FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The State of Competition in the Communications Marketplace	)	GN Docket No. 22-203
	)	

REPLY COMMENTS OF THE FREE STATE FOUNDATION[1]

I. Introduction and Summary

These reply comments are submitted in response to the Commission's Notice seeking comments for the agency's biennial report that assesses the state of competition in the communications marketplace. The Free State Foundation's initial comments focused on data from 2020 and 2021 that support the conclusion that the broadband and video services markets are effectively competitive and are characterized by ever more effective intermodal competition. These reply comments, taking into account the initial comments filed by other parties, focus on actions that the Commission should take to promote even more competition in the broadband and video markets than presently exists by removing regulatory barriers to entry and expansion of services.

Spectrum is perhaps the most important input for the provision of mobile wireless services. To enable more competitors to provide service to more Americans with next-generation wireless services, the Commission should consider every spectrum band that realistically may be suitable for commercial uses, including the lower 3 GHz, the 4 GHz, 7 GHz, and 12 GHz bands.

[1] These reply comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

Also, the Commission should identify bands where it may be able to increase signal power to maximize use, including the 6 GHz and 7/8 GHz bands. And the Commission should seek to boost secondary market transactions for spectrum licenses to improve access and efficient use.

Unreasonably high fees and undue permitting delays divert resources from infrastructure deployments and inhibit access to next-generation services. The Commission should declare that fees charged by local governments for deploying wireline facilities in rights-of-way that exceed reasonable costs effectively prohibit broadband services, contrary to Section 253(a). It also should adopt presumptive reasonableness timeframes of 60-days and 90-days for local governments to act on permit applications involving existing and new wireline facilities in rights-of-way.

Legacy requirements that telecommunications providers continue offering low-demand, outdated technologies do not help consumers. Old rules based on outdated monopolistic market assumptions drain investment from broadband networks. For those reasons, we support the recommendation of commentors that the Commission should modify or eliminate legacy restrictions such as Section 214 discontinuance rules, carrier-of-last-resort (COLR) obligations, and eligible telecommunications carrier (ETC) requirements in geographic areas where providers no longer receive federal support or federal subsidies support market competitors. In such instances, there is no case for legacy rules that put regulated providers at a disadvantage. The Commission should use its Section 10 forbearance authority, its Section 11 review authority, its waiver authority, and its preemption authority to provide relief from outdated Section 214, ETC, and state COLR mandates while ensuring that all Americans have access to basic voice services.

Alternatively, the Commission could implement a rule or policy of rebuttable deregulatory presumptions to eliminate or modify outdated regulations. Under this approach,

clear and convincing evidence demonstrating noncompetitive conditions and consumer harm would need to be collected by the Commission to justify continued application of a regulation. Absent such evidence, the rule would be eliminated or at least modified as the evidence warrants.

The legacy video regulatory landscape bears no resemblance to 2022's marketplace in which consumers increasingly favor a dynamic, self-curated mix of subscription streaming services accessed on consumer-owned devices over traditional MVPD services. Thus, the Commission should identify legacy regulation of MVPD services based originally on a lack of competition and eliminate, modify, or recommend congressional repeal of such regulation.

The Commission's network non-duplication, syndicated exclusivity, program carriage, and program access rules are ripe for elimination or at least modification to be less intrusive and more reliant on market competition. Those rules do not benefit consumers, and agreements between TV programmers and video service providers should be governed by private contracts. Moreover, the Commission should sunset its video device regulations pursuant to Section 629(e). Those rules are not necessary, as consumers today own TVs, streaming boxes, smartphones, video game consoles, computers, and more for accessing online streaming and MVPD content.

In addition to Section 629(e), the Commission should consider using a rebuttable presumption of market competition as an analytical tool for eliminating or modifying old video rules. Under this approach, clear and convincing evidence demonstrating consumer harm tied to market power abuse would be required to justify retention of the regulation. And in instances where the Commission lacks authority to eliminate rules, the agency may be able to use rebuttable presumptions as a tool for modifying their application and make them less restrictive.

By eliminating, modifying, or recommending repeal of legacy regulations, the Commission can help promote entry and expansion of broadband and video services, boosting competition in those markets and enhancing overall consumer welfare.

