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With Pay-TV on the Wane, Legacy Regulations Should Follow

by

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I. Introduction and Summary

At a recent congressional hearing and in a follow-up letter, Senate Commerce Committee Chair Maria Cantwell pressed FCC Chairwoman Jessica Rosenworcel to dust off a dated proposal to expand the definition of a Multichannel Video Programming Distributor (MVPD) to include services distributed over the Internet (virtual MVPDs or vMVPDs). The only constant in consumer consumption of video content is lightspeed change and disruption. The business model of local broadcast television stations, long a valued source of local news and community information, seems to have been caught in the crossfire. Some seem to believe that expanding and entrenching legacy Pay-TV regulations might restore the status quo. I disagree.

It is critical to step back and acknowledge that the transformative impact of over-the-top video distribution affects every aspect of the video-content-delivery ecosystem – not just for broadcasters. Traditional, facilities-based MVPDs such as cable TV operators also are experiencing substantial challenges, in the form of ongoing significant subscriber losses. But vMVPDs are not, as one might assume, the beneficiaries of that consumer migration. In fact, with the exception of YouTube TV, the vMVPD category appears to be experiencing customer-

base contraction, as well. In the words of one prominent industry analyst, "'[w]e are watching the sun beginning to set' on the pay-TV business."

Big picture, the reality is that consumer viewing habits are undergoing fundamental changes. Younger Americans, especially, overwhelmingly turn to websites and apps (YouTube, TikTok, and so on) for video content. We apparently have arrived at an inflection point, and regulatory attempts to recreate bygone marketplace dynamics, while perhaps well intentioned, will only further hamstring the ability of traditional MVPDs to compete. Instead, and as both Senator Cantwell and Free State Foundation President Randolph May have pointed out, if Congress wants to take measures to protect and promote local broadcasting, it should do so in the context of establishing a comprehensive 21st century deregulatory framework rooted in marketplace conditions as they currently exist that is applicable to all media currently subject to legacy regulations.

More broadly, the undeniable ascendance of innovative video-distribution alternatives (apps, websites, subscription and ad-supported library-based streaming platforms, and so on) to the long-in-the-tooth MVPD big bundle is not a reason to breathe life into outdated legacy rules. Rather, it's a clear indication that consumers have available more than sufficient choices to compel a comprehensive change in course away from government intervention – whether that's media-ownership limits like the top-four rule, must-carry and other compelled access carriage requirements, costly obligations to support retail "navigation devices" that cannot be found on store shelves due to the absence of consumer demand, or some other forms of regulation – and toward the exclusive reliance upon efficiently operating market forces.

II. Twentieth Century Rules Are a Bad Fit for Twenty-First Century Concerns

In 2014, then-Chairman Tom Wheeler initiated an FCC rulemaking that proposed to redefine an MVPD "without regard to the means by which … programming is distributed." In other words, it would have expanded the definition of an MVPD beyond cable, DBS, and telco TV offerings delivered over facilities that the provider controls to include services that stream content over the public Internet. While the Commission never officially terminated that proceeding, as I argued it should do in a December 2020 *Perspectives from FSF Scholars*, it did allow it to recede to a back burner.

As I described in an April 2023 post to the *FSF Blog*, however, the 2014 proposal recently has attracted renewed attention. Senator Charles E. Grassley wrote to Chairwoman Rosenworcel twice, in May 2022 and February 2023, expressing the concern "that severe and lasting harm will be done to the local video programming ecosystem if 'virtual' MVPDs that provide linear local television programming to their subscribers are not treated as MVPDs for the purposes of retransmission consent."

In response, Chairwoman Rosenworcel stated that because the relevant statutory provision references "a portion of the electromagnetic frequency spectrum which is used in a cable system" – language that does not encompass services distributed using Internet Protocol (IP) – the Commission lacked the necessary authority to adopt the 2014 proposal.

Likewise, Senator Cantwell recently urged Chairwoman Rosenworcel to refresh the record in the MVPD definition proceeding, arguing that while "Congress should create a new copyright regime for linear TV streaming services so that broadcasters can more easily be compensated," in the interim the Commission ought to sweep vMVPDs within the scope of the definition of an MVPD so that "'linear television streaming services would be required to negotiate directly with local broadcasters under current good faith negotiation requirements of the Communications Act, which would lead to agreements that better reflect the value of broadcasters' content.'"

