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Consumers Would Benefit from Deregulating the Video Device Market

by

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The ways that consumers view video content continues to change. In August, the launch of Time Warner Cable's app for the Xbox 360 was announced. The TWC App lets consumers watch 300-plus channels on their video game console. And in September, Verizon rolled out its Enhanced Mobile FiOS App. This one allows consumers to watch programming from several cable network channels as well as on-demand selections on wireless devices and tablets.

Both apps allow consumers to watch video content without cable set-top boxes. Before our eyes, the idea that set-top boxes are the sole means of viewing subscription video services is being upended.

With the video market changing so rapidly – especially with regard to the ways consumers access video – it is not surprising that a bill has been introduced in Congress that would align federal policy toward video devices with today's competitive market. H.R. 3196, just introduced by Congressmen Bob Latta and Gene Greene, would remove regulatory roadblocks to further video device innovation.

Importantly, H.R. 3196 would eliminate one of the most misguided aspects of the current video device regulation regime: the "integration ban." This FCC-created rule prohibits multi-channel video programming distributors (MVPDs) from making available to

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consumers devices that contain both navigation of video content functions and security functions. It belies common sense to think that consumer welfare in the broadband era is enhanced by the FCC banning – or at least requiring a waiver for – video devices that download security functions. Hopefully, H.R. 3196 gets a prompt hearing that leads to its enactment.

For its part, the FCC has ample means to set policy better suited to today's competitive video market. It can remove the regulatory barriers that prohibit or at least inhibit MVPDs from offering innovative, integrated video devices to consumers. Section 629 of the Communications Act contains a provision that requires the FCC to sunset set-top box regulations if it finds that the market is "fully competitive." The FCC should employ this sunset provision. Just as the FCC solicited public comment earlier this year on how it should approach the sunset of the legacy public switched telephone network (PSTN), the FCC should also take action aimed at the eventual sunset of legacy cable-set top box regulations.

Keep in mind, however, that the integration ban is the FCC's own creation. And the Commission appears uninterested in removing that barrier. H.R. 3196 should therefore be the preferred vehicle for consumer welfare-based regulatory reform. In addition, H.R. 3196 would go a long way to counter the FCC's push for broader regulation of broadband-enabled video devices.

The Commission's ill-conceived "AllVid" proposal would impose wide-ranging government controls over how MVPDs design and operate video devices. Fortunately, the AllVid concept has gone nowhere in the time since the FCC proposed it. If anything suffers serious design defects, it's the AllVid concept. The FCC's proposal is beset by policy and jurisdictional flaws, not to mention it potentially violates the First Amendment.

Furthermore, the FCC is now mulling over whether to re-impose decade-old set-top box-related encoding rules. Those are rules that the D.C. Circuit Court of Appeals threw out earlier this year. Pro-regulatory advocates are using the occasion to renew calls for AllVid or a similarly intrusive set of government controls over broadband-enabled video devices. Advocates of regulation want CableCARD-related regulations to serve as a placeholder until AllVid or something like it could be imposed and govern how video devices are designed and operate in the broadband era.

Much more important than the fate of encoding rules is the broader question of whether video devices will be subject to more regulation or less regulation. In this respect, the 2003 encoding rules and *EchoStar v. FCC* (2013) saga offers important lessons about the downsides of government attempts to engineer the future of video device viewing. The FCC's 2003 order imposing the encoding rules recognized that subjecting only one set of market players to restrictions would put them at a competitive disadvantage in meeting consumer demand. This points up a much more general concern: Regulating the design

and operation of video devices provided by MVPDs could harm MVPDs' future ability to compete with unregulated manufacturers of mobile devices, tablets, video game consoles, and other video viewing devices.

Also, the FCC's 2003 order imposed regulations out of concern for HDTV early adopters and the DTV transition. Time and change have rendered those rationales obsolete. Similarly, obsolete rationales still govern FCC policy toward video devices. Section 629 of the Communications Act, the primary source of FCC authority over video devices, was premised on early 1990s assumptions of cable monopolies. But cable operator market share has dropped to near 60%, with competition from DBS, telco entrants, and now online video distributors (OVDs). Relying on those same outdated premises to impose a new government framework controlling how video devices are designed and operate surely creates a mismatch with actual competitive conditions in the broadband era.

While the D.C. Circuit's ruling in *EchoStar* vacated the FCC's 2003 order and thereby threw out the encoding rules, plenty of regulations remain that are simply unfit for the video market's future. H.R. 3196 would put a stop to perhaps the worst excess of the FCC's video device regulatory regime. This welcome legislation would ensure that in the future, consumer choice will not be diminished by video device regulations that prohibit innovations from coming to the market.

