

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Expanding Consumers' Video Navigation Choices)	MB Docket No. 16-42
Commercial Availability of Navigation Devices)	CS Docket No. 97-80

To: The Secretary

COMMENTS OF SMITHWICK & BELENDIUK, P.C.

Introduction and Summary

In a speech at the 2015 Internet and Television Expo, Chairman Wheeler stated that the cable industry in 2014 had reached a tipping point. In the second quarter of that year and for the first time, the number of cable broadband subscribers exceeded cable TV subscribers. Chairman Wheeler went on to say that, “we recognized that broadband had to be at the center of our analysis, and that video was, in essence, an application that flows over networks and that could be supplied both by the owners of facilities and by competitors that use broadband pathways to compete against the owners of those broadband pathways.”¹

In its *Notice of Proposed Rulemaking*, (*Notice*) the Commission proposes, “rules intended to allow consumer electronics manufacturers, innovators, and other developers to build devices or software solutions that can navigate the universe of multichannel video programming with a competitive user interface.” Smithwick & Belendiuk, P.C. believes that FCC action requiring multichannel video programming distributors (MVPD) to provide meaningful access by competitive navigation devices is long overdue. In addition to their own program offerings MVPDs have near monopoly control of access to the Internet and are marvelously inventive in

¹ Prepared Remarks Of FCC Chairman Tom Wheeler NCTA – INTX 2015, Chicago, IL, May 6, 2015.

limiting consumers' free and enjoyable use of the Internet in order to favor their own programming. Smithwick & Belendiuk supports the Commission's proposed rule requiring MVPDs to state the price for navigation devices separately on consumer bills. A prohibition on MVPD cross-subsidization of navigation device prices also is needed to prevent anticompetitive practices.

Further, the decoupling of navigation devices from MVPD service offerings can only achieve the stated goal of a competitive marketplace if the Commission also addresses the heart of the MVPD conflict of interest. As providers of both their own programming and access to the Internet, MVPDs have every incentive to discriminate against Internet streaming, or over-the-top (OTT) viewing, unless they can derive substantial revenue from OTT activity. The Commission must build on its navigation device initiative by requiring MVPDs to offer broadband Internet access as a stand-alone common carrier service at the same, separately stated price to all of their customers, whether or not Internet customers take other services from the MVPDs. Additionally, the Commission must find that as providers of a common carrier service under Title II, MVPDs are subject to Section 201(a) interconnection obligations for their broadband Internet service and are not permitted to interfere with the customer's transmission choices, as by prioritization of traffic. Finally, if the Commission is to achieve its objective of empowering consumers to choose how they wish to access programming, and promote innovation in the display, selection and use of other video programming, it also needs to take up the unfinished business of expanding the availability and use of leased channel access to MVPDs by independent programmers.

Background

For independent programming to function as one of many competing applications, it must be free to flow through diverse distribution networks. To provide meaningful competitive alternatives to television viewers and to be able to compete with well-entrenched and vertically integrated MVPDs, independent programmers must have free and unencumbered access to consumers through both the Internet and existing MVPD distribution channels. MVPDs control Internet access, programming distribution channels and programming. They have the incentive and the ability to deny access to independent, non-affiliated program suppliers. Companies that control video distribution facilities and programming are able to engage in unfair practices, such as charging rival distributors much more for their programming than they charge themselves, or withholding content from online video distributors. By bundling traditional MVPD services, programming and Internet delivery of content, vertically integrated MVPDs leverage their dominant market position at the expense of competitive programming offerings.

Video program distribution consists of three forms of oligopolies. The first consists of MVPDs such as cable television systems, direct-broadcast satellite providers, and wireline video providers. These companies derive revenue from monthly cable subscriptions, additional charges from premium channels, and rental fees from set-top boxes. Before the 1990s cable systems usually operated as the sole local cable supplier to a specific area, having received government sponsored monopolies and guaranteed returns.² In the 1990s new regulations from the FCC allowed satellite operators to compete with the local cable distributors.³ Moreover, in this same decade telephone companies such as AT&T and Verizon also entered the market, constructing systems in areas where they provided landline common carrier services. However, even with

² *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 183 (DC Cir. 1995).