Notably, Senator Grassley attached as supporting documentation a letter, from KCCI President and General Manager Brian Sather, that described the perceived problem as follows:

> The media conglomerates (Disney, Comcast-Universal, Fox Television and Paramount Global) that own the four largest television networks (ABC, NBC, FOX and CBS) have cut local broadcasters out of negotiations for carriage of their signals on these platforms. Instead, these media giants negotiate directly with the vMVPDs – to the benefit of the conglomerates' broader asset portfolios and detriment of local television stations – and then present "take-it-or-leave-it" proposals to local network-affiliated stations like ours.

An *ex parte* submitted in March 2023 by a group of associations representing affiliates of the Big Four networks made similar points.

Thus, the issue highlighted by Senators Grassley and Cantwell does not arise from a perceived negotiating-power disparity between distributor and local television station – as was the case in 1992 when Congress deemed it appropriate to establish must-carry and retransmission-consent rights for broadcasters – but rather one between television networks and their local network affiliates.

In addition, and as demonstrated in the following section, the evidentiary foundation for regulating either traditional or virtual MVPDs as "MVPDs" has eroded in the face of ever-expanding – and ever-more-popular – competitive alternatives to the pay-TV model.

III. Transformative Video Subscriber Trends Continue

I last surveyed video subscriber totals in September 2022's "A Tale of Two Trends: Traditional Video Distributors Shrink While Streaming Video Grows." Over the past roughly nine months, Internet-based video alternatives have continued to transform the marketplace. Consequently, the consumer migration away from traditional MVPDs has continued – further eroding the evidentiary foundation for *any* government intervention in the video-programming-distribution marketplace.

As I highlighted in the *Perspectives* referenced above, the top seven cable operators shed nearly one million subscribers during the second quarter of 2022. The chart below presents subsequent subscriber losses that occurred between the second quarter of 2022 and the first quarter of 2023:

Cable Subscriber Losses Since September 2022

MVPD	Q2 2022	Q1 2023	Total Change	% Change
Comcast	17,144,000	15,528,000	1,616,000	9.4
Charter	15,495,000	14,906,000	589,000	3.8
Cox	3,230,000	-		
Altice	2,574,200	2,475,800	98,400	3.8
Mediacom	540,000	-	-	-
Breezeline	332,312	300,684	31,628	9.5
Cable One	221,000	167,000	54,000	2.4
Other major private companies (including Cox and Mediacom)	-	3,440,000	-	-
TOTAL	39,536,512	36,817,484	2,719,028	6.9

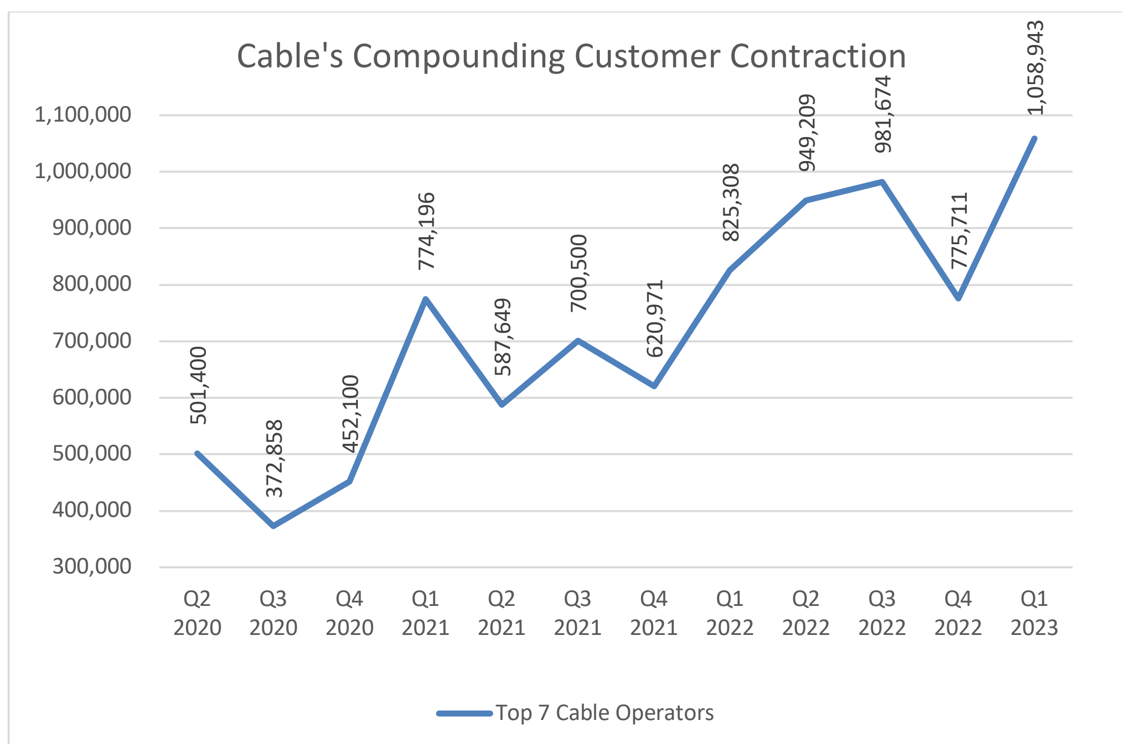
Source: Leichtman Research Group (Q2 2022, Q1 2023)

