Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Expanding Consumers' Video Navigation Choices	)	MB Docket No. 16-42
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80

COMMENTS OF

THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These comments are submitted in response to the Commission's Notice proposing new regulations on how video devices and related delivery technologies are designed and operate.

Today's markets for video distribution and video devices are competitive and innovative. In fact, 99% of consumers have choices from three or more multi-channel video programming distributors (MVPDs). These competing MVPDs offer consumers their own video devices for leasing. Meanwhile, consumers have the option of purchasing their own CableCARD-compatible devices from third-party device makers. Consumers today have ample choice among online video distributor (OVD) services as well, viewable on mobile devices, gaming consoles, PCs, or media streaming devices. All told, more than half of all households with Internet access can stream video from the Internet to their TV using their smart TV, gaming console, Internet-connected Blu-Ray device, or a digital streaming media device. These choices for video devices

[*] These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

– available now – favor a policy of market freedom, not the Commission's proposal to adopt complicated new "open standards" tech mandates.

No demonstrable market problem exists to justify the kind of intrusive tech mandates proposed by the Commission. And it highly doubtful that any conceivable benefit could outweigh the heavy costs that the Commission now ignores – costs which will initially be paid by MVPDs or program content owners, but will ultimately be paid by consumers. The Commission performed no cost-benefit analysis of its proposal prior to its Notice. Nor did it even seek input to conduct such an analysis.

It is highly doubtful the Commission has any idea how costly it will be to implement its proposed tech mandates, which includes its proposed requirement that MVPDs make available to third-party device makers presently bundled video content and related information in so-called disaggregated "information flows." MVPDs also would be required to develop an open standard for delivering these information flows. At the same time, the Commission would ban certain technological approaches that MVPDs might use, such as HTML 5.

These tech mandates substitute bureaucratic preferences for freedom to innovate. Requiring video service providers to re-design physical devices and standards to satisfy the Commission's proposed regulations means sinking financial resources and research efforts into new boxes. Video service providers will have increased incentive to focus efforts on recouping their forced investments in the new devices and standards, instead of forging ahead toward an app-based future for video viewing. The proposed regulations thereby threaten to hinder the future transition to apps-based delivery of video services.

Consumer privacy also is jeopardized as a result of the forced access requirements coupled with disparate regulatory treatment between MVPDs and third-party device

manufacturers. The Commission would require MVPDs to hand over their "information flows" to third party device makers that are not subject to Sections 551 and 338 privacy requirements with which MVPDs must comply. And the Commission has no authority to enforce third-party device makers to be in compliance with MVPD privacy requirements. The Commission's proposal would confer advantages on third-party device makers providing access to MVPD content because they would not have to comply with the privacy requirements that apply to MVPDs. Receiving only partial protections when it comes to third-party device makers, consumers would not know with any certainty what privacy protections they have in their subscriber and viewing data.

The information flows targeted by the Notice's proposed regulation certainly include copyrighted video content. Negotiated licensing agreements are a critical mechanism for owners of video programming to exercise their right of control over use of their content. But the Commission's proposal effectively would undo those agreements and harmfully disrupt existing business dealings. Under the proposed regulations, third-party video device makers would gain a special right to use video programming commercially without having to negotiate with the copyright owners. Third-party device makers could take these programming information flows and repackage them with add-ons or perhaps advertisements for viewing on their retail devices. At best, video service providers would become a kind of forced middleman, negotiating licenses for the benefit of third-party device makers while perhaps policing their compliance also. In any event, the Commission's approach would warp contractual relations, impair the exclusive rights of video programming owners, and diminish the value of video programmers' intellectual property rights.

Proposed regulations in the Notice also clash with the First Amendment. Although the Commission may not wish to recognize this, MVPD editorial choices concerning video programming content, channel placement, and display menus are protected forms of free speech. Under First Amendment jurisprudence, the government is prohibited from interfering with MVPDs' ability to select, control, and identify their own speech messaging and branding. Requiring video service providers to develop a method to bundle content and menu products into "information flow" outputs for third party device makers to rearrange and rebrand infringes upon the free speech rights of video service providers. Free speech infringement results from the government compelling MVPDs to provide market competitors with access to their editorial and expressive content while depriving MVPDs of the ability to preserve the integrity of the speech to be delivered to consumers.

