**Response to Questions in the Sixth White Paper**

**"Video Policy"**

**by**

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**before the**

**Committee on Energy and Commerce, U.S. House of Representatives**

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## I. Introduction and Summary

Once more, we commend the Committee for undertaking its sustained review and update of the increasingly anachronistic Communications Act. As is the case with the other areas that Free State Foundation scholars have addressed in prior Responses, updating the Communications Act on video policy is especially timely. Since Congress passed the Cable Acts of 1984 and 1992 and the Telecommunications Act of 1996, the video service market has been marked by rapid technological changes and increased competitive activity, which undermines the case for direct regulation.

As the next section of this Response amply demonstrates, breakthrough innovation backed by heavy entrepreneurial investment has for the last twenty-five years drastically transformed the video market. These same forces will continue to reshape its landscape going forward. Convergence toward digital and Internet Protocol-based

[*] While the signatories to this Response are in general agreement with the views expressed in these comments, their participation as signatories should not necessarily be taken as agreement on every aspect of the submission. The views expressed should not be attributed to the institutions with which the signatories are identified.

services and cross-platform competition from competing delivery technologies now offer consumers video capabilities and content choices hardly imaginable when Congress last spoke on video policy in the 1990s. The legacy video regulatory apparatus rested on an excessive concern with perceived scarcity, monopolistic power, lack of distribution outlets, and minimal consumer choice. Legacy video regulations based on those outdated concerns now impose disparate regulatory treatments on competing services, which threaten to stifle future innovation. In short, video policy must be reformed to reflect the demonstrably changed market conditions detailed in the body of this Response.

Historically, constitutional permissibility of several aspects of legacy video regulations rested on upon claims of scarcity and monopoly-like conditions in the market. Given the magnitude of the continuous ongoing technological and competitive changes, the case for exempting video services, with minor exceptions, from the standard First Amendment protections given to other forms of speech has evaporated. Standard rule of law norms now impose on Congress an obligation to adopt a new approach to video services that satisfies these First Amendment constraints.

Replacement of the legacy video services regime should be part and parcel of a new Digital Age Communications Act. A new policy framework for video services should rely on the same fundamental principles applicable to other digital services. Bringing video into a single, unified framework for digital services furthers the goals of policy simplicity and harmony.

The Communications Act's ubiquitous public interest standard, under which so much of video regulation takes place, is unfit for a digital age market characterized by cross-platform video competition. That standard is under-protective of free speech involving video content and other editorial decisions by video service providers. The FCC's open-ended authority to regulate "in the public interest" should be largely curtailed.

Transition of video to digital and IP-based platforms has rendered the current silo statutory structure obsolete and inequitable. And most of the distinct prescriptive rules for various types of video services are unsuited to competitive conditions in today's converged digital market for video services. Thus, for example, basic tier cable channel requirements, basic tier cable rate regulations, program carriage mandates, and must-carry and retransmission consent rules should be eliminated, albeit with reasonable transition periods to allow time for adjusting existing arrangements and protecting reliance interests. Regulation of video services would occur through case-by-case adjudications under the same competition-based standard that we articulated in our First White Paper Response. Thus, except in limited circumstances involving public safety, emergency notifications, or the like, regulation of video services, like other services, would be dependent on findings of consumer harm and market power.

Further, the FCC's existing authority over cable subscriber privacy and over DBS subscriber privacy should be transferred to the Federal Trade Commission. Consolidating consumer privacy for video services and other digital services within the FTC's jurisdiction would establish a consistent set of rules for data privacy policy, enforced by a single agency.

This clean-slate approach to video policy is consonant with the dynamic and competitive video services market that now exists and it is consistent as well with First Amendment objectives. To advance both consumer welfare and rule of law norms, consistent with our recommendations regarding other communications services, Congress should integrate video services into a generally applicable framework that presumes regulation is unnecessary absent evidence of consumer harm and market failure.

## II. Today's Video Market Is Dynamic and Competitive

Clearly, today's video market is far different from that of the early 1990s, when video programming subscribers enjoyed only a limited number of analog, standard definition channels, little or no interactive capabilities, and fewer pricing or premium content choices. At that time, the cable television industry was deemed "highly concentrated."[1] Most Americans had access to only one multichannel video programming distributor (MVPD), and cable operators controlled approximately 95% of the national market for video programming subscribership.[2] Those conditions prompted Congress to impose regulations intended to facilitate the entry of new programmers and media voices.

