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In the Matter of)

Modernization of Media Regulation) MB Docket No. 17-105

Comments of R Street Institute

I. Introduction & Summary

The media landscape in America has undergone a dramatic transformation in the past few decades. In the analog era of the 20th century, Americans' media sources were typically limited to local television broadcasters, local radio stations, and local newspapers. Later, cable news networks, national newspapers, and national radio stations added valuable viewpoint diversity to the media landscape, but it was not until the advent of the commercial Internet in the late 1990s and early 2000s that the media landscape truly transformed into the cornucopia of outlets and viewpoints now available to consumers.

Today, Americans enjoy an abundance of media sources from varying outlets and viewpoints, and those trends will likely continue going forward. Viewpoint diversity and localism are vitally important and the Federal Communications Commission ("FCC" or "Commission") should continue to support those initiatives. However, the current media rules and regulations have not kept pace with changes to technology and the media landscape. For this reason, we applaud the Commission for launching its media regulation modernization initiative.[1] We appreciate the opportunity to provide comments on ways media regulations should be reformed to better reflect the current media landscape and better serve the Commission's goals of supporting viewpoint diversity and localism.[2]

While the national media ownership cap and the ban on media cross-ownership both should be reconsidered, those are being addressed in a separate proceeding.[3] Here, we focus on the media regulations in Part 76 of the FCC's rules,[4] which govern access to media by multichannel video programming distributors ("MVPDs") and online video distributors ("OVDs"). In particular, we identify two sets of media regulations — both governing carriage rules for MVPDs — that should be amended or done away with going forward, as the video marketplace continues to shift away from facilities-based MVPDs and toward over-the-top OVDs.

II. Recent Trends in the Video Marketplace

The video marketplace has changed and expanded dramatically since Congress last considered media regulations in earnest.[5] The three or four channels of programming available in the late 20th century have since been augmented with hundreds more, and the

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[1] Commission Launches Modernization of Media Regulation Initiative, *Public Notice*, MB Docket No. 17-105 (May 18, 2017) ["Public Notice"], *available at* https://goo.gl/mK67ty.

[2] *See, e.g.*, 47 U.S.C. § 548(a).

[3] *See* Public Notice at 1 n.2.

[4] *See* 47 C.F.R. §§ 76.1 et seq.

[5] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

exclusive cable-franchisee model has given way to fierce intermodal competition between cable operators, telcos, and satellite TV companies.[6]

Moreover, the Internet now provides a nearly infinite supply of new video content. Much of that content is user-generated — like the more than 300 hours of video uploaded to YouTube every minute[7] — but much of it is also premium content that would traditionally have been available only via MVPDs. These over-the-top OVDs have proven to be incredibly popular, particularly among so-called "cord cutters" in the key advertising demographic of young and middle-aged viewers.[8] The most popular OVD, Netflix, already has more than 50 million subscribers in the United States alone, which exceeds the number of MVPD subscribers from the biggest U.S. cable operators.[9] More recently, numerous OVDs have sprung up offering multichannel linear video programming,[10] often with aggressive

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[6] *See, e.g.*, Amendment to the Commission's Rules Concerning Effective Competition, *Report and Order*, MB Docket No. 15-53 (June 3, 2015), *available at* https://goo.gl/Dn4Ctc (changing the Commission's rules to adopt a rebuttable presumption that cable operators are subject to "effective competition" in the video marketplace).

[7] Fred McConnell, *YouTube is 10 Years Old: The Evolution of Online Video*, THE GUARDIAN (Feb. 13, 2015), *available at* https://goo.gl/JxxzNm.

[8] *See, e.g.*, Nathan McAlone, *Netflix is 12 Times as Popular as Its Streaming Competitors Among Younger Viewers*, Business Insider (Oct. 14, 2016), *available at* https://goo.gl/p4qecp; Sarah Perez, *Netflix Reaches 75% of US Streaming Service Viewers, but YouTube is Catching Up*, TECHCRUNCH (Apr. 10, 2017), *available at* https://goo.gl/XFSVmS.

[9] Tom Huddleston, Jr., *Netflix Has More U.S. Subscribers Than Cable TV*, FORTUNE (June 15, 2017), *available at* https://goo.gl/GA2wD1.

