The Free State Foundation's
Fifth Annual Telecom Policy Conference

Panel II:

The Right Regulatory Approaches for Video Service Providers

March 21, 2013
National Association of Home Builders
Washington, DC

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* This transcript has been edited for purposes of correcting obvious syntax, grammar, and punctuation errors, and eliminating redundancy. None of the meaning was changed in doing so.

Proceedings

MS. TATE: Thank you all so much. We're going to move to the next panel on the agenda, which is the video panel. I want to thank Randy, as well. What a great turnout. It's wonderful to see you all back, even on an almost snowy day. And I wanted to add my congratulations and thanks, publicly, for Commissioner McDowell's service at the FCC. Certainly, his collegiality was wonderful while I was there. My thanks also for his statesmanship and, of course, for his and his family's friendship over the years.

I am very thrilled to note that over 50% of our panel today is female, in keeping with one of my other hats, and that is co-chair of the Healthy Media Commission. So I wanted to take note of that. As you all know, I am an advocate for keeping girls and women in this sector, and in STEM education overall, because – not only for this sector, but for every other sector – I've been saying that females are our greatest natural resource to continue the expansion of information and communications technologies worldwide.

So in keeping with movie themes and the "Life of Pi" this morning, we have been talking quite a bit about reform of the FCC. And I think we'll continue to do that

with regards to video and programming. Commissioner Pai has been out talking about reform quite a bit. Today, he even brought up forbearance, applying that to Title VI. And I loved his bringing it up, even *sua sponte* forbearance. It's very refreshing for all of us who have been in this world for a long time.

But now we are going to look back to the 1990s and discuss the MVPD world and video regulation. The previous panel was all about wireline and wireless broadband. However, video is absolutely driving so much of this explosion across all platforms, indeed, globally. So we need to get on with this show and hear from this panel.

You all know Donna Gregg, the former Media Bureau Chief, now at Catholic University Law School, formerly at Wiley Rein. I think I saw Chairman Wiley walk in. So we really want to hear about her insights, both from her time at the Commission, and also philosophically now that she is a professor.

Next, Gigi Sohn, you all know, who is President, CEO and co-founder of Public Knowledge, and certainly a respected advocate and champion for the public's rights as well as individual citizens.

Michael Powell, former Chairman of the FCC, oversaw one of the most transformational times in history.

And, coining the phrase that I often borrow from him, I remember making a phone call to say, "Can I please borrow your phrase, humble regulator?" And he said, "Knock yourself out, Commissioner Tate."

Stacy Fuller, Vice President for DirecTV, Regulatory Affairs, and advisor, also, to Commissioner Abernathy, will give a satellite television perspective.

Steven Teplitz, now Senior VP at Time Warner Cable, also formerly an FCC attorney, can give us the specific company's perspective on the recent FCC decisions as well as some court decisions that have come out.

Finally, Bill Lake, Chief of the Media Bureau, thank you so much. He's also leading Auction Strategy, if you all have any questions about the upcoming auctions. And we'll certainly welcome your insights and perspective about the entire convergence and explosion of the video marketplace.

So we are going to start with a few very brief opening comments, now that our time has dwindled somewhat. So with that said, Donna, I'll let you open.

MS. GREGG: Thank you, Debi. And thanks to Randy and the Free State Foundation. I, too, would like to add my thanks and admiration for Commissioner McDowell's service. That happened to be the time I overlapped with

him at the Commission, when I was Media Bureau Chief. And that time also overlapped with Commissioner Tate. They were both absolutely great to work with and did great service for the country.

Having been involved as counsel to companies who were involved in video, and then being a regulator – sometimes with some of those same companies – I experienced regulation of media in one way. Now I have an opportunity to step back, think about what I experienced and saw before, and learn a lot by watching what's going on now. And I do have a few observations I'd like to share with you.

We are living in an era now, with the Internet and the media, of constant polling and instant rankings, including top ten lists. If you watch late night TV, you can have a top ten list every night. If you look at your browser, you can get the top ten best fashion trends for spring, or the ten best restaurants that are ranked anywhere from Barcelona to Minneapolis. And if any of you are fans of men's and women's basketball, as I am, you can also get the rankings, which you anxiously turn to the day that the AP poll and the coaches' poll come out.

So we're constantly confronted with that. But I have my own ranking list. My own ranking list is *not* for

some of the best regulatory approaches that have been taken toward video.

I'm going to be charitable and not say that this is my ranking of the worst. However, I will say that on my list are questionable regulatory approaches that were not necessarily always successful. And I'm not going to reveal all 10. I could do more than 10, as a matter of fact. I'll just do three or four. Each one of what I consider the most questionable regulatory approaches to video services has something in common with the others.

First of all, I will say that all of them were adopted by the FCC, or imposed by Congress, with good intentions. They have that in common. Unfortunately, a lot of them were administratively burdensome for the regulated entities to deal with. All had unfortunate, unintended consequences. There were even some that were completely baffling, annoying, and greatly disliked by the public. And I think that was probably one of the worst things of all, because the regulations were supposed to serve the public interest. Yet the public was not always very enthusiastic about the way some of those regulations played out.

Finally, all of those regulatory approaches were predicated on certain circumstances. They were predicated

on the existence of a scarcity or a limitation of outlets for people or for messages, information, and communications to get to the audience. They were also predicated on a lack of competition.

But none of the circumstances that were the common underpinnings for the most questionable video regulatory schemes still exist today. We have many more outlets. People have a lot of different ways to tell their stories and to deliver information. People have a variety of ways to achieve access it or to receive it. And also there's a lot of competition. If you look at the *14th Annual Video Competition Report* from the Commission, and you look at a lot of the other surveys that are being done, there truly is an unprecedented amount of competition for delivery of video, much more than there ever has been.

