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**On Video, the FCC's Competition Report Falls Short**

by

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**I. Introduction and Summary**

On December 30, 2022, the Federal Communications Commission (FCC or Commission) released the [2022 Communications Marketplace Report](#) (Report), a consolidated snapshot of competition within – and, [to a less-than-ideal extent](#), across – the full range of communications industry sectors covering a two-year period that ended more than a year ago. Required by [RAY BAUM'S Act of 2018](#), each Report is required to summarize not only the state of the marketplace, but also outline regulatory and, significantly, deregulatory steps that are warranted given the relatively current conditions described therein.

With respect to video programming distribution, this latest Report, as was the case with previous editions, wholly neglects to articulate agency actions necessary in response to the acknowledged dominant position of streaming services vis-à-vis traditional distribution platforms that are inequitably and uniquely burdened by outdated rules. It is time for the FCC to embrace this radically altered reality – and, as instructed by Congress, act expeditiously to identify "laws, regulations, [and] regulatory practices [that]... pose a barrier ... to the competitive expansion of existing providers of communications services."

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In "[The 2022 Communications Marketplace Report: Timely FCC Action Could Accelerate Next-Gen Broadband Deployment](#)," a just-published *Perspectives from FSF Scholars*, Free State Foundation Director of Policy Studies and Senior Fellow Seth L. Cooper focused on the Report's broadband-related findings. The Report's insufficient treatment of video programming, however, warrants its own discussion which I present below.

Specifically, while the Report is replete with additional indicia that consumers are abandoning facilities-based Multichannel Video Programming Distributors (MVPDs) (cable operators, Direct Broadcast Satellite (DBS) providers, and telco TV services) and migrating to Internet-based alternatives – as it notes, this ongoing and transformative trend began a full decade ago – it inexplicably is unwilling to recognize (1) the inequitable role that the lopsided regulatory status quo plays in anointing these winners and losers, or (2) the consequential need for a comprehensive deregulatory response.

A Report fully compliant with RAY BAUM'S Act of 2018 would have targeted for elimination those rules premised upon the outdated-at-best view that traditional MVPDs possess undue power: program access and carriage requirements, as well as network non-duplication and syndicated exclusivity regulations. And it would have conceded that the sunset provision set forth in Section 629(e) of the Communications Act has been triggered, rendering moot the separated-security requirement that, as a practical matter, still requires that cable operators support CableCARDS despite the utter failure of efforts to craft a competitive market for navigation devices.

## **II. The Report Presents a Compelling Factual Case for MVPD Deregulation...**

To its credit, the Report paints a reasonably comprehensive portrait of the state of video competition circa year-end 2021. (To be sure, though, the transformative consumer shift from traditional MVPDs to streaming alternatives continued at a rapid pace throughout 2022. To present just one data point, Leichtman Research Group reported traditional MVPD subscriber losses totaling just under 4.8 million, representing over 7 percent, between [the beginning of 2022](#) and [the end of the third quarter](#).)

Specific highlights from the Report include the following:

- "*Continuing a downward trend that began in 2013*, MVPDs lost 6.7 million video subscribers between 2020 and 2021, ending 2021 with 69.1 million video subscribers" (emphasis added).
- Online Video Distributors (OVDs) "*have continued to proliferate, and many OVDs have grown rapidly relative to traditional MVPDs*" (emphasis added).
- Virtual MVPDs (vMVPDs) "*continue to grow and attract consumers away from traditional MVPDs*" (emphasis added).
- "[B]etween 2020 and 2021, cable MVPDs lost 3 million subscribers, DBS MVPDs lost 2.6 million subscribers, and telephone company MVPDs lost 1.1 million subscribers," an 8.8 percent decline.
- While "[t]otal hours spent on digital entertainment and total hours spent watching TV has changed little over the past two years," non-traditional sources of content are capturing an

increasing share of that zero-sum total. Advertising-based Video on Demand (AVOD) enjoys "widespread usage" by 80 percent of households. YouTube "dominates AVOD" and TikTok "has seen enormous growth."

- Subscription VOD (SVOD) "subscriptions jumped 31% from the fourth quarter of 2019 to the fourth quarter of 2020." Total SVOD subscriptions increased by over 111 million between Q4 2019 and Q4 2021, a 50 percent jump.
- "[B]oth subscribers and revenues for vMVPD providers have been increasing rapidly." Total vMVPD subscribers grew substantially, from 9.6 million in 2020 to 14.1 million in 2022, a 47 percent climb.