[10] *See, e.g.*, DIRECTV NOW, *What is DIRECTV NOW Service?* (last visited July 5, 2017), *available at* https://goo.gl/Pj7EPP; PlayStation Vue, *Why PlayStation Vue?* (last visited July 5, 2017), *available at* https://goo.gl/6XrBWX; Jeff Baumgartner, *Charter Tests Sports-Free Skinny Bundle*, Multichannel News (June 29, 2017), *available at* https://goo.gl/du1Un6; Jeff Baumgartner, *CenturyLink Bows Beta of OTT TV Service*, MULTICHANNEL NEWS (June 30, 2017), *available at* https://goo.gl/LcQdk5.

pricing and flexible programming packages. These app-driven OVDs are the future of video, not the clunky set-top boxes and overpriced MVPDs of the past.[11]

We should expect advertisers to go where the eyeballs are, so the rising share of advertising dollars allocated to online video content relative to broadcast or MVPDs indicates the extent to which OVDs are gaining ground and becoming the new norm.[12] As the eyeballs and advertising dollars shift from MVPDs to OVDs, there is some pressure to import legacy MVPD rules and regulations onto OVDs.[13] Thankfully, the Commission turned back from its recent proposal to reclassify OVDs as MVPDs,[14] after receiving significant pushback.[15] Reclassification likely would have stunted the growth of OVDs and denied consumers the significant benefits these services offer compared to legacy MVPDs.[16] Many of the legacy MVPD rules were premised on business models and competitive dynamics that no longer exist in the video marketplace. The Commission should think long and hard about which of its legacy media rules, if any, should be imposed on OVDs going forward,

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[11] *See, e.g.*, NCTA, *The Future of TV is Apps* (last visited July 5, 2017), *available at* https://goo.gl/cbnFNw.

[12] Mercatus Ctr., *Competition and Choice Spur Advertising Diversification* (Jan. 2016), *available at* https://goo.gl/SES3Hs.

[13] *See, e.g.*, Brent Skorup et al., *Why is My TV Bill so Expensive?*, MERCATUS CTR. (Mar. 2016), *available at* https://goo.gl/Ayn6sT (detailing the litany of costly regulations that apply to MVPD and DBS services compared to newer IPTV and OVD services).

[14] Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, *Notice of Proposed Rulemaking*, MB Docket No. 14-261 (Dec. 19, 2014), *available at* https://goo.gl/P8qXxB.

[15] *See, e.g.*, Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, *Comments of Competitive Enter. Inst. et al.*, MB Docket No. 14-261 (Mar. 3, 2015), *available at* https://goo.gl/pb5Kqm.

[16] *See id.*

and also how current MVPD rules should be changed to reflect the rise of OVDs and new competition in the video marketplace.

III. Rethinking Carriage Rules for MVPDs and OVDs

As much as possible, the FCC should seek to harmonize its media rules for the different methods of content delivery, and not favor any one technology or distribution method over another. A level playing field in the media marketplace will ensure that consumers receive the best content at the lowest prices. In some cases, achieving regulatory parity may require imposing legacy media regulations on OVDs,[17] but those cases are few and far between. Mostly, it will mean maximizing liberty and free-market negotiations for licensing and carriage agreements by reducing the regulatory burdens that currently beset the video marketplace.

The web of complex regulations governing MVPDs were designed in an era when consumers had few, if any, options to access video content.[18] Imposing those regulations on OVDs would significantly hamstring the consumer benefits brought about by the growth of these new services. The Commission should therefore seek to eliminate outdated rules where possible and not impose any regulations on OVDs without an overwhelmingly clear

[17] For example, certain accessibility rules may be appropriate in the OVD context, as the Commission has already made clear. However, like the rules governing media ownership, those accessibility rules are being addressed in a separate proceeding. *See* Public Notice at 1 n.2.

