, shining a

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[23] *See* Adam Gajo, John Fletcher, Scott Robson and Brian Bacon, "The 2019 Sports Report," *S&P Global Market Intelligence* (Apr. 4, 2019).

[24] *See, e.g.*, Joe Flint and Meg James, "Rising Sports Programming Costs Could Have Consumers Crying Foul," *Los Angeles Times* (Dec. 1, 2012).

[25] *See* Neil Barbour, "Broadcast fees in step with estimated retrans costs at national level," *S&P Global Market Intelligence* (Feb. 7, 2019).

light on the actual monthly prices cable, phone and broadband customers should expect to pay while attempting to prevent unjustified price hikes on set-top boxes rented from cable operators.

Congress could do even more, however, to provide transparency not only on below-the-line fees, but the prices that people pay for each and every channel they choose to buy — or more often, must buy — in the bloated bundles that still dominate the MVPD lineup.

Best of all would be the kind of long-overdue statutory fixes that this Committee has contemplated in the not so distant past, mandating a la carte programming options so that viewers can purchase the channels they want from their MVPD and not be forced to buy the ones they don't. But short of that, people should at least be able to see what they are paying and why, for every broadcast channel, RSN, and other cable channel in their subscription packages.

Preserving Local Content on Cable Means Ending the Attack on Community TV

Cable companies are also going on the offensive against local content, cheering on proposals at the FCC that would jeopardize funding for community-access television channels and production facilities around the country. Much like broadcasters, who want to keep all of the benefits and protections they receive in exchange for providing local content but none of the obligations to actually follow through on producing it, cable companies are looking to diminish the availability and even the viability of local PEG channels.

Cable operators negotiate local-franchise agreements with the cities and towns they serve, paying some small compensation in exchange for these companies' use of valuable public rights-of-way. Part of that bargain in many franchise agreements is money to fund the constriction and the operation of community access channels featuring local government, civic affairs, school boards, high school sports, and all manner of local-interest programming produced by actual community members. In a pending proceeding at the FCC, however, we're witnessing a sneak attack on the funding sources for these PEG channels' operating budgets, as the Pai regime proposes changes to the definitions of what counts against the 5% cap on franchise fees that the local government can collect from the cable company. The proposal would treat not just money paid over for PEG as a part of that franchise fee, but would place a monetary value on all manner of in-kind "contributions" by cable companies never before offset against the 5% cap.

As Free Press explained in our filing in that FCC docket, the cable industry's proposals here would violate the statute in the Cable Act and put continued support for these vital community voices at risk.[26] I would urge senators to make their voices heard on this issue and protect these local institutions which go far beyond community-access programming to provide technological training, youth education and other essential services.

Online Video Competition: A Ray of Hope?

Fortunately for consumers there are some signs of hope in today's online video era. While the 2017 survey results finally show lower prices of expanded basic tiers in effective competition communities compared to non-competitive markets ($75.19 vs. $77.24), this is a reversal of the historical trends, which generally showed prices for expanded basic tiers in effective-competition communities approximately 3 percent higher than in non-effective competition markets.

[26] Reply Comments of Free Press, MB Docket No. 05-311 (filed Dec. 14, 2018), https://www.freepress.net/sites/default/files/2019-05/free_press_reply_comment_on_community_access_television.pdf.

We believe this recent reversal of the historical trend demonstrates the importance of actual competition, as opposed to the weak and ineffective standard encapsulated in the Act's "effective competition" test. Once the FCC restored Title II non-discrimination obligations for broadband providers, the number of online video alternatives exploded.

This development reduced the pricing power of the cable-TV distributors, while the mere presence of satellite and telco video providers did not work as the "effective competition" test speculated it could. Traditional MVPDs still pass along the increased cost of programming to their customers, but the additional competition from numerous online alternatives reduces MVPDs' ability to pass along all of these costs. This means the rate of price increases in effective competition communities finally slowed, relative to non-effective competition communities, even though prices in both continued to rise.

In other words, even the online video competition we see today doesn't mean that pay-TV customers are paying less, only that their bills are climbing a little less quickly.

This is a real-world example of the economic truism that "four is few, six is many." Effective competition in this market requires the presence of more alternatives than just the monopoly cable incumbent and two satellite distributors. The recent data strongly points to the continued need for public policies that ensure video consumers and online video distributors have access to high-quality, non-discriminatory broadband telecommunications services.

Unfortunately, the current FCC has moved to eliminate the very policies — namely Net Neutrality protections grounded in Title II of the Communications Act — that helped spark this more competitive environment. Senate passage of the "Save the Internet Act" introduced by

Senator Markey, which passed the House of Representatives in April, is a crucial step not just to protect the free and open internet but to bolster needed competition in the video space.

