

I am a concerned citizen that in recent years has been intensely interested in the changes coming over the video marketplace as a result of the advent of the Internet as a mechanism for the delivery of video content. I have supported the efforts of such “over-the-top” providers as Aereo and Sling to liberalize access to programming traditionally provided by multichannel video programming distributors (MVPDs) and have shaken my head at the efforts of MVPDs and cable channels to hinder those providers’ access to programming. But I’m conflicted about the commission’s present proposal to classify such “over-the-top” providers as MVPDs, for such a proposal would apply rules developed under the assumption of a monopoly over infrastructure to entities with no infrastructure at all, would apply rules developed under the assumption of one technological regime to the technology with the potential to completely upend that regime.¹ At best, such a proposal would be a stopgap to use existing legislative structures to approximate modern market conditions until Congress has had the opportunity to update the law to reflect those modern market conditions.²

Under the circumstances, though, and given the constraints on the Commission’s power, the proposed reclassification is probably the best solution. Nonetheless the foregoing makes clear the challenge in front of the commission. The proposed “transmission path” interpretation of the law best matches Congress’ *intent* behind many of its regulations. But the “linear programming” interpretation best matches the *effective market* it aims to regulate from a consumer standpoint (and the plain text of the law). Any proposed redefinition or interpretation of the term must somehow juggle these conflicting aims. As the commission acknowledges, even the “linear programming” interpretation does not match well to what the commission is aiming to regulate, because the true distinction is the *content* that is being delivered.³ The commission, in short, is aiming to comprehensively regulate those entities that happen to deliver ESPN, CNN, and other traditional cable channels, as well as broadcast stations, but cannot actually say so because a) of its limited regulatory power over cable channels and b) two different entities that should both by all rights be covered under this proposal may well not have a single channel in common. Even *that* would not be sufficient if the day were to come when ESPN were to offer its WatchESPN service, which offers linear streams of every linear channel under the ESPN aegis (except ESPN Classic), as a standalone service; what matters is that an MVPD service offers several *different* streams from several different entities not under common ownership with the MVPD itself and which

¹ I have made the point that the 1992 Cable Act was predicated on the assumption that infrastructure was a necessary condition for the delivery of content in Response of Morgan Wick to the House Committee on Energy and Commerce White Paper on Regulation of the Market for Video Content and Distribution, 23 Jan 2015, p12, retrieved from <http://www.morganwick.com/commactupdate.pdf>. A similar point is made and expanded on with specific implications for the Commission’s proposal in the Comments of BlueRiddle Cooperative Broadcasting Association in the matter of MB Docket 14-261 (Promoting Innovation and Competition in the provision of Multichannel Video Programming Distribution Services), 27 Jan 2015, esp. pp. 2-3, retrieved from <http://apps.fcc.gov/ecfs/document/view?id=60001016988>. This is also acknowledged by the Comments of Atlanta Interfaith Broadcasters in the matter of MB Docket 14-261 (Promoting Innovation and Competition in the provision of Multichannel Video Programming Distribution Services), 12 Feb 2015, p6, retrieved from <http://apps.fcc.gov/ecfs/document/view?id=60001029092>. (Hereafter, all comments of all parties are in the matter of MB 14-261 unless otherwise noted.)

² The necessity of which is acknowledged by the Concurring Statement of Commissioner Michael O’Rielly on Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services (MB Docket 14-261), 19 Dec 2014, retrieved from <http://www.fcc.gov/article/fcc-14-210a6>.

³ Notice of Proposed Rulemaking in the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services (MB Docket 14-261), 17 Dec 2014, para. 25, retrieved from https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A1.pdf.

may be available from other MVPDs, under terms determined by the MVPD, likely including the bundling of several of these streams together.⁴

In short, the Commission's proposal would merely serve as a bridge to allow Internet-based entities to compete with traditional MVPDs on the same terms while the same technology upends the very concept of an MVPD entirely. The state of the law effectively creates an arbitrary distinction between one class of video content (primarily taking the form of a linear stream) that is delivered under the MVPD regime, bundled together and delivered through MVPD middlemen, and another class accessible to anyone with an Internet connection.⁵ The over-the-top MVPD would propose to deliver the first class of video over the Internet as well, yet apply the same 1990s assumptions governing them to the Internet,⁶ despite the distinction between the two classes, already arbitrary, becoming quite blurry in practice if both are delivered over the Internet.⁷ The problem is not that over-the-top providers have been kept out of being able to take advantage of the MVPD rules.⁸ The problem is that programmers and cable operators have been fighting to preserve the MVPD ecosystem as a whole and hinder the Internet from becoming a viable alternative to an MVPD subscription by avoiding making traditional linear programmers' content available on the Internet by any means that might not require possessing an MVPD subscription.

