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Online Video Subscriber Growth Compels Further Deregulation

by

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I. Introduction and Summary

Over decades, evidence of new entry in the multichannel video programming distribution marketplace has accumulated dramatically. Consumers long have reaped the benefits of a steady stream of innovative alternatives, such as Direct Broadcast Satellite (DBS) services and offerings delivered by telecommunications providers over fiber and Digital Subscriber Line (DSL) connections, and the additional competition they engender. And, most recently and significantly, the explosion of video services streamed over the Internet has provided even more choices. Wherever one draws the line between insufficient and robust, market-safeguarding levels of competition, at the end of 2020 one must concede without hesitation that the latter now exist. Therefore, regardless of the partisan make-up of the Commission, abandonment of the outdated regulatory model applied to traditional video distributors is overdue.

Under Chairman Ajit Pai, the FCC has taken significant and commendable steps to realign its regulatory approach with this fully competitive reality. As just one example, the Commission recently took formal action to terminate the long-pending – and long-idle – so-called "unlock the box" rulemaking. Initiated in 2016, that proceeding threatened burdensome and unwarranted

regulation of Multichannel Video Programming Distributor (MVPD) offerings in the service of a 1996 statute premised upon wildly inaccurate predictions regarding the future of video navigation devices.

In 2014, then-Chairman Tom Wheeler initiated an equally misguided "modernization" of the agency's interpretation of "multichannel video programming distributor," a term set forth in the Communications Act. Specifically, the Wheeler FCC proposed a new rule defining an MVPD "without regard to the means by which ... programming is distributed." The effect of this revision would be to expand the MVPD regulatory classification, and the rights and responsibilities associated therewith, to encompass Online Video Distributors (OVDs) and other offerings delivered over the Internet.

During the intervening years, virtual MVPDs (vMVPDs), a subcategory of OVDs that replicate the traditional MVPD user experience, have revolutionized the industry. Recent data reveals that, while traditional MVPDs continue to shed subscribers, vMVPDs are enjoying unprecedented growth. Whereas the former saw their totals drop by over 1.1 million between July and September of this year, the latter had their best quarter ever, adding 1.5 million customers.

The remarkable, unregulated success of vMVPDs proves that an expanded definition of an MVPD is unnecessary. More broadly, the increased levels of competition that they engender demand less regulation of video distributors in general. The FCC's Consumer and Governmental Affairs Bureau recently declined to terminate the MVPD definition proceeding because, strictly speaking, it was not "dormant." The Commission, however, can and should close out this rulemaking. Continued uncertainty as to the regulatory ground rules unnecessarily undermines the consumer benefits that competition is able to deliver.

II. The Video Distribution Marketplace Undeniably Is Competitive

In 1994's *Turner Broadcasting System, Inc. v. FCC (Turner I)*,¹ the Supreme Court upheld cable mandatory carriage requirements, citing a congressional finding that over 60 percent of television households subscribed to cable.² As a consequence, the Court deemed cable a "bottleneck."³ By the end of 2019, however, the percentage of occupied households subscribing to cable was just 38 percent.⁴

But to focus narrowly on cable is to ignore the ever-expanding forest that is the Multichannel Video Programming Distribution (MVPD) marketplace. DIRECTV and DISH Network, the two current Direct Broadcast Satellite (DBS) operators, initiated service in 1994 and 1996, respectively. While their subscriber totals have trended downward as of late – in the third quarter

¹ See generally *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

² *Id.* at 633.

³ *Id.* at 661.

