FREE STATE FSF FOUNDATION

Perspectives from FSF Scholars
May 8, 2024
Vol. 19, No. 17

The FCC Is Complicit in the Decline of Traditional MVPDs

by

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I. Introduction and Summary

On April 19, Federal Communications Commission Chairwoman Jessica Rosenworcel launched her fourth assault in less than a year on the beleaguered distributors of video programming over which the agency she helms holds dominion: cable operators and Direct Broadcast Satellite (DBS) providers. But it is widely acknowledged that these traditional multichannel video programming distributors (MVPDs) are not the video marketplace titans that they once were. Internet-based video providers have wrestled away that role.

The FCC itself, even as it barrels forward with more and more one-sided regulations, consistently concedes that the competitive landscape has been turned on its head. But that altered reality has not compelled a change in regulatory course. At this point, what previously might have been chalked up to a slow-to-turn bureaucracy today must be called out for what it is: a campaign that, intentionally or not, unfairly skews what would otherwise be a robustly competitive marketplace toward Internet-based providers.

Given the catastrophic video subscriber losses that traditional MVPDs weather financial quarter after quarter – losses that are driving smaller cable operators out of the video business altogether

– the FCC must come to terms with the fact that, big picture, whatever hypothetical consumer benefit it alleges might justify further regulatory meddling, that value is far outweighed by the damage inflicted upon the ability of cable operators and DBS providers to provide a competitive counterweight. Were it to embrace an up-to-date, honest understanding of the state of the video-distribution marketplace in 2024, the Commission surely should conclude to shelve its pending rulemakings that only would suppress competition further:

- It would see the error in its recently announced intention to infringe upon traditional MVPDs' freedom to contract with programmers – programmers that have countless paths available to reach consumers, including the popular direct-to-consumer streaming model.

- It would recognize the red flags raised by its administratively unworkable proposal to mandate that cable operators and DBS providers give customers rebates in the event of a "blackout," an obligation that would exacerbate the distorting impact of outdated rules on arm's-length negotiations and cause underserved reputational harm to distributors.

- It would open its eyes to the fact that early termination fees and monthly billing increments are standard, pro-consumer practices employed widely by traditional MVPDs' competitors in the video programming marketplace – and that restricting cable operators and DBS providers from likewise doing so would drive up their costs, lead to higher prices, and drive consumers into their arms of their rivals.

- And it would take another look at its recent decision to force traditional MVPDs to communicate pricing information in a way that misleads consumers into thinking that cable and DBS offerings are more expensive than similar services provided by Internet-based competitors.

Indeed, if the Commission truly wanted to maximize overall consumer welfare, it would focus broadly on *eliminating* legacy one-sided regulations in order to allow competitive forces in the marketplace to do their job. This would be sound regulatory policy and what Congress intended.

II. Traditional MVPDs Continue to Lose Subscribers to Internet-Based Alternatives

For a blow-by-blow account of the steady and years-long consumer migration from traditional MVPDs to Internet-delivered upstarts, I direct your attention to the lengthy *Further Readings* section below. Should there be any doubt that this trend continues, however, I present the following recent data points:

- Charter Communications, which in the last year became the largest cable operator due to its relatively stronger immunity to "cord cutting" (that is, it has been losing customers at a slower rate than Comcast Corporation, the former number one), just reported its biggest ever three-month drop: 392,000 subscribers, just under 3 percent of its total base.

- Speaking of Comcast, it continues to shed customers at an impressive pace, losing 487,000 subscribers in the first quarter of 2024, a 3.5 percent overall decline.

- DIRECTV, which does not publicly report earnings, is estimated to have lost 1.8 million video subscribers in 2023 across its DBS, telco TV, and virtual MVPD (vMVPD) offerings.

- The number of subscribers to DISH TV fell by 249,000 between October and December 2024, from 6.72 million to 6.471 million, nearly 4 percent.

- Overall, facilities-based MVPDs saw nearly 7 million consumers cut the cord in 2023.