³ *Satellite Broadcasting and Communications Associate v. FCC*, 275 F.3d 337 (4th Cir. 2001).

increased competition, the cable industry still remains concentrated with thirteen of the largest video providers representing about 94% of the market.⁴ AT&T's recent merger with DIRECTV has increased MVPD concentration. AT&T/DIRECTV now has 26.3 million subscribers, more subscribers than any other MVPD.⁵ The tenth ranked MVPD, WideOpenWest, by contrast, has just 606,500 subscribers.⁶

The second oligopoly consists of video programming networks that produce the content consumers watch. The MVPD industry is a highly concentrated industry dominated by big distributors or programming networks that can leverage significant market power. Many of the national broadcast and non-broadcast channels are owned by the dominant MVPDs. For example, Comcast provides cable services to 22.3 million customers and Internet service to 22.55 million customers.⁷ Significantly, Comcast's cable customer base is shrinking while the number of its Internet customers has increased. Comcast operates the NBC and Telemundo broadcast television networks.⁸ It also owns such popular cable networks as USA Network, E!, Syfy, MSNBC, CNBC, Bravo, NBC Sports Network, Oxygen, Golf Channel, Esquire Network, and Sprout.⁹ Through NBC Universal Comcast controls a premier motion picture company and television production operations.

The third oligopoly consists of control of access to broadband Internet. The 17 largest MVPDs in the U.S. represent 94% of the Internet market.¹⁰ Real-time entertainment, i.e.

⁴ Leichtman Research Group, Inc. Research Notes 1Q 2014 at p. 2,6. (herein after "Leichman 2014")

⁵ http://www.multichannel.com/sites/default/files/public/pdf/Coverstory_8_17_15_0.pdf *Eat or Be Eaten: Consolidation Creates a Top Heavy List of 25 Largest MVPDs.*

⁶ Id.

⁷ <http://venturebeat.com/2015/07/23/comcast-now-has-more-internet-customers-than-cable-tv-subscribers/> *Comcast now has more Internet customers than cable TV subscribers*, July 23, 2015

⁸ Comcast 10-K 2015

⁹ Id.

¹⁰ <http://www.multichannel.com/news/distribution/cable-broadband-enjoys-banner-year/403242> *Cable Broadband Enjoys a Banner Year.* March 11, 2016.

streaming video and audio, is the largest Internet traffic category.¹¹ Real-time entertainment is responsible for over 63% of fixed and 40% of the mobile downstream bytes during the peak period.¹² This is due in large part to the market leadership of Netflix, which accounts for 34.2% of downstream traffic during the peak period.¹³ Increasingly, applications are replacing real-time, linear television channels. Young consumers, ages 16 to 34, are moving away from traditional, linear television viewing to Internet based on-demand viewing. Young consumers spend 34% of their time viewing television online, compared with 12% for individuals 35-64.¹⁴ Thus, young consumers spend 3 times as much time watching television online as older viewers. This is a significant and growing trend in how individuals access entertainment programming. In traditional linear television, audiences are told what to watch and when to watch it. Internet viewers choose the shows they want to watch and when to watch them.

The top 15% of real time entertainment users consume on average 212GB of data a month, more than seven times the usage of a typical subscriber, who consumes 29GB per month. These “cord cutters” consume an average of 100 hours of video per month and account for 54% of total traffic consumed each month.¹⁵ This is a troubling trend for multi-channel video providers as it signals a rapid decline in traditional cable channel subscriptions.

MVPD companies like Charter, Time Warner and Comcast have controlled video distribution for decades, deciding what networks were available to consumers. But the Internet has put consumers in charge and the results are compelling. In 2015, the 17 largest MVPDs in

¹¹ Sandivine, Global Internet Phenomena Report 1H 2014, (herein after Sandivine 2014).

¹² Id. On an average day, the peak time for downstream Internet traffic on fixed networks is roughly from 9:00 until 11:30 p.m.

