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Perspectives from FSF Scholars
October 11, 2019
Vol. 14, No. 31

FCC Action Would Finally Eliminate Local Cable Rate Regulation

by

Seth L. Cooper *

At its October 25 public meeting, the Federal Communications Commission will vote on a [proposed order](#) that finally sweeps away the last of local cable rate regulation. There is no doubt the Commission should approve it. With 2020 fast approaching, it makes no sense to continue regulating cable services based on what the video market looked like in the early 1990s.

The Commission's proposed order commendably would recognize that AT&T TV NOW's nationwide streaming video service, which offers at least 65 live TV channels, provides "effective competition" to cable services in local markets. If adopted, the order would achieve at least four positive results: (1) remove old rules that don't fit today's competitive video market; (2) establish regulatory parity between cable providers and competitors not subject to local rate regulation; (3) remove burdens on the cable providers' editorial free speech rights; and (4) prevent local authorities from re-regulating cable rates.

Under Section 623(l)(1) of the Cable Act of 1992, a local franchising authority may regulate rates for basic tier cable services and leased consumer premises equipment, but only if the FCC finds the cable system is not subject to "effective competition." In its 2015 *Effective Competition Order*, the Commission adopted a rebuttable presumption that cable providers are subject to effective competition according to its "competing provider test." The rebuttable presumption of effective competition was based on the existence of competing multi-channel video

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

programming distributor (MVPD) services, particularly direct broadcast satellite (DBS) services. The Commission's analysis was later upheld by the D.C. Circuit in *NATOA v FCC* (2017). (Free State Foundation President Randolph May and I filed [reply comments](#) in the effective competition proceeding, and we analyzed the D.C. Circuit's ruling in a *Perspectives from FSF Scholars paper*.)

Pursuant to the 2015 *Effective Competition Order*, the Commission allowed local franchising authorities that wished to continue rate regulating basic tier cable services and equipment to submit evidence to rebut its presumption of effective competition with respect to their particular local markets. According to the proposed order: "As a result, there are few communities in which franchising authorities are currently permitted to regulate rates, and these communities are in Massachusetts and Hawaii."

The Commission's proposed order was prompted by Charter Communications' petition seeking relief from local rate regulation. Charter requested the agency to find that the AT&T TV NOW (formerly known as "DIRECTV NOW") streaming service provides effective competition to cable systems in those remaining rate-regulated areas.

Importantly, the order recognizes that over-the-top (OTT), or online video services, can satisfy the so-called "LEC Test." As the proposed order states: "Although Congress was not specifically contemplating effective competition from online video services in 1996, the language of the LEC Test nonetheless encompasses competitive offerings that were not necessarily available at that time" as "Congress provided room for the LEC Test to cover innovative video services that it could not foresee."

The order persuasively explains how AT&T TV NOW satisfies Section 623(l)(1)(D)'s requirement that it "offers video programming services directly to subscribers" that is "comparable to the video programming services provided by the unaffiliated cable provider in that area." AT&T TV NOW "offers" services "directly to subscribers" because it is "physically able" to deliver its service to subscribers with which it has a direct customer relationship "via existing broadband facilities in the Franchise Areas" and with "no regulatory, technical or other impediments." Also, AT&T TV NOW is deemed a "comparable" video services because it offers far more than agency rules requiring "at least 12 channels of video programming, including at least one channel of nonbroadcast service programming." Sensibly, the order also determines that third-party broadband facilities can be used rather than local LEC facilities because "the LEC Test explicitly provides that the competitive video programming provider may use 'any means' to offer its service."

The FCC's adoption of the proposed order would achieve at least four positive results:

First, it would finally do away with outdated regulation that makes no sense in today's competitive video marketplace. Local cable regulation ought to have been eliminated long ago. In the early 1990s, for the most part, consumers generally only had a single analog local cable provider for pay-TV services. Today, consumers have choices that include a national video streaming service provider and two national DBS providers. And many have access to competing services such as AT&T U-verse and Verizon FiOS. Indeed, high numbers of consumers already

have "cut the cord" or forgo MVPD services and instead subscribe to OTT services such as Netflix, Hulu, Amazon Prime, or watch over-the-air broadcast TV – and the cord-cutting has shown little sign of abating.

Second, it would establish regulatory parity. Local rate regulation applies only to cable video providers, but not to its competitors. No policy justification exists for such unequal treatment in today's competitive video services market.

Third, it would remove burdens on freedom of speech. First Amendment jurisprudence regards cable providers' selection of content as protected free speech. As the Supreme Court recognized in *Turner Broadcasting System, Inc. v. FCC*, (1994), "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." If they ever did, cable operators no longer possess, as the Court put it in 1994, "bottleneck" or gatekeeper control over video programming delivered to subscribers' homes. Given the competitiveness of today's video market, local cable rate regulation serves no compelling or substantial governmental interest justifying differential treatment. The FCC's action would alleviate free speech problems posed by local cable rate regulation.

Fourth, it would prevent local authorities from re-regulating local cable service. Among the factual predicates of the FCC's rebuttable presumption of "competing provider" effective competition were DBS' nationwide market share of 34% and subscriptions to providers other than the largest MVPD exceeding 15% in all 210 U.S. Designated Market Areas. DBS' market share has experienced recent declines, but even if those declines continue, so long as consumers have access to AT&T TV NOW or other video streaming services comparable to local cable services, attempts by local franchising authorities to reimpose rate regulation on cable basic services will be foreclosed.

The 2015 *Effective Competition Order* was one of the few genuine deregulatory reforms adopted by the Wheeler FCC. Commendably, the FCC's proposed action would build on that prior reform and mark another media modernization policy achievement by the Pai FCC. The Commission should say "so long" to local cable rate regulation.

* Seth L. Cooper is a Senior Fellow and Director of Policy Studies of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

Further Reading

Seth L. Cooper, "Modern TV Act Would Remove Old Rules, Bring Video Policy Up to Date," *FSF Blog* (July 25, 2019).

[Comments of the Free State Foundation](#), Leased Commercial Access, MB Docket No. 07-42, *et al.* (July 22, 2019).

[Comments of the Free State Foundation](#), Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-33 (December 14, 2018).

[Comments of the Free State Foundation](#), An Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 17-214 (October 10, 2017).

Randolph J. May and Seth L. Cooper, "[D.C. Circuit Ruling Supports FCC's Use of Deregulatory Presumptions](#)," *Perspectives from FSF Scholars*, Vol. 12, No. 24 (July 27, 2017).

[Reply Comments of the Free State Foundation](#), Amendment to the Commission's Rules Concerning Effective Competition, MB Docket No. 15-53 (April 20, 2015).

Seth L. Cooper, "[FCC Should Adopt the Deregulatory Proposal for Local Cable Rates](#)," *Perspectives from FSF Scholars*, Vol. 10, No. 15 (April 9, 2015).