All told, the Commission's proposal: (1) subjects a dynamic, well-functioning market to a swath of tech mandates; (2) imposes unknown costs on industry and consumers; (3) imposes privacy regulations that gives preferential treatment to third-party device makers but leaves consumers potentially vulnerable; (4) impairs contract rights and the intellectual property rights of video programmers; (5) and infringes the free speech rights of MVPDs. The Commission should lay its proposal aside.

The video competition that now exists and the choices for video devices that today's consumers have call for reaffirmation of market freedom, not unnecessary, counterproductive, costly new tech mandates. In a dynamic environment such as today's video marketplace, a policy favoring market freedom offers the best means for facilitating future video device and video app breakthroughs that will benefit consumers.

Finally, the early high-profile involvement of the Obama Administration in this proceeding

– making it clear that the President's views are completely aligned with the FCC's proposal – is an early warning sign that, like the net neutrality rulemaking proceeding, this rulemaking could become highly politicized in a way that cast doubt on the FCC's independence. When it appears that political considerations may trump considerations rooted in supposed Commission expertise, the agency's institutional integrity may be jeopardized.

II. Conditions in the Video Device Market Are Competitive and Favor Market Freedom, Not Regulation

Video consumers have choices among multi-channel video programming distributors. According to the *Sixteenth Video Competition Report* (2015), "cable MVPDs accounted for approximately 53.9 percent of MVPD subscribers at the end of 2013," while "combined shares of the two DBS MVPDs accounted for approximately 33.9 percent of MVPD subscribers," and "all telco MVPDs accounted for approximately 11.2 percent of MVPD subscribers."[1] As of 2013, more than 99% of households had access to at least three competing MVPD providers and approximately 35% had access to at least four competing providers.[2]

MVPDs, whether cable, (direct broadcast satellite) DBS, or "telephone" operators, offer consumers video devices associated with their own networks, and which include their own unique features and functions. Comcast offers consumers its X1 DVR, for example, whereas DIRECTV offers consumers video devices such as the DIRECTV HR 44 Genie Server, and Charter Communications offers consumers its Worldbox device. As will be discussed further below, consumers can also purchase independently-manufactured or third-party CableCARD-compatible devices, such as the TiVo BOLT, for viewing cable MVPD services. Some non-cable

[1] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Sixteenth Report*, MB Docket No. 14-16 (rel. Apr. 2, 2015), at 11, ¶ 27, available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1.pdf.

[2] *Sixteenth Report*, at 15, ¶ 31.

MVPD networks also permit viewing via CableCARD devices. And MVPD subscribers have increasing options for video viewing through gaming consoles, tablet devices, and smartphones through at-home Wi-Fi connections and public hot spots.

Choices for video distribution and video devices extend far beyond MVPDs, however. Viewing the MVPD market in isolation from the array of non-MVPD-related choices results in an incomplete and misleading picture of the competitive landscape.

Consumers today have ample choice among over-the-top (OTT) or online video distributor (OVD) services. Relying on broadband Internet connections and enabling viewing through mobile devices, gaming consoles, PCs, or media streaming devices – OVDs are rapidly growing rivals to MVPDs. Nearly two-thirds of all broadband households subscribe to an OVD service.[3] Netflix has 75 million or more subscribers and Amazon Prime has 54 million subscribers.[4] As of April 2015, Hulu had 9 million subscribers.[5] Combined, these three biggest OVDs have 140 million or more subscribers. By way of comparison, a recent market estimate indicates that for MVPDs, "[y]ear-end 2015 residential subscriptions dropped to 96.7 million."[6] The *Sixteenth Competition Report* cited declines in MVPD subscriptions beginning in 2012-2013.[7] Those trends concerning MVPD cord-cutting or cord-shaving appear to be continuing. Market analysts forecast further declines in MVPD subscriptions.[8]

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[3] Parks Associates, Press Release: "Parks Associates Update to OTT Subscriber Churn Rates for Netflix, Hulu, and Amazon Users" (April 14, 2016), available at: http://www.einnews.com/pr_news/321428028/parks-associates-announces-update-to-ott-subscriber-churn-rates-for-netflix-hulu-and-amazon-users.