As you can see, over a nine-month period the total number of subscribers to the top seven cable operators decreased by more than 2.7 million, almost seven percent, to 36.8 million. By comparison, in 2010 59.8 million American households subscribed to cable. Overall, the number of cable households since that time has declined significantly, by 23 million or 38.4 percent.

Notably, the pace of this well-established trend is accelerating, even as the total subscriber base shrinks: the top seven cable operators lost under one million subscribers (949,209) from a total of 40,485,721 (2.3 percent) during the second quarter of 2022 but just over a million subscribers (1,058,943) from a total of 37,779,127 (2.8 percent) during the first quarter of 2023.

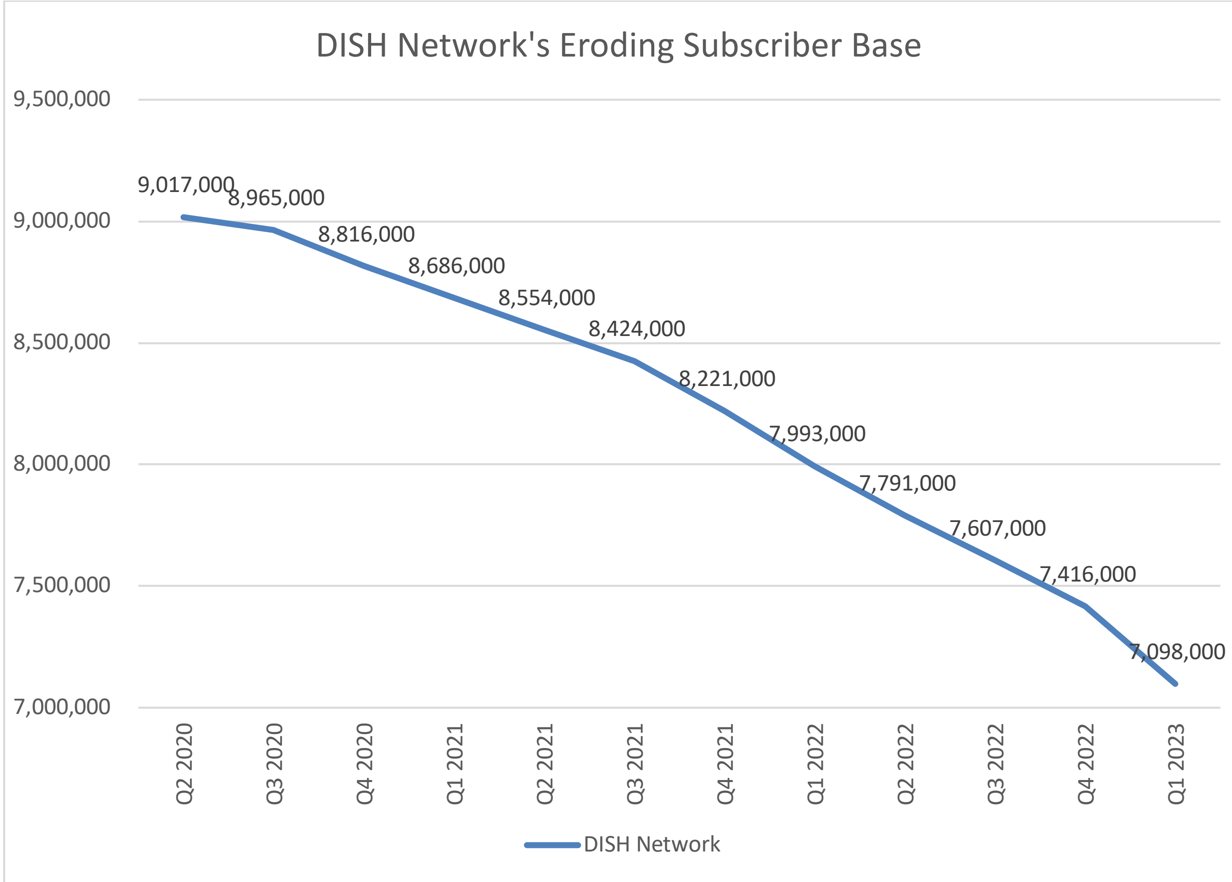
Below, meanwhile, are updated versions of graphs I prepared in September 2022.

