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Ever-Expanding Video Competition Undercuts Calls for More Rules, Compels Elimination of Existing Regulations

by

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I. Introduction and Summary

In a letter dated October 18, 2023, twenty Senators urged the Federal Communications Commission (FCC or Commission) to refresh the record in its 2014 proceeding that misguidedly proposed to expand the definition of a multichannel video programming distributor (MVPD) to include alternative providers – known as virtual MVPDs or vMVPDs – that rely upon the public Internet, rather than facilities to which they have privileged access, for distribution. And on October 11, 2023, FCC Chairwoman Jessica Rosenworcel publicly announced the circulation to her fellow commissioners of two proposals that would further implicate the agency in retransmission consent negotiations between local broadcasters and traditional MVPDs. And yet evidence abounds that the video programming marketplace is more than sufficiently competitive to drive singlehandedly efficient consumer outcomes. The appropriate response, therefore, is the elimination of regulation – not to impose awkward retrofitting of outdated rules on innovative new entrants or to adopt new rules that interfere with the efficient operation of competitive marketplace forces.

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Over thirty years ago, in the 1992 Cable Act, Congress articulated a clear policy to "promote the availability to the public of a diversity of views and information through cable television *and other video distribution media*" – and to "rely on the marketplace, *to the maximum extent feasible*," to do so (emphasis added). It is hard to imagine a more competitive landscape than exists today:

- Traditional MVPDs (cable, Direct Broadcast Satellite (DBS), telco TV) recently crossed a highly significant subscriber threshold: they now serve less than half of U.S. households – compared to 74 percent just five years ago and down eight percent over just the last 24 months – and continue to shed subscribers at a steady pace.
- While the growth of vMVPDs, the largest of which are owned by corporate titans (Alphabet's YouTube TV, Disney's Hulu + Live TV), appears to have flattened out, they nevertheless offer a competitive alternative to the dwindling number of consumers still drawn to your parents' television viewing experience.
- Direct-to-consumer (DTC) offerings, including a number of sports-team-specific streaming services (Jazz+, ClipperVision, Monumental Sports Network), bypass traditional distribution mechanisms altogether to achieve "greater reach as traditional pay TV subscribers continue to decline."
- Consumers, and in particular younger consumers, increasingly choose Internet-delivered options: streaming services such as Netflix, Amazon Prime Video, Hulu, and Max; social media platforms like TikTok and YouTube; and free ad-supported streaming television (FAST) channels such as Pluto TV, The Roku Channel, Tubi, and Freevee.

While the specific details likely are vastly different than what Congress may have envisioned in 1992 – thank the Internet for that – there is no denying that the video programming landscape in 2023 has achieved competitive critical mass.

Rather than extending outdated regulatory classifications to new platforms (such as vMVPDs, a topic that I addressed in "With Pay-TV on the Wane, Legacy Regulations Should Follow," a July 2023 *Perspectives from FSF Scholars*) or imposing new regulations that pick winners and losers (see Chairwoman Rosenworcel's blackout-related proposals, which I discuss below), the FCC should abide congressional intent by eliminating marketplace-distorting rules and allowing competitive forces to do their job. Congress, too, has a role to play – specifically, to repeal outdated statutory provisions. Among those ready for the chopping block in a comprehensive fashion, whether by the Commission or by Congress, are media ownership rules, must-carry and retransmission consent requirements, cable and satellite compulsory licenses, and the obligation to support virtually non-existent retail set-top boxes.

II. Further Agency Interference in Carriage Negotiations Is Unwarranted

In a recent press release, Chairwoman Rosenworcel publicized two proposals that would, in the name of "empower[ing] consumers in the media marketplace," inappropriately tilt retransmission consent negotiations in the direction of local broadcast television stations. Consumers today have far more options than ever before, both generally in terms of video programming and specifically regarding access to local television stations' content. The inevitable consequence, whether intended or not, of the Chairwoman's proposals would be to empower broadcasters – and, in doing so, make future blackouts more likely, not less.

According to the press release, the Notices of Proposed Rulemaking that have been circulated to the four commissioners would (1) require cable operators and DBS providers "to issue rebates to subscribers in the event of a blackout due to a failure to reach a retransmission consent agreement with broadcast station(s)/group owners," and (2) require MVPDs to inform the Commission of a blackout lasting more than a day. In each case, it appears that the burden – and presumably the blame – for the blackout would fall squarely on the distributor's shoulders. Regardless of the reasonableness of their respective bargaining positions.

