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A Proposal for Reforming the FCC's Video Competition Policy

by

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The Federal Communications Commission released its *Eighteenth Video Competition Report* on January 17. Data points in the report demonstrate persuasively that the video services market is characterized by competition among cable, satellite, and telco providers of video subscription services as well as disruptive online video services. The market also is being transformed by the proliferation of media streaming devices and video apps.

Yet for all the technological advancements and proliferation of choices now available to consumers, much of the video market is still subject to regulatory restrictions that originated in the early 1990s, if not earlier. These regulatory burdens, and the uncertainty posed by the threat of new regulations based on leftover cable analog-era perceptions, impose costs and inhibit investment in advanced digital technologies and business models. Relief from legacy video regulations that no longer confer any benefit to consumers will free up entrepreneurial resources for further investment in innovative services that enhance consumer welfare and that also create new jobs.

The FCC should make the current competitive conditions of the video marketplace the analytical basis for an all-encompassing review of its video competition policy. In light of report data and other evidence of innovation and competition in the video market, the Commission should undertake a comprehensive reassessment of its existing and recently proposed regulations of video services. Pursuant to its review, the Commission should identify ways to eliminate or reduce regulatory burdens and to keep breakthrough online video services free from new restrictions. It should close unnecessary regulatory proceedings, repeal old rules, and render other regulations less intrusive by applying them in conjunction with a more market-based analytical approach.

Evidence from the *Eighteenth Video Competition Report* revealing that the market for video products and services is innovative and competitive includes the following highlights:

- **MVPD Competition**: At the end of 2015, 99% of all households were served by three competing multi-channel video subscription distributors (MVPDs), and 18% of households were served by four MVPDs. Cable MVPDs' share of the national market was 53%, while direct broadcast satellite (DBS) providers served 33%, and former telephone company MVPDs served 13.4% percent. Yet total MVPD subscriptions dropped one million, down to a 99.4 million total.

- **OVD Competition**: By the second quarter of 2016, subscriptions to online video distributor (OVD) services, such as Netflix, Amazon Prime, and Hulu Plus grew to more than 120 million. OVDs are negotiating "exclusive streaming rights, which they use to attract consumers seeking specific video content," and also "investing in original programming to attract and retain customers." Recent niche OVD launches include HBO Now, Showtime, STARZ, and Movies on US. In 2016 some MVPDs began offering online video services, such as DISH Network's Sling TV, Verizon's go90, and AT&T's DIRECTV NOW.

- **Broadcast TV Competition:** Broadcast TV also remains a viable choice for video consumers. Households relying on over-the-air (OTA) broadcast service exclusive of any MVPD service increased to 12.4 million TV households in 2015. 26.7 million TV households relied exclusively on OTA service on at least one TV. The report observed that some consumers "seek to use a combination of OVDs and broadcast services" in place of an MVPD. According to an analysis cited in the report, in 2015 retransmission consent fees paid by MVPDs to TV broadcast stations increased to about 23% of total TV revenue, or $6.4 billion.

- **Video App Use:** Consumers are increasingly using apps to view video content on Internet-connected devices. Most popular pay-TV networks have stand-alone apps for smart TVs and streaming devices, and OVD services are widely available on the same devices. MVPDs have introduced or plan to launch apps that consumers can use to watch MVPD video programming without set-top boxes. Over 460 million IP-enabled consumer-owned devices support video apps.

- **Video Device Alternatives:** The report grudgingly acknowledged "MVPDs are introducing innovative services on the devices that they lease," yet claimed the device market lacks competition. But all MVPDs support CableCARD-enabled devices manufactured by third-parties. And, importantly, alternative digital devices for viewing video content today include smart TVs, Apple TV, Amazon Fire TV, Google's

> Chromecast, Roku, Sony Playstation and Xbox video game consoles, as well as Internet-connected Blu-Ray players, tablets, and smartphones. These developments point to a video device market that is fully competitive.

In view of the vibrant competition for video services and products reflected in the report, the Commission should review, comprehensively and promptly, its video regulations. Pursuant to its review, the Commission should close regulatory proceedings in which it has previously proposed to expand legacy regulations. For example, the Commission should close its MVPDs re-definition proceeding. Extending the scope of program access, program carriage, or other legacy requirements to certain online video services makes no sense. Those disruptive services emerged in a free market environment that should be preserved to foster future growth.