⁴ Comments of NCTA – The Internet & Television Association, *Competition in the Communications Marketplace*, GN Docket No. 20-60 (filed April 27, 2020), at 15, available at <https://ecfsapi.fcc.gov/file/1042700221723/042720%2020-60%20NCTA%20Comments%20On%202020%20Competition%20Report%20-%20FINAL.pdf>.

the former lost 690,000, the latter 87,000⁵ – that in no way diminishes the pervasive competitive impact they have had over the past twenty-five years. In addition, those that we once thought of as merely the phone companies today also vie for video customers. Verizon FiOS currently counts 4 million subscribers, AT&T U-verse and AT&T TV together have an estimated 3.5 million subscribers.⁶

But the big story, of course, is video distributed over the Internet. Consumers have signed up for streaming services – what the FCC identifies as Online Video Distributors (OVDs) – by the tens of millions. By way of example, Netflix reported a whopping 73.08 million paid memberships in the United States and Canada at the end of the third quarter, an increase of nearly 6 million in just the past twelve months.⁷ Disney Plus, which debuted late last year, already has nearly 74 million subscribers worldwide.⁸ Hulu has 36.6 million members in the U.S., having added 11 million over the past year.⁹ And an increasing number of households subscribe to more than one streaming service: 55 percent, up from 43 percent in 2018 and just 20 percent in 2015.¹⁰

An important subset of OVDs, from both a competitive and regulatory perspective, are Virtual MVPDs (vMVPDs). Unlike those OVDs, such as Netflix, that provide only access to a stored library of content, vMVPDs offer packages that rival the feature sets of traditional MVPDs. They typically provide live (including local) channels, an Electronic Program Guide (EPG), Video On Demand (VOD), and recording capabilities (such as a cloud-based Digital Video Recorder (DVR)).¹¹ Although a relatively new phenomenon, the number of vMVPDs from which consumers may choose already is large and continues to grow. The list includes YouTube TV, Hulu + Live TV, AT&T TV, Sling TV, fuboTV, Philo, and T-Mobile's just-launched TVision.¹²

According to research firm MoffettNathanson, the months of July, August, and September produced vMVPDs' "best-ever quarter" in terms of subscriber growth. The total number of

⁵ Leichtman Research Group Press Release, "Major Pay-TV Providers Lost About 120,000 Subscribers in 3Q 2020" (November 17, 2020), available at <https://www.leichtmanresearch.com/wp-content/uploads/2020/11/LRG-Press-Release-11-17-2020.pdf> (LRG Press Release).

⁶ *Id.*

⁷ Netflix Third Quarter Letter to Shareholders (October 20, 2020), at 7, available at https://s22.q4cdn.com/959853165/files/doc_financials/2020/q3/FINAL-Q3-20-Saveholder-Letter.pdf.

⁸ Joan E. Solsman, "Disney Plus hits 73.7 million subscribers," *CNET* (November 12, 2020), available at <https://www.cnet.com/news/disney-plus-hits-73-7-million-subscribers-india-hotstar/>.

⁹ *Id.*

¹⁰ Leichtman Research Group Press Release, "78% of U.S. Households Have an SVOD Service" (August 28, 2020), available at <https://www.leichtmanresearch.com/wp-content/uploads/2020/08/LRG-Press-Release-08-28-20.pdf>.

¹¹ See, e.g., Daniel Frankel, "YouTube TV: Everything You Need to Know About One of the Fastest Growing Virtual Pay TV Services," *Next TV* (September 21, 2020), available at <https://www.nexttv.com/news/youtube-tv-everything-you-need-to-know-about-one-of-the-fastest-growing-virtual-pay-tv-services> (reporting that YouTube TV "delivers more than 70 networks. Local affiliate/O&O access to the Big Four broadcast networks is included in most U.S. markets.... Cloud DVR storage is unlimited").

¹² See Ty Pendlebury, "T-Mobile's TVision live TV hands on: Worth \$10 if you're already a customer," *CNET* (November 20, 2020), available at <https://www.cnet.com/news/t-mobiles-tvision-live-tv-hands-on-worth-10-if-youre-already-a-customer/> ("TVision is a live TV streaming service exclusive to T-Mobile customers, and it includes a live TV guide, on-demand content and up to 100 hours of DVR.").

subscribers to vMVPDs increased by 1.5 million to 11.5 million.¹³ That is nearly a third more additions than the 1.1 million subscribers lost by traditional MVPDs over the same time period.¹⁴ Hulu + Live TV saw the biggest gains, adding 700,000 to reach a total of 4.1 million – and thereby surpass Verizon, Cox, Altice, and AT&T on the current top-ten MVPD list (see below). YouTube TV was not far behind, adding an estimated half a million new members to its previous 2.5 million during the third quarter alone.¹⁵