So here are my rankings for four of the most questionable regulatory approaches:

Must-carry retransmission consent regulation was something adopted with good intentions, with high hopes, and touted as a market solution because it requires negotiation. But I submit that a negotiation is not necessarily a market negotiation if the government places down the ground rules. Must-carry and retransmission consent, in tandem, have caused a lot of outrage in the

public, by viewers who are suddenly deprived of the channel or the programming that they want to watch, whether it's right before the Academy Awards or the Super Bowl, or the NCAA Final Four.

Another questionable set of regulations is network non-duplication rules, and especially the syndicated exclusivity rules. Those regulations resulted in more deprivation of certain channels or certain stations for people, particularly those living on border areas between two television markets. I know there's someone here in the audience, Mr. Effros, for whom this may ring true.

The third set of questionable regulations is Commercial Leased Access rules. Of course, we had the little kerfuffle over those rules with the Office of Management and Budget. But those were regulations that certainly imposed difficult administrative burdens. And it just was a bad business model. It didn't really work.

When I was in practice, I had an opportunity to represent cable companies who were dealing with wannabe channel lessees. And, I even represented some people who wanted to lease channel time on cable systems.

The more savvy people who wanted to time on cable systems recognized that Cable Leased Access wasn't a very good business model. Really, the only viable application

or viable business that you could do using Cable Leased Access rules was advertising infomercials. The minute the Internet took off, even the people that were using Cable Leased Access more or less successfully for infomercials, immediately realized that the Internet was a much better platform for delivering that kind of communication with video.

MS. TATE: Quickly Donna, number four?

MS. GREGG: Fourth, the rate regulation scheme in the 1992 Cable Act was administratively burdensome and couldn't really be handled by a lot of the municipalities who had to hire consultants or else forego regulating entirely.

In my observations, something very encouraging was the introduction of the Next Generation Television Marketplace Act in the last Congress. That legislation proposes an overhaul, with elimination of some of the most questionable regulatory approaches to video that I mentioned as well as others.

MS. TATE: We're going to talk about that.

MS. GREGG: Good. I hope that Mr. Scalise reintroduces that and that other members will support it.

MS. TATE: Thanks, Donna. Gigi?

MS. SOHN: Good morning, and thank you Debi and

Randy. Thank you so much for inviting me. I really do enjoy speaking at your conferences. Although I did want to jump up on the podium at the last panel and speak, I held myself back.

(Laughter.)

MS. SOHN: So I'm not going to quote Yogi Berra. I'm going to quote somebody else in saying that for TV it's the best of times and the worst of times. Programming is fantastic. It's great the way people are consuming TV over their iPads, even in their own homes through WiFi. Life is good as far as programing is concerned. But the problem is that everything is changed about TV except the Byzantine regulatory structure, and the result is really negative for consumers.

Rather than the content provider just directly providing content to consumers, you have this Byzantine set of middlemen. Those middlemen are either protected by government fiat or in some other cases they have bottlenecks that are really not being enforced by antitrust regulators. And sometimes, the law just doesn't fit. So in this equation consumers are the losers.

Let me give you some examples. Donna mentioned some of them.

First of all, consumers are held hostage by

retransmission consent fights and blackouts almost always coming at the times for the shows that they want to watch most. Second, they're unable to access local broadcast stations over their cable that may be more relevant to them than the ones that the cable operator is forced to carry. That's all the nonsense with distance signal, syndicated exclusivity, and the sports blackout rule. Those are decades-old regulation. They're subject to ever-higher cable rates, in large part because of retrans fights and the bundling that large content creators engage in.

Consumers are still using set-top boxes that have looked the same for 25 years. They don't have a choice when it comes to devices to hook up to their cable systems and also access the Internet.

Finally, consumers are saddled with restrictive data caps that force them to make a decision as to what to watch and what not to watch. As you can see, I'm punching everybody. Nobody gets away from the concerns that we have.

You may have seen that Public Knowledge put out a paper, maybe a year ago now. It's called "Tomorrowvision," and I really commend everybody to read it. It was written by my colleague, John Bergmayer, a bright young attorney who just did a fantastic job. And it's got four

recommendations for changing the regulatory structure to be more consumer-friendly.

First for changing the regulatory structure to be more consumer-friendly is reforming or, frankly, eliminating all the regulations that protect broadcasters. I'd love to see retransmission consent repealed. I'm not sure that's going to happen, but there are certainly reforms that can happen short of that, including requiring broadcast stations to stay on during a dispute. Consumers should not be the losers there. We believe that the FCC can order arbitration, though the FCC doesn't believe that. And I understand there's some talk in Congress about possible legislation that will directly give them that authority that so there's no question. Certainly, distant signal protections, sports blackout, and must-carry are from a bygone era and really need to be eliminated. They are nothing but incumbent protectionist schemes, so they really need to go.

Second, the FCC should finish its rulemaking about what constitutes an MVPD or multi-channel video provider, and should permit over-the-top or online video providers to take advantage of the advantages that MVPDs have. Now, I don't think they should apply all of Title VI to OVDs, and they need to decide what makes sense and what doesn't make

sense. I don't think they should apply commercial leased access. Certainly, commercial leased access hasn't worked. I certainly would agree with Donna on that. So the FCC should finish up that proceeding and allow OVDs, like Sky Angel, to take advantage of the same rights and responsibilities that MVPDs do.

Third, the FCC should make it illegal for MVPDs to act competitively with regard to OVDs. Specifically the FCC should issue an order or a declaratory ruling that prohibits MVPDs from engaging in unfair methods of competition or deceptive acts and practices with regards to OVDs.

Fourth and finally, allow consumers to attach any non-harmful device to their cable systems. We liked the "AllVid" suggestion that was in the National Broadband Plan. I'm sure my colleagues to my left will beat the living daylights out of it. But have you looked at your set top box lately? It really hasn't changed in 25 years, and I think that's because there's not device competition.