Much of the Cable Acts of 1984 and 1992 as well as the FCC's video regulations are based on these analog-era monopolistic assumptions about the video market. Recognizing the competitive, innovative nature of the video market is a necessary first step in bringing about legislative and regulatory reforms to reflect marketplace realities.

Dramatic advances in technology and market entry by cross-platform competitors have now led to proliferation of video capabilities and content choices for consumers. New technologies, new pricing options, and new sources of distribution now supply evolving consumer demands. In short, rapid innovation backed by heavy entrepreneurial investment has drastically transformed the video market of twenty-five years ago and continues to reshape its landscape.

[1] 1992 Cable Act, § 2(a)(4).
[2] *See In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Further Notice of Inquiry*, 26 FCC Rcd 14091, 14092-3, ¶ 2 (2011).

Snapshots of market share data often give a poor measure of market competitiveness, when market shares can rapidly change as consumer behavior responds to technologies and services, many of which are introduced by new market entrants. But even in static terms, readily available evidence reveals vibrant competitive market conditions with multiple choices for consumers. In the Commission's *Fifteenth Video Competition Report*, the agency found that by the end of 2013, cable providers represented only 55% of the more than 100 million households that subscribe to all multichannel video program distributors (MVPDs).[3] Meanwhile, direct broadcast satellite (DBS) providers and "telephone" providers gained market share, claiming about 33.6% and 8.4% of all MVPD subscribers respectively.[4] At the end of 2011, 98.6% of subscribers or 130.7 million households had access to at least three MVPDs, 35.3% or 46.8 million households had access to at least four, and some areas had access to as many as five MVPDs.[5] The Commission's latest report is already a year-and-a-half old. Not surprisingly, trend lines suggest the market share of cable operators has slipped even further relative to DBS providers.[6]

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[3] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming *Fifteenth Report*, MB Docket No. 12-203 at ¶ 3 (released July 22, 2013), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0801/FCC-13-99A1.pdf. .
[4] *Id.* at ¶ 27.
[5] *Id.* at ¶ 36.
[6] *See* SNL Kagan, Press Release: "Multichannel Video Subscription Count Drops by a Quarter Million in 2013 According to Research by SNL Kagan" (March 19, 2014), at http://www.snl.com/InTheMedia.aspx. See also Roger Yu, Pay-TV providers see first yearly customer loss, USA Today (March 19, 2014), at http://www.usatoday.com/story/money/business/2014/03/19/pay-tv-2013-customer-loss/6628769/.

The emergence of telephone MVPDs like AT&T and Verizon marks one of the most significant changes in market competition for MVPD services.[7] U-verse and FiOS services were available to one-third of U.S. homes by the end of 2010, accounting for approximately 6.5 million customers.[8] By the end of June 2012, AT&T's U-verse and Verizon's FiOS services grew to 10.7 million subscribers combined.[9] CenturyLink's Prism TV also continues to expand, boasting approximately 175,000 subscribers at the end of 2013.[10] Within recent weeks, CenturyLink announced first that it reached a franchise agreement with Portland, OR, and second that it is pursuing an agreement in Minneapolis, MN.[11] By year's end 2013, Consolidated Communications Holding's had 110,000 subscribers to its IPTV service.[12] Moreover, entrants such as Google Fiber, certainly not lacking in financial resources, are also supplying consumers with new options, employing advanced infrastructure technologies and high-speed functionality.

If anything, it seems likely that the competitive capabilities and potential of former telephone companies in providing MVPD services have been underappreciated. Fiber-to-the-home services such as Verizon FiOS have been lauded for providing reliable video because of the enhanced speed, capacity, and other performance capabilities of their infrastructure. At the same time, moreover, "telephone" company MVPDs continue

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[7] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fourteenth Report*, MB Docket No. 07-269, at ¶ 80 (released July 20, 2012) (citing SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 7-8).
[8] See SNL Kagan.
[9] *Fifteenth Report*, at ¶ 3.
[10] *See* SNL Kagan.
[11] *See* Mike Rogoway, "CenturyLink strikes cable TV deal with Portland; service could begin in 2015," *The Oregonian* (Dec. 20, 2014), at http://www.oregonlive.com/silicon-forest/index.ssf/2014/12/centurylink_strikes_cable_tv_d.html; Erin Golden, "CenturyLink looks to enter Minneapolis cable market," *Star Tribune* (Dec. 23, 2014), at http://www.startribune.com/local/minneapolis/286634151.html.
[12] *See* SNL Kagan.

