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June 4, 2019

The Honorable Michael F. Doyle, Chairman
Subcommittee on Communications and Technology
Energy and Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Robert E. Latta, Ranking Member
Subcommittee on Communications and Technology
Energy and Commerce Committee
U.S. House of Representatives
2322 Rayburn House Office Building
Washington, D.C. 20515

RE: Hearing on "STELAR Review: Protecting Consumers in an Evolving Media Marketplace"

Dear Chairman Doyle and Ranking Member Latta:

We at the R Street Institute ("R Street") commend you and the Subcommittee for holding this hearing on "STELAR Review: Protecting Consumers in an Evolving Media Marketplace."[1] Given the impending expiration of several key provisions that govern program carriage agreements and the broader shifts underway in the video marketplace, it is both appropriate and timely.

R Street's mission is to engage in policy research and outreach to promote free markets and limited, effective government. As part of that mission, we have researched and commented upon multiple policy issues related to American media regulation, including some of the video competition rules currently in place at the Federal Communications Commission ("FCC").[2] For the Subcommittee's convenience, we would like to highlight the following specific recommendations:

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[1] *Hearing on 'STELAR Review: Protecting Consumers in an Evolving Media Marketplace' Before the House Committee on Energy & Commerce*, 116th Cong. (June 4, 2019), http://bit.ly/2wAZz62.
[2] *See, e.g.*, Tom Struble and Joe Kane, "Comments of R Street Institute," *In the Matter of Modernization of Media Regulation*, MB Docket No. 17-105 (July 5, 2017), http://bit.ly/2wA0jbK.

To ensure a level playing field, program carriage rules must be harmonized across distribution platforms.

The history of video competition and the regulatory framework that governs this market is long and complex. To account for new distribution platforms and business models, Congress and the FCC have updated these rules periodically but there remains a great deal of regulatory underbrush.[3] Worse yet, these legacy regulations are uneven and tend to favor certain distribution platforms and business models over others, which ultimately distorts the market and harms competition. Set to expire at the end of this year, the STELA Reauthorization Act of 2014 is one example of such uneven regulation that distorts the video marketplace.

Originally with the Satellite Home Viewer Act in 1988 and periodically since then, Congress gave satellite television distributors certain rights that other multichannel video programming delivery ("MVPD") services did not have, including a right to import distant broadcast signals into a local video market pursuant to a compulsory statutory license.[4] This is similar to, but distinct from, the statutory license available to wireline MVPDs under Section 111(d) of the Copyright Act.[5] When they were first developed, different carriage rules for these different distribution platforms made some sense as a way to encourage new competition from satellite MVPDs in local video markets. But the video marketplace has changed dramatically since then. Wireline and satellite MVPDs now compete head-to-head in most local markets, and both sets of MVPDs must grapple with ongoing technological shifts that are enabling new competitive viewing options for consumers and programmers—including broadcasters' new ATSC 3.0 protocol and improved over-the-top video services enabled by the Internet Engineering Task Force's ("IETF") Real-time Transport Protocol ("RTP"). Accordingly, to promote fair and open competition among MVPDs, broadcasters and new entrants into the video marketplace, program carriage rules should be harmonized across distribution platforms as much as possible.

As competition grows, legacy rules should be relaxed or eliminated.

Open and fair competition can come only from a regulatory framework that levels the playing field and treats all video distribution platforms the same. One way to do that and to harmonize program carriage rules would be to regulate upward, imposing the rules that currently govern wireline MVPDs onto satellite MVPDs (and perhaps over-the-top video providers, as well). This could be done by making STELAR's provisions permanent and harmonizing them with Section 111(d) or by simply incorporating satellite MVPDs into Section 111(d). However, new competition from satellite MVPDs and other video providers suggests that many of the legacy regulations that govern these markets could be relaxed or even eliminated, as market forces may be able to sufficiently constrain bad behavior and protect consumers. Doing so would achieve parity and harmonize program carriage rules across distribution platforms by regulating downward, such as by allowing STELAR to expire and then removing the compulsory license for wireline MVPDs in Section 111(d), too. The video marketplace has been governed

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[3] *See* Committee on Energy and Commerce Staff, "Memorandum Re: Hearing on 'STELAR Review: Protecting Consumers in an Evolving Media Marketplace," (May 31, 2019), http://bit.ly/2wzxfkD.
[4] 47 U.S.C. § 325(b)(2)(C); 17 U.S.C. § 119.
[5] 17 U.S.C. § 111(d).

by specific rules and regulations for decades, but general copyright, contracts and antitrust law could also be used in this area, perhaps to even greater effect. Such an approach would take more effort on the part of Congress, but it may ultimately lead to better outcomes in the video marketplace.

Incremental changes could be made now, but any major reforms should be gradual and phased in over time to minimize disruptions in the current video marketplace.

Regardless of the course of action Congress pursues here, lawmakers should carefully consider the impact that a sudden shift in the regulatory environment could have on the current video marketplace. Many consumers rely on video programming for vital news and weather alerts, so Congress should try to minimize disruptions to these consumers. Incremental reforms could be made now, but any major reforms to the video marketplace should be gradual and phased in over time. For example, in 1996, when Congress directed the FCC to oversee the shift from analog to digital broadcasts, they did not simply allow all analog signals to be turned off with no chance for consumers to plan for the changes.[6] In fact, after several delays and efforts to help consumers adapt, it was not until 2009 that analog service was phased out completely, thirteen years after the passage of the Telecommunications Act.[7] Any major and unexpected changes to the video marketplace now could similarly harm consumers and thus Congress should ensure that any major reforms to the video marketplace are phased in gradually with adequate notice to consumers before implementation.

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Again, we commend you for your efforts to protect consumers in an evolving media marketplace. We also look forward to working with you and the rest of the Subcommittee as you consider potential legislation in this area.

Sincerely,

Tom Struble, Technology and Innovation Policy Manager
R Street Institute

Jeff Westling, Technology and Innovation Policy Fellow
R Street Institute

CC:

The Honorable Frank Pallone, Chairman
The Honorable Greg Walden, Ranking Member

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[6] *See* "Digital Television," *Federal Communications Commission* (last visited June 3, 2019), https://bit.ly/2WmnwgO.
[7] Ibid.