I think I'm going to ask John to update our paper to include something about bundling. We're watching the Cablevision-Viacom case with great interest. While we wish Cablevision well, I'm skeptical. We're skeptical that the antitrust laws are really going to be strong enough here to

do anything about it. But it is a major problem. Again, bundling and rising retrans rates help lead to ever-growing cable rates, and it's very, very problematic.

I don't know if folks saw the *Post* article from a couple days ago. Verizon is now trying to figure out who watches what, and they're going to negotiate with the bundlers along those lines. I'm not exactly sure. Maybe Tom Tauke could explain how that actually works. But it's interesting to see the cable operators start to fight back against the bundling of channels that nobody really watches.

MS. TATE: Thank you, Gigi. Mr. Powell?

MR. POWELL: Thank you. I sit before you today as a proud member of the Byzantium. The cable architecture continues to be an extraordinary value for American consumers. And I hope we are able to get into that in terms of our questioning and our discussions.

There's a certain truism about the regulatory state, which is that it is only as valid as the factual predicates or the rationales that inform them continue to be viable and authentic. Unquestionably, we have a situation in which the world of video has changed, not a little, but quite radically from the last time our government made those collective judgments about how it

should be regulated.

I would be the first to admit, if we were to time travel back to 1992, you would be looking at the cable industry as a multichannel video provider that absolutely was a monopolist. It had 98% of that market at the time. Virtually every rule in the 1996 Act is built on one of three cornerstones, two of which are related to monopoly power, horizontal or vertical.

Horizontally, there were few, if any, meaningful, horizontal video competitors in the market. This is before DBS. This is before the Internet. This is before telecomm companies were able to enter into the video market. And many of the rules were intended to jumpstart and energize a horizontally competitive marketplace.

Secondly, in 1992, over 50%, probably closer to 53-57% of cable programming was vertically integrated with a cable operator.

Today, that number is radically lower, closer to only 14%, and the general trend over this period of time has been the disaggregation of content and distribution, not the re-aggregation of it. Yet, the rules that are administered today are fundamentally built on the cornerstones of those earlier judgments.

And third, a huge part of it was also built on the

continued protection of the long-term viability of the broadcast model, as an inherent public trust, a public social compact that the country would remain deeply committed to.

We could debate that pro or con. But at the time that judgment was made, over-the-air viewership was still close to 70% of the American population. The number today of those relying completely on over-the-air video distribution is only 14%. So you could debate what you think the rules should be. But what you can't do is continue to defend rules solely on the basis of its original purpose and conception when those factual predicates and those market rationales are no longer authentic and viable.

So what you get is a regulatory structure that at best is faded and ambiguous. And it's fertile for regulatory mischief.

I'm willing to entertain the question that Gigi posed, for example, about Sky Angel and MVPD. But are you talking about the burdens or just the benefits? Frankly, more often than not people attempt to take advantage of provisions that will handicap a competitor, advance the entry of their offering, or provide them competitive advantages, but not with the full panoply of things that

Congress carefully balanced in making a tradeoff, when at the time that it made those judgments, this was the only creature that it had available for its evaluation.

It's all well and good to say, "I'm not sure everything should apply to them." But the rule is premised on a very careful balancing of your position, your responsibilities, your investment needs and the benefits you enjoy. And to pull like a pixie stick out of the regulatory structure and enjoy only its fruits and none of its pains creates a very disruptive, conflicting, and not logically applicable regulatory framework. That's fundamentally what we're living with today. When you say, "What should we do about it?" my only caution is just because you know it's broken doesn't mean you always are clear about what the fix is.

Rules can be ambiguous, faded, no longer effectual, and they're not necessarily particularly burdened. They're not burdens or benefits. They just sort of hang there like warts that won't go away, but they're not fundamentally distorting or distracting anybody for doing anything. Yet, any modern evaluation of the video market has to take into consideration the massive transformation on what people watch, when they watch it, and how they watch it.

If everybody's going to quote Yogi Berra, you observe a lot by what you watch. Well, they're watching a lot of high quality TVs over a myriad of platforms that have never been heard of before. You know, my wife is really mad at me right now, because when she comes home she just wants to watch her show. The problem is there's 19 different ways to watch a show, and she can't figure out whether we're turning the input to the Apple TV, the Roku, the Hulu, the Smart Samsung TV, or we're watching linearly over cable; whether we've recorded it on our DVR or we're going to watch it on demand. She doesn't care.

We can't confuse the technology with what consumers do with 8-1/2 hours of every day. They watch programming and stories that move them. And as that market fragments across multiple platforms in multiple ways, that shouldn't be forgotten. A marketplace where programming costs between $4 and 5 million per episode is an awfully expensive programming environment with a high degree of quality that we're all heralding. They're very proud of that, but that comes at a massive expense.

As we consider what we do next, if you want to continue to feed the consumer passion in America around video and high quality stories, you're also going to have to make sure you do it in a way that preserves the

modernization model that would make those productions continue to be viable. I still think that future is bold, optimistic, and innovative. I'm excited to be in it and look forward to our conversation. Thank you.

MS. TATE: As Stacy is one of those old, old disrupters, let's hear from you.

MS. FULLER: Thank you, Commissioner, and thank you to Free State Foundation for inviting me to talk with you this morning. Before DirecTV launched service in 1994, there was no such thing as video competition. If you wanted a multi-channel video service you got it from your cable operator or not at all. Today, DirecTV is the second largest MVPD. We face competition not only from cable, but also from Dish, Verizon, AT&T, and now over-the-top providers like NetFlix and Hulu. And this increased competition is mainly good for consumers. You get more choice. It forces competitors to improve their service. But, this competition has also created an imbalance between distributors and programmers.