to upgrade their systems through a network fiber build out, that reaches the neighborhood or network node. Expansion of fiber is being combined with innovative techniques for upgrading the capabilities of VDSL (very-high-bit-rate digital subscriber lines) lines. Such solutions parallel regular cable network systems upgrades, enabling "telephone" MVPDs to achieve speeds that are far more comparable to cable ISPs than to older DSL networks.[13]

Increasingly, consumers have gained access to high-capacity wireless broadband services capable of streaming HD and other video content. According to estimates of wireless mobile broadband network coverage cited in the FCC's *Seventeenth Wireless Competition Report* (2014), as of January 2014, AT&T's coverage extended to 98.7% of the population, Verizon Wireless' to 96.9%, T-Mobile's to 92.1% and Sprint's to 89.8%.[14] Those numbers do not include regional or local wireless broadband providers, such as U.S. Cellular, C-Spire, and Ntelos.

Next-generation wireless network upgrades continue to exhibit increased speeds and capacity, making wireless an increasingly viable competitive alternative – indeed a potential substitute for – wireline broadband. For most major wireless broadband providers, average LTE speeds range between 30 and 40 Mbps,[15] enabling a wide range of video viewing functionalities. With regard to video, about half of all broadband

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[13] *See, e.g.*, Reply Comments of ADTRAN, Inc., Applications of Comcast Corporation, Time Warner, Inc., Charter Communications, Inc., and Spinco To Assign and Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-57 (Nov. 7, 2014), at http://apps.fcc.gov/ecfs/document/view?id=60000979824.

[14] *In re* Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Seventeenth Report*, WT Docket No. 13-135 (released Dec. 18, 2014)(Chart VI.B.1 – Estimated Mobile Wireless Coverage in the U.S. by Provider, Jan. 2014).

[15] *See, e.g.*, Lynn La, "4G LTE Showdown: How Fast is Your Carrier?" *CNet* (Aug. 5, 2014), available at: http://www.cnet.com/news/4g-lte-showdown-how-fast-is-your-carrier/.

consumers access mobile TV apps each month; 17% use mobile TV apps weekly; and 16% use mobile TV apps daily.[16] These numbers are certain to increase, as wireless broadband providers are unveiling new technologies that will enhance wireless video viewing capabilities. For instance, Verizon and AT&T plan to launch their LTE multicast video services in the near future. "LTE Multicast" promises to deliver live TV signals wirelessly to mobile devices more efficiently than unicast delivery, because multiple users can watch the same multicast stream as it is delivered from a single cell site.[17] Sprint is deploying its enhanced LTE service, with peak download speeds of 60 MBps.[18]

Over-the-air broadcast TV continues to offer consumers a further option, albeit now in HD and with multi-casting capabilities. While recent estimates of audience size suggest that the number of people who rely exclusively on broadcast TV is down substantially from the early 1990s, today's consumers readily combine broadcast TV viewing with low-cost alternatives such as the broadband-enabled online video distributor ("OVD ") services like Netflix.[19] Broadcast TV mobility options are also available.[20]

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[16] TGD, Press Release: "Half of Adult Broadband Users Now Engage Mobile Video Apps at Least Once a Month" (Ju. 23, 2014), available at: http://tdgresearch.com/tdg-half-of-adult-broadband-users-now-engage-mobile-video-apps-at-least-once-a-month/; *Id*. ("39% of adult broadband users engage mobile video apps on a portable computer, compared to 30% who do so using a tablet, and 22% that do so using a smart phone").

[17] Jeff Baumgartner, "Verizon CFO: LTE Multicast'Pivotal' to Mobility," *CNet* (Aug. 12, 2014), available at: http://www.multichannel.com/news/technology/verizon-eyes-2015-lte-multicast-video/382678; http://www.lightreading.com/video/mobile-video/verizons-multicast-lte-video-to-arrive-in-2015/d/d-id/710057; Jeff Baumgartner, "AT&T Plays Ball With LTE Broadcast," *CNet* (Jan. 8, 2015), at http://www.multichannel.com/news/technology/att-plays-ball-lte-broadcast/386750.

[18] Sprint, Press Release: "Sprint Spark" (June 24, 2014), available at: http://newsroom.sprint.com/presskits/sprint-spark.htm.