¹³ Id.

¹⁴ Kleiner, Perkins, Caufield, Byers, Internet Trends – Code Conference, Mary Meeker, May 28, 2014, p. 122.

¹⁵ Sandivine 2014 p.7. Cord cutters are users in the top 15% of streaming audio and video. Sandivine could not resolve if they have actually cut the cord but concludes that “they are likely using streaming as a primary form of entertainment.”

the U.S., representing 94% of the market, raked in 3.1 million net additional high-speed Internet subs. On the other end, the top MVPDs lost about 185,000 broadband subs last year. The growth of high-speed broadband Internet access poses a new challenge to the oligopoly of the MVPDs: Internet-based TV. Hundreds of new entrants are coming in with innovative video offerings. Often called over-the-top (OTT) video, such service is provided via the consumer's existing broadband connection rather than through separate cables, spectrum, or other infrastructure.

The OTT marketplace is competitive, dynamic, and even a bit chaotic. Perhaps the best-known video provider is Netflix. But the service faces a virtual horde of competitors, including Amazon Instant Video, Vudu, Hulu, Sling TV, Flixster, Crackle, TV.com, and YipTV and many others. And more OTT services are on the way. Perhaps most notably, Apple is planning to debut a new online TV service, providing about 25 channels of OTT programming, including content from CBS, ABC, and Fox.¹⁶ Google is also rolling out a new subscription service, called YouTube Red. These ventures use a variety of business models. Some, like Netflix, allow unlimited viewing for a flat monthly rate. Others charge a fee to digitally rent a particular movie or TV show, or to buy it. Most operate on an "on demand" basis, but a few, including Apple's planned service and Dish Network's Sling TV offer "linear," or scheduled, programming.

The top MVPDs have the incentive and the economic ability to check the emergence of OTT distributors and independent program suppliers. Well-entrenched MVPDs have significant bargaining power with programmers and the ability could hurt smaller MVPDs and new entrant video services. The three forms of oligopolies, the oligopoly of program distribution, the oligopoly of program network ownership and the oligopoly of Internet access, pose a triple treat

¹⁶ *The Wall Street Journal*, Apple Plans Web TV Service in Fall, March 17, 2015.

to the emergence of OTT and independent programming. When there is unfettered competition there is little need for regulation, as the market will correct itself. In the case of the MVPDs the market for programing, program distribution and access to the Internet is highly concentrated and must be regulated until there is sufficient competition to allow the market to self-regulate. To permit emerging independent programmers to compete on a level playing field with the dominant MVPDs, Smithwick & Belendiuk, P.C. asks that the Commission to amend its rules as follows:

A. The Commission Should Adopt Proposed Rules on Billing Transparency and Ban MVPD Cross-Subsidization of Navigation Devices

Adopting the proposed rule requiring MVPDs to state the price of navigation equipment separately on the customer bill is essential to creating a competitive marketplace for navigation devices. Failure to adopt this rule would impair consumers' ability to make informed choices.

Since MVPDs can raise service prices to make up for revenue lost by reductions in equipment prices, there is a real risk that MVPDs will offer navigation devices for free or at below cost prices. That current MVPD lease charges for equipment generally are considered excessive, as the *Notice* points out, in no way predicts the pricing strategies that MVPDs may adopt once they face meaningful competition in this market. Unless the Commission declares cross-subsidization to be unreasonable and anticompetitive and prohibits such conduct, MVPDs will be able to impede unfairly the development of a competitive market for equipment. The *Notice* asks commenters supporting an expanded anti-subsidy rule to address the FCC's determination in the *First Plug and Play Report and Order* that "[a]pplying the subsidy prohibition to all MVPDs would lead to distortions in the market, stifling innovation and

undermining consumer choice.”¹⁷ While the Commission did make that statement in the referenced order, it never went on to explain how an across-the-board anti-subsidy rule could bring about this parade of horrors. Indeed, the Commission would be hard pressed to do so, as there seems to be no logical connection between the asserted cause and effect.

