Introduction

This is the sixth in a series of white papers issued by the committee in its process of reviewing the Communications Act for update. This paper focuses on regulation of the market for video content and distribution.

Background

Congress created the Federal Communications Commission to oversee a radio licensing system in the "public interest, convenience, and necessity." In exchange for the privilege of exclusive access to, and profit from, the scarce public resource of spectrum, the broadcast licensee is obligated to serve the public interest. At the time, the thinking was that a broadcast license essentially grants the licensee an exclusive right to a public soapbox, while denying such rights to others.

As broadcasting expanded to include video signals, cable services soon followed. Cable first entered the market in the 1940s in the form of community antenna services that used a single antenna to deliver broadcast programming to areas that were unable to receive over-the-air TV signals due to terrain or distance. At the time, cable was primarily regulated by local franchise laws. As cable rose in popularity, the FCC also began regulating the franchise relationship and set rules to ensure access to broadcast programming. The ensuing 1984 and 1992 Cable Acts that remain largely in effect today were adopted when the cable industry represented 98 percent of the subscription television market.

Direct broadcast satellite ("DBS") entered the subscription video market in the 1980s as a competitor to subscription cable service. The 1988 Satellite Home Viewer Act and its successors, as well as the Cable Act of 1992, govern the satellite industry. Like the cable law, a substantial portion of the satellite law is dedicated to the relationship between the satellite distribution platform and broadcasters.

As networks have evolved, telephone companies are also delivering programming. For the most part, telephone companies are regulated like cable providers when they offer video products.

Finally, over-the-top ("OTT") video – video content provided by a third party, delivered over a customer's existing broadband connection – has begun to compete with traditional offerings that bundle content with delivery. OTT has been the crucible for testing a number of questions about how video programming can and should be regulated under existing law. Access to programming has stymied a number of would-be OTT providers, including Aereo, ivi.tv, SkyAngel, and FilmOn. The legal debate around these services highlights how various video programing distribution models are subject to significantly different regulations even though they appear analogous to consumers.

Barriers to Entry and Expansion

With increasing numbers and types of video service providers has come increased competition for customers in the subscription video market. Not unlike other areas of communications, new

market entrants have generally shied away from entry in the legacy, government regulated services, instead focusing on market disruption in areas with fewer barriers to entry.

Broadcasting

Nowhere is the government's role as gatekeeper more pronounced than in the FCC's role as licensor of broadcast spectrum. While the FCC today grants few new full-power broadcast licenses, its role as gatekeeper also extends to renewals and assignments of licenses. Licensing regulations and procedures have been considerably liberalized since 1934, and broadcast license renewals are rarely contested. Nevertheless, compliance with broadcast regulations represents a significant corporate undertaking and certainly factor into investment decisions by potential market entrants.

While more universal video business concerns – access to capital, programming affiliations, etc. – are often the chief obstacles for an entity seeking to enter the broadcasting business, media ownership limits present a significant barrier for existing broadcasters seeking to enter a new market or expand operations within a particular market. Existing law limits several aspects of broadcast ownership:

- The law limits the number of broadcast properties a single entity may own in a given television market;
- The law prohibits a broadcaster from owning stations that serve more than 39 percent of the nation; and,
- With limited exception for pre-existing ownership, the law prohibits a broadcaster from taking ownership of a daily newspaper in the same market.

The original rationale for these limits was to ensure localism, diversity of voices, and competition in the market. However, changes in the video market have outpaced changes in the regulations governing this area – a fact exacerbated by the FCC's failure to complete its required review and revision of the media ownership rules in 2010.

Multi-Channel Video Programming Distributors (Cable, Fiber and Direct Broadcast Satellite)

As with the broadcast business, governments control entry into the other segments of the video market through licensing. For DBS, the necessary spectrum requires a license from the FCC. For cable and fiber companies, local franchising authorities control access to rights-of-way (rules governing access to utility areas to lay both fiber and cable). Traditionally cable operators are charged a franchise fee for the right to operate a cable system, some of which is used often to fund public, educational, and governmental channels.