On the streaming side of the ledger, the already big continue to get even bigger:

- Netflix, Inc. in the fourth quarter of 2023 added 2.53 million subscribers in the U.S. and Canada for a total of 82.66 million – which is substantially more than all pay TV providers combined: 71.24 million. (Netflix does not separately report U.S. subscribers and will stop reporting subscriber numbers altogether in 2025).

- YouTube TV, far and away the largest vMVPD serving over 40 percent of all vMVPD customers, now has more than 8 million subscribers, rendering it larger than DISH TV and potentially the third-biggest MVPD overall. Moreover, one analyst predicts that YouTube TV will become the largest MVPD by the end of 2026.

To be sure, the Commission is aware of the existing state of affairs. By way of example, a footnote on the second page of the so-called *Fostering Independent and Diverse Sources of Video Programming* Notice of Proposed Rulemaking (NPRM) released last month paints a clear picture of the plight of traditional – and, more to the point, regulated – MVPDs:

> *8 Million Homes Dump Big TV Channel Bundle In Last 12 Months*, nScreenMedia.com (Aug. 15, 2023), https://nscreenmedia.com/8-m-homes-dump-big-tv-channel-bundle-q2-2023/ (noting that the decline in MVPD subscribership continues to accelerate, with a year-over-year decline from 8.1 percent in Q2 2022 to 13.3 percent in Q2 2023); *Communications Marketplace Report*, GN Docket No. 22-203, FCC 22-103, paras. 218-21 (Dec. 30, 2022) (*2022 Communications Marketplace Report*) (noting that MVPD subscribership has been declining since 2013, including a loss of 6.7 million video subscribers between the end of 2020 and 2021).

III. The Commission Continues to Saddle Traditional MVPDs With Additional Rules Without Regard to the Impact of Those Unnecessary Burdens on Competition

It is one thing to insert into the official record a recitation of impactful marketplace trends. But as the actions of the Rosenworcel FCC make plain, it is another thing entirely to factor – or not to factor – the significance of those trends into forward-looking policy decisions. On four separate occasions during the last year, the Commission has taken steps to increase the regulatory obligations that cable operators and DBS providers alone must shoulder – without once seriously considering how those new rules will affect competition.

As I once again pointed out in "Ever-Expanding Video Competition Undercuts Calls for More Rules, Compels Elimination of Existing Regulations," an October 2023 *Perspectives from FSF Scholars*, long ago Congress expressed an undeniable desire to rely upon competition, not regulation, to ensure that consumers are well served by the video distribution marketplace:

> 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).

Competition – in particular, robust levels of competition like that which exists in the video distribution marketplace – maximizes overall consumer welfare through expanded options, lower prices, and faster innovation. Accordingly, a rational regulator refrains from actions that serve to suppress competition, or at least first considers whether any harm to competition is outweighed by the hoped-for impact of a decision to interfere with a well-operating marketplace.

Unfortunately, and as repeatedly underscored by Commissioners Brendan Carr and Nathan Simington in their Dissenting Statements, the proceedings targeting traditional MVPDs initiated by Chairwoman Rosenworcel over the past eleven months fail to reckon with the competitive consequences of the FCC's actions.

Most recently, in last month's *Fostering Independent and Diverse Sources of Video Programming* NPRM, the Commission suggested that possible "marketplace *obstacles*" – not "market failures," a well-defined concept in economic literature that under certain circumstances can justify government intervention, but merely *obstacles* – might warrant infringements upon traditional MVPDs' freedom to contract with programming providers, despite the multitude of ways that programmers today can reach consumers with their content. After all, cable operators and DBS providers cannot credibly be called gatekeepers when programmers market their content directly to consumers:

- AMC Networks Inc., one of the independent programmers cited in the NPRM, reported 11.4 million subscribers for its direct-to-consumer (DTC) AMC+ offering as of the end of 2023, a 3 percent increase in just 3 months.