[19] *See* Christopher S. Stewart, "Over-the-Air TV Catches Second Wind, Aided by Web," *Wall Street Journal* (Feb. 21, 2012), at http://www.wsj.com/articles/SB10001424052970204059804577229451364593094.

[20] *See, e.g.*, George Winslow, "CES: RCA to Launch Mobile DTV-Capable Tablet," *Broadcasting&Cable* (Jan. 4, 2013), at http://www.broadcastingcable.com/news/technology/ces-rca-launch-mobile-dtv-capable-tablet/49701?nopaging=1.

Indeed, the OVD market segment has also emerged as a disruptive force in the video market. By the end of 2013, Netflix had 44 million customers,[21] compared to 21.7 million Comcast customers and 11.4 million Time Warner Cable customers.[22] OVDs have made their programming available on smartphones, tablets, and laptops as well as new connected devices like Roku, Apple TV, and game consoles like Xbox 360, PS3, and Wii.

A recent survey indicates that more than a third of TV households subscribing to MVPD services also subscribe to Netflix.[23] Those numbers suggest that video consumers value OVDs as a complement or add-on to MVPD services. Individual cable and broadcast networks have also embraced streaming services. CNN, ESPN, MTV, and ABC are among the networks that offer their content by live stream or on-demand.

On the other hand, OVDs also fill the role of disruptive competitor to MVPD services. According to one report, during the third quarter of 2014, "homes receiving programming solely through broadband service reached 2.57 million, or 3 percent of total TV households."[24] Also, nearly half of households that do not subscribe to pay-TV services have Netflix. Additional OVD or over-the-top (OTT) services, relying exclusively on broadband connections, are also being launched. These include Dish's Sling TV – limited number of cable channels at discount price – and HBO's direct-to-

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[21] Victor Luckerson, "Netflix Mulls Price Tiering as Subscriber Numbers Soar," *Time* (Jan. 22, 2014): http://business.time.com/2014/01/22/netflix-number-of-subscribers-grows-greatly-in-q4/.

[22] William Alden, "The Comcast-Time Warner Deal, by the Numbers," *New York Times* (Feb. 13, 2014): http://dealbook.nytimes.com/2014/02/13/the-comcast-time-warner-deal-by-the-numbers/?_php=true&_type=blogs&_r=0.

[23] http://www.mediapost.com/publications/article/241028/dvr-service-soars-in-us.html?edition=79069

[24] USTelecom, "Broadband Suprs Increased Digital Video Viewing," *USTelecom Blog* (Dec. 11, 2014), at http://www.ustelecom.org/blog/broadband-spurs-increased-digital-video-viewing.

consumer service.[25] Of course, consumers can also make stand-alone purchases of movies, TV episodes, or TV series, or certain video channels through streaming apps and mobile platforms like Apple's iOS, Google's Android, and Amazon Prime.

Today's video market is also characterized by the ongoing replacement of analog systems with digital; the rapid expansion of high-definition broadcasting and TV ownership; the rise of cloud-based user interfaces, digital video recorder (DVR) options, video-on-demand functions, as well as TV-Everywhere and other mobility capabilities.[26] The Commission's *Fifteenth Video Competition Report* notes that, as of 2012, more than 74% of households have sets capable of receiving digital signals, including HD signals.[27] 4K ultra-HD TV sets and content are now being marketed to consumers.[28]

Streaming apps and mobile platforms like Apple's iOS and Google's Android provide consumers access to video programming offered by cable operators Comcast, Cox, Charter, Cablevision, and Bright House. Comcast and Time Warner Cable programming can be accessed by Microsoft's Xbox 360. Time Warner Cable provides its subscribers access to video-on-demand services through devices like Roku and Samsung Smart TVs.

Non-cable operators like DirecTV, DISH, AT&T, and Verizon have also made

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[25] *See, e.g.*, David Carnoy, "Dish's new Sling TV Internet TV service starts at $20, features ESPN, Disney Channel, CNN, TNT, and other channels," *CNET* (Jan. 5, 2015), at http://www.cnet.com/news/dish-launches-20-sling-tv-streaming-video-service-with-channel-lineup-that-includes-espn-disney/; Mike Farrell, "OTT's Real Impact Eludes Nets – and Ops," *Multichannel* (Dec. 15, 2014) at http://www.multichannel.com/news/ott/ott-s-real-impact-eludes-nets-and-ops/386284.