Franchising authorities regulate cable rates unless the cable system is subject to effective competition as defined under the law. The FCC also requires cable operators to provide a basic tier of service that contains broadcast channels as well as noncommercial and educational stations. The basic tier of service is the least expensive and was intended to guarantee an affordable level of cable service to consumers. Lastly, local authorities, in addition to the FCC, have the jurisdiction to review mergers and transactions impacting a franchisee. As a result of

this gatekeeper position, local franchising authorities and the FCC have been able to place economic requirements on those seeking to enter the video business. Although local franchising authorities may not grant an exclusive franchise, and may not unreasonably withhold consent for new service, they have sometimes been perceived as an impediment to competition. For example, when telephone companies began entering the video market by beginning the installation of fiber network cable, local franchising authorities were viewed as barriers to entry.

Up through the enactment of the Cable Act of 1992, cable operators faced little competition for subscription video services. The DBS industry was just beginning to find a foothold, and franchises often insulated cable operators from additional competition. The capital-intensive work of laying cable also required the ability to navigate the local franchising authority, and few municipalities had permitted more than one cable operator to dig up the public streets.

In 2006, Congress contemplated a wholesale change of the franchising system to promote robust video competition, as did many individual states. The states began implementing statewide franchising statutes, seeking to lower barriers to entry and leveling the playing field between new entrants and incumbent cable operators. In some instances, the state franchising laws eliminated local franchising authorities completely. In other instances, state franchising laws eliminated certain franchise requirements such as the requirement to provide video service to all neighborhoods or the requirement to provide public access, educational, and government programming. Critics of the statewide franchising system argue that localism has suffered as a result.

Other Video Services

Few obligations apply to over-the-top (OTT) providers that offer streaming video services, and although such services have been the subject of experimentation for the past decade, these services have not yet reached mass-market adoption. Notable attempts to provide streaming OTT video service have met with various legal challenges. For example, ivi.tv, Aereo, FilmOn, and SkyAngel have sought to define the rights and obligations that apply to OTT video streaming through the courts. TV Everywhere, Dyle, and other streaming services, operated by traditional MVPDs, similarly have met challenges in reaching widespread adoption.

Access to Video Programming

In addition to the infrastructure challenges faced by prospective video service providers, access to video programming is a significant challenge governed partially by statute (broadcast programming such as CBS) and partially by private contract (non-broadcast programming such as HBO). The purpose of any law governing this area is to strike balance between the needs of consumers and the rights of copyright holders.

Broadcast Content on Cable/Fiber/Satellite

Carriage of broadcast content is subject to two often-counteracting legislative regimes. The law makes a distinction between the right to carry the content of a broadcaster (a matter of copyright law) and the right to retransmit the signal carrying the content (a matter of communications law).

Broadcasters must choose every three years whether to require retransmission consent, for which they may charge cable, fiber, and satellite providers. Broadcasters who forgo retransmission consent are considered "must-carry" stations, a designation that guarantees them distribution on subscription television platforms.

There are also significant rules, known as "local market rules," that determine where broadcast programming can be distributed. The local market rules were originally designed to protect local broadcasters from advertising competition from adjacent markets.

Although direct broadcast satellite began as a national service, the law has slowly increased local content carriage obligations on DBS. During the infancy of the DBS industry, Congress authorized satellite operators to redistribute broadcast network content to "unserved" households without obtaining retransmission consent or copyright licenses. At that time, satellite operators did not have sufficient capacity to carry each of the approximately 1,700 local broadcast stations throughout the country. Instead, they carried the network affiliates for New York, Chicago, Denver, and Los Angeles, making it possible to offer unserved households the national network news and primetime lineup for each time zone. Since then, DBS operators have gained both additional flexibility to carry local programming and restrictions against providing out-of-market signals.

Non-Broadcast Content on MVPD Platforms

Non-broadcast content is regulated in two ways: access to content and access for content. Regulations ensuring access for content were developed to during the early days of cable to address competitive concerns raised by cable investment in programming networks. For example, the HBO and Discovery programming networks began as joint cable ventures.

To ensure that independent networks would have the ability to challenge discriminatory practices favoring cable-owned networks, Congress established the program carriage rules in the 1992 Cable Act to ensure that consumers would benefit from competition and diversity in the video programming and video distribution markets.