Programmers have always had a monopoly over their product, but now they can play one distributor off of another. This is actually the only market I've ever seen where actually more competition has led to higher prices. And you can see that this results in imbalances everywhere

in the video space. It's in rising sports cost, such as ESPN paying the NFL over $15 billion in 2011 for Monday Night Football, and in sports bundling. It's in program bundling, such as the circumstances that led to the Viacom-Cablevision lawsuit, and in packaging requirements that limit consumer choice and force subscribers to pay for channels that they don't want.

You can perhaps see this most clearly with respect to broadcasting programming, with spiraling retransmission consent fees and costs, and numerous blackouts. In 2012 there were blackouts in almost 100 different markets across the country.

Broadcast programming presents the most particular problems because it isn't a true market. The market for broadcasting programs is subject to numerous regulations that protect broadcasters and promote free, over-the-air television service.

In 1992, when cable was the only MPVD, Congress created the "must carry" and the "retransmission consent" rules. These essentially give local broadcast stations a government-mandated, geographic monopoly over network content and guarantee distribution even for the least watched stations, even in areas where their broadcast channel doesn't actually reach.

For a long time, this actually worked well. That's because you had broadcasters being a monopoly on one side of the table and you had cable being a monopoly on the other side of the table, a balance of terror. No broadcaster wanted to lose all their eyeballs in the cable franchise area, and no cable operator wanted to lose the broadcast networks.

Ultimately, these two parties were able to reach a deal, and blackouts were almost unheard of. Things have changed, but the government rules still give the broadcaster its monopoly. Now, however, the broadcaster sits across the table from multiple competitors, each of who are fighting for subscribers. So, what happens when one side has leverage and the other side doesn't? Prices go up and the stations are coming down. And as Pay TV competition increases, the situation only gets worse.

Broadcasting is definitely a special case. But the imbalance of power applies to cable programming as well.

Today, cable programming is user-leveraged to require distributors to accept bundles and packaging commitments they wouldn't otherwise accept. This in turn makes consumers pay more for programming that they wouldn't necessarily want to watch.

So where does this leave us? It's time for the government to take a fresh look at the video marketplace and see how it really affects consumers.

Maybe it's time to remove regulations that were put in place 20 years ago when the world looked far different than it does today. Or maybe it's time to look at new regulations in order to protect consumers. I wouldn't profess at this point to know all the answers. But at the very least it's time to start the debate and to look at it with a realization of what the marketplace looks like today. Thank you.

MS. TATE: Thanks, Stacy. Steven?

MR. TEPLITZ: Thank you, Debi. I'm happy to be here today, and I know Randy is very focused on keeping us on track. So my suggestion, now we have this great new space, is that next year we have a little orchestra and we can pretend we're at the Academy Awards. And when people start to go over their time, the music can cue up.

(Laughter.)

MR. TEPLITZ: I think that might be a nicer way to move everybody along. And speaking of the time, I'm tempted to cede my time back, because a lot of the points that I wanted to make have been made quite eloquently by some of the other folks on the panel already.

There are three points I am hoping to make today. In order to get the regulatory approach right going forward, we need to have a dialogue and a common understanding of what's wrong with the current approach. That was point one.

The second point is to talk a little bit about retransmission consent as the poster child for what happens when you get it wrong and what kind of harm can be caused.

Finally, I have a few thoughts on what's a better way or a better approach and how you get there. So I will take each of those in turn, because if I exceed my time, I think Randy will not give me my very large speaker fee that he promised, and I'm counting on that.

(Laughter.)

MR. TEPLITZ: First, what's wrong with the current system? I won't go into very much detail since Michael really talked about that. The 1992 Cable Act, and a lot of the FCC rules and regulations that have since followed, are really premised on the notion that cable is a monopoly provider. Whatever the situation was in 1992, it absolutely isn't the case today.

There are more programming options now. Consumers have an increasing ability to watch what they want, when they want it, and on a whole variety of devices. Gigi

suggested that we're still using these same devices, and I don't think that's actually true. Palomar Cable, for example, just announced a deal with Roku where you can get our linear cable service on a Roku box. You can watch a program on your iPad. There's lots of different options that are now emerging in the marketplace.

Clearly, the marketplace has changed dramatically, and the rules haven't. To play off a comment that Michael made, does that matter? In some cases maybe it doesn't. It's just a little bit of an annoyance. But there are real harms in other cases, for example, retransmission consent. The government has inserted itself into the relationship between MVPDs or originally cable operators and broadcasters in a circumstance that no longer exists.

Now those rules have caused significant blackouts and price increases that are rate increases or retrans fees that get ultimately passed on to consumers. Both the rates and the blackouts cause real consumer harm. And that has really been the result of the mismatch between monopoly-based rules and a more competitive environment.

Finally, what do we do about all this and where do we go from here? The policy community has to abandon the cable's-a-monopoly mindset in recognition of the dramatic change in marketplace competition. Any review or

assessment of existing regulations and any new regulations going forward have to take into account the competitive landscape that currently exists.

A long-term solution is a comprehensive rewrite of these rules. That seems for a variety of political and practical considerations unlikely. But there is a real opportunity to look at more targeted reforms and retrans is certainly the first one among them. And Congress can give the FCC more tools. Specifically, forbearance for video service would be a way to address, on a case-by-case basis, some of the most egregious problems. That was one of the things Commissioner Pai talked about.

There were a number of hearings in the second half of 2012 where Congress really looked at the video marketplace. And a lot of the themes we talked about today came out. I am hopeful and ever optimistic that that mindset will carry the day, and that it will be ultimately reflected in how policymakers approach video regulation. Thank you.

MS. TATE: Bill?

MR. LAKE: Thank you. I'm delighted to be here, and what everyone said about Rob McDowell, he's a prince.