[4] Laura Gensler, "Netflix Tops 74 Million Members On Growing International Footprint," *Forbes* (Jan. 19, 2016), available at: http://www.forbes.com/sites/laurengensler/2016/01/19/netflix-fourth-quarter-earnings/#7435967e7df3; Brad Tuttle, "How Amazon Prime Is Crushing the Competition," *Money* (Jan. 25, 2016), available at: http://time.com/money/4192528/amazon-prime-subscribers-spending/

[5] Joan E. Solsman, "Hulu closes in on 9 million paid subscribers," CNET (April 29, 2015), available at: http://www.cnet.com/news/hulu-closes-in-on-9-million-paid-subscribers/.

[6] http://www.prweb.com/releases/2016/03/prweb13263922.htm

[7] *Sixteenth Report,* at 59, ¶ 133.

[8] *See, e.g.*, Toni Fitzgerald, "The big new worry: Cord shaving," *Media Life Magazine* (Feb. 29, 2016), http://www.medialifemagazine.com/big-new-worry-cord-shaving/.

Consumers also enjoy video viewing through their choices of digital streaming media devices. These multi-functional Internet-capable video devices are unaffiliated with MVPDs. They are also increasingly popular with consumers. According to one market research report, nearly 20% of U.S. broadband households have at least one streaming media device.[9] Among broadband households in the U.S., almost 20% have a streaming media device – whether the Roku 3, Amazon Fire TV, or Apple TV. Meanwhile, 8% of U.S. broadband households have a smaller stick device for streaming media to TVs or PCs, like the Google Chromecast or Amazon Fire TV Stick. The report estimates global sales of streaming media devices will reach 86 million in 2019. To put these streaming media device figures in perspective, a recent industry update indicates that the nine largest cable operators have deployed more than 53 million video devices to cable subscribers.[10]

Aside from media streaming devices, OVD services are also widely viewed via tablet devices, smartphones, gaming consoles, PCs, and smart TVs. All told, it has been recently reported that 49 million households – that is, 52% of all households with Internet access – can stream video from the Internet to their TV using a smart TV, gaming console, Internet-connected Blu-Ray device, or a digital streaming media device.[11]

The choices available to consumers among competing platforms and devices flatly contradict the Commission's tentative conclusion that "the market for navigation devices is not

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[9] *See* Parkes Associates, Press Release: "Parks Associates: Amazon, Apple, Google, and Roku Dominate Streaming Media Device Market With 86% of Sales," (Aug. 20, 2015), available at: http://www.marketwired.com/pressrelease/parks-associates-amazon-apple-google-roku-dominate-streaming-media-device-market-with-2049258.htm.

[10] NCTA, Letter – "Re: CS Docket No. 98-80 (Commercial Availability of Navigation Devices)" (Jan. 29, 2016), available at: http://apps.fcc.gov/ecfs/document/view?id=60001416410.

[11] Janko Roettgers, "One in Two U.S. Households with Internet Access Has TV Hooked Up for Streaming, *Variety* (March 3, 2016) (citing NPD's "Connected Home Entertainment" report), available at: http://variety.com/2016/digital/news/one-in-two-households-with-internet-access-has-tv-hooked-up-for-streaming-1201724235/.

competitive."[12] Its tentative conclusion is simply unsustainable in the face of the abundant market evidence of choice and competition between MVPDs offering different video devices as well as the alternatives such as media streaming devices, smart TVs, and other devices. The fact that consumers can make trips to retail outlets or make online purchases of CableCARD-enabled devices manufactured by third-parties also flatly undermines the Commission's conclusion that the market does not provide "commercial availability" of competitive navigation devices.[13] Few consumers appear to be interested in making trips to retail outlets and purchasing third-party devices rather than leasing devices provided by MVPDs.[14] The TiVo BOLT, for instance, retails from approximately $300 to $400.[15] For that matter, third-party device makers appear to charge higher monthly service fees than MVPDs.[16] Yet that choice is real and it is misleading for the Commission to dismiss it.