A rule applicable to all MVPDs prohibiting cross-subsidization of navigation devices by service revenues indeed is warranted under current market conditions. The Commission has not found that market forces are sufficient to constrain the ability of MVPDs to cross-subsidize navigation equipment. Neither the MVPD service market, nor the market for navigation equipment is fully competitive. Section 629(e) provides that the Commission’s regulations under that section shall sunset upon determinations that the MVPD and equipment markets are *fully competitive* and that elimination of the regulations would promote competition and the public interest. If the Commission is serious about promoting competition for navigation devices, it will adopt an expanded anti-subsidy rule.

The *Notice* also seeks comment on how an anti-subsidy rule would work. Smithwick & Belendiuk suggests an approach that is not burdensome, yet promises to be effective; an outright ban on cross-subsidization of navigation devices applicable to all MVPDs. A complaint process would be available for parties to allege that an MVPD is violating the rule. The burden of production would be on the complainant to show that the MVPD’s pricing of navigation devices is significantly below prices in the market for comparable equipment. If the complainant meets its burden of production, the burden of proof would shift to the MVPD to show that it is not subsidizing its devices, i.e., that its prices recover the cost of the equipment.

¹⁷ *Notice*, at ¶ 85, referencing 13 FCC Rcd 14775, 14812, ¶90

B. The Commission Should Require MVPD Broadband Providers to Open the Last Mile of the Internet to Competition.

The Telecommunications Act of 1996 imposed a set of new obligations on incumbent local exchange carriers, including the duty to provide competing carriers access to unbundled network elements at cost-based rates.¹⁸ In the *Cable Modem Order*¹⁹ the FCC determined that Internet access services provided by the cable companies were inexorably linked to telecommunications. At that time broadband Internet access providers played a prominent role in the user's Internet experience. Thus the FCC found that cable modem providers offered broadband transmission that was integrated with other features and services within their networks. As such it classified cable broadband as an information service.

In 2005, the FCC went a step further when it concluded that telecommunications companies providing broadband connections to the Internet were no longer required to offer the wireline broadband transmission component of wireline broadband Internet services as a stand-alone telecommunications service under Title II.²⁰ The Commission determined that wireline broadband Internet access service provided by a telecommunications company was an information service, rather than a telecommunications service, and therefore was not subject to Title II regulation. Citing the Supreme Court's Decision in *Brand X*, the FCC reasoned "Wireline broadband Internet access service, like cable modem service, is a functionally

¹⁸ See 47 U.S.C. §§ 251(c)(3), 252(d)(1). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 (1996).

¹⁹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-785, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, (2002) (*Cable Modem Order*), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

²⁰ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005). (*Broadband Access to the Internet Order*).

integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.”²¹

The Commission in the *Broadband Access to the Internet Order* based its decision on two primary findings, (1) that broadband Internet service is an integrated information service, and (2) that the broadband Internet providers would have sufficient financial incentives to permit independent ISPs to provide competing Internet services.

The Act defines “information service” as

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.²²

The Act also defines “telecommunications service” as

“the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used”²³ and “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”²⁴

Applying the definitions of “information service,” “telecommunications,” and “telecommunications service,” the Commission found that wireline broadband Internet access service “inextricably combines the offering of powerful computer capabilities with telecommunications,” and therefore is an information service.²⁵

²¹ *Broadband Access to the Internet Order*, p. 14860, citing *Brand X*.

²² 47 U.S.C. § 153(20).

²³ 47 U.S.C. § 153(46).

²⁴ 47 U.S.C. § 153(43).

²⁵ *Broadband Access to the Internet Order*, p. 14864.

