

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Annual Assessment of the Status of ) MB Docket No. 07-269  
Competition in the Market for the )  
Delivery of Video Programming )

**COMMENTS OF PUBLIC KNOWLEDGE**

The Commission’s reports to Congress are more than a data-collection exercise. They serve a purpose beyond simply cataloging, without comment, “the status of competition in the market for the delivery of video programming.”<sup>1</sup> As the Commission recognizes, the purpose of collecting this information is to “better understand the implications for the American consumer, and provide a solid foundation for Commission policy making with respect to the delivery of video programming to consumers.”<sup>2</sup> While the Commission can use a number of tools to accomplish its policy goals, its basic task with regard to video programming is clear. Congress charged it “to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, ... and to spur the development of communications technologies.”<sup>3</sup> A new technology, online video, now allows the Commission to promote competition and diversity better than ever before. But the Commission must take a few steps to allow online video distributors (“OVDs,”) to realize their potential.

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<sup>1</sup> 47 U.S.C. § 548(g).

<sup>2</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Further Notice of Inquiry*, MB Docket No. 07-269, FCC 11-65 (rel. Apr. 21, 2011).

<sup>3</sup> 47 U.S.C. § 548(a).

## I. THE PROMISE OF ONLINE VIDEO

The Internet has revolutionized the entire information economy, from music to news to publishing. While the transition has been jarring for some long-established industries, it has been great for consumers. Today, consumers can access more, better content than ever before.

Ultimately everyone benefits from the online transition. Creators and media companies can sell to a large and growing market. Distribution costs are low and nothing ever goes “out of print.” Hits can reach millions and niche content can find an audience. Creators can charge for content or give it away for free—and consumers have demonstrated that, as long as content is available and reasonably priced, they will buy it.<sup>4</sup>

These trends have begun to do the same for video. As the Justice Department has noted, OVDs “represent the most likely prospect for successful competitive entry into the existing video programming distribution market.”<sup>5</sup> But this entry is not certain. Video is different than other media in a few key ways, and has proved resilient to disruption. Broadcasters, programmers, and multichannel video program distributors (MVPDs) are locked into a symbiotic relationship, protected by regulations and supported by business arrangements that keep outsiders out. They even control the wires that OVDs need to access their viewers. These things

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<sup>4</sup> Prominent success stories include Steam (games), Netflix (streaming movies and TV), iTunes (downloadable movies, TV, and music), and Kindle (ebooks).

<sup>5</sup> Competitive Impact Statement of the Department of Justice, *United States v. Comcast Corp.*, 1:11-cv- 00106, (DC Cir. Jan. 18, 2011) (hereafter *DoJ Analysis*) at 28, available at <http://www.justice.gov/atr/cases/f266100/266158.pdf>.

might keep OVDs from becoming outright competitors to MVPDs. The remainder of this section will briefly outline the obstacles online video providers might face.

### ***Barriers to Video Disruption***

The barriers to entry to starting a new broadcast station, or a new cable system, are very high. It is expensive to obtain spectrum licenses, build broadcasting facilities, launch a satellite, or lay down cables to every house in a city. OVDs seem to have figured out a way around these problems. But other barriers persist. As the largest buyers of video content, MVPDs are able to keep their suppliers from putting some content online. Certain arrangements, from the initial grant of spectrum to “free” over-the-air broadcasting, to retransmission consent and program access, to compulsory copyright licensing—keep incumbents working together fairly well. But they funnel high-value content to incumbents, leaving new entrants unable to buy their way into the market at any cost. There’s no obvious way for new entrants to avail themselves of the means that, for instance, smaller MVPDs have at their disposal to protect against anticompetitive conduct. Companies like *ivi*, Digital Broadcasting and Sky Angel simply want to add competition to existing markets and to slot themselves into established categories. But incumbents and a creaky regulatory system conspire against them.<sup>6</sup>

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<sup>6</sup> See *WPIX et al. v. ivi*, Case 1:10-cv-07415-NRB (S.D.N.Y. Feb. 22, 2011) (granting temporary restraining order against an OVD because it was not a “cable” system for copyright statutory license purposes); Digital Broadcasting OVS Certification to Operate an Open Video System, *Memorandum Opinion & Order*, DA 11-996, at ¶ 3 (rel. June 3, 2011) (denying an Open Video Certification because the applicant “failed to sufficiently and exhaustively indicate to the Commission the local communities it intends to serve and has failed to adequately serve a copy of its application on designated telecommunications officials in such local communities”);

### ***MVPD Advantages***

Traditional “multichannel video programming distributors” (MVPDs) are facilities-based:<sup>7</sup> they own the wires their content travels on. This contrasts with the typical Internet model, where web services like Google, Amazon, and Facebook rely on the user buying an Internet connection from some other party. This gives the MVPDs several advantages. Although this has changed in recent years, video delivered over owned infrastructure has traditionally been higher quality (in terms picture quality and stability) than what is available online. Even today many ISPs simply do not offer the high-bandwidth, low-latency connections needed for high-quality video streaming or reasonable download times. (And if they do, network management practices or bandwidth caps may make online video suffer.)