II. The Commission Should Remove Regulatory Barriers to Entry and Expansion of Broadband Services

The RAY BAUM's Act requires the FCC, in preparing its report on the state of competition in the communications marketplace, to "assess whether laws, regulations, regulatory practices" of the federal, state, local, and tribal governments or demonstrated market practices "pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services."[2] The Free State Foundation's initial comments in this proceeding identified specific actions that the Commission should take to promote even more competition in the retail mass-market broadband Internet services market by removing costly regulatory burdens on investment and innovation.[3] In these reply comments, we acknowledge points of agreement with other commenters in this proceeding who have identified regulatory barriers that ought to be eliminated, modified, or recommended for repeal.

A. The Commission Should Increase Access to Spectrum and Flexible Use

The Commission has long recognized that "[a]ccess to spectrum is perhaps the most important input for the provision of mobile wireless services."[4] In light of the fact that "[a] larger spectrum supply will enable more competitors to service more Americans with next-gen services," the Free State Foundation's initial comments recommended that "the Commission

[2] 47 U.S.C. §163(b)(3).
[3] Comments of the Free State Foundation, The State of Competition in the Communications Marketplace, GN Docket 22-203, at: https://www.fcc.gov/ecfs/search/search-filings/filing/107012445202472.
[4] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Sixteenth Report*, at 17, WC Docket 11-186 (released Mar. 21, 2013).

should advance every proposal for identifying and readying spectrum that may realistically be suitable for commercial uses – whether on a licensed or unlicensed basis."[5] Accordingly, we agree with commenters who have identified the lower 3 GHz band as a top priority.[6] The Commission should continue to build on opportunities in that band.[7] We also support the review of other spectrum for repurposing, including the 4 GHz,[8] 7 GHz,[9] and 12 GHz bands.[10]

Additionally, the Commission should review its existing allocations and rules to identify bands where it may be able to increase permissible signal power in order to maximize spectrum use, whether for licensed or unlicensed purposes. Thus, we agree with commenters that the Commission ought to carefully consider raising power levels for the 6 GHz and 7/8 GHz bands to enable greater Wi-Fi connectivity for homes, schools, and offices.[11] Along with other commenters, we believe it worthwhile for the Commission to actively explore ways to boost incentives for secondary market transactions for spectrum licenses, as a strong secondary market may enable access to spectrum by more wireless broadband providers, including new entrants.[12]

B. The Commission Should Remove Local Regulatory Barriers to Infrastructure Deployment

The Free State Foundation's initial comments recommended that the Commission apply to wireline infrastructure in state and local rights-of-way the same type of shot clocks and fee caps that the agency adopted for small cell deployment.[13] Thus, we agree with commenters who

[5] Comments of the Free State Foundation, GN Docket 22-203, at 17.
[6] Comments of CTIA, GN Docket 22-203, at 61; Comments of NCTA, GN Docket 22-203, at 18.
[7] Comments of Competitive Carriers Association (CCA), GN Docket 22-203, at 11.
[8] Comments of CTIA, GN Docket 22-203, at 61.
[9] Comments of CTIA, GN Docket 22-203, at 61; Comments of NCTA, GN Docket 22-203, at 18.
[10] Comments of CCA, GN Docket 22-203, at 12.
[11] Comments of NCTA, GN Docket 22-203, at 16.
[12] Comments of NCTA, GN Docket 22-203, at 16.
[13] Comments of the Free State Foundation, GN Docket No. 22-203, at 16.

have made similar recommendations to the Commission.[14] Unreasonably high costs and undue permitting delays divert resources away from infrastructure deployments and inhibit Americans' access to next-generation broadband services. Those harms are no less real in the context of wireline facilities than in the context of small wireless facilities.

The Commission's 2018 *Small Cell Order* determined that access or application fees charged by state or local governments for deploying small wireless facilities inside and outside rights-of-way violate Sections 253 or 332(c)(7) unless they are premised on objectively reasonable approximations of the state or local governments' costs and are applied to all similarly situated competitors.[15] Based on Sections 253 and 332, the Commission also established shot clocks to define presumptively reasonable periods of time for making decisions on wireless infrastructure siting applications involving existing and new structures.[16] Importantly, the Ninth Circuit upheld the Commission's authority to make those determinations.[17]

The Commission should exercise its discretionary authority to declare that fees charged by state or local governments for deploying wireline facilities inside and outside rights-of-way that exceed a reasonable approximation of costs prohibits or has the effect of prohibiting the ability of any entity to provide broadband services, contrary to Section 253(a). In upholding the *Small Cell Order*'s limit on rights-of-way fees for small wireless facilities, the Ninth Circuit remarked that Section 253(c)'s provision that ensures cities receive "fair and reasonable" compensation for use of their rights-of-way does not mean that state and local governments