Rank ¹⁶	Provider	Total Subscribers	Net Change from Q2
1	Comcast	20,094,000	(273,000)
2	Charter	16,235,000	67,000
3	DIRECTV	13,600,000	(690,000)
4	DISH TV	8,965,000	(87,000)
5	Hulu + Live TV	4,100,000	700,000
6	Verizon FiOS	4,000,000	(62,000)
7	Cox	3,710,000	(60,000)
8	AT&T U-verse/AT&T TV	3,500,000	100,000
9	Altice	3,035,100	(86,400)
10	YouTube TV	~3,000,000	~500,000¹⁷

Other vMVPDs also report impressive third-quarter subscriber growth: Sling TV increased its total from 2.25 million to 2.46 million, Philo from 750,000 to 800,000, and fuboTV from 286,126 to 455,000.¹⁸

Given these game-changing competitive developments, Leichtman Research Group president and principal analyst Bruce Leichtman concluded that “[i]t is more important than ever before to recognize vMVPDs as a key segment of the live pay-TV industry.”¹⁹ At the FCC, that acknowledgement should include additional deregulatory action.

III. Robust Competition Directs an End to the "MVPD Definition" Rulemaking

The FCC in September considered the fate of two lingering rulemakings relating to MVPDs. In the first instance, Commissioners wisely terminated a proceeding relating to video navigation devices. In the second, the Consumer and Governmental Affairs Bureau (CGB), constrained by

¹³ Ben Munson, "Hulu, YouTube TV and other vMVPDs added 1.5M subs in Q3," *Fierce Video* (November 19, 2020), available at <https://www.fiercevideo.com/video/hulu-youtube-tv-and-other-vmvpds-added-1-5m-sub-q3> (citing a reference note by Craig Moffett of MoffettNathanson) (*Munson*).

¹⁴ See *LRG Press Release*.

¹⁵ See *Munson*.

¹⁶ See *LRG Press Release*.

¹⁷ Leichtman Research Group does not provide subscriber numbers from YouTube TV "because it does not formally report quarterly results." *Id.* The numbers presented here for YouTube TV therefore are MoffettNathanson estimates. See *Munson*.

¹⁸ See Ben Munson, "Deeper Dive – How YouTube TV, Hulu + Live TV and others stack up after Q3," *Fierce Video* (November 12, 2020), available at <https://www.fiercevideo.com/video/deeper-dive-how-youtube-tv-hulu-live-tv-and-others-stack-up-after-q3>.

¹⁹ See *LRG Press Release*.

the limited authority it was delegated, unfortunately was unable to close out a rulemaking proposal to expand the definition of an MVPD (the *MVPD Definition NPRM*). In light of the abundant competition detailed above, the full Commission can and should take action to terminate that proceeding, as well.

In 2016, then-Chairman Wheeler initiated a rulemaking that eventually became known as the "unlock the box" proposal.²⁰ As I wrote in a recent *Perspectives from FSF Scholars*,²¹ this most recent attempt by the Commission to implement Section 629, the Communications Act's outdated mandate to establish a retail marketplace for video navigation devices,²² suffered a number of fatal defects, the most egregious of which was its failure to respect to copyright. Ultimately and inevitably, it reached an intractable impasse as a result. Nevertheless, it technically remained open – and thus a looming potential source of additional regulatory obligations and substantial compliance-related costs – for the last four years.