[26] George Winslow, "TV Everywhere Video Consumption Doubles," *Broadcasting & Cable* (Dec. 16, 2014), at http://www.broadcastingcable.com/news/technology/tv-everywhere-video-consumption-doubles/136435.

[27] *Fifteenth Report*, at 5, ¶ 7.

[28] Mark Hachman, "We saw lots of 4K TVs at CES. 4K content? Not so much." *TechHive* (Jan. 14, 2015), at http://www.techhive.com/article/2867546/we-saw-lots-of-4k-tvs-at-ces-4k-content-not-so-much.html.

their content available through iOS and Android mobile platforms and devices. DirecTV offers its programming through DIRECT Ready TVs and Samsung TVs. Additionally, DISH and DirecTV offer their programming through smart TVs that do not require a set-top box or other receiver.

This survey is necessarily far from comprehensive. Additional options become available almost weekly, if not daily. But the dramatic technological and competitive advances in video services witnessed in the last quarter-century are abundantly and indisputably documented. Video policy must be reformed to reflect these emphatically changed market conditions.

### III. First Amendment Constraints Should Prompt Video Policy Reform and Guide Policy Implementation

As indicated above, a significant number of statutory restrictions on video services and the Commission's regulations of such services were premised on a now primitive 1990s snapshot of the video market. The constitutional permissibility of several aspects of those laws and regulations similarly rested upon claims of monopoly-like conditions in the market.

Given the magnitude of technological and competitive changes of the last quarter-century, the case for exempting video services from First Amendment protections accorded other forms of speech has evaporated. Rule of law norms impose an obligation on Congress to establish a new approach to video services that satisfies First Amendment standards. In other words, in light of today's video market conditions, conformity to First Amendment requirements should dictate a light-touch approach that covers only real, not imagined, market failures.

In the words of the Supreme Court, "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."[29] Courts have recognized First Amendment protections against compelled speech in the context of modern media communications.[30] Yet a variety of existing regulations, in fact, do tell video service providers what they must say, overriding editorial decisions with government proscriptions. For instance, decades-old must-carry regulations require MVPDs to carry broadcast TV content not of their own choosing, curtailing MVPDs' discretion, in their role as publishers, to determine channel lineups and arrange channel tiers.

Program carriage regulations designed to protect video programmers unaffiliated with MVPDs from "discrimination" amount to forced-speech mandates by substituting the government's judgment concerning program channel selection and lineup placement for that of an MVPD. Program access regulations effectively require vertically integrated MVPDs, operating in their role as publishers, to act as speakers in settings not of their own choosing by making their programming available to competitors on terms and conditions that are subject to second-guessing by the FCC. Agency-defined "must-have" categories of programming, such as sports networks, designed for purposes of enforcing program access requirements verge on content-based speech controls. And "leased access" regulations, which require MVPDs, again operating in the role of publishers, to make available certain amounts of their channel capacity to third parties subject to government-set rate controls, deprive MVPDs of editorial control over any video programming on the leased channels.

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[29] *Rumsfeld v. CAIR*, 547 U.S. 47, at 61 (2006).
[30] *See, e.g.*, *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974) and *Pacific Gas & Electric Company v. Public Utility Commission*, 475 U.S. 1, 9 (1975)

To preserve its regulatory power, the FCC has for many years relied upon rationales that have always been analytically suspect and are today increasingly factually unsupportable. Most notably, in *Red Lion Broadcasting Co. v. FCC* (1969), and *Turner Broadcasting System, Inc. v. FCC* (1994), the existence of so-called spectrum "scarcity" and cable monopoly "bottlenecks" were asserted to excuse selectively applied regulations restricting the free speech of TV broadcasters and cable providers.[31] Many of those restrictions imposed on cable video services have subsequently been extended to other MVPD services, including satellite video providers. In light of these recent developments, it is not surprising that federal courts have challenged both the scarcity and bottleneck rationales for pervasive regulation of speech in video services media.[32] Congress should take this disconnect into account when it revises its rules for video services.

Courts typically defer to both Congress and federal agencies whenever public policy depends upon judgments involving marketplace economics. While piecemeal judicial dismantling of the legacy video regulatory apparatus might vindicate free speech rights in today's new video market conditions, it could also introduce unintended policy

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[31] *Red Lion*, 395 U.S. 367; *Turner Broadcasting*, 512 U.S. 622.