This suggests that in the long term, many of the regulations that currently apply to MVPDs should no longer be necessary, or will ultimately have their role taken by the commission's Open Internet rules, and indeed that many of the provisions of the 1992 Cable Act, intended to promote competition and limit cable operators' gatekeeper power, may even be serving to hinder competition and maintain that gatekeeper role against all logic. For example, the retransmission consent rules, intended to compensate broadcast stations for cable operators' use of their signals to attract and build a subscriber base and maintain the continued existence of free broadcast television, has now become vital to broadcast stations' very existence, giving them a vested interest in the continued existence of the MVPD ecosystem and thus disincentivizing them from adapting to the modern age or even adequately defending their medium's continued existence.⁹ Despite Congress and the commission's best efforts, indeed because of them, "the business model on which over-the-air television broadcasting system is built is" already "eroded."¹⁰ Broadcasters would now most like it if a maximum number of people were

⁴ This problem is also acknowledged, and a similar solution proposed, in the Comments of Blueriddle Cooperative Broadcasting Association, pp. 4-7, but that seems not to recognize that the FCC has already proposed exempting providers strictly of co-owned streams from its proposal (Notice of Proposed Rulemaking, para. 26).

⁵ Reply Comments of Morgan Wick in the matter of MB Docket RM-11728 (Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors), 14 Oct 2014, p9. Indeed the technology of the Internet calls into question the necessity of a linear television "channel" itself as a condition for the provision of content, another assumption underlying the Cable Act; see Comments of Atlanta Interfaith Broadcasters, pp. 8-9.

⁶ However, as noted by the Comments of Blueriddle Cooperative Broadcasting Association, pp. 9-12, the differences between Internet-based distribution and traditional MVPD distribution are such that even the Internet-based MVPD would tend to break down the traditional assumptions of the MVPD market in the long term, as further discussed below. This is one reason I support the proposed reclassification despite my concerns.

⁷ For example, what obligations would a service that merely provides login credentials to "TV Everywhere" services such as WatchESPN and HBO GO have? See Comments of Atlanta Interfaith Broadcasters, pp. 10-11.

⁸ As suggested by e.g. Comments of S.C. Networks Inc., DBA fuboTV, 4 Jan 2015, retrieved from <http://apps.fcc.gov/ecfs/document/view?id=60001011847>.

⁹ See Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, pp. 2-4.

¹⁰ Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates ("Affiliate Associations"), 3 Mar 2015, p22, retrieved from

dependent on MVPDs or other subscription mechanisms to view their programming, and in all likelihood would even prefer the advent of the over-the-top MVPD to actually investing in their over-the-air signal, if the over-the-top MVPD was forced to pay retransmission consent. The commission should assess its commitment to free over-the-air television and, if it finds it to continue to be important, should not allow those that claim to offer it to submit to a voluntary dependence on other means of distribution.

Evidence is already emerging, however, that while broadcasters may have initially feared Aereo at least in part because of its claim to be able to deliver broadcast signals without paying retransmission consent fees, many Internet-based MVPDs may benefit from business models where they do *not* deliver broadcast signals (or at least make them optional) on the assumption that their customers can use an over-the-air antenna and that not paying the requisite retransmission consent will allow them to offer a lower price.¹¹ In effect, this reverses the assumption underlying the whole retransmission consent regime: not only is the presence of broadcast stations *not* a selling point for an Internet-based MVPD, their *absence* may well *be* a selling point. As such, the Commission should be fully justified in allowing this practice, neither obligating Internet-based MVPDs to negotiate with broadcasters if they don't want to (so long as the MVPD treats all relevant broadcasters equally and doesn't carry stations it doesn't have retransmission rights to) nor requiring retransmission-consent stations to be carried on the most basic package if the provider doesn't want to, assuming such is allowed under the law.¹²