[14] Comments of INCOPMAS, GN Docket No. 22-203, at 26-28; Comments of US Telecom, GN Docket No. 22-203, at 23.
[15] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order ("*Small Cell Order*") (released Sept. 27, 2018), at ¶ 50.
[16] *Small Cell Order*, at ¶ 13.
[17] *City of Portland v. FCC*, 969 F.3d 1020 (9th Cir. 2021).

should be permitted to profit by charging providers fees above costs.[18] That same logic applies in the wireline infrastructure context. Additionally, the Commission should adopt presumptive reasonableness timeframes of 60-days and 90-days for local governments to act on permit applications involving existing and new wireline facilities in rights-of-way.

C. The Commission Should Eliminate, Modify, or Recommend Repeal of Legacy Regulatory Barriers to Broadband Deployment

Legacy requirements that voice providers continue offering low-demand, outdated technologies do not help consumers and they ought to be eliminated or at least modified. Old rules based on outdated monopolistic market assumptions drain investment from broadband networks that could provide consumers with more valuable, reliable, cost-effective service.

For those reasons, we support the recommendation of commentors that the Commission should eliminate or modify legacy restrictions such as Section 214 discontinuance rules, carrier-of-last-resort (COLR) obligations, and eligible telecommunications carrier (ETC) requirements insofar as the Commission has the delegated authority to do so. Particularly in geographic areas where federal subsidies are supporting market competitors, there is no longer a case for continuing those legacy rules. Indeed, continuing enforcement of such requirements puts the regulated providers at a disadvantage compared to their competitors.

The Commission ought to provide the type of relief proposed in comments by USTelecom:

> Where a competing provider receives federal funding to deploy high-speed broadband in an area, the incumbent LEC should be eligible for an automatic grant of any Section 214 discontinuance application where it chooses to no longer provide legacy services. Similarly, where an ILEC no longer receives universal service support, it should be able to seek relief from ETC requirements and COLR obligations, which should be removed or transferred to the newly funded provider in the area (to the extent they are necessary at all).[19]

[18] 969 F.3d at 1039.
[19] Comments of US Telecom, GN Docket No. 22-203, at 21.

The Commission should make use of its Section 10 forbearance authority, its Section 11 review authority, its waiver authority, and its preemption authority to provide relief from Section 214, ETC, and state COLR mandates while ensuring that all Americans have access to basic voice services. And if the Commission finds that it lacks the delegated authority to provide relief that is warranted by the facts, it should recommend to Congress that such rules be repealed.

Aside from outright eliminating those legacy mandates, the Commission could eliminate or modify the old regulations by implementing a rule or policy of rebuttable deregulatory evidentiary presumptions. A rebuttable deregulatory presumption would require the Commission to marshal evidence that competition is lacking in the local market in order to retain Section 214, ETC, or COLR requirements. Absent the proffering of clear and convincing evidence demonstrating noncompetitive conditions and consumer harm, the Commission would grant relief to the service provider from the regulation under review, or at least modify its application as the evidence warrants. Such a rebuttable presumption would not be outcome-determinative in a given instance, but it would be a means for the Commission to more expeditiously eliminate outdated regulations absent clear and convincing evidence they are still needed. This approach is discussed in much more detail in a January 2017 *Perspectives from FSF Scholars* titled, "A Proposal for Improving the FCC's Regulatory Reviews."[20]

III. The Commission Should Remove Regulatory Barriers to Entry and Expansion of Video Services

The Commission's Notice requests comment on "whether laws, regulations, regulatory practices, or demonstrated marketplace practices pose a barrier to competitive entry into the

[20] Randolph J. May and Seth L. Cooper, "A Proposal for Improving the FCC's Regulatory Reviews," *Perspectives from FSF Scholars,* Vol. 12, No. 1 (January 3, 2017), at: https://freestatefoundation.org/wp-content/uploads/2019/10/A-Proposal-for-Improving-the-FCC%E2%80%99s-Regulatory-Reviews-010317.pdf.