ACA Connects President and CEO Grant Spellmeyer claimed in a statement in response that:

> [T]he proposals announced today do not appear to address the root cause of these blackouts: the insatiable demand of broadcasters for outrageous, ever-increasing fees. We urge the FCC to focus on tackling this underlying problem and to avoid proposals that are more likely to make it worse by giving mega-broadcasters even more leverage in their negotiations with smaller cable operators.

I take no position whatsoever as to whether broadcasters in fact make "outrageous" demands – but I find it hard to dispute his assertion as to the proposals' practical impact on relative bargaining positions. And I struggle to understand why the Commission might further involve itself in carriage negotiations at a time when broadcasters themselves acknowledge the expanded options available to consumers who want to access their content.

During the recent high-profile impasse between Disney and Charter Communications, the former published a blog post pointing out that "you don't need a cable provider to watch your favorite live sports, news, and shows" and "consumers have more choices today than ever before to immediately access the programming they want without a cable subscription"; promoted the Disney-owned vMVPD Hulu + Live TV; underscored that "Disney's networks and stations are also available on other TV streaming services such as DIRECTV Stream, YouTube TV, Sling, and Fubo"; and "noted that the ABC Owned Television Stations will always be available over the air at no cost to the consumer."

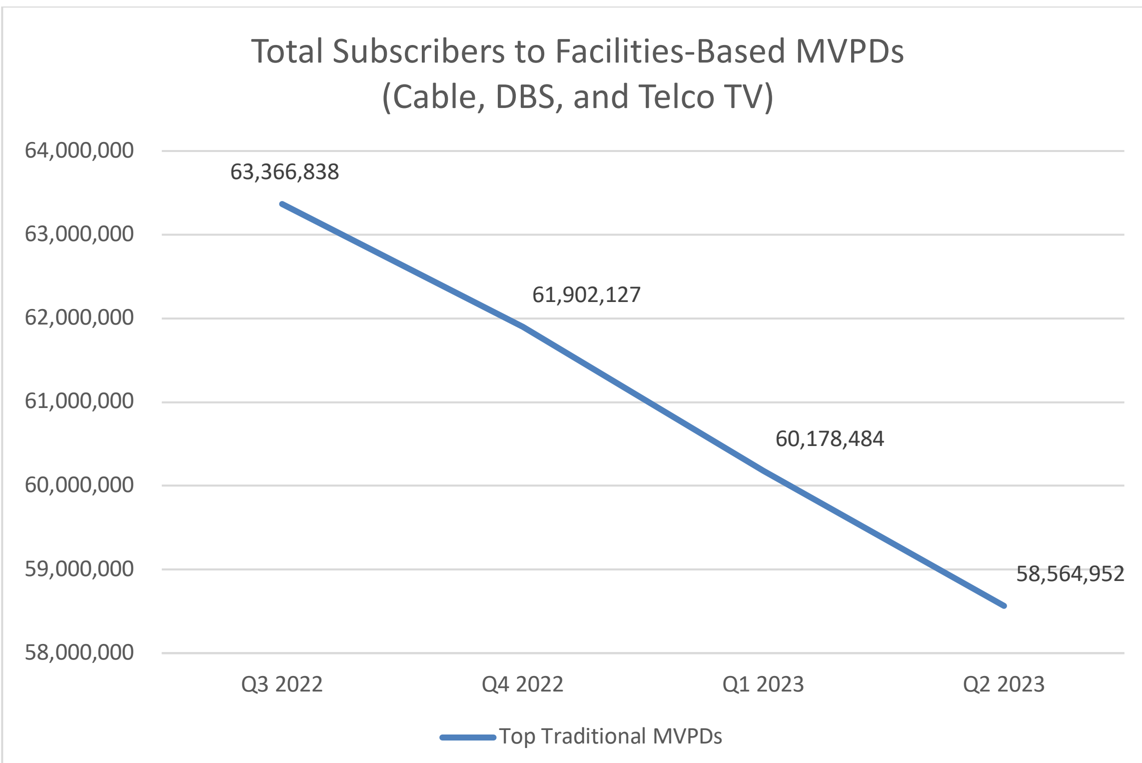
As the owner of eight television stations in some of the largest media markets (including New York City, Los Angeles, Chicago, Philadelphia, San Francisco, and Houston), Disney without question is a reliable source for information regarding the many options via which consumers can access local broadcasters' signals. Make no mistake, the days when "cable" held a privileged position in the video distribution marketplace are long past.