While this would encourage consumers to use over-the-air antennas and thus improve support for over-the-air television as a technology, it would have the same effect on broadcasters as Aereo posed: a group of people not paying for broadcast television but potentially paying for other video content.¹³ In terms of ability to compete for programming, this may not pose as much of a threat as one might think if customers of Internet-based MVPDs are able to choose from a selection of programming that better reflects their own interests.¹⁴ However, absent other regulatory changes, one can easily see a scenario where broadcasters that wish to collect retransmission consent react to this development by making their coverage areas as small and useless as possible to maximize the number of viewers forced to use other distribution mechanisms, ones that require them to pay, to view their content. Given the aforementioned reversal of the assumption underlying the retransmission consent regime, one solution

<http://apps.fcc.gov/ecfs/document/view?id=60001039115>. In addition to the source cited in the previous note, see Reply Comments of Morgan Wick in the matter of MB Docket 14-50 (2014 Quadrennial Regulatory Review), 8 Sep 2014, pp. 5-7, 12-14.

¹¹ Notice of Proposed Rulemaking, para. 52. See, e.g., Lafayette, Jon, "CES: Dish Sling TV Streaming Service to Cost \$20 a Month", *Broadcasting and Cable*, 5 Jan 2015, retrieved from <http://www.broadcastingcable.com/news/technology/ces-dish-sling-tv-streaming-service-cost-20-month/136728>.

¹² In this, I agree with Comments of Blueriddle Cooperative Broadcasting Association, p15. As noted by (among others) the Comments of the National Association of Broadcasters, 3 Mar 2015, pp. 9-11, retrieved from <http://apps.fcc.gov/ecfs/document/view?id=60001039050>, there is precedent for how to handle this situation in the rules governing DBS providers' carriage of local stations.

¹³ As a whole, broadcasters seem to be accepting of this possibility; see Comments of the National Association of Broadcasters, p9 et seq., and Comments of the Affiliate Associations, pp. 26-27. On the other hand, this may be because they assume the only reason for doing so would be to avoid the complexities of having to negotiate with all 1,400-odd full-power commercial broadcast stations (Comments of the National Association of Broadcasters, pp. 9-10), ignoring the potential market benefits of foregoing carriage of broadcast stations in its own right laid out here (the Affiliate Associations seem to be more perceptive).

¹⁴ See Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, esp. pp. 2-8, for more on the reasoning behind this.

may be to phase out the regime entirely, though that may require Congressional action.¹⁵ Moreover, in order to preserve localism the FCC may need to enforce its syndication exclusivity and network nonduplication rules for any entity that seeks to transmit broadcast stations, to the extent it can in the lack of a statutory compulsory licensing scheme.¹⁶

Although an Internet-based MVPD's desire to avoid carrying broadcast stations may be rooted in the assumption that their customers may elect to receive broadcast content using an antenna, in general a major impetus for the development of over-the-top services is the desire to cut down on paying for content you don't watch. Sling TV's "slim" bundle of services has been touted as one of its attractions.¹⁷ In this light, it is possible that the program carriage rules, rules intended to prevent traditional MVPDs from favoring their own content or attempting to muscle competitors out of the market through the imposition of constraints on programmers by preventing discrimination on their part, may, depending on interpretation, restrict the business models of the very competitors it is designed to protect by forcing them to expand into the sort of bloated bundle that typifies a traditional MVPD.¹⁸

A traditional MVPD, with its command of infrastructure, must be all things to all people; it has to carry and make available as many different channels as possible to appeal to as many potential audiences as possible.¹⁹ An Internet-based MVPD, on the other hand, can travel over any infrastructure to anywhere in the country. A traditional MVPD is selling *access* to the *universe* of content available on multichannel television; an Internet-based MVPD assumes access to the universe of the Internet is already in place, and so its task is to sell a bundle of content that has appeal as a *product* to a certain audience. As such, the notion that an Internet-based MVPD is likely to be a "closed garden" somehow "isolated from other Web content" that is likely to be a consumer's "primary TV viewer experience" is based on the flawed assumption that an Internet-based MVPD will serve the same role as a traditional MVPD in connecting consumers to, and therefore representing, the whole universe of content one might be interested in.²⁰