Would you like to step back and look a little bit at the evolutions that are going on with respect to video?

There's a lot of talk these days in Washington about the evolution of voice service to IP. But there's a parallel evolution, perhaps not quite as far advanced, of cable service from analog to digital, and then ultimately to IP. It's clear that in the future video service, even those provided by the MVPDs, will be an application riding on an IP platform. We're already thinking about what the implications are of that evolution for regulation of the service providers and for the treatment of the devices at the end of the network.

A simultaneous evolution is going on with respect to the handling of content. There is what someone recently called a steady drip, drip, drip of video content onto the Internet. It's very much in its beginnings. The program providers realize that they still make most of their revenue from traditional TV distributors. As long as that's the principal business model, I think that will limit the availability of video on the Internet. But that's a business evolution and we see it occurring.

At the same time, there are roughly 30% of the homes in the country that don't have broadband. So when we look at the regulatory implications of video over the Internet, we have to realize that those implications, so far, haven't reached a significant part of our population.

Is it time now for a comprehensive rewrite of the Act? That's obviously for Congress. We live to serve and we'll do what we're told. But we know that it's not too early for us to be considering experiments with regulatory innovation to reflect the changing marketplace. And I'd just like to mention one example of that.

The Commission recently decided not to extend the prohibition, the *per se* rule prohibiting exclusives with respect to content of vertically integrated cable companies. What we did, instead, was to move to a case-by-case approach bolstered by presumptions; for example, a presumption that a regional sports network must have programming. The reason for trying to insert presumptions is that a case-by-case approach without some presumptions or rules to guide it can be very resource intensive. Our thought was that rather than have a *per se* rule, if we could have a case-by-case approach but guide it with presumptions of that sort, we might be able to accommodate these developments and possibly develop a model that we could use in other contexts.

This is just one example of the fact that the Commission, under existing law, has the ability and the willingness to try to adjust our regulation to changing circumstances. And it will continue to do that unless and

until Congress gives us a different regime to administer.

MS. TATE: Thanks, Bill. That was very visionary. I loved hearing all that from you. The presumption and case-by-case is a terrific idea. But we're still living in this Byzantine world that Gigi reminded us of. So if we are looking toward the possibility of a new Communications Act, a new digital act, or just some new legislation, maybe you all briefly talk about that in terms of whether there are any vehicles.

Last Congress, we saw the Next Generation TV Marketplace Act, and then also the Freedom For Consumer Choice Act. Do you think there is any vehicle? Or do you all see anything coming down the pike? If not, if you had a blank sheet of paper, then maybe you could give us one or two ideas of what the scope of regulatory oversight might look like. Donna.

MS. GREGG: Whatever the vehicle for video services regulatory reform is, there are certain characteristics that it is must have. It must take into account the enormous change in the marketplace, in the competitive landscape, in the technology that's available now, and all of the new services coming out. Any proceeding or vehicle that is under consideration should definitely have that as one of the things that it sets its

attention upon.

It must also keep in mind some of the flaws of some of the regulatory approaches in the past. Policymakers just need to remember, to think carefully, and maybe use a little bit lighter touch. I'm very much in favor of some of the ideas of test beds and trying new things before something is necessarily written in stone. But just keeping those things in mind is essential.

MS. SOHN: So, in the words of Stanley Kowalski: "Stella!" Okay. That's the vehicle. That's the satellite. I don't even know what it stands for any more, but it's the renewal of the compulsory license.

MS. FULLER: Satellite, Television, Extension and Localism Act.

MS. SOHN: Thank you. So that's the must-pass or kind of must-pass vehicle. Although, in the past they've kept it clean. I don’t think they’re going to load it down. I did mention this arbitration bill but I'm not even sure who's actually on the bill. My people tell me that it's buzzing around. I think the best vehicle for reform, particularly for some retrans reform, is the FCC. Unfortunately, they construe their authority way too narrowly.

So I think that's the way to go. It would be nice

if Congress gave them more authority to do things like standstills for blackouts and arbitration. But we've made this argument. I'm not going to go through it now. We've made this argument in our filings. We think they've got the authority now. And they certainly can repeal the syndex and the single provisions and the blackout provisions. Those are their rules; that's not a congressional thing. They could do that tomorrow if they had the courage.

MS. TATE: Michael?

MR. POWELL: STELA, certainly, is the principal thing to focus on. I'm relatively sure someone will think about introducing another comprehensive act, not unlike what Scalise and DeMint's bills were. The chances of passing something that comprehensive in nature are highly unlikely. But it's certainly a floating vehicle.

I would watch FCC process reform as legislative vehicle. It seems to always continue.

For example, if you're talking about something like forbearance, that can be put in the context of process oriented reform as much as it is substantively about video. That's certainly a vehicle.

And watch for exogenous shocks. One might be the Aereo case. If that case comes out one way or it comes out

another way, it could create an enormous amount of immediate energy around a concern that could force Congress into action.

I still believe the elements of net neutrality could conceivably draw in questions about video, at least in the context of Internet-delivered videos. So think of the Cablevision lawsuit. Whatever its merits, that outcome is probably a long way off, given the way litigation goes. But it is one of those exogenous events out there that could suddenly change the landscape. People disinterested in legislative action could suddenly become intensely interested in legislative action.

Our judgment is Congress has other priorities and commitments that are going to consume an enormous amount of its time. A massive rewrite of the Communications Act is probably not in the cards for the next year. But there are very surgical things that can be generated from these other viewpoints.

MS. FULLER: Yeah. I just echo a lot of what everyone has said. STELA is a little unique, for us especially. It is must-pass legislation to ensure that our distant signal license continues for about a million subscribers. So that will definitely be a vehicle that there'll at least be a lot of conversation around. And

especially, as Michael said, if anything happens in any of those court cases between now and then, look for that as a vehicle. Whoever's on the losing side could try to look for Congressional remedies along those lines.