This first graph presents total cable subscriber losses between the second quarter of 2020 and the first quarter of 2023:



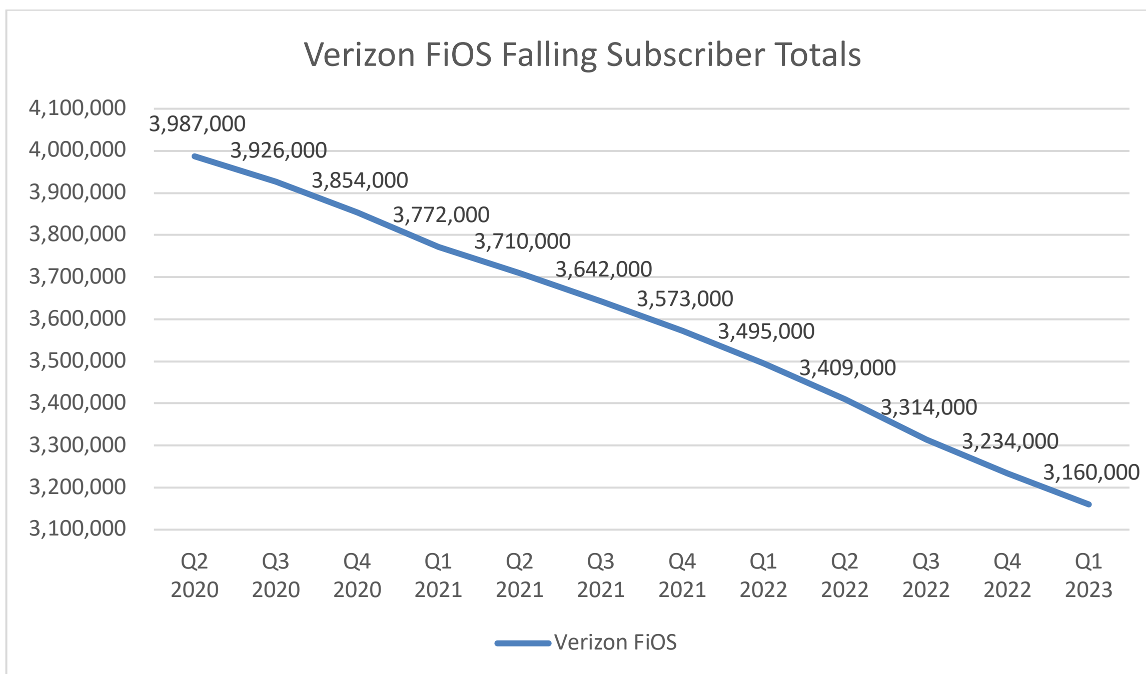
Source: Leichtman Research Group Press Releases

As I have noted previously, and perhaps for understandable reasons, the list of providers that make public subscriber totals is shorter than it once was. Only one of the two DBS providers, DISH Network, does so. The graph below presents its subscriber totals from the second quarter of 2020 – 9.0 million – to the first quarter of 2023 – 7.8 million. That decrease, which exceeds 1.2 million, equates to 13.6 percent of its Q2 2020 total. And as DISH Network revealed in its latest quarterly financial results, the rate at which it is shedding subscribers also is accelerating: 552,000 in Q1 2023 as compared to 462,000 in Q1 2022.



Source: [DISH Network Reports First Quarter 2023 Financial Results]

What follows is a graph illustrating total subscribers to Verizon FiOS over the same time period. Since Q2 2020, the number of subscribers to Verizon FiOS has dropped from roughly 4 million to 3.16 million, a difference of 827,000 customers representing 21 percent of its base – and in less than three years.