Moreover, in its Notice the Commission appears to take for granted the validity of certain "reported statistics" concerning MVPD-provided set-top rental fees.[17] The Notice implies that consumers are paying above-market rates, that existing rates show the need for rules, and that its proposed regulations would reduce rates for consumers. Analysis of the figures cited in the Notice, and the methodology by which those figures were computed, reveal flaws that call the

[12] *See* Notice, at 8, ¶ 13.
[13] *See* Notice, at 15, ¶ 25.
[14] *See* NCTA Letter, *infra*.
[15] *See* TiVo, "TiVo Bolt" (offering a 500 GB storage model for $299.99 and a 1000 GB model for $399.99), available at: https://www.tivo.com/shop/buy-bolt (last visited April 20, 2016).
[16] *See* TiVo, "Service Plans and Policies: Essentials - Service Plan Pricing and Availability" (listing Monthly Plan prices at $14.99/month and $19.99/month, for 1-year commitments and for no commitments, respectively), available at: https://support.tivo.com/articles/Essential_Summary/TiVo-Payment-Plans-and-Policies#pricingg (last visited April 20, 2016).
[17] *See* Notice at 13, ¶ 8, incl. fn. 44 (internal cites omitted).

Notice's pricing and pro-regulatory premises into question.[18] Contrary to the Notice, those "reported statistics" fall far short of showing any need for new tech mandates.

The Commission's tentative conclusion about the supposed non-competitiveness in the video device market is also belied by the Commission's own acknowledgment of the video market in its *Effective Competition Order* (2015).[19] The *Order* acknowledged nationwide and local video market competitive conditions, and on that basis adopted a baseline presumption that local MVPD markets are effectively competitive. By its *Order*, the Commission provided cable operators with broad relief from rate regulations concerning video services and cable operator-provided equipment, such as set-top box devices. Despite any evidence of significantly reduced competition in the market since the *Order* was issued, the Commission now proposes regulations on video devices far more onerous – and even less analytically defensible – than rate regulation.

III. The Commission's Proposed Video Device and Video App Regulations Would Cause More Harm than Good

Even assuming, for the sake of argument, that the video device market is not competitive, the Commission's proposed regulations would cause harm to video service providers and also cause harm to consumers. Such harms would outweigh any possible benefits.

One of the most disturbing aspects of the Commission's proposed rulemaking is its disregard for the costs its regulations would impose on MVPDs. The Commission proposes using regulatory fiat to force cable, satellite, and other video subscription services to re-engineer ways their networks deliver video, profoundly impairing their business contractual arrangements. Yet, the Notice contains no estimates of the potential financial costs of implementing its proposed

[18] *See* Hal Singer, "The Sketchy State Behind the FCC's Unlock the Box' Campaign," Forbes (February 5, 2016), available at: http://www.forbes.com/sites/halsinger/2016/02/05/the-sketchy-stat-behind-the-fccs-unlock-the-box-campaign/#43632c6c69b8.
[19] *Sixteenth Report*, at 10, ¶ 25.

regulations. The Commission did not perform a cost-benefit analysis of its proposal prior to its Notice. Nor did it take interest enough to ask for data to perform such an analysis.

Surely, the Commission has no idea how financially costly its proposal will be to implement. Just as sure, the Commission knows the costs of its proposal – however much they amount to – will be imposed on video service providers. But if the Commission is wholly ignorant of the prospective costs of its proposed regulations, how can it ascertain whether the promised benefits of its proposed regulations would exceed those costs?

What is known, or at least more knowable, is that prior Commission attempts to redesign video devices through regulation have made video devices even costlier to manufacture and therefore costlier for consumers. For example, the Commission's 2003 IEEE-1394 interface or FireWire data report requirement cost the industry an estimated $400 million in compliance costs.[20] All that for a rigid tech mandate that the Commission finally and wisely jettisoned in 2010. The cable industry has estimated that CableCARD-related costs to consumers have exceeded $1 billion.[21] By another reported estimate CableCARD adds $56 to the cost of each set-top box.[22] Indeed, the harm that results from regulating the design and operation of video devices is inevitably *consumer* harm. Consumers would inevitably be tapped by video service providers to pay for the compliance costs of the Commission's proposed regulations through price increases.

[20] Leslie Ellis, "Firewire: A $400 Million Black Hole," *Multichannel* (June 28, 2010), available at: http://www.multichannel.com/news/news/firewire-400-million-black-hole/378747.
[21] *See, e.g.*, NCTA, "50 Million Reasons to End the Integration Ban," (October 30, 2014), available at: https://www.ncta.com/platform/public-policy/50-million-reasons-to-end-the-integration-ban/
[22] *See* Neal M. Goldberg, NCTA, Letter – RE: National Broadband Plan, GN Docket No. 09-51; Commercial Availability of Navigation Devices, CS Docket No. 97-80, at note 1 (Nov. 18, 2009), available at: http://apps.fcc.gov/ecfs/document/view?id=7020348983.