However, this twofer of better content with better picture quality is not the biggest advantage that MVPDs have over OVDs. That comes from the fact that the largest broadband ISPs are also MVPDs, who provide the very Internet connections OVDs need to access their viewers. This puts OVDs in a parlous situation. Indeed, the Department of Justice recently found that MVPDs have incentives to discriminate against OVDs.<sup>8</sup> The Commission dealt with this issue as a general matter in the Open Internet proceeding. But the dangers from a non-neutral Internet, or one saddled

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Sky Angel U.S., Order, 25 FCC Rcd 3879, ¶7 (M.B. 2010) (denying a program access complaint from an online cable system by interpreting the term “channel” to require a physical “transmission path”);

<sup>7</sup> Satellite MVPDs and even broadcasters are both facilities-based, enjoy regulatory advantages, and even possess a degree of market power, but they (generally) are not also ISPs.

<sup>8</sup> DoJ Analysis 11.

with usage caps designed to cripple (or “monetize”)<sup>9</sup> online video, to online video are particularly pronounced.

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Because of the advantages MVPDs have, and the barriers to entry that keep them in place, online video providers have mostly specialized in providing content that does not directly compete with what MVPDs provide, such as on-demand movies, old TV shows, and out-of-market sports. To underline how they try to avoid colliding with MVPDs, many of them even take steps to keep consumers from watching their content on TV screens.<sup>10</sup> The following section suggests that this is not in the best interests of consumers and provides steps the Commission can take to remedy the problem.

## **II. STEPS THE FCC CAN TAKE TO PROMOTE AND PROTECT ONLINE VIDEO**

To the extent that MVPDs and online video providers both provide “video,” they compete with each other and are part of the same market. Indeed, the Justice Department recently conditioned the merger of Comcast and NBCUniversal upon the joint entity licensing programming to OVD competitors, after recognizing that OVDs provided beneficial competition to the video distribution market.<sup>11</sup>

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<sup>9</sup> Philip Dampier, Bell CEO: Bandwidth Usage Charges Are About Monetizing Video Traffic for Shareholders, *Stop the Cap!*, Mar. 24, 2011, <http://stopthecap.com/2011/03/24/bell-ceo-bandwidth-usage-charges-are-about-monetizing-video-traffic-for-shareholders> (quoting Bell Canada CEO explaining its strategy that “as we see a growth in video usage on the internet, making sure we’re monetizing that for our shareholders through the bandwidth usage charges.”)

<sup>10</sup> See, e.g., Janko Roettgers, *Logitech Revue: The Wrong Choice for Cord Cutters*, GIGAOM, Oct. 6, 2010, <http://gigaom.com/video/logitech-revue-the-wrong-choice-for-cord-cutters> (describing how the Logitech Revue’s TV-based browser is blocked from accessing certain sites).

<sup>11</sup> DoJ Analysis 11.

But competition is multi-faceted. Baseball games and movies are part of the “entertainment” market. But like “entertainment,” “video” is a very broad category, and in practice online video remains complementary to traditional MVPD or broadcast programming, for most viewers. Without certain high-value content it cannot be a complete substitute, and many viewers are left paying a high monthly fee for a large bundle of content when they only want to access a handful of programs. This complementarity is not in the best interest of consumers, who would be better served by online choices that offered the same kinds of content available on MVPDs. There is no denying that many viewers have already “cut the cord” and now access all their video online. But many would like to, and cannot.

The FCC should care about this. It should take whatever steps it can to promote competition—true, head-to-head competition—in the video marketplace. This is the kind of competition that will make prices low for viewers. This is the kind of competition that is good for content creators, by providing them multiple outlets, and multiple potential buyers, for their programming. And this is the kind of competition that will help the FCC promote numerous goals of communications policy, even beyond the video-specific charge to promote competition and diversity. For example, video competition would help promote the competitive development of the Internet,<sup>12</sup> would maximize user control of content,<sup>13</sup> and would spur broadband adoption.<sup>14</sup> Recently, the FCC noted that OVDs “can provide and promote

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<sup>12</sup> 47 U.S.C. § 230

<sup>13</sup> 47 U.S.C. § 230(b)

<sup>14</sup> In its Order on the Comcast/NBC merger, the FCC said that, in addition to enhancing available content, lowering prices, and driving innovation, “[a] robust

more programming choices, viewing flexibility, technological innovation and lower prices.”<sup>15</sup> These benefits cannot be realized until online video is an equal player in the video marketplace.

There is room for complementary online services, and there is clearly demand for them. But these should not be the only online video choice, because if OVDs remain complementary to MVPDs then their full competitive promise will go unrealized. Outdated business, technological, and regulatory assumptions should not hold them back. The Commission should therefore take, at a minimum, the following actions designed to promote and protect OVDs.

***Issue a declaratory ruling that MVPDs may not engage in “unfair methods of competition or deceptive acts and practices” with regard to OVDs.***

Congress has determined that the public interest is best served by competition between video programmers. But experience in the U.S. and comparisons to overseas video markets have shown that video competition does not happen on its own. Left to itself, the video market tends toward oligopoly, which is not good for viewers or creators. Thus, to bring about the desired level of competition, various policies prevent MVPDs from engaging in anticompetitive acts

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OVD market also will encourage broadband adoption, consistent with the goals of the Commission’s National Broadband Plan.” *FCC Analysis* ¶62. By stimulating demand for broadband, OVDs create market incentives for Internet access providers to bring the attendant benefits of broadband connectivity to communities that may currently lack it.