Source: Verizon Quarterly Earnings

Critically, traditional MVPD subscriber losses do not appear to translate into vMVPD customer gains. Although news reports indicate that YouTube TV has added over a million subscribers over the past year to reach a total of 6.3 million, overall vMVPDs, too, are losing customers. According to SVB MoffettNathanson senior analyst Craig Moffett, vMVPDs "lost 264,000 customers in Q1, among the worst quarters to date for the segment. 'The picture is not one that suggests that a plateau in the rate of decline is coming any time soon.'" In fact, pay-TV subscriptions, traditional and virtual combined, in the first quarter of 2023 reached a low not observed since 1992: 58.5 percent.

Leichtman Research Group data supports these conclusions. During the first quarter of this year, it estimates that YouTube TV added 100,000 subscribers (Craig Moffett pegs that number higher: 300,000) – while Hulu + Live TV lost an equal amount, Sling TV lost 234,000, and Fubo 160,000. (Once again, subscriber data for other vMVPDs, such as DIRECTV Stream and Philo, are not made public.)

In stark contrast, Nielsen data indicates that the share of eyeballs captured by streaming (which does not include linear channels accessed through a vMVPD offering or an app made available by a traditional MVPD) in May 2023 reached a historic high: 36.4 percent.

(Note: in September 2022, I reported that, based upon Nielsen data available at the time, streaming – in relation to "broadcast," "cable," and "other" – surpassed the 1/3 mark for the first time in June 2022 (specifically, 33.7 percent). In the interim, Nielsen changed its methodology. Accordingly, it is not possible to do an apples-to-apples comparison in the form of an updated graph.)

Meanwhile, consumer use of non-traditional video platforms, particularly among younger Americans, is exploding. Again according to Nielsen, in February 2023 YouTube "moved into the No. 1 spot on Nielsen's monthly TV viewing rankings among all TV networks and platforms." And TikTok usage among teens has gotten so high that in March of this year it announced a 60-minute daily time limit for those below the age of 18.

IV. Conclusion

It is clear from the above that traditional, facilities-based MVPDs – whether cable, DBS, or telco TV – in 2023 enjoy no privileged status able to justify legacy regulatory handcuffs that uniquely impede their ability to compete in the marketplace. As I wrote in "On Video, the FCC's Competition Report Falls Short," a January 2023 *Perspectives*, RAY BAUM'S Act of 2018 directs the Commission, in its biennial consolidated report on the state of the communications marketplace, to (1) identify "laws, regulations, [and] regulatory practices [that]... pose a barrier ... to the competitive expansion of existing providers of communications services," and (2) devise an "agenda ... for the next 2- year period for addressing the challenges and opportunities in the communications marketplace ... identified." Sadly, despite the congressional direction, the *2022 Communications Marketplace Report* failed to do either.

The expansion of legacy rules targeting MVPDs to those that rely upon the Internet for distribution unacceptably would exacerbate the mismatch between the regulatory regime and current competitive marketplace conditions by further entrenching the very rules that congressional directive, general notions of equity, and sound regulatory policy would dictate the FCC eliminate. More importantly, they would not address the problem faced by local television stations, for two reasons: (2) broadcasters issue appears to be with television networks, not vMVPDs, and (1) as the data presented in the previous section proves, vMVPDs are weathering a customer exodus similar to that of facilities-based incumbents. Put simply, the issue is not that the definition of an MVPD is not sufficiently broad, it's that pay-TV companies confront a marketplace that is dramatically changed.

Consequently, should lawmakers conclude that the public interest compels steps to protect and promote local broadcasting in the streaming age, a tailored, modern response would be far better than one that repurposes outdated rules forged in a bygone era – and, in doing so, leads to unwanted, harmful consequences for the vibrantly competitive video-distribution marketplace.

More broadly, consumers would be best served if Congress took a fresh look at all the video-specific provisions in the Communications Act. Ownership restrictions such as the top-four rule, compelled carriage requirements for cable and satellite operators, pointless obligations relating to set-top boxes, and numerous others have outlived whatever rationale they once may have had. To

fully harness for consumers the benefit-generating engine that is competition, it is time for regulators (and regulations) to step aside and let the marketplace drive optimally efficient outcomes.

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Further Readings

Andrew Long, "Greater Video Competition Should Prompt Less Regulation, Not More," *FSF Blog* (April 10, 2023).

Andrew Long, "Consumer Preferences Steadily Shift to Streaming Video," *FSF Blog* (February 28, 2023).

Andrew Long, "On Video, the FCC's Competition Report Falls Short," *Perspectives from FSF Scholars*, Vol. 18, No. 3 (January 24, 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).

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).