### **III. ...But Neglects the Statutory Obligation to Craft a Responsive Deregulatory Agenda**

By any reasonable measure, the factual references to the Report in the previous section compel a robust deregulatory response. Rules adopted during the bygone era in which a handful of MVPDs were the only game in town unreasonably hamstringing a subset of competitors, artificially constrain overall competition to the detriment of consumers, and are vulnerable to constitutional challenges. As NCTA | The Internet & Television Association wrote in its [Comments](#):

[I]t is time for regulations premised on a lack of competition in the video marketplace to be repealed. Such regulations simply have no place in a marketplace that is vigorously competitive, and indeed may no longer withstand First Amendment scrutiny. The Commission should therefore identify in the upcoming Communications Marketplace Report those statutory and regulatory provisions premised on a lack of competition and explore eliminating or modifying them or, if statutory, recommend that Congress consider eliminating them.

To be clear, this suggestion tracks directly statutory language located in the very legislation that compels the creation of the Report itself.

RAY BAUM'S Act of 2018 is codified in [Section 163 of the Communications Act](#). Subsection (b)(1) sets forth the big-picture objective – that is, the preparation of the Report:

Each report ... shall assess the state of competition in the communications marketplace, including competition to deliver voice, video, audio, and data services among providers of telecommunications, providers of commercial mobile service (as defined in section 332 of this title), multichannel video programming distributors (as defined in section 522 of this title), broadcast stations, providers of satellite communications, Internet service providers, and other providers of communications services.

Subsections (b)(3) through (b)(5), meanwhile, impose additional requirements that are especially relevant to the state of multichannel video programming distribution in 2022:

- Subsection (b)(3) states that communications marketplace reports are to "assess whether laws, regulations, [or] regulatory practices ... pose a barrier ... to the competitive expansion of existing providers of communications services";

- Subsection (b)(4) instructs the Commission to "describe [its] agenda ... for the next 2-year period for addressing the challenges and opportunities in the communications marketplace ... identified"; and
- Subsection (b)(5) requires that the reports "describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report."

This Report, like the ones before it, falls short on each count. As set forth above, it acknowledges that the subscriber bases of traditional MVPDs have been shrinking for a decade and that Internet-delivered content providers of all stripes are enjoying significant growth at their expense – but it wholly neglects to discuss the role that lopsided legacy regulations play in the changed competitive landscape that exists today or set forth a forward-looking deregulatory agenda to address that distortion.

Given the dramatically transformed competitive reality that the Report itself lays out, it is disappointing that it fails to take those next steps. Or even, at an absolute minimum, to define with specificity the point at which traditional MVPD subscriber declines – which, according to NCTA, have been "declining at an annual rate of approximately 9%" – ultimately will trigger some type of agency action, whether the elimination of rules, legislative recommendations to Congress, or both.

#### **IV. The Navigation Device Statute Itself Further Compels a Deregulatory Response**

Navigation devices – that is, the set-top boxes whose relevance has waned substantially over the last 25 years – present an even more striking missed deregulatory opportunity. Section 629, the 1996 statute that led the FCC down the dead-end road of attempted competitive market creation, includes a sunset provision – one that FSF in its [Comments](#) once again asserted has been triggered, a fact that the Report acknowledges but, perhaps not surprisingly, declines to address.

In the [Public Notice](#), the Commission specifically sought:

Data and comment that will help the Commission analyze how the ongoing evolution in the video programming market affects competition *in the related market for set-top boxes and devices*, including how it affects the extent to which consumer choice for devices to access MVPD content remains a relevant aspect of the competitive environment (emphasis added).

As an initial matter, it is worth reiterating that "[the practical reality is that no such market exists.](#)"

Beyond that, the Report reveals at the outset a perplexingly narrow focus, one that considers only "whether there is a need for *further* regulations to ensure the commercial availability of devices to access MVPD programming" (emphasis added). By all reasonable accounts, the Commission definitively answered that question in 2020 when it officially closed the lid on an ill-fated rulemaking initiated in 2016. Riddled with problems, that misguided effort could not overcome a finding by the [Government Accountability Office](#) (GAO) "that the *NPRM* did not sufficiently analyze 'the extent to which Internet-based providers affect consumer choice for video programming and what that change means for the importance of consumer choice for devices in the context of the Act.'" The impact of Internet-based providers is equally relevant for both

potential and existing regulations, particularly given the sunset provision found in [Section 629\(e\)](#):

The regulations adopted under this section 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.

Consequently, the Free State Foundation wrote in its [Comments](#) in the instant proceeding that "the Commission should follow its sound decision in September 2020 to terminate the so-called 'unlock the box' navigation device proceeding to its logical conclusion by announcing that the sunset provision set forth in Section 629(e) of the 1996 Act has been satisfied."

