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The FCC's cynical set-top box play

By George S. Ford, contributor

The Federal Communications Commission (FCC) **recently announced** that it intends to vote this month on a "Notice of Proposed Rulemaking" aimed at creating a competitive retail market for video set-top boxes, a move that gives clear meaning to the **biblical proverb** "as a dog returns to his vomit, so a fool repeats his folly." In 1998, the agency **initiated** its first attempt to fabricate a competitive retail set-top box market as mandated by **Section 629 of the Telecommunications Act of 1996**. Over a decade later, the agency would be **forced to concede** that its "efforts to date have not led to a robustly competitive retail market for navigation devices that connect to subscription video services." That's a stout understatement of the facts. Only about 1 percent of consumers ever used the technology despite over a billion dollars in implementation costs. The agency would try again in 2010 with its **AllVid proposa**l, but this scheme never got out of the gate.

Despite the FCC's failures, the march of technology moved on. Indeed, there are **plenty of technologies** and services available today through which consumers can get video programming. At various times, I'll use a Roku box, an Amazon Firestick, a laptop alone or connected to a TV via a HDMI output, a TV or DVD player with smart apps, or one of my U-Verse set-top boxes (the first of which is provided free by AT&T). Programming is obtained from AT&T, Netflix, Amazon, Hulu and YouTube, among others.

Given these market developments and the agency's track record of failure, what could be driving Chairman Tom Wheeler to stick his burnt finger back into the fire?

Accordingly to Wheeler, the problem is one of price. As he argued in a **recent op-ed**, "Pay-TV subscribers spend an average of $231 a year to rent these boxes, because there are few meaningful alternatives." To support his assertion, Wheeler pulls some numbers from a **survey** by Sens. Edward Markey (D-Mass.) and Richard Blumenthal (D-Conn.) which found that, on average, a set-top box rents for $7.43 per month. Like Wheeler, the senators "decry lack of choice" as the root cause of these "high" prices. Despite the claim of "high" prices, neither the senators nor the chairman (or anyone else for that matter) makes any reference to the cost of the boxes, including the costs of installation, maintenance and replacement that these costs cover. (By way of comparison, insurance coverage alone for your mobile device runs about **$10 a month**.)

However, if Wheeler's central argument for government intervention is price, then my question back to the chairman is this: If the government could set the price for a set-top box, what would that price be?

Surprising to some, including the chairman, I suspect, is that we already know the answer to that question. Set-top box prices are (often) regulated using an **FCC formula** designed to ensure that the rates for such boxes are based on "the actual cost of regulated equipment and installations plus a reasonable profit." This fact is made plain in the responses to the senators' study. Brighthouse Networks, for example, **observes** that its $8 rental fee for a box and a remote are based upon "rates that are calculated using FCC rate rules. FCC rate rules allow cable operators to only recover the aggregate cost of boxes, maintenance, and a regulated rate of return on investment." Likewise, Cablevision **explains** that its rate of $6.95 is "[p]er the rate card established under FCC rules." While not all the survey respondents point to the FCC formula, their prices are in line with the others in the sample. An FCC survey in 2008 (the last year the data were reported) shows only the difference of pennies between the rates of regulated and unregulated boxes ($8.26 for regulated versus $8.06 for unregulated). The regulation of set-top box rates is a **formal process** that remains tied to the FCC rules.

With Wheeler's "high price" ruse thus exposed, we must ask: What is this new proposal really about?

Wheeler's new plan isn't about equipment at all; instead, his plan is nakedly designed to force Multichannel Video Programming Distributors (MVPDs) to make available to third parties not only information about what programming is available to consumers (including channel listings and on-demand options), but access to the programming itself. At bottom, the plan allows edge providers to confiscate another company's product — and the viewers it works hard to acquire — by doing little more than repackaging it to create their own video service without having to negotiate and pay for content.

While government-sanctioned property theft is bad enough, it isn't just content being taken — it's eyeballs. Indeed, ***information* about**

consumers' viewing habits is the currency of the modern age; the equipment is incidental. This information is very valuable (more so than the cost of the box, which could easily be subsidized). Quite plainly, Wheeler's proposal is a naked play to provide customers' viewing habits to edge providers so these companies can monetize that information without having to go to the trouble of actually putting together a video product. Add to this the fact that the administration is limiting the ability of broadband service providers to use such information for their own business plans by imposing legacy "Customer Proprietary Network Information" rules onto the Internet via the FCC's controversial net neutrality ruling, and Wheeler's favoritism to edge providers is plain to see. The deck is being stacked in a private-interest shell game.

At this point, the set-top requirements of Section 629 of the Telecom Act are pointless. The next evolution of the set-top box is not a competitive market; it's the elimination of the box outright. **In fact, many video providers have already made progress to the new age of multichannel video**. For example, Charter allows (in some markets) its content (about 30 channels) to be accessed through a Roku box for its Internet-only subscribers. This approach looks like the future of video distribution. Doing more with that type of technology is likely limited by programming contracts, but those are evolving too. Content providers are sensibly concerned about signal theft and piracy. In fact, security is the key driver of the need for a set-top box, and the device has served both the content and distribution industries well in that regard. If security can be handled without a box, then the box goes away.

The near-future world without set-top boxes would obviously remedy the alleged rental fee problem. If Wheeler's new set-top scheme was about rental fees alone, it would be day late and a dollar short. But it's not about rental fees, it's about information, and the value of information isn't going away any time soon. The inevitable and rapid progress to box-less video delivery, while perhaps simplifying things for both providers and consumers, doesn't serve the special interests of the information brokers. Edge providers don't want a competitive set-top market to lower rental fees for consumers; they want to monetize the consumers' viewing habits. It is these interests which the Obama administration seeks to serve. Don't get distracted by Wheeler's wily redirection of your attention.

While Wheeler's new scheme is clever way to serve certain special interests, like the plans before it, there's a risk it will fall flat. For example, Wheeler promises that the FCC will honor the sanctity of contracts between programmers and video providers. But what happens if a programming contract prohibits providing the video feed to a third party? Will the FCC then abrogate that contract? And under what convoluted legal theory may it do so? Or will the agency simply forget that promise when the time comes?

Sadly, the days of consumer protection at the FCC are long gone. Whether in the form of **net neutrality**, **special access regulation**, **piracy**, **spectrum auctions** or now **set-top boxes**, the agency is now in the near-exclusive business of shifting profits among corporate giants. Consumers are merely pawns in the game of special-interest squabbles that use the regulator to get a leg up. As a former FCC staffer, I have defended the relevance of the agency on numerous occasions. It is becoming an exhausting and increasingly difficult position to maintain.

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