The Commission insists it "has often been wary of mandating the adoption of specific technologies" and implies it is avoiding "tech mandates."[23] Nonetheless, its proposed regulations *are* tech mandates. The Commission requires MVPDs to make available to third-party device makers Commission-defined bundles of content and related information called "information flows."[24] It requires MVPDs to make those information flows available according to a standard MVPDs are required to develop. All the while the Commission prohibits MVPDs from using certain technological approaches, such as HTML 5 and digital rights management.[25] And the Commission hints it will adopt its own "fallback" specifications in the even that MVPDs do not design and implement things in the manner the Commission wants.[26]

Like other tech mandates, the Commission's proposed video device design regulations substitute bureaucratic preferences for freedom to innovate. Real innovation requires investment-backed risk-taking by market participants who must actually create and sell products and services. This is especially the case in dynamic markets, such as the market for video devices. But the proposed regulations replace "permissionless innovation" with a Commission permission approach that ignores the conditions of market freedom that lead to technological and consumer welfare-enhancing breakthroughs.

The Commission's proposed regulations also threaten to harm consumers by needlessly saddling consumers with physical boxes and hindering industry trends toward cloud-delivered and apps-based solutions to video viewing. The rise in smart TVs, small stick devices, and mobile device viewing evince a larger trend away from set-top boxes. Video access, security, delivery, and storage functions are increasingly pushed into the network and made available via

[23] Notice, at 28, ¶ 56.
[24] *See* Notice, at 18, ¶ 35.
[25] *See* Notice, at 29, ¶ 57.
[26] *See* Notice at 22, ¶ 43.

the Internet. For their part, MVPDs now give their subscribers the ability to view MVPD-delivered programming – such as TV Everywhere offerings – on gaming consoles tablets, laptops, and PCs. To date, these trends have been proceeding without the Commission's intermeddling. They portend a future that is increasingly apps-based, with the potential to become almost exclusively so.

But requiring video service providers to re-design physical devices and standards to satisfy the Commission's proposed regulations means sinking financial resources and research efforts into new boxes. Under the Commission's regulations, video service providers will have increased incentive to focus efforts on recouping their forced investments in the new devices and standards, instead of forging ahead toward app-based solutions. And should it prove more cost-effective for video service providers to comply with the Commission's tech mandates by designing a second device to attach to existing video devices, those mandates will end up increasing the number of physical devices in consumer households.

Consumer privacy is also potentially harmed as a result of the forced access requirements coupled with disparate regulatory treatment between MVPDs and third-party device manufacturers. MVPDs are subject to privacy protection requirements under Sections 551 and 338.[27] Yet the third-party device that the Commission would require MVPDs to hand over their "information flows" to are not subject to those privacy requirements. The Commission has no authority to enforce third-party device maker compliance with those privacy requirements.

In today's digital, IP-based converging communications market it is unreasonable to think consumers hold privacy protections that differ when data is handled by an MVPD or a third-party device maker. Common standards are easier for consumers to understand, for providers to comply with, and for governing authorities to enforce. But the Commission's

[27] *See* 47 U.S.C. §§ 551, 338(i).

proposal would confer advantages on third-party device makers providing access to MVPD content, since they would not have to comply with the privacy requirements that apply to MVPDs. Consumers would have difficulty knowing what privacy protections they have in their subscriber and viewing data, receiving only partial protections when it comes to third-party device makers.

IV. The Commission's Proposed Regulations Undermine Contracts and Impair IP Rights

The Commission proposed its new regulations as a means to "unlock the cable box." But if adopted, what the Commission's regulations would likely end up doing instead is unlock copyright protections for video content. If imposed, the new regulations would jeopardize the rights of video content owners and diminish the value of their intellectual property.

Owners of video content have exclusive rights over distribution of their programming. Accordingly, carriage of video programming on video networks is dependent upon business contracts. Video service providers negotiate detailed licensing agreements for rights to transmit copyrighted video to subscribers. Those agreements factor in audience size, channel tier placement, channel lineup neighborhoods, as well as access and security protections. Negotiated terms can also involve marketing and promotional efforts concerning the licensed video content. Other terms may involve sharing of advertising revenue or restrictions on ad placements for licensed video programming.