[32] *See Comcast v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("the record is replete with evidence of ever increasing competition among video providers…Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992"); *Comcast v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring). ("In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market"); Fox v. FCC, 613 F.3d 317, 326-327 (2d Cir. 2010) (recognizing dramatic changes in technology and competition but concluding it is bound by U.S. Supreme Court precedent regarding spectrum scarcity); *Time Warner Cable v. Hudson*, 667 F.3d 630 (5th Cir. 2012) (concluding that the First Amendment prohibits modern speech media from being subject to selective, discriminatory regulations and striking down certain state video franchise requirements). On other occasions, federal circuit courts have concluded that the MVPD market characterized by bottlenecks when the Cable Act of 1992 was passed is now "mixed," with competition varying according to geographic region. *See Cablevision v. FCC* , 597 F.3d 1306, 1314 (D.C. Cir. 2010); *Cablevision v. FCC* 649 F.3d 695, 712 (D.C. Cir. 2011); *Time Warner Cable v. FCC*, 729 F.3d 137 (2d. Cir. 2013).

glitches and uncertainties that a uniform approach to all video market segments and providers could avoid. Congress should be the first mover in establishing a new framework for video services. Moreover, respect for First Amendment rights should lead Congress to avoid regulation that abridges free speech. It should also spur Congress to remove outdated regulatory burdens on speech in light of changed marketplace conditions.

Taking the First Amendment seriously as a policymaking guide means authorizing government intervention in the video market only where such intervention demonstrably serves a compelling government interest while burdening protected speech as little as possible. It also means carefully tailoring such intervention to employ the least restrictive means possible for this limited class of objectives. And it means regularly revisiting such regulatory interventions to ensure that they still serve a compelling government interest, with repeal as the default option. The new policy framework for today's competitive, convergent, digitally-driven media marketplace should provide equal speech protections to all video services, regardless of the media or technology used. Regulation is warranted only after a showing of a demonstrable and compelling market failure based on specific technical and market characteristics.[33]

**IV. A Market-Power Framework for Video Services in the Digital Age**

In the Free State Foundation's First Response to the Committee, we proposed the following general framework: (1) a clean slate approach to updating the Communications Act that would (2) eliminate the existing silo regime that subjects different providers of similar services to different regulatory burdens, (3) largely eliminate the overly-broad

[33] See Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373 (2009); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L. J. 245 (2003).

public interest standard for regulating services; (4) limit the FCC's authority to adopt broad anticipatory *ex ante* rules and confine primarily its actions to an *ex post* process based on adjudication of individual complaints alleging specific abuses of market power and consumer harm; and (5) transfer certain functions from the FCC's jurisdiction to the FTC.[34] We urged that these framework principles form the basis for a new Digital Age Communications Act. Replacement of the legacy video services regime should be part and parcel of that reform so that video services are integrated into the same regulatory framework.

First, inclusion of video within the scope of a new Digital Age Communication Act is warranted by the transition of video from largely static, one-way, analog services to increasingly interactive, digital, IP-based services. Generally, the same technological and competitive principles relevant to other advanced telecommunications services are also relevant to video services.[35] In key respects, video may be regarded as a digital app in the broadband ecosystem. Bringing video into a single, unified framework for digital services furthers the goals of policy simplicity and harmony.

Second, transition of video to digital and IP-based platforms has rendered the silo statutory structure obsolete. With competition primarily taking place across multiple digital platforms employing various technologies, and often a mix of technologies, consumers enjoy numerous choices of content providers and services. It is precisely this kind of competition among platforms for video services that has significantly reduced,

[34] Free State Foundation Response to Questions in the First White Paper, "Modernizing the Communications Act," (Jan. 31, 2014), at 4-5: http://www.freestatefoundation.org/images/Response_to_Questions_in_the_First_White_Paper_013114.pdf.

[35] We recognize that circumscribed cases involving public safety or emergencies may present exceptions to application of the general principles.

and in most areas eliminated, concerns about market power and consumer harm based on scarcity, bottlenecks, or lack of alternative outlets. Different platforms for delivering video services should no longer be subject to disparate regulations simply because they fit 1990s conceptions of how different silo should operate. Regulations should no longer be geared toward managing the technical or business model particulars of broadcast TV services, cable services, or DBS services through broad prescriptive rules. Nor should Congress merely supplement the existing silo regime with new silo categories for online video distributors, mobile broadband-enabled video, or the like. Instead, Congress should replace the legacy video regulatory regime with a technologically neutral framework applicable to video services that reflects the presence of cross-platform competition.