In truth, such an MVPD is not even likely to be the source of video a consumer uses most of the time, especially in the long term. A typical consumer of over-the-top services is already likely to use such

¹⁵ Nor would it be completely successful in disincentivizing broadcasters from neglecting their over-the-air signals if they can charge consumers directly, as with the recent CBS All Access service; quashing such business models may raise First Amendment concerns. Another solution requiring Congressional action may be to simply allow broadcasters to charge for access to their content without restriction, but removing retransmission consent may be enough to ultimately make investment in over-the-air signals a necessity, given the technological burdens of the alternative. See Reply Comments of Morgan Wick in the matter of MB Docket 14-50 (2014 Quadrennial Regulatory Review), 8 Sep 2014, pp. 14-16. The question is whether such a regulatory scheme would be in place, and whether broadcasters would realize its implications, in time for the incentive auctions currently scheduled for early 2016 with its implications for the state of broadcast signals and their ability to change thereafter.

¹⁶ This is not explicitly laid out in the NPRM, but its necessity is made clear by Comments of the National Association of Broadcasters, pp. 17-21, and would address the concerns of the Comments of BlueRiddle Cooperative Broadcasting Association, pp. 12-13.

¹⁷ See, e.g., "Cable a la Carte: Cord-Cutting Options Multiply", *Computer Power User*, vol. 15, #4, 1 Apr 2015, retrieved from <http://www.computerpoweruser.com/article/17043/cable-la-carte>. Also see sources cited in Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, note 23.

¹⁸ This may be suggested in Comments of Public Knowledge, pp. 28-29, retrieved from <http://apps.fcc.gov/ecfs/document/view?id=60001039111>.

¹⁹ Unless of course it operates under an a la carte model such as that discussed in Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, esp. pp. 5-10.

²⁰ Comments of the National Association of Broadcasters, p25.

services as Netflix and Amazon more or less interchangeably, and the distinction the commission draws between various business models (as useful as those distinctions are for the present regulatory efforts) notwithstanding, an Internet-based MVPD is likely to be used as a supplement to such services and used with them interchangeably, or even supplemented with other Internet-based MVPDs.²¹ Any inconvenience in switching between different Internet-based MVPDs, other over-the-top services, and an over-the-air antenna²² is purely a user interface problem that the free market is highly likely to fix if the device market is allowed to develop freely.²³

As a compromise, the Commission may consider drawing a distinction between the traditional MVPD that controls the infrastructure and can practically keep out other means of MVPD programming distribution, and the Internet-based MVPD that does not, and apply some regulations to one but not the other, including, potentially, exempting Internet-based MVPDs from must-carry rules and allowing them to make any retransmission consent stations they carry optional.²⁴ This may help serve as a transition to a time when linear television, as defined as a continuous stream of video content transmitted from a source that any customer with the proper credentials can receive without imposing any further burden on the source (as opposed to the Internet model that is necessarily reciprocal), primarily serves the function of reducing the strain on the Internet infrastructure from high-demand video content, since in the long term the vast majority of traditional MVPDs to continue operating are likely to also serve as Internet service providers, if they do not already, and so their carriage of traditional linear channels would effectively be a supplement to their Internet service.²⁵

Another regulation that applies to MVPDs currently that is rooted in the assumptions of control of infrastructure underlying the 1992 Cable Act is the provision of public, governmental, and educational (PEG) access channels, and more generally the provision of local content beyond local broadcast stations. These channels have a devoted following – the mere passing mention of the possibility that the PEG requirement might no longer be necessary in a recent white paper by the House Energy and Commerce Committee caused such a deluge of letters in their support that it was the primary reason that white paper produced more responses than any other in the committee’s ongoing efforts to update

²¹ This last is suggested by Comments of Blueriddle Cooperative Broadcasting Association, p10.

²² Comments of the National Association of Broadcasters, p7, suggests this as a reason for a consumer to purchase an Internet-based MVPD bundle including broadcast stations despite being in range of any desired broadcast signals. (If this is a concern for someone purchasing a substantial number of Internet-based MVPD services, at some point they’re likely to fall back on a traditional MVPD service even if it costs more if the convenience is that important to them.)

