



Perspectives from FSF Scholars
August 28, 2015
Vol. 10, No. 30

FCC Should Finally Sunset Its VCR-Era Video Device Regulations

by

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Introduction

In an era of video devices featuring cloud-based DVR functions and ultra HD viewing, why is the FCC still enforcing device regulations dating back to the days of VCRs? And why is the Commission encouraging adoption of new rules when a stronger case exists for eliminating the old rules?

These are important questions for the Commission – and the public – to be asking.

September 4 is the deadline Congress set for an advisory committee working group to submit to the FCC a report recommending new downloadable security standards for video devices. Yet the Commission has steered the group in a problematic pro-regulatory direction. FCC staff instructed it to propose standards for unbundling multichannel video programming distributors' (MVPDs') video and menu content for repackaging by third-party providers. That instruction exceeds Congress's mandate and is an invitation for the adoption of unsound policy.

It appears the Commission hopes to use the report as a springboard for new video device regulations. But the case for regulating video devices based on lack of competition has collapsed. Cable, direct broadcast satellite, and former telco companies compete head-to-head

for video subscribers. Online video distributors (OVDs) like Netflix and Amazon Prime now have over 100 million subscriptions – equal to or greater than the number of MVPDs’ subscriptions. Also, there is an emergent streaming media device market segment, which includes Roku 3, Amazon Fire TV, and AppleTV. As many as 86 million streaming media devices will be sold globally by 2019. OVD and streaming media devices offer consumers an alternative to MVPDs.

New regulatory mandates imposing uniform device standards threaten to choke the investment and innovation in video device technology that has taken place outside the scope of FCC requirements. Regulation also harms the ability of MVPDs to make competitive offerings to consumers in response to challenges posed by OVD and streaming media devices.

Whatever the report recommends, the FCC should consider another course: eliminating its video device regulations. In Section 629(e), Congress established a course for sunseting video device regulations when competitive conditions in the device market are ripe. That time has come.

The FCC should declare the video device market “fully competitive” and sunset its device regulations. The Commission ought to be willing – indeed, it should be eager – to show that it can get rid of regulations that are no longer necessary in light of the development of a competitive market.

FCC Video Device Regulations

Section 629 of the Telecommunications Act of 1996 is the source of the FCC’s authority to regulate video devices leased to consumers by multi-channel video programming distributors (MVPDs). It charges the Commission with ensuring there is a commercial market for retail devices that receive video subscription services.

Recently, the FCC’s video device regulations have been somewhat curtailed. The D.C. Circuit’s ruling in [EchoStar v. FCC](#) (2013) threw out the FCC’s CableCARD rules for video devices. The STELAR Act of 2014 repealed the FCC’s rules that banned integration of video navigation and security functions in the same device.

The absurdity of the FCC’s ban on video navigation and security functionality in the single compelled Congress’s repeal. The ban prohibited MVPD-provided devices from even downloading security software from the Internet. Regulation requiring a separate device or device component be required to provide both navigation and security functions was technologically inefficient, economically costly, and inconvenient to consumers. At the same time it repealed the “integration ban,” the STELAR Act also charged the FCC’s Chairman to set up a working group – called the Downloadable Security Technical Advisory Committee (DSTAC). Congress authorized the group to report and recommend technical capabilities and standards for downloadable security. The standards are to be “not unduly burdensome, uniform, and technology- and platform-neutral.”

Unfortunately, the FCC's actions regarding DSTAC reveal its pro-regulatory bias. As we have written about previously, FCC has pushed DSTAC to exceed Congress's mandate for recommending downloadable security standards. FCC staff has instructed DSTAC to come up with a "black box" for third parties to repackage content and menu products for resell. Seemingly stung by the D.C. Circuit's ruling that threw out CableCARD rules and Congress's repeal of the FCC's "integration ban," the Commission appears bent on re-asserting control over how video devices are designed and function.

The Collapsing Case for Regulating Video Devices

FCC regulation of video devices has long outlived its reason for being. Section 629 passed Congress at a time when cable operators still had more than 90% market share for video subscription services. It was adopted during the days of VCRs and analog video technology. And [the FCC's initial implementing order](#) expressly rooted its video device regulations in 20th century monopoly telephone attachment principles.

The FCC has conceded that today's video market is competitive. In April the FCC's *Effective Competition Order* (2015) readjusted some of its old cable regulations "for the first time in over 20 years, to reflect the current MVPD marketplace." The *Order* examined nationwide and local video market competitive conditions and adopted a baseline presumption that local MVPD markets are effectively competitive. This acknowledgment of effective competition in MVPD services undermines the analytical basis for video device regulations.

According to the FCC's [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." Further, the largest nationwide provider of MVPD services is no longer a cable operator. AT&T-DIRECTV serves approximately 26% of all MVPD subscribers. The *Sixteenth Report* estimated that, as of 2013, more than 99% of households had access to at least three competing MVPD providers and that approximately 35% had access to at least four competing providers.

Beyond market share indicators of competitiveness, today's video market is marked by continuous technological innovation. The old market for one-way analog cable service has been dramatically transformed. Digital video services in hi-definition – and now ultra HD – have replaced analog, with two-way functionality such as video-on-demand, time-shifting, TV-Everywhere, and whole homing now readily available. Consumers now enjoy Internet-connected HD DVRs, as well as cloud-based DVRs. Video viewing choices through gaming consoles and mobile viewing choices through at-home Wi-Fi connections and public hot spots are also offered to consumers. Doubtless, choices for video programming content have grown significantly since the early 1990s, with wider varieties of niche and premium content increasingly available.