Such a step is important because, while the [2020 Report and Order](#) terminated the 2016 rulemaking and repealed the rules that expressly require cable operators to support CableCARDS, it did not eliminate the underlying obligation, set forth in [Section 76.1204 of the Commission's rules](#), to make available "equipment that incorporates only the conditional access functions of such devices." As a practical matter, this means that cable operators still must support CableCARDS, despite their de minimis use in 2023. This imposes unjustified costs that are borne by all customers and [reportedly](#) complicates efforts to increase broadband upload speeds.

The Report notes that only two commenters – the Free State Foundation and NCTA – weighed in on this issue. (On its own, the lack of interest in this topic speaks volumes.) As noted above, the former made the case for sunset pursuant to Section 629(e), while the latter argued that "there is no longer any legitimate basis for concern that consumers are effectively forced to rent set-top boxes from MVPDs to be able to access video content." The Report declines to respond to either assertion on the merits, perhaps for obvious reasons.

However, the Report does cite a number of facts, all of which support the elimination of rules implementing Section 629, its sunset, and/or its outright repeal by Congress: that MVPDs make their content available to a wide range of devices that connect to TVs, to Smart TVs themselves, and to portable devices with integrated displays that are increasingly popular with consumers; that "the 'relevance of traditional multichannel set-top boxes is waning'" and "only 37% of televisions are connected to an MVPD set-top box"; and that vMVPDs offer consumers viable alternatives that in virtually all cases deliver service exclusively to third-party equipment.

At a minimum, this reality compels a discussion, consistent with the requirements of RAY BAUM'S Act of 2018, regarding how Section 629 and the Commission's implementing rules "pose a barrier ... to the competitive expansion of existing providers of communications services" – to say nothing of how those facts implicate the sunset provision set forth in Section 629(e).

## V. Conclusion

Congress mandated that the Commission prepare communications marketplace reports every two years not only to document competitive realities on the ground, but also to telegraph what regulatory – and deregulatory – steps have been, and will be, taken in response. The 2022 edition – released only days before the statutory deadline, and thus based upon data regarding rapidly evolving industries that is nearly a year out of date – does a reasonable job reporting what transpired in 2020 and 2021. In terms of announcing an agenda to address the dramatic shift in consumer preferences from traditional MVPD offerings to Internet-based alternatives, however, it comes up short.

The FCC's seeming reluctance to relinquish its historical oversight role vis-à-vis MVPDs in the face of efficiently operating marketplace forces, as well as its failure to acknowledge the landscape-distorting impact of its one-sided and outdated rules, results in an incomplete response. A more complete and compliant Report would have identified by name those regulations that in 2023 do not advance consumer welfare, including program access, program carriage, network non-duplication, syndicated exclusivity, and those implementing 1996's misguided navigation device statute.

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### Further Readings

Seth L. Cooper, "[The 2022 Communications Marketplace Report: Timely FCC Action Could Accelerate Next-Gen Broadband Deployment](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 2 (January 19, 2023).

Andrew Long, "[Google's YouTube Scores Rights to NFL Sunday Ticket](#)," *FSF Blog* (January 9, 2023).

Andrew Long, "[Streaming Services Surpass Cable in Total Viewing](#)," *FSF Blog* (October 28, 2022).

Andrew Long, "[A Tale of Two Trends: Traditional Video Distributors Shrink While Streaming Video Grows](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 46 (September 15, 2022).

[Reply Comments of the Free State Foundation](#), *The State of Competition in the Communications Marketplace*, GN Docket No. 22-203 (August 1, 2022).

[Comments of the Free State Foundation](#), *The State of Competition in the Communications Marketplace*, GN Docket No. 22-203 (July 1, 2022).

Andrew Long, "[Don't Believe the Hype: Streaming Dominates the Video Marketplace](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 25 (May 16, 2022).

Andrew Long, "[Virtual Video Programming Services Continue to Gain Ground](#)," *FSF Blog* (December 30, 2021).

Andrew Long, "[Pixel by Pixel, Video Streaming's Ascension Comes Into Focus](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 52 (September, 29, 2021).

Andrew Long, "[Nielsen: Viewership of Streaming Video Has Surpassed That of Broadcast Television](#)," *FSF Blog* (June 25, 2021).

Andrew Long, "[Streaming Continues to Redefine the Video Landscape: It's Past Time to Eliminate Legacy Regulations](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 30 (June 11, 2021).

Randolph J. May, *et al.*, "[The FCC's Marketplace Report Substantiates the Extent of Competition](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 4 (January 25, 2021).

Andrew Long, "[Online Video Subscriber Growth Compels Further Deregulation](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 66 (December 11, 2020).

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

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