Negotiated licensing agreements are a critical mechanism for owners of video programming to exercise their right of control over use of their content. But the Commission's proposed regulations would effectively undo those agreements and harmfully disrupt existing courses of business dealings. Going forward, its proposed video device regulations would also sharply curtail the choices of copyright owners in making licensing agreements. Undermining

the video programming owner's control through regulation, as now proposed, threatens to reduce the value of their intellectual property.

Under its proposed regulations, MVPDs would be forced to make licensed video content available to third party device-makers by delivery of designated "information flows." Third-party devices makers can take these information flows and repackage them with add-ons or perhaps advertisements for viewing on their retail devices. By regulation, third-party video device makers would gain a special right to commercially use video programming without having to negotiate with the copyright owners. The Commission's regulations would thereby warp business contractual relations. Negotiation and enforcement of licensing terms would become far more precarious for copyright owners. And video service providers would become a kind of forced middleman. In effect, video service providers would be negotiating licenses for the benefit of third-party device makers while perhaps policing their compliance also.

Ultimately, the FCC's proposed video device regulations clash with principles of copyright law. The Copyright Act sets forth the exclusive rights of copyright owners in motion pictures and other audiovisual works. Under Section 106 of the Act those exclusive rights include reproduction, distribution, and public performance of copyrighted works.[28]

Video programming transmitted on cable, satellite, and other networks receives the protections of copyright law. Thus, the information flows targeted by the FCC's proposed regulation include copyrighted video content. By requiring copyrighted video to be made available to non-contracting third party device makers, the Commission's proposal would impair the exclusive rights of video programming owners under law. If and when a legal challenge to the Commission goes to court, it is all but certain the Commission's convoluted forced-access proposal for licensed video programming will be tossed out on copyright grounds.

[28] 17 U.S.C. § 106.

V. The Commission's Proposed Regulations Conflict with the First Amendment

The Commission's proposed regulations clash with First Amendment principles. MVPD editorial choices concerning video programming content, channel placement, and display menus are protected forms of free speech. Under the First Amendment, government is prohibited from interfering with MVPDs' ability to select, control, and identify their own speech messaging and branding. Requiring video service providers to develop a method to bundle content and menu products into "information flow" outputs for third party device makers to rearrange and rebrand would infringe upon the free speech rights of video service providers.

The Commission insists its proposed regulations "would not interfere in any way with MVPDs' choice of content or require MVPDs to provide content to anyone with whom they have not voluntarily entered into a subscription agreement."[29] But this misses the nub of the First Amendment problem. MVPDs would be required to turn over to third-party device makers "information flows" in which they have unmistakable First Amendment interests but which by virtue of the regulations the MVPDs would be deprived of securing once they are turned over. Free speech infringement results from government compelling MVPDs to provide competitors – not consumers – with access to their editorial content while depriving MVPDs of the ability to preserve the integrity of the speech to be delivered to consumers.

First Amendment difficulties are also downplayed to the extent the Commission describes its proposed regulations as requiring "the disclosure of purely factual and uncontroversial information concerning the MVPD's service."[30] Undoubtedly, aspects of the "information flow" that MVPDs would be required to disclose, such as programming availability to consumers and content entitlement for devices, may fit the Commission's characterization.

[29] Notice, at 23, ¶ 45
[30] Notice, at 23, ¶ 45.

However, the information flows contain "original programming" inextricably tied to the exercise of "editorial discretion over which stations or programs to include" whereby MVPDs "communicate messages" entitled to the protection of the First Amendment.[31] Even if content-neutral, the Commission's proposed regulations should be subject to intermediate scrutiny under First Amendment jurisprudence rather than "a more relaxed standard" described in the Notice.[32] The competitive market data concerning MVPD competition and available choices for video devices cast serious doubt on any Commission claims that its regulations further an important or substantial governmental interest in the availability of competing video devices. The breadth and intrusiveness of its "information flows" and other forced access tech mandates are also greater than what is essential to further such an interest.

VI. Conclusion

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

Respectfully submitted,

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[31] *Los Angeles v. Preferred Communications, Inc*., 476 U.S. 488, 494 (1986) (quoted in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, at 636 ("*Turner I*").

[32] Notice at 23, ¶ 45 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). For application of intermediate scrutiny to regulations of cable video services, see, *e.g*., *Turner I*, 512 U.S. at 643; *Time Warner Entertainment Co., L.P. v. FCC*, 94 F.3d 957, 977 (D.C. Cir. 1996).