Privacy Concerns with New TV Technology

While people still love watching TV, they may not expect their TVs to be watching them. But that's exactly what is happening. And it's creepy.

Cable and telecommunications providers have access to an incredible trove of sensitive information about what their customers watch, visit and download. Unfortunately, rules that the FCC implemented in 2016 to protect this data and limit how ISPs can use it were overturned in the last Congress.[27] There's little to no accountability for what these companies are doing with that data. For example, Nielsen, which is also testifying at this hearing, has paid companies including Comcast, AT&T, Charter, and Dish to receive set-top-box data about what shows Americans are watching.[28]

New smart TVs are being sold with sophisticated content-recognition technology and other software that monitors what people watch on their sets and collects data to target them with advertising.[29] Viewers are sold on opting in with promises of better content recommendations, but many may not understand that their clicks have become a commodity or that they are being tracked across platforms so that what they watch on TV may show up Facebook, for example.

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[27] *See, e.g.*, Free Press, Press Release, "House Republicans Vote to Destroy the FCC's Online Privacy Protections" (Mar. 28, 2017).

[28] Daniel Frankel, "Comcast finally agrees to sell set-top data to Nielsen," *Fierce Video* (Nov. 9, 2017).

[29] Sapna Maheshwari, "How Smart TVs in Millions of U.S. Homes Track More Than What's on Tonight," *New York Times* (July 5, 2018).

Nielsen, which has long held a monopoly over TV ratings, has now become a big data company that traffics in TV viewer data.[30] Data on your channel surfing is brokered to and from many companies. The opt-in disclosures on your set may tell you that "third parties" will see the data, but they often provide viewers with no idea of who has the data or offer any way to delete or reclaim their data once it is sold and resold.

Senators Markey and Blumenthal have raised this issue with the chairman of the Federal Trade Commission and called for an investigation into the "privacy policies and practices of smart TV manufacturers."[31] Much more oversight is needed by Congress and the Federal Trade Commission on how these companies and their partners — including Gracenote, a Nielsen subsidiary — are using the data, with whom they are sharing it, and whether it is being sold to data brokers.

CONCLUSION: A DIFFERENT PATH FORWARD

When it comes to the state of the media — especially local media — we are going in the wrong direction. But it is not too late to change course. This committee should enact laws, and conduct oversight of the agencies it authorizes, to stop the erosion of localism and promote diversity. We need laws and policies that improve competition, boost innovation, increase transparency, and support the creation of content from diverse, independent, under-represented and varied viewpoints. Now is the time to give your constituents more choices, lower prices, better service and new opportunities.

In sum, Free Press Action urges the Committee and the Senate to:

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[30] Mike Masnick, "Nielsen Using Patent Monopolies to Act like a Monopolist," *Techdirt* (May 23, 2019).
[31] Letter to the Hon. Joseph Simons from Sens. Ed Markey and Richard Blumenthal (July 12, 2018), https://www.markey.senate.gov/imo/media/doc/FTC%20smart%20TV%20letter%20.pdf.

- Reauthorize STELAR or its equivalent for another five years.
- Enact legislation to prevent blackouts and preserve carriage during negotiations.
- Revoke the FCC's "UHF discount," an obsolete rule that serves only to enable further media consolidation.
- Reject the FCC's efforts and broadcasters' pleas to raise the national broadcast audience reach cap above 39%, and instead lower that cap to 15%.
- Create incentives, modeled on the "minority tax certificate" program that NAB and Free Press Action alike have long supported restoring, to incentivize sales of stations to local owners who are women and people of color.
- Restore local limits on broadcast media ownership, and prevent broadcasters from operating multiple stations in a single market through shell companies
- Eliminate the FCC's "quadrennial review" of media-ownership rules.
- End below-the-line fees and other hidden charges, requiring cable and satellite providers to show the total price in advertisements and bills. Also require them to show how much consumers pay for individual channels in any package.
- Pass legislation allowing consumers to pick and choose the channels they want to watch and then to purchase multichannel programming "a la carte."
- Protect carriage and funding for PEG channels, signaling disapproval of proposals circulating at the FCC that endanger these essential local outlets.
- Support and pass the "Save the Internet Act" introduced by Senator Markey to restore strong Net Neutrality rules grounded in Title II of the Communications Act, which are essential for preserving access to competitive online video.
- Institute strong privacy protections to protect personal information, and limit its sale and exploitation not only by internet companies and broadband providers but also by TV and video providers, manufacturers, or other parties.
- Bolster antitrust laws to prevent mega-mergers in the TV and video industries.

- Consider imposing a tax on targeted online advertising, with revenues used to fund local journalism and civic technology alongside increased support for noncommercial media in places poorly served by commercial media.

I look forward to working with the Committee and answering any questions you have.