The FCC's 2005 decision to allow wireline common carriers to discontinue their tariff offerings of stand-alone broadband transmission was predicated on its belief that the large gatekeeper providers would nevertheless continue making broadband transmission available to independent ISPs.²⁶ Likewise, the Commission reasoned that the cable operators, which have never been required to make Internet access transmission available to third parties on a wholesale basis, would have business incentives to make such transmission available to ISPs.²⁷ "Incumbent LECs have represented that they not only intend to make broadband Internet access transmission offerings available to unaffiliated ISPs in a manner that meets ISPs' needs, but that they have business incentives to do so."²⁸ The FCC assured the public that it was not sacrificing competitive ISP choice for greater deployment of broadband facilities. Rather, "our reasoned judgment tells us that sufficient marketplace incentives are in place to encourage arrangements with innovative ISPs."²⁹

Unfortunately, this did not prove to be the case. As a result of the FCC's decision, up to 7,000 independent ISPs were forced out of business.³⁰ What is left today is a paucity of competition, controlled by a handful of MVPDs. Increasingly American's are faced with a Hobson's choice for broadband Internet access; they can have any broadband Internet provider they like as long as it is the large MVPD that serves their area.

Information services like email and web hosting that the FCC in 2002 viewed as being inexorably linked with broadband transmission are today provided primarily by entities unaffiliated with the broadband provider and are separate and distinct from the transmission

²⁶ *Broadband Access to the Internet Order*, p. 14887.

²⁷ *Broadband Access to the Internet Order*, p. 14887.

²⁸ *Broadband Access to the Internet Order*, p. 14893-4.

²⁹ *Broadband Access to the Internet Order*, p. 14895.

³⁰ <http://newnetworks.com/killingispscreatednetneutrality/>

service. Third parties, such as Google, primarily handle consumers' email.³¹ Web hosting is competitively provided. Furthermore, many end-users' "web presence" is now associated with third party applications such as Facebook and Twitter. Broadband customers now demand, and broadband providers supply, a pure telecommunications service to receive and deliver data, voice, video, text, and images. When a broadband customer views video on YouTube, access Netflix, watches a video stream, updates a Facebook page, posts on a blog, or shares files, all that is needed from the broadband provider is pure transmission.

In the *Open Internet Order*,³² the FCC found that "times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a 'telecommunications service.'" The FCC also found that broadband Internet providers function as gatekeepers and that they have the ability to control access to the last mile of the Internet. Despite its unequivocal findings, the FCC did not open the last mile to competition. The FCC decided instead to forbear from key interconnection provisions vital to competition. The Commission concluded that the availability of other protections adequately address concerns about forbearance from the interconnection provisions under the section 251/252 framework and under section 256.

We thus forbear from applying those provisions to the extent that they are triggered by the classification of broadband Internet access service in this Order. The Commission retains authority under sections 201, 202 and the open Internet rules to address interconnection issues should they arise, including through

³¹ See "Gmail Opens Increase 243%; Android Drops Back to #4," Litmus, February 7, 2014, which identifies at least 86% of email opens being associated with Gmail, Outlook.com, Yahoo, and AOL. <https://litmus.com/blog/gmail-opens-increase-android-drops-january-email-client-market-share>

³² *Protecting and Promoting the Open Internet, Report And Order On Remand, Declaratory Ruling, And Order in General Docket 14-28*, 30 FCC Rcd 5601, 5615 (2015) ("*Open Internet Order*").

evaluating whether broadband providers' conduct is just and reasonable on a case-by-case basis.³³

The FCC went on to say,

We also reject arguments suggesting that we should not forbear from applying sections 251(b) and (c) with respect to broadband Internet access service.... Section 251(c) subjects incumbent LECs to unbundling, resale, collocation, and other competition policy obligations.³⁴

In the *Open Internet Order*, *passim* the FCC repeatedly and consistently states that its new rules are designed to ensure that telecommunications networks develop in ways that foster economic competition, technological innovation, and free expression. The Commission found that competition for broadband Internet access service is limited, with the majority of Americans facing a choice of only two providers.³⁵ Yet, for reasons that are not explained in the *Open Internet Order*, the FCC decided to forbear from the interconnection requirements of the Telecommunications Act of 1996, except to make a vague reference to its authority to resolve interconnection issues, should they arise, under Sections 201 and 202.