Consumer welfare should *not* be sacrificed to regulations protecting competitors. With the growth of competitive and innovative video service options for consumers, government controls over how video devices are designed or should operate are unjustifiable. Offerings like the TWC App or the Enhanced Mobile FiOS App are products of marketplace innovation, not regulation. And an AllVid-like regime of intrusive regulations would also have the effect of restricting consumer access to future video viewing innovations.

The FCC shouldn't risk banning or even inhibiting future inventions from the video device market. Consumers deserve better. In light of today's dynamic market and the Section 629 sunset provision, the Commission should consider ways to reduce government set-top box controls and eventually eliminate them. Even better, H.R. 3196 now offers an additional avenue for removing regulatory barriers and promoting video consumer welfare.

Request to Re-impose Encoding Rules Rekindles Larger Device Regulation Debate

This latest round of clamoring for video device controls is occasioned by TiVO's petition to the FCC. The Commission is taking public comments on TiVO's request that the FCC re-impose encoding regulations regarding copyrighted program viewing through cable set-top boxes.

The encoding rules were thrown out by the D.C. Circuit in *EchoStar v. FCC* (2013). I profiled that ruling in my *Perspectives from FSF Scholars* paper, "[A Recent Appeals Court Ruling on Ancillary Power Limits Could Curb Regulatory Overreach](#)." The D.C.

Circuit concluded that the FCC's 2003 order exceeded agency authority by subjecting DBS providers to those rules. Now TiVo and certain other interests want the encoding rules put back on the books and applied solely to cable operators.

After a decade in place, encoding rules are hardly worth getting worked up over. Comments filed in the proceeding contend those regulations are no longer controversial. It has been said they now embody industry consensus among cable operators, video programmers, and independent device manufacturers. Still, those considerations actually cut *against* re-regulation. If video content is reaching consumers and giving them choices, the FCC should leave matters to the market. It can instead monitor the video market for any instances of anticompetitive conduct causing consumer harm and take more targeted action, if warranted.

Also, the case supplied by the FCC in adopting the encoding rules has largely vanished. In 2003, the FCC believed rules were needed to protect HDTV early adopters and to facilitate the DTV transition. Flash forward ten years and HDTVs are commonplace. "As of 2012, 85.3 million U.S. television households, or 74.4 percent of such households, have sets capable of displaying and/or receiving digital signals, including HD television signals," according to numbers cited in the FCC's [15th Video Competition Report](#). Meanwhile, the June 2009 completion of the DTV transition is now more than four years in the rearview mirror.

Furthermore, with the *EchoStar* ruling now prohibiting the FCC from imposing encoding rules on DBS, it's not unreasonable to think that cable operators will be at a regulatory disadvantage if they are singled out for re-regulation. The FCC's 2003 order was insistent that encoding regulations apply to both cable and DBS, so as to "avoid the creation of a regulatory and marketplace imbalance between cable and DBS." "Absent this approach," the order concluded, "cable operators would be at a significant competitive disadvantage in obtaining access to content."

Lessons for the Larger Debate Over Video Device Design Regulations

Whatever the fate of old encoding rules, far more important is the ongoing debate over future regulations of video devices. Public comments submitted to the FCC regarding TiVo's petition resumed that debate.

Pro-regulatory advocates again urged the FCC to keep the CableCARD regulatory regime intact. In its [Charter Waiver Order](#) (2013), the FCC's Media Bureau concluded that the CableCARD regime was no longer enforceable in light of the *EchoStar* ruling. But certain device regulations remain in force. Those include the FCC's "integration ban" that requires MVPDs separate security and navigation functions – discussed further below. Advocates of regulation want CableCARD-related regulations to serve as a placeholder for a new regulatory apparatus to govern how video devices are designed and operate.

But the FCC encoding rules and *EchoStar* saga offers important lessons about downsides to government attempts to design and engineer the future of video devices and viewing. Consider the technological neutrality or parity problems of video device design regulations. The FCC's 2003 order recognized that subjecting only one set of market players to regulatory restrictions would put them at a disadvantage. That problem remains today and will likely increase. Regulating the design and operation of MVPD-provided video devices could harm their ability to compete with unregulated manufacturers of mobile devices, tablets, video game consoles, and other video viewing devices. Consumer welfare depends on an environment where innovation and competition can take place and produce more product choices in the market.