²³ As suggested by Comments of TiVo, Inc., 3 Mar 2015, p3, retrieved from <http://apps.fcc.gov/ecfs/document/view?id=60001039063>.

²⁴ As suggested by Comments of Blueriddle Cooperative Broadcasting Association, note 28, and expanded on by the Comments of BiggyTV, LLC, 2 Mar 2015, pp. 9-11 et seq., retrieved from <http://apps.fcc.gov/ecfs/document/view?id=60001038775>. I qualify this, however, by stating that the Commission should ensure some means of extending the reach of any station to areas it has a must-carry right to that does not require a customer to specifically want that station. One way to achieve this may be a “carry-one-carry-all” provision that requires an entity to carry any must-carry stations on any packages they also carry retransmission consent stations on. See Comments of the National Association of Broadcasters, pp. 9-10.

²⁵ See Response of Morgan Wick, p11, which also includes some suggestions for relevant regulations to consider for the long term (including the aforementioned “carry-one-carry-all” provision).

the Communications Act so far.²⁶ Yet such a concern may be moot: as a practical matter, Internet-based MVPDs with no infrastructure of their own have no need for the acquisition of a local franchise, which is at the core of the PEG requirement, and in any case have a national if not international footprint that makes the provision of local channels beyond the major network affiliates and regional sports networks a minor concern and somewhat impractical in any case.²⁷ PEG channels are often dependent on franchise fees from traditional MVPDs and perform a vital service that may not be performed if their fate is left to the free market alone. Their role may no longer be quite as central in an age where the traditional linear television channel is no longer the only means for the wide, instantaneous distribution of content, but the Internet in its own turn is international in scope – “even the most ‘hyperlocal’ neighborhood blog can be read by someone clear on the other side of the world.”²⁸

As noted by Andrew Morris, the Commission has in the past voiced hope that cable and satellite radio and television would serve as an outlet for national programming, allowing terrestrial broadcasting to focus on more local concerns.²⁹ Not only has this not been successful, it is precisely *because* of the need to compete with national programmers on cable and satellite that local content has atrophied on the free airwaves, especially given the ubiquity of multichannel television.³⁰ This concern is all the more potent in the age of the Internet, with its international scope, especially given the difficulty of making money on the Internet as it is. The Open Internet rules only ensure a level playing field for small, local actors to play on; it still forces them to fight for attention once on that playing field with far larger, well-heeled outfits that aim to reach larger audiences. There are no good solutions to this conundrum, which at any rate is likely outside the scope of this proceeding and possibly beyond the scope of the Commission’s present authority. Perhaps the onus for supporting local content in the vein of PEG channels should be moved to the constructors and maintainers of Internet infrastructure, but besides likely requiring Congressional action such would raise First Amendment concerns in a way the present PEG regime does not.

The Internet-based MVPD market presents tremendous potential for innovation and disruption in the video market. At first glance, it would seem to be a simple matter to extend the existing MVPD regime to cover such innovation, but Internet-based MVPDs present important differences with existing classes of MVPDs, and these are not just incidental but strike at the heart of the assumptions underlying the 1992 Cable Act. Combine this with the inadequacy of the Copyright Act as presently enforced to ensure parity between traditional linear distribution and online distribution, as noted by many commenters, and it may be that Internet-based MVPDs cannot truly be adequately accommodated without Congressional clarification, which could just as easily render their whole business model unnecessary. In the lack of this, the FCC will need to exercise considerable care to establish a regulatory regime for Internet-based MVPDs that balances the similarities and differences with traditional MVPDs with the constraints of the law.

²⁶ Author’s analysis of relevant responses. See House Committee on Energy and Commerce, “Regulation of the Market for Video Content and Distribution”, 10 Dec 2014, retrieved from <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20141210WhitePaper-Video.pdf>, and responses linked from House Committee on Energy and Commerce, “#CommActUpdate”, retrieved from <http://energycommerce.house.gov/commactupdate>.

²⁷ Comments of Atlanta Interfaith Broadcasters, pp. 13-14.

²⁸ Response of Morgan Wick, p8.

²⁹ Comments of Blueriddle Cooperative Broadcasting Association, p16.

³⁰ Reply Comments of Morgan Wick in the matter of MB Docket 14-50, pp. 6, 12.

Morgan Wick
Venice, CA
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