As far as FCC reform, we think that there is discretion that the FCC does have in doing retrans reform and other things.

If forbearance authority came down the road, as long as it is well thought out and justified, it would be a nice option. Then Congress could act quickly to give the FCC authority to keep up with the marketplace.

MR. TEPLITZ: Predicting what's going to happen in Congress is a fool's errand. But STELA hearings, comprehensive legislation that is introduced, or conferences like this are a real value. Having a dialogue about what the marketplace looks like today and why the monopoly era mindset needs to be jettisoned is a real value. Over the next year or so, the real mission is going to be winning the hearts and minds of people to recognize how competitive the video marketplace really is.

MR. LAKE: To pick up the theme of process reform and forbearance, there is a variant of forbearance that Congress has tried in the video area, which is to establish sunset provisions with authority for the Commission to

consider extension. That's what we used in the case of the exclusives ban with respect to vertically integrated content.

We recently decided not to extend our viewability rule, another case in which Congress said, "After X number of years, take a look and see whether it should be extended." And we decided not to. Of course, we have the authority to do that with other provisions that are simply FCC rules. We recently decided no longer to forbid encryption of basic tier services on cable, because market conditions had changed, and that rule was no longer necessary.

I have to mention retrans, since everybody else does. That's a very odd regime of essentially regulated negotiations. Someone has suggested that's an oxymoron like managed competition. But it's the regime we have, and we have tried to thread that needle. We've got a lot of input in response to our notice of proposed rulemaking on that. And the proceeding is not dead.

We continue to look at it and to watch events in the marketplace. We have concluded and told the Congress that we don't have the ability under the current statute to take some of the remedies, such as mandatory arbitration that have been urged on us. Congress obviously could

choose to give us that authority. But we'll try to do the best we can under the statute we have.

MS. TATE: But, Bill, are you regularly reviewing to see if there are opportunities, like the examples you've given, to reform without congressional approval?

MR. LAKE: Yes, yes. We think about reform opportunities constantly, and people can bring them to us. The encryption ban was something brought to us, first in the form of requests for waivers. And then we concluded that we shouldn't be waiving this rule. Rather, we thought about whether the rule should exist at all and concluded that it shouldn't.

MS. TATE: Right. Thank you. Gigi?

MS. SOHN: Yeah. I just want to add one wild card. Yesterday, the Register of Copyrights testified about her desire to have Congress completely rewrite the Copyright Act. And that's where Aereo really comes up. Depending on which way the Aereo case goes it could also have an impact if there is some desire in Congress to rewrite copyright law to clarify what a "public performance" is.

I don't want to get into that. That is an essential copyright question in the Aereo case. But if Congress decides to make it easier for companies like Aereo

to not run afoul of the copyright laws, then that could have a huge impact on the marketplace.

MS. TATE: I think it was Gigi that brought up the devices, and what has happened. Obviously, we heard in the last panel about Xbox and whether or not that should be able to perform 911 functions or whatever. Increasingly, there are all types of futures for video, WiFi, for tablets, TV Everywhere, and going to the cloud. But the FCC proposed to regulate video devices more comprehensively with the *AllVid* notice. So what is the road ahead for video devices? And then, Bill, you might just tell us where the *AllVid* proceeding is.

(Interference.)

MR. LAKE: Do you want me to start?

MS. TATE: Yeah.

MR. LAKE: Yes. The AllVid proposal is still out there. We've continued to watch the developments in the marketplace. And there have been a lot of developments since we've made that proposal. I'd like to hope and think that maybe the proposal would help to spur some of those developments.

One thing that's happened is it's clear that whole home solutions are something that consumers increasingly want. They just don't want one box in each room

separately. They want a system in which they can record in this room and watch in that room, and so forth. One thing we did last year was to impose the requirement that boxes have an IP output. Whatever the status of that first box in the home, we wanted to make sure that there was a retail marketplace for all the other boxes that would be connected to it. And that would be enabled by having an IP output on the first box.

Whether that rule survives the *EchoStar* decision is an open question. We know that our CableCARD regime took a real hit in that decision. One of the things we're thinking about is what we do in terms of reinstating some or any of those rules. And, we're thinking very much about what will be the replacement for the CableCARD regime in an IP world. It's not designed for an IP world.

The AllVid solution was proposed at a time when we were farther from an IP world than we are today. So we're open for suggestions as to exactly how we ought to treat the whole set-top box issue when cable has gone IP.

MS. TATE: Michael, do you or Steven or Stacy want to talk about the boxes?

MR. POWELL: Not particularly.

(Laughter.)

MR. POWELL: One, they're not 25 years old. I

have one in my house that's three years old. I have one in another house that's brand new with amazing new functionalities that Cox debuted at the Consumer Electronics Show.

One of the things the set-top box debate shows you is how radically innovation can change the conditions upon which fundamental judgments made in another time depended. At the time we were asking the government to invent a market for retail boxes. There was almost an assumption that the only video content that mattered was the multi-channel video content. And that was where we were going to introduce this competitive layer.

Probably the hottest products that have evolved in the box market are ones that aggregate and collect over-the-top video strains that are separate and distinct from what the cable operator is providing. Roku is making a business; Boxee is making a business. Tivo is making a business.

All those companies we hear about are making businesses by attempting to be an aggregator of a really compelling suite of video programming. And by the way, every leading innovative tech company in America seems interested in chasing this market. There is hardly anyone to be left out in the pantheon of companies that have

announced an intention in the television video distribution space, whether it's Google, Apple, Amazon, Intel, Facebook, Sony, Samsung. The lists are long. They continue to see differentiated opportunities for them to take a place in the value chain.