[18] *See, e.g.*, Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, MB Docket No. 10-71, ¶¶ 40–54 (Mar. 31, 2014) ["2014 FNPRM"], *available at* https://goo.gl/MqnRU1 (describing the background of the FCC's carriage rules regarding network non-duplication and syndicated exclusivity).

justification for doing so. In particular, Commission rules enforcing syndicated exclusivity and network non-duplication agreements are neither necessary nor suitable for the future of video competition.[19]

Programmers and broadcasters should generally be allowed maximal freedom to negotiate the terms of any licensing or carriage agreements they make with distributors. That includes negotiating for various forms of exclusivity, including syndicated exclusivity and network non-duplication.[20] However, agreements between private parties for exclusive syndication or non-duplication rights do not require FCC enforcement.[21] Private parties remain able to negotiate and enforce contracts even without FCC rules to enforce those contracts.[22] Just as "the NFL does not need the FCC's rules to do what it can do for itself[,]"[23] other programmers and distributors do not need special rules to enforce their own contracts, as Article III courts are perfectly capable of handling suits regarding copyright infringement or breaches of contract.

Furthermore, exclusivity agreements in contracts are already waning in importance and prevalence. Valuable prime-time content that once was available only via broadcast

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[19] *See id.*

[20] *See* 47 C.F.R. §§ 76.92–76.130.

[21] *See* 2014 FNPRM, ¶ 41 ("The Commission's network non-duplication and syndicated exclusivity rules are designed to serve as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming.").

[22] *See* Sports Blackout Rules, *Report and Order*, MB Docket No. 12-3, at 60 (Sept. 30, 2014), https://goo.gl/zHXJ6v ("We are eliminating our blackout rule, but the professional sports leagues like the NFL can still choose to maintain their own blackout policies.") (Statement of Commissioner Ajit Pai).

[23] *Id.* at 62 (Statement of Commissioner Michael O'Reilly).

and MVPDs is now frequently made available by OVDs, like Sling TV,[24] and by programmers' own distribution services, like NBC Sports Gold.[25] In 2016, for example, the NFL experimented with a "Tri-Cast" distribution model that aired several games simultaneously on broadcast TV, cable TV, and Twitter.[26] The NFL also struck a similar deal with Amazon for the 2017 season.[27] These innovative distribution deals give consumers new ways to consume video content and potentially open new revenue streams for programmers and distributors alike. The FCC should consider amending its current media regulations to encourage experimentation with these types of agreements.

Exclusive syndication agreements, too, are increasingly becoming outdated, as programmers seek wider distribution of their content. Syndicated programming is now frequently licensed to broadcasters, MVPDs, and multiple OVDs, especially video-on-demand services like iTunes, Amazon Prime, Hulu, and Netflix. However, exclusivity agreements remain common between programmers and OVDs, like Sony's deal to make Hulu the exclusive host of past episodes of *Community*[28] or Disney's deal to make Netflix the exclusive subscription-based distributor of Disney movies.[29] The Commission should

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[24] *See* Sling TV, *Why We're Better* (last visited July 5, 2017), *available at* https://goo.gl/GegQTp.

[25] *See* NBC Sports, *Own Your Sports with NBC Sports Gold* (last visited July 5, 2017), *available at* https://goo.gl/pY2cDz.

[26] Kevin Patra, *Thursday Night Football to be Streamed Live on Twitter*, NFL.COM (Apr. 5, 2016), *available at* https://goo.gl/R17Uuf.

[27] Joe Flint & Shalini Ramachandran, *NFL and Amazon Reach One-Year Streaming Deal for About $50 Million*, WALL STREET J. (Apr. 4, 2017), *available at* https://goo.gl/gXkqfB.

[28] Lesley Goldberg, *Hulu Nabs "Community" in Digital Syndication Deal*, HOLLYWOOD REP. (Dec. 2, 2011), *available at* https://goo.gl/LxCif3.

[29] Bryan Bishop, *Netflix Wraps Up Rights for New Disney, Marvel, and Pixar Films Starting in 2016 (Update)*, The Verge (Dec. 4, 2012), *available at* https://goo.gl/qz8ZCD.

allow for these exclusivity agreements wherever programmers and distributors agree to them, but having specific regulations on the Commission's books to enforce them makes little sense going forward. This would be particularly true if the 39 percent cap on national ownership is relaxed or done away with, as should happen going forward.

IV. Conclusion

We thank the Commission for launching this initiative to modernize its media regulations. The media marketplace looks very different today than it did in the late 20th century, and the impact of technological advancements and increased competition will continue to change the media landscape going forward. The Commission needs to embrace those changes and avoid saddling new and innovative media practices with outdated regulations from the past.

Respectfully submitted,

/s/

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