The *Open Internet Order* therefore did nothing to open the telephone and cable broadband markets to competition, which is sorely needed, since the FCC's 2005 predictive judgment has been proven erroneous. Clearly, the broadband gatekeepers have no economic incentive to open their gates and enable competing ISPs to enter the broadband Internet market.

The *Open Internet Order* found that circumstances have changed since the FCC decided it would no longer require common carriers to offer broadband transmission separately from broadband Internet access service. It found at p. 5614, that "times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers

³³ *Open Internet Order* at p. 5849-50

³⁴ *Open Internet Order* at p. 5850.

³⁵ *Open Internet Order* at p. 5810-11.

straightforward transmission capabilities that the Communications Act defines as a ‘telecommunications service.’” Likewise, the FCC found that broadband providers have the market power and the means to engage in predatory practices. These near monopoly broadband providers function as gatekeepers and have all the tools necessary to deceive customers, degrade content or disfavor content.³⁶

In the *Open Internet Order*, therefore, the FCC effectively reversed the *Cable Modem Order* and the *Broadband Access to the Internet Order*. Inexplicably, the Commission failed to restore the *status quo ante* by requiring broadband providers to make available to competitors stand-alone broadband transmission over the gateway last mile. As the FCC acknowledged, it is this very lack of competition that gives the broadband gatekeepers the power to abuse their customers and those entities seeking to interact with them. In order to break the stranglehold that MVPDs have on access to the Internet, programing and viewers, the FCC should require MVPDs to provide stand-alone access to their networks by competing Internet Service Providers, providing meaningful options for independent video programmers. In this way the FCC will make possible fair competition for program distribution and equal access to viewers.

C. The Commission Should Ban Any Form of Traffic Prioritization Including Sponsored Data and Zero Ratings

Comcast has been rolling out data caps on its broadband plans. This limits the amount that customers can use the Internet without facing expensive penalties. Customers are allowed 300GB of data per month, and once they reach that point they are charged an extra \$10 for each additional 50GB or for an additional \$35 per month a customer can get unlimited data.³⁷ Data caps affect all kinds of Internet usage, but impact streaming video disproportionately because

³⁶ *Open Internet Order* at ¶5.

³⁷ <http://time.com/money/4143682/comcast-data-caps-internet/> *Why Comcast Keeps Insisting Its Data Caps Aren't Caps—and That They're Fair* December 15, 2015.

video streaming requires more data. A person watching the average four-hours of TV a day over their broadband connection rather than through a traditional cable service would quickly exceed Comcast's cap. Of special concern is the way Comcast is tabulating customer data usage. Specifically, while typical Internet usage—streaming Netflix or Hulu, watching YouTube—is counted toward a customer's monthly data cap, Comcast's own Stream TV service can be used without any cap or limit. Such a system obviously makes Comcast's service far more attractive, giving it an unfair advantage over other streaming options. Customers can get unlimited access to Comcast's "Stream TV" for \$15/month, but unlimited access to Netflix will now cost \$35/month to get the 'unlimited bandwidth' package, on top of the cost of a subscription to Netflix. Other MVPDs are starting to adopt their own zero rating plans. Verizon has started excluding its own mobile video streaming service, go90, from data charges. No doubt, other MVPDs, if unchecked, will adopt similar unfair, anticompetitive plans.

MVPDs such as Comcast and Verizon have already demonstrated that adopting zero-ratings gives MVPDs an unfair advantage over competing services, especially over fledgling services provided by independent programmers. In establishing a "clear, bright line rule" banning paid prioritization and prioritization of affiliate traffic. If an open Internet stands for anything, it means that a common carrier that is transmitting nothing but bits of data to and from its customers according to the customers' preferences may not discriminate or interfere with what it is transmitting.