As alluded to earlier, in a market characterized by technological and consumer behavioral change, video device regulations will almost inevitably outlive FCC-proffered rationales. The FCC's 2003 order imposed regulations out of concern for nascent products and services that are now firmly established. Moreover, Section 629 of the Communications Act, the primary source of FCC authority over video devices, was premised on early 1990s assumptions of cable monopolies. But cable operator market share has dropped some 30% since that time, with competition from DBS and telco entrants. And now online video distributors (OVDs) offer another set of choices to consumers. Future comprehensive regulation of video device design and operation would be a mismatch with actual competitive market conditions.

Section 629 Sunset: A Way Forward to a Deregulated Video Device Market

The D.C. Circuit's ruling in *EchoStar* vacated the FCC's 2003 order and thereby threw out the encoding rules. Similarly, the FCC has means at its disposal to eliminate regulations that are unfit for the future video market. Section 629 of the Communications Act contains a provision that requires the FCC to sunset set-top box regulations if it finds that the market is "fully competitive." The FCC should take the sunset option seriously.

Earlier this year the Commission sought public comment on how it should approach the retirement of the legacy voice telephone regulatory apparatus, the PSTN. At the very least, the FCC should repeat that approach when it comes to the legacy cable set-top box regulatory regime. It should chart out a future sunset of set-top box rules in light of competitive conditions. The days of uni-directional analog cable set-top boxes have given way to cross-platform competition characterized by functionalities including: all-digital signals, HDTVs, broadband-connectivity, time-shifted viewing, DVRs, video-on-demand, whole-home viewing, TV-Everywhere, and multi-device viewing. From both [intuitive](#) and from more [empirical](#) standpoints, today's video market is fully competitive.

A Congressional Approach to Ensuring a Deregulatory Future for Video Devices

Congress can also play a constructive role in bringing federal regulatory policy regarding video devices into alignment with today's competitive conditions in the video market. Legislation introduced in Congress on September 26 would eliminate one of the most misguided aspects of video device regulation: the "so-called integration ban."

The integration ban is an FCC-created rule prohibiting MVPDs from making available to consumers devices that contain both navigation of video content functions and security functions. It belies common sense to think that consumer welfare is enhanced by the FCC banning – or at least requiring a waiver for – video devices that contain downloading security functions. Permission for downloadable security functions was the subject of the *Charter Waiver Order*, for instance.

H.R. 3196 – introduced by Congressmen Bob Latta and Gene Greene – would ban the integration ban. The legislation is a welcome addition to the broader debate over video device regulation in the broadband era. H.R. 3196 deserves a prompt hearing and passing vote by Congress.

FCC's Misguided "AllVid" Regulatory Morass

Regrettably, much of this debate over future regulation of video devices has been fuelled by the FCC's ill-conceived "AllVid" proposal. AllVid would impose wide-ranging government controls on how all MVPDs design and operate the video devices they make available to subscribers.

Under the proposal, all MVPDs must make available to subscribers a special "adapter" or "set-back" device – providing access, provision, decoding, and reception functions – to connect to all video devices. That includes connecting devices manufactured by companies unaffiliated with MVPDs. Alternatively, MVPDs must use an AllVid adapter as a "gateway" device for allowing all consumer electronic devices throughout a subscriber's home network to access MVPD services. Included in the AllVid are requirements for communications protocols, encryption and authentication standards, audio-visual codecs, as well as ordering and billing methods. The AllVid proposal would also regulate video programming menu and guide display as well as video content search functionality. In public comments to the FCC on the TiVo petition, pro-regulatory advocates called for AllVid-like regulations.

Thankfully, AllVid has gone nowhere in the three-plus years since the FCC floated the proposal. As I have argued on prior occasions, AllVid suffers design defects of its own. The proposal is severely problematic on [public policy](#), [jurisdictional](#), and [First Amendment](#) grounds.

Conclusion

Like the TWC App or the Enhanced Mobile FiOS App, future mobile and multi-device video viewing innovations should not be subject to a host of technical government rules. Nor should such advances require waivers. Unfortunately, the FCC is spending time tinkering with outdated rules when it should be charting a deregulatory course to match today's dynamic broadband-enabled market conditions.

In a video market characterized by change and choice, consumers should decide what services and devices receive approval or disapproval. The FCC should sunset set-top box regulations rather than hamper the video device market's future with heavier sets of controls. And Congress should carefully consider adopting H.R. 3196.

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