IP is a big shift that's going on. To try to jam that into the set-top box architecture thinking of the past would be a mistake.

The trend from hardware to software is huge. Time Warner has done a really cool thing with Roku. But it's partly because they increasingly are figuring out how to provide a live linear stream using software design, rather than hardware design. The minute you can use software design and you speak the language of computers in the form of IP, essentially any computing device is potentially your access point.

That's the Holy Grail for consumers, that you don't have to think about your box. You don't have to think about whether you prefer the Galaxy S4 or the Apple iPhone 5. It doesn't matter. You're running a software stack that can operate in IP and speak the language of computers, and it can be whatever you want it to be. That to me is the Holy Grail, not creating another thing that CES can show and you can buy. Let the consumer have

whatever they want to have, and let innovation drive things in that direction.

MS. SOHN: I love that idea. I love it. The problem is that is the Holy Grail. Consumers should have a choice to be able to connect to their cable system through any device. But right now the system is whatever companies, like Roku or the cable industry gives permission to. That's who gets to sell to consumers. I don't want to belabor this, because in the grand scheme of things it's probably a small thing. But my dream is that consumers can go to Best Buy or they can get online to Amazon; or they go to HH Gregg, go to Graffiti Audio, and they can buy whatever device they want to connect to a cable system. It shouldn't be a permission-based society. It shouldn't have to be a Holy Grail.

There is a law. It's called Section 629. That requires competition in navigation devices. And it may be things need to change because we're going more to IP, but I still do not believe the FCC has fulfilled Congress's intent in passing that section of the Communications Act.

MS. TATE: Stacy?

MS. FULLER: Being a satellite provider, we have a little different technology, and we will never be the all-IP world. We don't have a head end on the ground, so

basically we use our set-top box as a head end in the home. And that's not saying we're not innovating. Our new Genie Box has a gateway in the home that can talk to any RVU-enabled television, which is an open platform. Samsung has them.

Other companies are developing it so you don't need the set-top box on every single television set. But, in the satellite provider world that we live in, we don't just transmit plain vanilla programming. And if we were just sending through the channels, then any box can have that functionality. That's fine.

But for us to compete, especially as a stand-alone video player, we're really competing on our innovative services. We're competing on customer service.

We're competing on innovation. And, if we don't have a set-top box in the home that has the features that we promise our customers – that includes VOD, it includes NFL Superfan and it includes YouTube searches – then we can't make that commitment to our customers come through.

And there is no way to explain to a DirecTV customer that if they buy a box today from someone else then all these innovations that we're going to do tomorrow may not work as well.

We try to work with multiple manufacturers. We

actually have a new TiVo box set out. TiVo has an interesting history. When we first had our TiVo HD box, it was MPEG2. So when we wanted to move to MPEG4 and have greater capacity, more services for folks, anybody that bought a TiVo HD box could no longer get HD service from us. And did they go to TiVo and say, "Replace my box?" No. They came to DirecTV and said: "I want what you're offering. I'm subscribing to DirecTV. You need to give me a new box."

Customer service is another way we are competing. If we're going to solve problems that our customers call us about, we need to understand how our architecture works and make sure our services work. They're not going to call the box manufacturer.

We believe in innovation and we think it's happening. And we're forward-thinking and trying to get rid of all these boxes in the house. But in order for us to be competitive and to provide customer service and innovation, we need to have at least that basic gateway be our box.

MS. TATE: Steven, did you want to respond? I don't want to cut you off.

MR. TEPLITZ: Just a final comment, because I don't know whether Gigi and I would agree on whether the

marketplace was taking care of this issue or not. I certainly think it is moving that way. And I commend the FCC for its approach, which is let things develop and watch.

But one note of caution. The risk with set-top boxes is if you're imposing technical standards in an area that's moving as quickly as this is, you're probably going to get it wrong.

That imposes real costs. We see with the CableCARD regime now, the cable industry has spent tens of millions of dollars for something that is not necessary and is probably a mistake. We don't want to revisit that. And so the wait and see approach to all of it is the right one.

MS. TATE: Donna? One quick comment.

MS. GREGG: These equipment and box issues are some of the hardest things for regulators to deal with at FCC. I'm glad that I'm not in your shoes any more, Bill. And I just wish you all the luck in the world, because it's tough.

With the technology moving as quickly as it is and all the different things happening, the government needs to be careful. Moving in hard and fast with standards would fail to take advantage of some of the developments that are happening.

MS. TATE: We're really needing to close up just in a moment. I have been writing about tiered billing for a number of years, dating all the way back to '09. And I just wondered if you all might run down the line and talk a little bit about that. DOJ was investigating pricing practices, metered, tiered data caps. So what should the regulatory approach be?

MS. GREGG: I'm not a good person to ask, because I'm one of those households that only watches 15 channels, except for all the ESPN ones.

MS. TATE: Gigi?

MS. SOHN: Despite Public Knowledge's clear distaste for data caps, I'm not quite sure we have the regulatory answer yet on pricing. I could say, unequivocally, we would oppose any use of data caps for discriminatory purposes. What Comcast is doing with their XBox service, essentially not applying their Xfinity service to the data cap but applying everybody else's video service to the data cap, to us is a violation of the open Internet rules that should be treated as such.

We have a complaint, not under the open Internet rules, but the terms of Comcast's merger agreement, which the FCC has now had for more than a year. I've just stopped counting.

So that's number one. Number two, there has to be transparency. That's got to be critical.

Now we're not opposed to price discrimination. I'm happy to hear that the cable industry has finally come to its senses and admitted that data caps are not about congestion. It's about price discrimination. Our problem with data caps as a price discrimination tool is that consumers can't really read the signals. They don't know what to give up in order not to go over their cap, and they're going to underutilize.