Congress also sought to ensure that cable operators did not discriminate against competitors by withholding programming produced by their affiliated companies. Congress therefore instituted the program access rules to ensure that cable operators did not withhold programming produced by companies affiliated with cable operators from their MVPD competitors. Until 2012, the commission prohibited exclusive contracts between cable companies and cable-affiliated programmers. The best-known examples of these types of arrangements involved regional sports networks. The FCC allowed the ban on exclusive contracts to expire in 2012, but provisions remain for parties to petition the FCC when such arrangements hinder competition.

Other Video Services

The FCC has held that over-the-top video providers do not qualify as MVPDs for the purpose of the program access rules. Therefore, an OTT provider cannot seek relief from the FCC in order to gain access to cable-owned programming under the program access rules. Over-the-top

streaming providers have not sought retransmission consent for broadcast programming, but they have attempted to avail themselves of the compulsory copyright to provide programming. The Copyright Office has determined that they are not cable companies under the meaning of the Copyright Act and would therefore be subject to seeking a commercially negotiated license. The FCC has not determined the rights of OTT providers with regard to retransmission consent. MVPDs have sought to provide streaming video but with limited success – the rights to programming remain unclear and have been the subject of frequent litigation.

Developments in the Programming Marketplace

With the advent of mainstream, over-the-top video services, the development of time-shifted viewing, and the proliferation of over 800 programming networks, video audiences have become increasingly fractured, arguably decreasing the value of broadcast advertising time slots. The economics of video programming is slowly evolving to revenue-based subscriptions and syndication fees rather than advertising rates. At the same time, broadcast network programming remains an expensive and risky investment. Retransmission consent fees have relieved some of the pressure of the changes in the broadcast business model. Programmers have also relied on the strategy of bundling programming, *i.e.*, offering popular network programming (such as broadcast networks) at a lower price if the MVPD agrees to carry additional networks that may be newer or may have less mass appeal. Bundling is a time-tested business strategy for many businesses in the communications industry, including cable operators and telephone companies. However, independent and start-up networks and some MVPDs have argued that bundling advantages incumbent programmers who are able to require cable operators to expend both bandwidth and programming budgets on carrying incumbent programming networks leaving little spectrum or money for independent networks. Due to First Amendment concerns, the government does not set the programming to be carried by MVPD networks beyond the must-carry regime and certain other public interest-related obligations that have thus far passed scrutiny. Taken together, these developments reflect a video market that is substantially different than the one that existed at the time of the last congressional examination of the Communications Act, and one that merits reconsideration today.

Questions:

1. Broadcasters face a host of regulations based on their status as a "public trustee."

    a. Does the public trustee model still make sense in the current communications marketplace?

    b. Which specific obligations in law and regulation should be changed to address changes in the marketplace?

    c. How can the Communications Act foster broadcasting in the 21st century? What changes in law will promote a market in which broadcasting can compete with subscription video services?

d. Are the local market rules still necessary to protect localism? What other mechanisms could promote both localism and competition? Alternatively, what changes could be made to the current local market rules to improve consumer outcomes?

2. Cable services are governed largely by the 1992 Cable Act, a law passed when cable represented a near monopoly in subscription video.

    a. How have market conditions changed the assumptions that form the foundation of the Cable Act? What changes to the Cable Act should be made in recognition of the market?

    b. Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the Internet?

3. Satellite television providers are currently regulated under law and regulation specific to their technology, despite the fact that they compete directly with cable. What changes can be made in the Communications Act (and other statutes) to reduce disparate treatment of competing technologies?

4. The relationship between content and distributors consumes much of the debate on video services.

    a. What changes to the existing rules that govern these relationships should be considered to reflect the modern market for content?

    b. How should the Communications Act balance consumer welfare with the rights of content creators?

5. Over-the-top video services are not addressed in the current Communications Act. How should the Act treat these services? What are the consequences for competition and innovation if they are subjected to the legacy rules for MVPDs?

While these questions address regulation of the market for video content and distribution, the committee encourages comment on any aspect of competition policy and updating the Communications Act. Please respond by January 23, 2015, to commactupdate@mail.house.gov. For additional information, please contact David Redl at (202) 225-2927.