The *Open Internet Order* at p. 5655-6 explains the ban on paid prioritization:

Prioritizing some traffic over others based on payment or other consideration from an edge provider could fundamentally alter the Internet as a whole by creating artificial motivations and constraints on its use, damaging the web of relationships and interactions that define the value of the Internet for both end users and edge providers, and posing a risk of harm to consumers,

competition, and innovation. Thus, because of the very real concerns about the chilling effects that preferential treatment arrangements could have on the virtuous cycle of innovation, consumer demand, and investment, we adopt a bright-line rule banning paid prioritization arrangements. (Footnotes omitted)

This reasoning is sound and supportable. However, the *Open Internet Order* never considered whether prioritization that does not involve consideration, monetary or otherwise, may produce the same harms and ought be proscribed. “[T]he chilling effects that preferential treatment arrangements could have on the virtuous cycle of innovation, consumer demand, and investment,” clearly could obtain whether or not the broadband provider received consideration from the content distributor. There is now evidence that gatekeeper MVPDs are favoring their services as the expense of competitors and their customers. MVPDs that provide Internet service are common carriers and should be regulated as such.

A common carrier makes service available to the public, who in turn “may communicate or transmit intelligence of their own design and choosing...” The intelligence that customers transmit over a broadband provider’s network is made up of bits of data. There is no reasonable basis for a carrier to treat data bits differently or prefer some to others.

The *Open Internet Order* at p. 5666-8 discusses “sponsored data” plans, and contains the FCC’s analysis:

We are mindful of the concerns raised in the record that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on different service plans. At the same time, new service offerings, depending on how they are structured, could benefit consumers and competition. Accordingly, we will look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary. (Footnote omitted)

The FCC put the consideration of sponsored data plans to individual case-by-case proceedings under the “no-unreasonable interference/disadvantage” standard adopted in the *Open Internet Order*. Comcast’s and Verizon’s zero rating plan clearly interfere with free and open competition in the video distribution marketplace and are designed to disadvantage independent program distributors. Allowing MVPDs to decide which content providers’ bits will or will not count against a customer’s data plan gives them control and leverage over Internet traffic that is unprecedented and wholly inappropriate for a Title II transmission service. Accordingly, the FCC should ban zero rating schemes and thus allow for fair and open competition among program suppliers.

D. The Commission Must Require MVPDs to Offer Broadband Internet Access as a Stand-Alone Common Carrier Service to All Customers Indifferently

As OTT grows in popularity, so grows the serious potential for MVPD interference with Internet viewing. The previous section documents the proliferation of MVPD schemes whose purpose is either to discourage OTT viewing or to leverage their near monopoly control over broadband Internet access to extract revenues from program providers. These devices unreasonably interfere with the right of customers of a common carrier service “to communicate or transmit intelligence of their own design and choosing...” If the Commission insists on evaluating on a case-by-case basis the trove of MVPD manipulations that we are already beginning to see, it will forever be playing catch-up to the detriment of the user public.

Smithwick & Belendiuk believes that the only sensible and effective way to protect broadband customers’ unfettered use of the Internet is to require MVPDs to offer broadband Internet access like other common carrier services, as a stand-alone service at the same price and on the same terms and conditions to all members of the public, whether or not a customer

purchases any other services the MVPD provides. Broadband Internet access would be treated as a pure transmission service, as it is supposed to be, and would be free of any interference by the MVPD. No price or other concessions would be allowed that could favor the MVPDs own programming distributed either via a cable channel or OTT. The whole point of common carriage is that a provider of an essential, bottleneck service may not exploit its dominant position to favor or disfavor members of the public, engage in anticompetitive practices and extract unreasonably high profits through monopoly pricing or tying the service to other services the common carrier may provide. Of course, the Commission will need to expand this proceeding or commence a separate proceeding to move in this direction. In the spirit of empowering consumers by freeing navigation devices from the stranglehold of the MVPDs, the Commission must recognize that unencumbering broadband Internet access goes hand-in-hand with its proposals in this proceeding.

E. The Commission Must Renew its Stalled Efforts to Provide Leased Channel Access to Independent Programmers

In 1984, Congress began requiring cable operators to set aside up to 15 percent of their capacity for “leased access” that would give independent programmers access to viewers.³⁸ MVPDs were free to set the rates, terms, and conditions for leased access consistent with the purposes of the statute; programmers could challenge these rates and terms as unreasonable by seeking relief in court or from the FCC, but reasonableness would be presumed. MVPDs are permitted to use any unused channel capacity designated for leased access until an unaffiliated programmer obtains use of the channel capacity pursuant to a written agreement.