<sup>15</sup> Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, MB Docket No. 10-56, FCC 11-4, at ¶78. (rel. Jan. 20, 2011).

with regard to each other or locking up programming in exclusive contracts.<sup>16</sup> If it would be illegal for an MVPD to do something with respect to another MVPD, it should also be illegal for it to do that same thing with respect to an OVD. Therefore, the FCC should issue a declaratory ruling that, under 47 U.S.C. §§ 536 and 548, “traditional” MVPDs (cable, telco, and DBS) may not engage in unfair practices, including exclusionary programming contracts, with respect to all players in the multichannel video market, including OVDs.

***Begin a proceeding to determine which regulations ought to apply to OVDs that choose to operate as cable providers.***

OVDs should not automatically be covered by regulations that do not apply to them. For example, the network attachment rules of 47 U.S.C. § 549 only make sense with respect to facilities-based cable systems. In FCC terminology, OVDs are Title I services, not Title VI services.

At the same time, while a number of Title VI provisions would make no sense when applied to a non-facilities-based, (possibly) nationally-available, over-the-top Internet cable system, some of them would. In any event the statute at no point expressly requires that cable systems be facilities-based. Facilities owners already have a natural advantage over their over-the-top counterparts. They should not receive regulatory benefits as well.

The FCC should therefore allow an online system that meets certain requirements (such as signal security comparable to what is possible on a facilities-based system) to opt into Title VI status. Such an opt-in would grant regulatory

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<sup>16</sup> See 47 U.S.C. § 548.



privileges (such as the right to negotiate for retransmission consent) as well as obligations (perhaps must-carry).<sup>17</sup> Determining exactly how to modernize media regulation in a technologically-neutral way will be a complex undertaking, and involves more than just the FCC.<sup>18</sup> This issue, however, is worthwhile, and merits its own proceeding, and further analysis.

***Protect online video in an Open Internet and broadband context***

The Commission already prohibits broadband ISPs, both wireless and wired, from blocking OVDs that compete with their own video services.<sup>19</sup> The Commission, however, allows providers to engage in “reasonable network management,”<sup>20</sup> to offer usage-based pricing plans,<sup>21</sup> and to offer “specialized services.”<sup>22</sup> But the Commission should be firm when enforcing its rules: Network management practices with an undue effect on video services are not reasonable, usage-based billing plans that are unrelated to actual costs or constraints are not allowed,<sup>23</sup> and specialized services must not be a “Get Out of Jail Free” card that allows ISPs to discriminate in favor of their own video offerings because they are “special.” Even

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<sup>17</sup> Of course, certain regulations, such as those affecting public safety or accessibility, may be applied even to OVDs that choose to maintain Title I status. There does not have to be a telecommunications-specific or competitive justification for policies like these.

<sup>18</sup> For example, the FCC should work with the Copyright Office to make sure OVDs fit into the compulsory copyright license system for MVPDs. *See WPIX et al. v. ivi*, Case 1:10-cv-07415-NRB (S.D.N.Y. Feb. 22, 2011) (granting temporary restraining order against an OVD because it was not a “cable” system for copyright statutory license purposes).

<sup>19</sup> Preserving the Open Internet, *Report & Order*, 25 FCC Rcd. 17905, ¶1 (2010).

<sup>20</sup> *Id.* ¶ 80.

<sup>21</sup> *Id.* ¶72.

<sup>22</sup> *Id.* ¶112.

<sup>23</sup> *See* Letter from Netflix to FCC, GN Docket No. 09-191, May 10, 2011, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021347961>.

certain “bundling” deals that make it uneconomic for a consumer to cut the cord might be unfairly discriminatory. When it acted to protect net neutrality, the Commission gave providers flexibility. But it did not intend to provide ISPs with a guide to maintaining video market power indefinitely.

## **CONCLUSION**

The FCC must be aware of a particular siren song: the one that says, now that this market is more “competitive,” public policies to promote competition are no longer necessary. In the first place, as discussed above, whether OVDs compete with MVPDs is a complex question. In some ways they do and in other ways they do not. More importantly, some policies are designed to protect competition, not just bring it into being. These policies are expressly designed to heighten competition beyond the level that would occur “naturally,” as a preferable alternative to the rate regulation of monopolists. Phasing them out would be counterproductive. Finally, even if deregulation happens in the future it should not happen too quickly. A rapid process of deregulation would simply allow the largest of today’s incumbents to shore up their market share and close off new entry. This windfall would not serve the public interest.

Media policy should not prop up an “old boy’s club” where incumbents and known players deal only with each other, occasionally bickering, but eventually getting along as the price of protection from truly disruptive competition. No sector of the information economy has managed to withstand the Internet’s disruptive powers as well as the video marketplace. The Commission should take steps to put an end to this.

Respectfully submitted,

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