We think speed tiers is a much better way for consumers to have price discrimination, for consumers to understand, "Hey, it's taking me forever to download this movie, or my stream is balky, so therefore, I need to go to another tier."

MS. TATE: Maybe this is a place to try one of these tiered experiments and see what consumers want, see if they're happy or not, see if price matters.

MS. SOHN: I'd love that.

MS. TATE: Bill, is that a possibility? Bill Lake?

MR. TEPLITZ: Well, I'll jump in. It's happening today. We think that any government approach should encourage tiered pricing. They should encourage different

business models.

We've got to remember that the Internet just really isn't that old. Originally, everything was metered. Then it went to flat rate. Now there's a mix and range of different pricing options. And the marketplace will continue to change based on what customers want, what works and what doesn't.

We have usage-based plans that, from our perspective, are all about giving customers more choice. So if you want to use less or you want to pay less and use less, we have an option for that.

We also continue to offer an unlimited option for our subscribers. So let different companies experiment. The real concern that we have is with some of the dialogue about having the government exclude a particular pricing model. We think that is really a bad approach.

MS. SOHN: Never heard that.

MR. LAKE: I can't comment on the specific complaint that's pending against Comcast.

In my view, the marketplace is free to experiment in the area of pricing. We'll watch, and if there are particular practices that seem to be nefarious, we may have to consider action. But I think tiered pricing plans are something that the market can experiment with and we'll see

what consumers want.

MS. TATE: Michael?

MR. POWELL: A few things about this, and I'll try to be quick. One, I really emphasize that we are still in an experimental phase, and we have major cable companies who have deployed no tiered or capped pricing models yet.

I always get tired of when we're talked about in some broad brush. All of cable is experimenting with many different versions of this. What Time Warner was doing is very different than what Comcast is doing. And Cablevision's choice not to do it, at least for the time being, is very different than other people's choices to do it. Remember that.

The second important point that really is unassailable is that price variation models are not ever inherently good or inherently bad. They are neutral. They are widely accepted pricing models that are used widely throughout the economy. They have benefits and they have disadvantages, and it depends on their application and what problem you're trying to solve.

I would submit, however, there are three or four rising problems to which usage of variable pricing models may be beneficial. And I can emphasize "may be."

First thing, this country has an adoption gap. We

are persistently stuck with a hundred million Americans who have access to broadband but are not subscribing to it. We can have all kinds of healthy debates about why that is. One of the things that price discrimination often does well is it helps penetrate parts of the market that heretofore have been unwilling to come on the Net. The greatest threat to the United States is more than the silly debates about where we rank in the world. It's whether all of our citizens are online, have universal access to that capability. And if price discrimination can create tiers that are more affordable and more suited to the needs of that hundred million people and get them on the Net, that would be a major achievement.

That's one thing. The second thing is, when the Internet started most of us probably did roughly the same kinds of things. What we're seeing happen as the Internet grows and matures is there's a wider variation coming on about the way people use the Internet. There are power users who use massive amounts of data and gigabytes. There are those who love to cut the cord and do NetFlix streaming, and there are still plenty, probably 80% of the mass market of users who do very low bandwidth things: e-mail, Facebook, Skype, Twitter. These things do not use substantial capacity.

So as we get wider variety among the users, you do have a subsidization problem. You have people who are all paying the same price and getting different values of use. Frankly, the power elite user is enjoying the benefits of the subsidy that's being masked by an unlimited pricing model. That is not to say that model isn't simple and predictable, and you might like it for those reasons. But it does mask that cross-subsidization that in another context we worry about.

The third thing, it's not a congestion argument. It's important to just jettison this, because we're really not being honest. We're not really talking about congestion. I'll say it over and over and over again. We've been saying it for a while, but it still gets cited as what we're doing. What we're doing is what any company does that has massive, fixed costs.

We often hear our profitability talked about while people ignore completely the cost of building and maintaining the network. The network is a $200 billion expense over the last decade, and it takes $30 billion a year across all broadband providers to keep it going. That includes digging up the ground, laying wires, and keeping those wires current. You have to sink that money in the ground before you're paid one dime from a subscriber.

The question is, when you go to recover those costs, what's the fairest way to allocate those costs among the people who buy your service? If you have people who use it a little, should they pay the same as the people who use it a lot? Or, should you have the people who use it a lot pay more than the people who use it a little? That's what we're really trying to figure out: the fairest way to allocate the cost of a high fixed cost network.

And the last thing that I don't think is talked about enough is that bandwidth is not an infinite resource, whether it's wireless or wireline. You can get congestion. You can get overloading. What we have to do is make sure everybody has incentives to build for efficient broadband use. We have to do it as network engineers. But, right now, a lot of apps providers, service providers have absolutely no incentive to design their application or their services in a way that will use as little bandwidth as required. Why should they?

They don't have any cost to really deeply internalize as a consequence of it. It's like when Windows used to write software code, it could be more and more bloated, and as long as Intel kept making faster processors, it didn't matter. But, I assure you, if we go to 100 GBs, or a trillion gigabytes, software can bloat to

meet that demand if there are incentives for efficiency. And, if you want that NetFlix steam to continue at high capacity, they should also have to be concerned about efficient algorithmic design.

MS. TATE: Thanks so much, Mr. Powell.

I wanted to say that it's no surprise to anybody here that the Competitive Enterprise Institute found the FCC to be in the top three most expensive agencies with $132 billion in regulatory costs. Public Knowledge did call this nonsense, however.

I would like to just remind us all that regulations do cost all of us.

With that said, the great and powerful Oz is here. I want you all to join me in thanking this fabulous panel for being here.

(Applause.)

MR. MAY: Okay. The great and powerful Oz. I've never heard that one before. And I want you to join me in thanking my friend Deborah Taylor Tate for moderating this panel so expertly. So let's thank her.

(Applause.)