In the Cable Television Consumer Protection and Competition Act of 1992 (the “1992 Act”), Congress broadened Section 612’s, 47 U.S.C. § 532, statutory scope to encourage

³⁸ Cable Communications Policy Act of 1984 (the “1984 Act”).

“competition in the delivery of diverse sources of video programming,” to allow independent programmers (i.e., those not affiliated with major cable, satellite, or broadcast companies) to buy their way on to the cable lineup. Congress amended the leased access provisions of the 1984 Act by giving the FCC authority to regulate the maximum price and other terms and conditions of leased access channel use. Through a series of rulemakings from 1993 to 1997, the FCC implemented its authority to set caps on leased access rates and to regulate other terms and conditions.³⁹ Despite the 1992 amendments to the Communications Act and modified FCC rules, leased access remained relatively underutilized. A 2006 survey by the FCC revealed that the average cable system carried 0.7 leased access channels.⁴⁰ This should come as no surprise, inasmuch as MVPDs do not want competition and, whenever possible, will limit access to competing program sources. In response to the leased channel NPRM,⁴¹ the FCC received numerous comments outlining poor customer service practices and the imposition of unreasonable rates, terms and conditions for leased access by MVPDs.⁴² In 2008 the Commission issued new rules, which included a drastically revised rate formula for leased channel access. In addition to the mandated rate reduction, the Commission adopted several regulatory changes intended to facilitate leased channel usage. For example, the Commission reduced the response time for operators to provide information to leased access applicants from 15 to three days, provided new, expanded discovery rights, and required the agency to resolve any future complaints within 90 days.

³⁹ See, *Value Vision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1205-08 (D.C. Cir. 1998) (discussing and citing FCC orders and proposed rulemaking).

⁴⁰ *Report on Cable Industry Prices, Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service Cable Programming Service, and Equipment*, MM Docket No. 92-266, 21 FCC Rcd. 15087, 15089-90 (2006).

⁴¹ *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, Notice of Proposed Rule Making*, MB Docket No. 07-42, 22 FCC Rcd 11222 (2007).

⁴² *In the Matter of Leased Commercial Access Report and Order and Further Notice of Rulemaking* MB Docket No. 07-42, (*Leased Access Report and Order*) 23 FCC Rcd 2909, 2913 (2008).

In 2008, the U.S. Court of Appeals stayed the *Leased Access Report and Order*.⁴³ Soon after, the Office of Management and Budget denied the rule changes adopted in the *Leased Access Report and Order*. No further action has been taken by the Commission to date and the rule changes remain in abeyance.

In this rulemaking the FCC is seeking to find ways to empower consumers to choose how they wish to access programming, and promote innovation in the display, selection and use of other video programming. Along with other options discussed herein, the FCC should consider how to expand the availability and use of leased access programming. The biggest MVPDs are highly vertically integrated entities that control not only access to programming but also the programming itself. The FCC should take a holistic approach to opening the cable box, one that would include breaking the MVPDs strangle hold on Internet access as well as opening cable programming to competition. The legislation is in place; there is no need for Congressional action. There are FCC rules in place, but as the FCC properly concluded in 2008 they need to be amended to prevent MVPDs from overcharging for leased access or otherwise engaging in anticompetitive behavior. The FCC should use its regulatory power to require MVPDs to open more leased access channels to independent programmers. Finally, as an adjunct to this proceeding, the FCC should issue a Notice of Proposed Rulemaking to amend its current leased access rules, with tougher rules that will guarantee greater channel capacity for independent programmers seeking to access cable audiences.

⁴³ See *Order, United Church of Christ Office of Communications, Inc. v. FCC*, No. 08-3245 (6th Cir. 2008).

Respectfully Submitted,

By: /s/ Arthur V. Belendiuk

Arthur V. Belendiuk

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, D.C. 20016
(202) 363-4559

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