- Paramount Global's DTC offerings, which include Paramount+, earned nearly $2 billion – $1.879 billion to be precise – in the first quarter of 2024, up 24 percent from Q1 2023.

Nevertheless, and based upon an outdated record from 2016, the NPRM proposes to ban (1) all Most Favored Nation (MFN) provisions, including those in existing contract provisions that may not be severable from the broader agreement, and (2) "unreasonable" Alternative Distribution Method (ADM) provisions, a line-drawing endeavor that inescapably and inappropriately injects the FCC into arms' length negotiations.

As a result, Commissioner Carr in his Dissenting Statement wrote that the rulemaking "proceeds from a dated view of the marketplace that can only further tilt the regulatory playing field in a way that will not serve consumers' interests" – and warned that "[t]his proceeding – whether intended or not – will only serve to widen the regulatory imbalance between traditional MVPDs and their OTT competitors."

In March of this year, the Commission voted along party lines to impose "all-in" pricing obligations solely upon traditional MVPDs, an action that I described in "Divided FCC Imposes New Pricing Requirements on Legacy Video Providers," a March 2024 post to the *FSF Blog*. In this instance it was Commissioner Simington who, in his Dissenting Statement, flagged the inevitable but unacknowledged competitive ramifications:

> [W]e are yet again adding additional regulatory burden and complexity on an industry that is shedding customers by the millions. Traditional linear video is on the way out, but we don't have to shoo them away like the last guest who hasn't gotten the hint that the party's over. For every mote of regulatory complexity we add to legacy providers, unregulated online video providers become more nimble by comparison.

Yet another rulemaking, initiated in January of this year, proposes to require that cable operators and DBS providers "give their subscribers rebates when those subscribers are deprived of video programming they expect to receive during programming blackouts that result from failed retransmission consent negotiations or failed non-broadcast carriage negotiations." As I explained in an October 2023 *Perspectives*, this is administratively unworkable, tips the scales further in the direction of programmers, and ultimately will lead to higher prices for consumers. And as Commissioner Simington pointed out in his Dissenting Statement, blackout rebates will not benefit consumers "[b]ecause broadcasters can use this new regulatory reality as a mote of leverage in retransmission consent negotiations with MVPDs."

And in December 2023, the FCC adopted an NPRM that would prohibit cable operators and DBS providers from offering consumers long-term contracts enforceable via early termination fees and from offering service in monthly increments – a common practice across many industries.

As Commissioner Carr wrote in his Dissenting Statement, "[i]t does so at a time when traditional MVPDs are bleeding market share to new, unregulated competitors" and "no matter how competitive the market." In his Dissenting Statement, Commissioner Simington cautioned that:

> Consumer choice in the video marketplace abounds, and today, consumers are exercising that choice. They're marching right out the door from traditional MVPDs. Today's proposed action on monthly billing will make it marginally harder to operate as an MVPD, in that it puts a costly burden on them that no other video marketplace participant is required by law to bear. It may not be the proverbial straw on the camel's back, but the pro-consumer effect of today's proposal will certainly be a mirage. Rather than improving the consumer experience, it will just make the experience for most MVPD consumers marginally worse, as MVPDs recoup lost revenues in the form of higher monthly service costs overall.

Time and again, Dissenting Statements from the two Republican Commissioners have brought attention to the competition-dampening impact that additional rules singling out traditional MVPDs will have on consumers. If only the Democratic majority were willing to admit to the inescapable consequences of its actions.

IV. Conclusion

In the past, I have argued that the steady rise of Internet-based video distributing rivals – and the concomitant decline of traditional MVPDs – is generating robust competition that should compel both Congress and the Commission to *eliminate* existing statutory and regulatory constraints on the ability of the latter to compete. In the face of the current onslaught of *additional* regulations singling out traditional MVPDs, however, here I simply urge the Rosenworcel FCC to own up to the way its actions are tilting the playing field to the detriment of cable operators and DBS providers – and, more importantly, to take responsibility for the harmful impact those actions are having on the ability of competition to maximize overall consumer welfare.

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Further Readings

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