Similarly, the Commission should close its fatally flawed AllVid proceeding for imposing new regulations on set-top box devices and video apps. The regulations proposed in that proceeding threatened copyright protections and contract rights. AllVid would have imposed heavy costs, initially to be paid by MVPDs and video programming owners, but ultimately to be paid by consumers. The Commission's proceeding regarding program carriage procedures should also be closed. In that proceeding, the Commission adopted a "stand-still" rule to require MVPDs to carry programming for an indeterminate period after their contracts with independent video programmers expired. But that is contrary to free market principles and violates of MVPDs' First Amendment rights of editorial discretion in choosing TV channel lineups. The stand-still rule was struck down by the Second Circuit Court of Appeals in *Time Warner Cable v. FCC* (2013), but only for violating notice requirements. Closing the proceeding will keep it from being revived.

In connection with its review, the Commission should also identify rules that can be eliminated because breakthroughs in digital technology and competition have replaced analog-era cable TV bottlenecks. For instance, network non-duplication and syndicated exclusivity regulations should be repealed. Those regulations, which allow local TV broadcast stations to block MVPDs who carry the network's local broadcast affiliate on their channel lineups from importing programming from out-of-market sources, are unnecessary. Broadcast TV networks, local TV stations, and MVPDs are entirely capable of negotiating contracts to sort out payment and sharing of royalties or other revenues in exchange for carriage.

In addition, the Commission should exercise its unique authority under Section 629 to sunset its video set-top box regulations. As evidenced by the report, MVPD competition, OTA alternatives, and the rise of OVD services and streaming media devices now offer consumers ample video viewing choices. The Commission should declare that the markets for MVPD services and for video devices are "fully competitive" and find that eliminating its set-top box rules is in the public interest.

Undoubtedly, elimination of some legacy video restrictions requires an act of Congress. Consistent with a comprehensive review of its video policy, the Commission should explore ways to reduce regulatory burdens by applying a rebuttable presumption of market competition in conjunction with its legacy regulations.

In our *Perspectives from FSF Scholars* paper "A Proposal for Improving the FCC's Regulatory Reviews," FSF President Randolph J. May and I recommended the Commission apply a rebuttable presumption of market competition in conducting retrospective reviews of its telecommunications regulations. Our proposal involved the Commission's determination about which regulations to eliminate or modify using its deregulatory authority under Section 11. Our *Perspectives*, "A Proposal for Improving the FCC's Forbearance Process" recommended a similar approach to implement the Commission's deregulatory authority under Section 10.

Rebuttable evidentiary presumptions of market competition can also be employed when the Commission conducts case-by-case inquiries into provider conduct under its legacy video regulations. Under this approach, clear and convincing evidence demonstrating consumer harm tied to market power abuse would be required to justify regulatory intervention. The Commission or a party supporting regulatory intervention or claiming occurrence of a violation would bear the burden of overcoming that presumption of market competition with proffered evidence.

For instance, the Commission's *Program Access Orders* (2010 and 2012) replaced its ban on exclusive contracts by vertically-integrated cable programmers with a rebuttable presumption of market competitiveness, subject to qualifications. Pursuant to a comprehensive review of its video regulations, the Commission should seek ways to expand this type of approach taken in the *Program Access Orders*. In the video market context, the net effect of applying such a rebuttable evidentiary presumption of marketplace competition would be to make the Commission's regulations less intrusive and more protective of First Amendment free speech rights of MVPDs. This is another important reason for doing so.

The Commission could, for example, adopt and apply a rebuttable presumption of market competition in connection with its program carriage rules. The Commission's *Program Carriage Order* (2011) modified program carriage complaint rules so that independent programmers need only establish a *prima facie* case of unreasonable discrimination by MVPDs against unaffiliated programmers rather than prove a violation of the rules. Further, the Commission's determination of what constitutes a *prima facie* case is not based on market power or consumer welfare but rather on a set of indeterminate factors that stress competitor welfare, including the effect of an MVPD's adverse carriage decision on an unaffiliated network's "subscribership, licensee fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale."

The First Amendment rights that MVPDs possess to exercise editorial discretion in packaging and distributing media speech content deserve a more protective standard than the one set forth in the *Program Carriage Order*. Requiring parties filing program carriage complaints to provide clear and convincing evidence of harm tied to market power abuse would provide a level of protection more fitting for the First Amendment rights of MVPDs.

Until Congress passes a new Communications Act for the Digital Age, the FCC can nonetheless achieve a closer alignment between its video competition policy and the conditions in today's dynamic video marketplace. Following a comprehensive reassessment of its video regulations, the Commission should eliminate or reduce legacy regulatory burdens that saddle providers with costs but provide no benefit to consumers. By curtailing the legacy regulatory framework for video services, the Commission can foster an overall economic environment that is more hospitable to investment in innovative new services. And one that is more hospitable to honoring First Amendment rights too.

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Further Readings

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