Fortunately, the FCC adopted a *Report and Order* on September 4, 2020, formally ending that ill-fated proceeding.²³ In doing so, it noted with approval that "without Commission intervention, many MVPD subscribers can watch the services that they pay for wherever, however, and whenever they want on an array of innovative devices via many different applications."²⁴

Former Chairman Wheeler's other attempt to expand regulation of the video distribution marketplace, the *MVPD Definition NPRM*, was initiated in 2014. In that rulemaking, the Commission proposed to adopt an expanded definition of an "MVPD" to account for the rapid emergence of rivals that stream content over the public Internet rather than a closed transmission path (such as cable operators' hybrid fiber-coaxial (HFC) networks, the licensed spectrum utilized by DBS operators, or the fiber/copper-loop facilities of telecommunications providers).²⁵

²⁰ See generally *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (2016), available at

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiBt6C25rntAhVOCM0KHQ6yAqIQFjAAegQIARAC&url=https%3A%2F%2Fdocs.fcc.gov%2Fpublic%2Fattachments%2FFCC-16-18A1.pdf&usq=AOvVaw2u8L1wFluCNXu5tYJIrLj>.

²¹ See generally Andrew Long, "Closing the Lid on 'Unlock the Box' Should End Video Device Regulation," *Perspectives from FSF Scholars*, Vol. 15, No. 50 (September 25, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/09/Closing-the-Lid-on-Unlock-the-Box-Should-End-Video-Device-Regulation-092520.pdf>.

²² See 47 U.S.C. § 549.

²³ See generally *Report and Order, Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC 20-124 (September 4, 2020), available at <https://docs.fcc.gov/public/attachments/FCC-20-124A1.pdf>.

²⁴ *Id.* at ¶ 7.

²⁵ See generally Notice of Proposed Rulemaking, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, FCC 14-210 (2014) (*MVPD Definition NPRM*).

The Communications Act of 1934, as amended, defines an MVPD as:

[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple *channels of video programming*.²⁶

The *MVPD Definition NPRM* proposed to "modernize" – that is, expand – the Commission's MVPD regulatory classification by (1) interpreting the phrase "channels of video programming" to include "prescheduled streams of video programming ... without regard to whether the same entity is also providing the transmission path,"²⁷ and (2) codify in its rules the following corresponding definition of a "multichannel video programming distributor":

A person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming. As used in this paragraph, channel means linear video *without regard to the means by which the programming is distributed*.²⁸

The Commission at that time concluded that:

Specifying the circumstances under which an Internet-based provider may qualify as an MVPD ... may incent new entry that will increase competition in video markets. In particular, extending program access protections to Internet-based providers would allow them to "access[] critical programming needed to attract and retain subscribers." And extending retransmission consent protections and obligations to those providers would allow them to enter the market "for the disposition of the rights to retransmit broadcast signals." Broadcast and cable-affiliated programming could make Internet-based services attractive to customers,²⁹

The latest statistics on vMVPD subscriber growth presented above, however, reveal that they are doing just fine on their own. As Commissioner Michael O'Rielly argued in 2014 when the NPRM was adopted, "[w]ith all of [the] dynamism in the online video marketplace, it makes this item particularly puzzling.... As a government agency with little to no authority over the Internet, the best thing that the Commission can do is not get in the way."³⁰ That assessment is even more true today.

²⁶ 47 U.S.C. § 522(13) (emphasis added).

²⁷ *MVPD Definition NPRM* at ¶ 18. In the disfavored alternative, "channel" would be interpreted as "requiring a transmission path." *Id.* at ¶ 29.

²⁸ *Id.* at Appendix A (emphasis added).

²⁹ *Id.* at ¶ 5.

³⁰ Concurring Statement of Commissioner Michael O'Rielly, *MVPD Definition NPRM* at 56. *See also id.* at 57 ("Finally, and maybe most importantly, I am extremely troubled that the Commission may be headed down a path to capture OTT video providers within Title VI of the Communications Act.").

On September 28, 2020, CGB issued an *Order* terminating an extensive list of proceedings as "dormant."³¹ It kept open only three dockets, one of which was the *MVPD Definition NPRM*. The Commission in 2011 delegated authority to CGB to terminate all open dockets that were "inactive,"³² and in its recent *Order* the bureau reported that:

The Affiliates Associations objects to the proposed termination of this proceeding, contending that recent *ex parte* filings in the docket indicate ongoing communications with the Commission on the issues raised in the proceeding. Upon further evaluation, we find that this proceeding does not appear to be a good candidate for termination under delegated authority at this time.³³