Vibrant competition and rapid innovation in the MVPD market provide ample reason for removing video device regulations. Emergence of online video distributor (OVD) services and streaming media devices clinches the case for finally sunseting device regulations.

OVD and Streaming Media Device Competition Cement the Case for Sunset

OVDs or over-the-top (OTT) video services – relying on broadband Internet connections and enabling viewing through mobile devices, gaming consoles, PCs, or media streaming devices – now offer consumers an alternative vertically-integrated platform.

OVDs are rapidly growing competitive rivals to MVPDs. The *Sixteenth Report* stated: “From year-end 2012 to year-end 2013, the total number of MVPD video subscribers posted its first-ever, full-year decline, falling from 101.0 million to 100.9 million households.” Indeed, recent [news reports](#) indicate that investors anticipate steep MVPD subscriber losses, or at least take the threat of such losses [very seriously](#).

The *Sixteenth Report* also observed one industry estimate that “as of 2013, more than 53 million U.S. households watched online programming with at least one Internet-connected device, including computers, game consoles, streaming media players, television sets, and Blu-ray players, with an average of 4.8 such devices per online viewing household.”

More recent reports indicate that Netflix now has more than 65 million subscribers, Hulu Plus has approximately 9 million subscribers, and Amazon Prime has 40 million or more subscribers. OVD subscriptions thus total 100 million or more – a number equal to MVPD subscriptions at the end of 2013.

In addition to overall OVD subscribership growth compared to the decline of MVPD subscribership, a handful of surveys cited by the *Sixteenth Report* also shed light on growing OVD substitution trends:

- 8% of U.S. households reported they eliminated their MVPD service in the third quarter of 2013, compared to 4% having done so in the first quarter of 2013;
- 8% of survey respondents dropped premium cable networks in 2013, and 7.6% reduced the level of their MVPD service;
- 15.3% of adult broadband and MVPD subscribers were likely to cancel their MVPD service in 2013, up from 15.1% in 2012; *and*
- 15% of households that kept MVPD service decreased the level of service, with 69% of these cutting back on the number of channel tiers purchased.

The rapid rise of OVD services coincides with the emergence of the stream media device market. These Internet-capable devices are unaffiliated with MVPDs and growing in popularity with consumers. According to a recent market research report, nearly 20% of U.S. broadband households have at least one streaming media device. 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. And at least 2% of U.S. broadband households have both types of devices. The report estimates global sales of streaming media devices will reach 86 million in 2019.

To put these figures in some perspective, a [cable industry July 31, 2015, letter](#) to the FCC indicates that the nine largest cable operators have deployed more than 53 million cable video devices to cable subscribers. At the same time, “there have been over 617,000 CableCARDS deployed for use in retail devices by the nine largest incumbent cable operators.” In other words, MVPD consumers overwhelmingly prefer to lease video devices from their provider instead of making separate trips to the store to purchase their own, unaffiliated video devices. These numbers also indicate that consumers interested in alternatives are far more inclined toward innovative devices developed and marketed outside the purview of the FCC’s old device regulation regime.

Of course, new OVD services as well as many streaming devices integrate with MVPDs to offer complementary services. But those new services and devices also offer an independent alternative for video viewing that is increasingly popular with consumers, especially cost-conscious consumers. Indeed, the rise of OVDs and media streaming devices constitute video market segments that pose growing challenges to MVPD market and MVPD-provided device market segments. Thus, the disruptive presence of OVDs and the streaming media devices not only challenges MVPDs – it also challenges the rationale for intrusively regulating MVPD-provided video devices. The old rationale for regulating devices based on lack of competition no longer holds. And prolonging the life of such regulation for MVPDs and MVPD-provided devices threatens to unfairly restrict their ability to entice consumers who show growing interest in the unrestricted OVDs and streaming media devices.

Instead of New Regulations, the FCC Should Finally Sunset Its Old Regulations

Whatever standards the DSTAC report might ultimately recommend, the FCC should consider an alternative course to imposing new regulations. The Commission should finally eliminate its analog, VCR-era video device regulations. It should finally allow a larger role for entrepreneurship, innovation, and competition fit for today’s digital, HD, IP-connected video marketplace.

Section 629(e) contains a unique mechanism for sunseting video device regulations. It provides the regulations adopted “shall cease to apply when the Commission determines that: (1) the market for the multichannel video programming distributors is fully competitive; (2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and (3) elimination of the regulations would promote competition and the public interest.”

Given the choices that consumers now have for video services and video devices, the Commission should declare the markets for MVPD services and MVPD devices “fully competitive.” The Commission’s *Effective Competition Order* set the table with its findings that local cable markets are presumptively subject to “effective competition” in MVPD

services. By factoring in consumer adoption trends involving OVDs and streaming media devices, there is ample reason for declaring the markets fully competitive and eliminating video device regulations immediately or on a fixed but short timetable.

Conclusion

Regulating an innovative marketplace with ultra HD video, cloud-based DVR services time-shifted, and whole home viewing according to analog-era and telephone monopoly attachment premises is foolhardy. It risks restricting future investment and innovation in MVPD services and MVPD-affiliated devices that could benefit consumers.

The anti-competitive basis for regulating video devices has collapsed. Monopolistic conditions do not exist in the MVPD market. Consumers have competitive choices among competing MVPD platforms. And OVD and streaming media devices now play disruptor roles in the video market, offering consumers additional video viewing choices.

There is ample evidentiary basis for the Commission to declare the above markets “fully competitive” and to sunset its Section 629 regulations. The Commission should make use of the authority Congress gave it and open the way for an even more vibrant future for video device innovation.

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Further Readings

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