III. Innovation and Shifting Consumer Preferences Continue to Transform the Competitive Video Programming Distribution Landscape

Bigger picture, the ongoing trend away from traditional "cable" offerings toward new distribution models is picking up steam. By every measure, subscriber defections from facilities-based MVPDs continue. The vMVPD category's growth seems to have hit a plateau, and by no means offsets the losses experienced by cable operators, DBS providers, and telco TV platforms. Subscription streaming services – Netflix, Amazon Prime Video, Hulu, Disney+ and the like – are facing challenges, but continue to fare reasonably well as a category, as I documented in a July 2023 *Perspectives*. Meanwhile, alternative video sources – Direct-to-Consumer (DTC) offerings, Free Ad-Supported Streaming Television (FAST) channels, social media options (TikTok, YouTube), and others – further redefine the viewing experience, particularly for younger Americans.

- According to the Leichtman Research Group, the percentage of households subscribing to facilities-based MVPDs recently crossed a "critical threshold," falling below half to 49 percent. Just 24 months ago that total was eight percent higher. Five years ago it was 74 percent.

The following chart depicts the steady decline in total subscribers to the top cable, DBS, and telco TV services over just the past four quarters:



Source: Leichtman Research Group Press Releases

- An additional fifteen percent of households subscribe to a vMVPD, but that number is relatively unchanged year to year. Alphabet's YouTube TV, the new home of the NFL Sunday Ticket game package, appears to be the one success story within this category: whereas Hulu + Live TV, Sling TV, and Fubu lost over 300,000 subscribers combined in the second quarter of this year, YouTube TV added an estimated 200,000, for a net loss of 100,000.

- From the once-lucrative Regional Sports Network (RSN) ashes arise DTC streaming services specific to a single sports team (including Jazz+ in Utah and ClipperVision in Los Angeles) or market (for example, the Monumental Sports Network, which covers a number of teams in the Washington, D.C. market). As mentioned above, one of the factors motivating the creation of these offerings is that, as traditional pay TV offerings lose subscribers, bypassing those distribution platforms leads to "greater reach."
- Meanwhile, FAST channels – that is, linear channels that are streamed over the Internet rather than carried on a traditional multichannel platform; they include services such as Paramount's Pluto TV, The Roku Channel, Fox-owned Tubi, and Amazon's Freevee – are experiencing rapid growth. *Forbes* reported in January that FAST channels' share of total viewing jumped from 6 percent in 2020 to thirty percent in 2022. And recently *MediaDailyNews* noted that 40 percent of FAST viewers increased the amount of time they spent watching such services over the past year, two-thirds of whom doing so at the expense of other video distribution platforms.
- Finally, it is worth highlighting the generational gap that is emerging with respect to video consumption. Older Americans are more likely to purchase traditional pay-TV packages: "[t]he mean age of traditional pay-TV subscribers is 49.3 vs. 42.5 among non-subscribers, and 40.8 with vMVPD-only." Conversely, teenagers are more likely to watch YouTube than Netflix – and more likely to watch TikTok than YouTube.

Innovation and change in the video programming distribution marketplace continues to occur at a breakneck pace. In many respects, the data points presented above offer only a current snapshot. What is undeniable, however, is that the steady decline of traditional MVPDs – significantly, the only category whose ability to compete is hamstrung by legacy rules based upon marketplace realities that do not exist – compels a deregulatory response. And in light of the dramatic changes in the overall media landscape, there are regulations applicable to broadcasters, such as media ownership regulations, that should be eliminated as well.

IV. Conclusion

In 2023, the only things hindering vibrantly competitive marketplace forces from optimizing consumer welfare are unnecessary, outdated agency regulations and their underlying statutory provisions. Consistent with the policies embraced by Congress in the 1992 Cable Act, the Commission should be looking for ways to eliminate one-sided rules that pick winners and losers – not exacerbating existing inequities by imposing new rules or extending legacy obligations to new entrants.

Specifically, the Commission should reject Chairwoman Rosenworcel's blackout-related proposals and resist calls to refresh the record in the long-dormant MVPD definition proceeding. It also should move swiftly to eliminate rules that serve no beneficial purpose, such as media ownership limits, carriage obligations, and retail set-top box support requirements. And Congress should take whatever complementary deregulatory actions, such as elimination of the must carry - retransmission consent obligations, and cable and satellite compulsory licenses, that are appropriate to ensure that the efficiently operating marketplace determines winners and losers – not policymakers.

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