video marketplace, or to the competitive expansion of existing providers."[21] The Free State Foundation's initial comments in this proceeding observed that the legacy video regulatory landscape bears no resemblance to a marketplace transformed by consumers trending away from traditional MVPD offerings in favor of a dynamic, self-curated mix of subscription streaming services accessed on consumer-owned devices.[22] In those comments, we concluded that the state of video marketplace in 2022 compels reassessment of the MVPD regulatory model and the basis for continued government intervention in the market. And we recommended that outdated regulations be eliminated. Accordingly, we agree with commenters who have recommended that the Commission identify legacy state and regulation of MVPD services based originally on a lack of competition and explore whether to eliminate, modify, or recommend congressional repeal of such regulation.[23]

FSF's initial comments identified some obvious legacy regulatory targets for elimination, modification, or recommendation for congressional repeal. In particular, the Commission's network non-duplication and syndicated exclusivity rules are ripe for elimination.[24] Those rules do not serve any useful purpose and they do not benefit consumers. The terms of agreements between TV programmers and video service providers should be governed primarily by contracts negotiated at arms-length in the competitive marketplace, and not by government restrictions. To the extent that it has delegated authority to do so, the Commission also ought to eliminate its program access and carriage requirements, or at least modify them to make them less intrusive and more reliant on market competition.[25]

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[21] Public Notice: Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace, GN Docket No. 22-203 (May 16, 2022), at 7.
[22] Comments of the Free State Foundation, GN Docket 22-203, at 17-18.
[23] Comments of NCTA, at 33.
[24] Comments of the Free State Foundation, GN Docket 22-203, at 24.
[25] Comments of the Free State Foundation, GN Docket 22-203, at 24.

Furthermore, we agree with commentors that the Commission should sunset its video device regulations pursuant to Section 629(e).[26] As explained in the Free State Foundation's initial comments:

> Consumers today purchase a range of devices – TVs, dedicated streaming boxes, smartphones, video game consoles, computers, and more – upon which they access video content, including the services of traditional MVPDs, in ways well beyond the wildest dreams of the lawmakers who passed Section 629 over a quarter-century ago.[27]

In addition to the Commission's authority under Section 629(e)'s sunsetting provision for video device rules, the agency should consider using rebuttable presumptions of market competition as an analytical tool for eliminating or modifying legacy video regulations that are harmful and provide no benefit to consumers. Under this approach, clear and convincing evidence demonstrating consumer harm tied to market power abuse would be required to justify retention of the regulation. And in instances where the Commission lacks authority to eliminate particular video regulatory provisions, the agency may be able to use rebuttable evidentiary presumptions of market competition when it applies its legacy video regulations. When the Commission conducts case-by-case inquiries into provider conduct under its legacy video regulations, a clear and convincing evidence demonstrating consumer harm tied to market power abuse would be required to justify regulatory intervention. The Commission or a party supporting regulatory intervention or claiming occurrence of a violation would bear the burden of overcoming that presumption of market competition with proffered evidence. This approach to eliminating or modifying outdated video regulation is discussed in much more detail in a

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[26] 47 U.S.C. § 549(e). *See* Comments of NCTA, at 33. *See also* Comments of the Free State Foundation, GN Docket 22-203, at 24-25.

[27] Comments of the Free State Foundation, GN Docket 22-203, at 24-25. *See* Andrew Long, "Closing the Lid on 'Unlocking the Box' Should End Video Device Regulation," *Perspectives from FSF Scholars*, Vol. 15, No. 50 (Sept. 25, 2020), 10-11 (arguing that "[t]he FCC now should embrace the inevitable consequences of its findings and invoke the sunset provision"), at: https://freestatefoundation.org/wp-content/uploads/2020/09/Closing-the-Lid-on-Unlock-the-Box-Should-End-Video-Device-Regulation-092520.pdf.

February 2017 *Perspectives from FSF Scholars* titled, "A Proposal for Reforming the FCC's Video Competition Policy."[28]

The Commission should consider undertaking a comprehensive reassessment of its video regulations as part of its *2022 Communications Marketplace Report* proceeding. Or the Commission could establish a separate proceeding for its review. In any case, by undertaking a comprehensive reassessment of its video regulations and employing rebuttable presumptions of market competition, the Commission can bring its video policy into closer alignment with today's dynamic video marketplace and promote an environment more hospitable to investment and cross-platform competition.

IV. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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[28] Randolph J. May and Seth L. Cooper, "A Proposal for Reforming the FCC's Video Competition Policy," *Perspectives from FSF Scholars*, Vol. 12, No. 5 (February 8, 2017), at: https://freestatefoundation.org/wp-content/uploads/2019/10/A-Proposal-for-Reforming-the-FCC%E2%80%99s-Video-Competition-Policy-020717.pdf.