Third, the Communications Act's public interest standard is unfit for the digital age marketplace, and it should be largely dropped.[36] By virtue of such an indeterminate delegation of authority, the FCC continues to enjoy an extraordinary degree of discretionary power over editorial content decisions involving broadcast TV services and MVPD services, even as technological advancements have transformed spectrum into a more fungible, dynamic resource. Public interest regulation of video services relying on spectrum is no longer justifiable in light of competitive and technological developments. Continued regulation of video services under this standard, and the potential reinstatement of older regulations, such as the Fairness Doctrine, that have been removed but for which agency authority still exists, risks harming consumers by selectively burdening some media outlets and by discouraging the development of innovative business models.

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[36] See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L. J. 427 (2001).

The public interest standard is so vague that it easily can be criticized for conferring too much discretion on the agency without sufficient direction from Congress. [37] In the video context, the public interest standard poses acute First Amendment problems. Over the years, the FCC has invoked the public interest delegation to impose content-based regulations on broadcast TV services. Even putting aside doubts whether such content regulation was ever justified, technological advancements and competitive marketplace developments provide no persuasive rationale for subjecting broadcast TV services to a greater degree First Amendment restriction compared to other video services and media outlets. A First Amendment-compatible approach would put broadcasters, as well as other digital media purveyors, including cable, satellite, wireless, and broadband Internet providers, on par with the First Amendment protections traditionally enjoyed by the print media.[38]

Fourth, prescriptive rules for various types of video services are unsuited to competitive conditions in today's digital market for video services. A simplified, clean slate approach should replace those rules with a case-by-case adjudicatory process tied to actual findings of market power and consumer harm. In the Free State Foundation's First Response to the Committee, we recommended Congress adopt "a competition-based standard that directs the FCC generally to undertake an antitrust-like economic analysis when it engages in regulatory activity that is subject to its jurisdiction."[39] We elaborated

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[37] See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L. J. 427 (2001).
[38] See Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373 (2009); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L. J. 245 (2003).
[39] FSF's First Response, at 12.

on the market power standard and accompanying process for case-by-case adjudication in the Free State Foundation's Third Response to the Committee:

> Regulatory prohibitions and sanctions under the new Communications Act should generally be accomplished through focused adjudicatory proceedings. The filing of individual complaints, whether by consumers or market rivals, should contain specific allegations of abuse of market power. The burden should rest on complainants to demonstrate the need for regulatory intervention by clear and convincing evidence of anticompetitive conduct and its likely resulting harm. Any regulatory intervention by the FCC should thus normally be tied to a finding of a threat of market power abuse and a concomitant threat of consumer harm. Furthermore, due to the dynamism that characterizes the modern communications marketplace, these allegations of market failure should show more than some transitory failure that can be met by targeted responses of other market participants. Therefore, any allegations of market failure should be "non-transitory" in order to trigger a Commission response.[40]

This same market power framework and case-by-case approach should apply to video services, replacing the silo approach and public interest standard governing video services today. In other words, the existing legacy video regulatory apparatus that presumes regulatory intervention is the norm and its sector-specific or technology-specific rules regarding video content delivery should be eliminated. A new framework should be established that is applicable all video services in the digital marketplace, the organizing principle of which is a rebuttable presumption that runs in favor of marketplace freedom and against regulatory intervention in the video market.

In establishing a market power standard for video services, one modest agency precedent for Congress to consider is the FCC's *Program Access Order* (2012).[41] In that

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[40] Free State Foundation Response to Questions in the Third White Paper, "Competition Policy and the Role of the Federal Communications Commission" (June 13, 2014), at http://www.freestatefoundation.org/images/Response_to_Questions_in_the_Third_White_Paper_061314.pdf.

[41] *In re* Revision of the Commission's Program Access Rules, *Report and Order and Further Notice of Proposed Rulemaking* ("*Program Access Order*"), 27 FCC Rcd. 12619-37 (2010).

order, the FCC replaced its ban on exclusive contracts by vertically-integrated cable programmers with a rebuttable presumption of market competitiveness, albeit with extra qualifications attached. A market power analytical framework could build in part on the approach adopted in the *Program Access Order* by employing a more straightforward deregulatory presumption to apply to all video services.

