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FCC's Cognitive Dissonance Leads to Regulatory Policy Run Amok

by

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The Federal Communications Commission has a bad case of cognitive dissonance when it comes to assessing the competitiveness of today's video marketplace. Not surprisingly for a federal agency with a built-in pro-regulatory bent, the Commission's malady leads to regulatory policy run amok.

FCC Chairman Tom Wheeler recently announced a rulemaking proposal, which the full Commission is set to consider on February 18, to regulate the design features and functionalities of set-top TV navigation devices. This proposal currently is Exhibit A in showing the agency's cognitive dissonance.

Back in June 2015, the Commission adopted a rule establishing a presumption that local video markets, on a nationwide basis, are subject to "effective competition." The practical result of this commendable action is to prevent local franchising authorities from regulating basic cable television rates and associated equipment, such as TV set-top devices, unless the local authority rebuts the competitive presumption.

In defending adoption of the newly-adopted competitive presumption, the Commission pointed to the dramatic changes that have occurred in the video marketplace since the FCC started regulating basic cable rates after passage of the Cable Act of 1992. As the agency explained in a brief filed in the court of appeals on February 2, 2016, two decades ago, in most locations, a single cable operator often was the only purveyor of multichannel video service. Now, the Commission concedes in its appellate brief that there has been a "transformation" of the multichannel video marketplace, acknowledging that "consumers have alternatives to cable," and "cable's market share has sharply declined."

Indeed, the FCC's own figures from 2013 – the most recent available – show that cable's share of the multichannel video distribution market has plunged to approximately 54%, with the two satellite operators garnering 34% and telephone companies the rest.

In light of the FCC's February 2 brief touting the competitiveness of the video marketplace, it's completely understandable if you are surprised that only a few days before – on January 27 – Chairman Tom Wheeler proposed that the government mandate new uniform, "open" standards for the set-top TV navigation devices (now often called DVRs) used in connection with the provision of multichannel video service. Wheeler wrongly suggests that the cable, satellite, and telephone video providers' market power means consumers lack alternatives when it comes to choosing set-top boxes.

As an analytical matter, Chairman Wheeler's proposal is fundamentally inconsistent with the FCC's recent conclusion that the multichannel video marketplace is presumptively competitive. Wheeler implies that 99% of subscribers choose to lease a set-top device from their multichannel video provider. Even if this figure is correct, because alternatives exists, the vast majority of subscribers do so as a matter of preference and convenience.
But the key point is that the various video providers, whether cable, satellite, or telephone operators, each offer their own associated set-top devices, each with their own special features and functions. And these different devices are integral elements of the video providers' overall competitive offerings. For example, Comcast proudly touts the attributes of its X1 DVR, while DIRECTV sings the praises of its own DIRECTV DVR service.

Even assuming (wrongly, to be sure!) that consumers are not able to choose a set-top device from a supplier other than the traditional cable, satellite, or telephone video providers, as long as the video distribution marketplace is competitive, as the FCC has concluded, Wheeler's proposal makes no sense. There simply is no reason for the government to intervene and mandate the design of a new uniform set-top DVR device – with all the associated costs and burdens that such a new government mandate necessarily will entail – when DVRs already are an element of the competitive offerings of the various video providers.

But, of course, you don't need to be a videophile to know that consumers now have many video choices available other than the traditional cable, satellite, and telephone video offerings. Due to technological and marketplace innovation, rapidly proliferating online video services, streaming video devices, gaming consoles, and Smart TVs render Wheeler's proposal entirely unnecessary. In today's video environment, consumers may choose among a multitude of services and devices, such as Netflix, Hulu, Amazon Fire TV, Google

Chromecast, Apple TV, and Roku. And they are doing so in exponentially increasing numbers. Indeed, online video subscriptions, led by Amazon Prime and Netflix, now total 100 million – equal to, or even greater than, the number of subscriptions to traditional video distributors.

The FCC needs to resolve its case of cognitive dissonance. And it needs to resolve it in a way that leads to abandonment of the agency's ill-conceived proposal for a costly new government-mandated and government-designed video navigation device. Otherwise, this will be another prime example of regulatory policy run amok.

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