A review of MB Docket No. 14-261 reveals only eight filings since 2017, half of them submitted by the Affiliates Associations.³⁴ As a purely technical matter, therefore, one might accurately state that this proceeding is not "dormant" – and therefore is ineligible for termination at the bureau level pursuant to delegated authority. At the same time, however, it is undeniable that the efficient operation of the marketplace over the last six years, highlighted by the unprecedented subscriber growth of vMVPDs during the most recent quarter, proves that the expansion of regulation proposed in the *MVPD Definition NPRM* cannot be justified. Here, too, formal action by the full Commission to close out this proceeding would remove uncertainty and benefit consumers through even greater levels of competition and marketplace freedom.

³¹ See generally *Order, Termination of Certain Proceedings as Dormant*, CG Docket No. 20-158, DA 20-1138 (September 28, 2020), available at <https://docs.fcc.gov/public/attachments/DA-20-1138A1.pdf> (*2020 Termination Order*). The complete list of terminated proceedings, which spans 76 pages, is set forth in an Attachment available at <https://docs.fcc.gov/public/attachments/DA-20-1138A2.pdf>.

³² See *Report and Order, Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, CG Docket No. 10-44, 26 FCC Rcd 1594 (2011), ¶ 23, available at <https://docs.fcc.gov/public/attachments/FCC-11-16A1.pdf>.

³³ *2020 Termination Order* at ¶ 8 (citation omitted).

³⁴ See Electronic Comment Filing System (ECFS) search of MB Docket No. 14-261, available at https://www.fcc.gov/ecfs/search/filings?proceedings_name=14-261&sort=date_disseminated.DESC (last visited December 3, 2020). In their most recent submission, the Affiliate Associations assert that "[t]he arguments made by broadcasters in 2015 for treating OVDs as MVPDs for purposes of retransmission consent have even greater force and urgency today, as viewers increasingly turn to Internet-based services – and away from traditional MVPD platforms – for access to linear program streams." Reply Comments of the ABC Television Affiliates Association, *et al.*, *Termination of Certain Proceedings as Dormant*, CG Docket No. 20-158; *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261 (filed August 20, 2020), at 2, available at <https://ecfsapi.fcc.gov/file/1082009856332/Four%20Affiliates%20Associations%20Reply%20Comments%20regarding%20OVD%20as%20MVPD.pdf>. Cf. Letter from Susan Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 14-261 and 18-349 (submitted July 11, 2019), at 2, available at <https://ecfsapi.fcc.gov/file/10731924904982/14-261%3B%2018-349A.pdf> ("Ms. Fox noted Disney's previously-stated position that there is no need for the FCC to expand the FCC's current definition of MVPDs.").

IV. Conclusion

The latest news regarding vMVPD subscriber growth provides still more incontrovertible evidence of a robustly competitive MVPD marketplace. It also demonstrates that an expanded definition of an "MVPD" – with its associated adverse regulatory consequences – is unwarranted. Operating beyond the reach of antiquated rules, vMVPDs just enjoyed their best quarter ever. The FCC should send a clear signal that it will defer to competitive forces by terminating the rulemaking initiated in 2014 with the *MVPD Definition NPRM*.

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Further Readings

Seth L. Cooper, "[FCC Proposal Would Reform Legacy Video Rules for Programming Disputes](#)," *FSF Blog* (November 13, 2020).

Andrew Long, "[Maine Cable Law, Ignoring Competition, Is 'Unambiguously Preempted'](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 56 (October 26, 2020).

Andrew Long, "[Multicasts, ATSC 3.0 Turn Broadcasting Into a Multichannel Platform](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 53 (October 12, 2020).

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[Comments of the Free State Foundation](#), *The State of Competition in the Communications Marketplace*, GN Docket No. 20-60 (April 27, 2020).

Seth L. Cooper, "[Online Video Offerings from INCOMPAS/DISH TV Bolster the Case Against Local Cable Rate Controls](#)," *FSF Blog* (October 16, 2019).

Seth L. Cooper, "[FCC Action Would Finally Eliminate Local Cable Rate Regulation](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 31 (October 11, 2019).