Congress can also draw upon useful insight offered in a judicial context. Section 616 of the 1992 Cable Act contains program carriage requirements restricting MVPD conduct that will "unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage." In *Comcast v. FCC* (2013), involving a program carriage complaint filed by the Tennis Channel, Judge Brett Kavanaugh interpreted Section 616 in light of antitrust law's understanding of the term "unreasonably restrain":

> Because Section 616 incorporates antitrust principles and because antitrust law holds that vertical integration and vertical contracts are potentially problematic only when a firm has market power in the relevant market, it follows that Section 616 applies only when a video programming distributor has market power in the relevant market. Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market.[42]

Significantly, Judge Kavanaugh also addressed the First Amendment implication of the government overruling video content and channel lineup decisions made by video programming distributors. He concluded that government interference with the editorial discretion of video programming distributors is only permissible where such distributors possess market power in the relevant market. Judge Kavanaugh's antitrust-based reading

[42] 717 F.3d 982, 991 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

of Section 616 was thereby bolstered by the constitutional avoidance canon, whereby a statute susceptible to more than one reasonable construction is interpreted to avoid raising constitutional problems. In that case, First Amendment protections for editorial decisionmaking related to video programming tipped the scales in favor of free speech in the absence of a market power.

Fifth, jurisdiction over consumer privacy matters related to digital video services should be turned over to the Federal Trade Commission (FTC). As part of that reform, existing FCC authority over cable subscriber privacy (Section 551) and over DBS subscriber privacy (Section 338 of the Satellite Home Viewing Improvement Act) should be transferred to the FTC.

In the Free State Foundation's First Response to the Committee, we stated:

> [W]ith regard to any regulatory oversight relative to the protection of privacy or data security, even though the FCC presently has some jurisdiction in these areas, for the most part, it would be preferable to consolidate such jurisdiction in the FTC. The types of consumer protection issues most likely to arise with regard to privacy and data security are at the core of the FTC's institutional expertise. If jurisdiction over these type of matters – matters outside of the purview of traditional economic regulation of service providers – is transferred to the FTC, it is much less likely that telecom and cable services providers, on the one hand, and, say, Facebook or Twitter, on the other, will end up subject to disparate regulations in these areas.[43]

Simple and consistent rules concerning privacy of personal data are the most consumer-friendly and what consumers in converging digital markets increasingly expect. There is no basis to presume consumers want different sets of basic data privacy protections that depend upon whether they are doing business with, say, a cable provider, a DBS provider, or an OVD. Nor is there any basis in thinking consumers want different sets of data privacy protections from a single provider of digital services, depending on

[43] FSF First White Paper Response, at 17.

whether video, voice, or other data applications are involved. Consolidating consumer privacy for video services along with other digital services within the FTC's jurisdiction would establish a common enforcer and common set of rules for data privacy policy, providing the consistency to consumers of digital services.

### V. Transitional Measures for Implementing a New Framework for Video Services

Successful implementation of a market-based policy approach to video that relies on antitrust-like analysis in case-by-case adjudication will undoubtedly require various periods of transition from the current disparate regulatory requirements in order to protect established reliance interests. To ensure the eventual end to sector-specific or provider-specific regulations based on outdated snapshots of the video market and the Communications Act's antiquated silo regime, Congress should require the Commission to adopt a series of specific sunset dates by which time legacy video mandates are to be eliminated.

Sunset date announcements will crystallize the expectations of video service providers as well as video content owners, giving them a reasonable transitional period to adjust technical and business operations to a more market-oriented approach and to take into account the adjustment of existing arrangements.

Where the Communications Act grants the FCC rulemaking authority over video services that has long since gone dormant or where the FCC has already repealed relevant regulations, no transitional provisions should apply. For instance, elimination of FCC authority to reinstitute cable leased access regulations or broadcasting rules such as network non-duplication rules, syndication exclusivity rules, or sports blackout rules should be immediate. To the extent that Congress adopts the approach suggested here, which includes jettisoning basic tier cable channel requirements, basic tier cable rate regulations, program carriage mandates, and must-carry and retransmission consent rules, it will also need to consider changes in the law in related areas, such as copyright law, where the compulsory license should be reconsidered.

## VI. Conclusion

As the Committee moves forward with its review and update process, including the evaluation of competition policy, we urge it to carefully consider and implement the views expressed in this Response, as well as the previous Free State Foundation Responses. We look forward to continuing to play a constructive role in this process leading to a much-needed update of the Communications Act.