

Working Toward A Deregulated Video Marketplace

A White Paper By

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The multichannel video marketplace of 2005 is vigorously competitive. Consumers already have a choice between cable and direct broadcast satellite (DBS) providers, and now telephone companies are poised to offer the same services on a broad scale as well. All providers of video services including cable and telephone companies, and new Web-based providers, are also exploring the use of Internet Protocol (IP) technology to deliver traditional multichannel services and other innovative services not even imagined a few years ago.

IP technology has the potential to benefit consumers by fostering innovation and efficiencies in the delivery of video programming for established players such as cable, as well as for new entrants. Just as in the marketplace for voice and data communications, the potential for additional competition warrants a comprehensive re-examination of an existing regulatory framework adopted when the video marketplace was far less competitive. The guiding principle should be to provide a stable framework that treats like services alike, rather than one that picks winners and losers by imposing regulation based on the particular mix of technology deployed by a video provider.

With the use of IP to deliver video still at an early stage, now is the time to begin a thorough review of the implications of IP for the regulation of *all* multichannel video services. Many of the issues raised by IP video have no parallel in IP voice and so have not been part of the debates over the proper framework for voice offerings. Legislating or regulating in advance of a careful consideration of these issues, such as localism, content rights management, and redlining, could inadvertently undermine important public policies.

Treating Like Services Alike

In NCTA's White Paper on Voice over Internet Protocol (VoIP), published in February 2004, we argued that newcomers should be free from economic regulation but should be subject to certain social obligations that are important to consumers regardless of whether they obtain service from incumbents or new entrants. Likewise in the video context, economic regulation of newcomers is unnecessary. Moreover, with competition from DBS and soon telephone companies, video *incumbents* face effective competition, and there is no basis to impose more stringent economic regulation on cable operators than on other providers. As with VoIP, we also believe like services offered by all multichannel video programming distributors (MVPDs) – incumbents and newcomers – should be treated alike with respect to social responsibilities, with those responsibilities narrowly limited to what is necessary to fulfill fundamental goals.

Congress and the FCC have gone to considerable lengths to define the social responsibilities and obligations, first, of broadcasters, and, subsequently, of cable operators and DBS providers. The obligations embodied in current law reflect Congress's determination that video programming serves as an important source of information and entertainment for the American public. Congress and the FCC should now re-examine Title VI to determine the extent to which these responsibilities and obligations remain viable and appropriate, and the extent to which competition from DBS, telephone companies, and the prospect of new IP-based competition warrant modifications to the existing framework and a lighter regulatory touch for *all* video providers.

While Congress considers these issues, the framework embodied in Title VI of the Communications Act today continues to govern. That framework applies both to incumbent cable operators and to other MVPDs that provide service using public rights of way, regardless of the technology they use to distribute programming over their facilities to subscribers. Whether a land-based MVPD offers service by analog, digital or IP technology, Congress spoke comprehensively in Title VI as to the regulatory regime that should apply to all MVPDs. *Importantly, it included provisions that allow new entrants from day one to operate free of economic regulation – including rate regulation – and it provided that certain regulations would be eliminated from the incumbent as effective competition developed.* Moreover, Title VI provides for a balance of federal and local roles that is not tied to whether the MVPD's service is interstate or intrastate.

Appropriate Video Regulation Balances Rights and Responsibilities

Core Principles to Ensure Rights

The comprehensive review of the responsibilities and obligations currently imposed by Title VI should be guided by several *core principles* that ensure certain rights for facilities-based MVPDs:

- First, as noted above, in an evolving competitive marketplace, it is critical that ***like services be regulated alike***. Innovative technologies, such as IP, may offer new opportunities, efficiencies and competitive advantages to multichannel video programming providers. These competitive benefits should be neither enhanced nor diminished by imposing more onerous regulations on other technologies that offer the same services. Congress should not pick winners and losers by rewarding or disadvantaging video providers based on the mix of technologies they use.
- Second, regulation should be ***no greater than necessary to ensure the fulfillment of important social responsibilities and objectives***. This principle has always been vital in order to promote investment and innovation in the facilities-based provision of multichannel video programming.
- Third, multichannel video programming is an interstate service most appropriately regulated under a federal framework with ***uniform national standards***, including access to public rights-of-way.

- Fourth, the existing federal framework allocates some regulatory tasks to the FCC and others to state and local governments. It is appropriate to determine, in each case, **which governmental authority is best equipped for, and most suitable to, the regulatory task.** Local regulation, as implemented by the franchise agreement, may be the most appropriate way to implement and enforce those obligations that involve local circumstances – such as the prohibition on redlining and management of public rights-of-way to protect health and safety. Whatever the level of government and scope of regulation, existing providers and new entrants should be treated alike. In particular, if newcomers are subject to less restrictive requirements or granted longer service terms, such lighter regulation makes sense for existing franchisees, too.
- Finally, fair competition requires that like services pay **equivalent fees and taxes.** All competing video providers, including DBS and Internet-based video distributors, that are within the taxing authority of a state or locality should simply pay comparable taxes for doing business with the residents of a community or state. Fees imposed on a video distributor who uses the public rights-of-way should be based on actual direct costs of such use by such distributor.

Responsibilities

Even under a reformed regulatory regime, certain responsibilities remain relevant and appropriate. Whether IP or more conventional technology is used, MVPDs should continue to:

- ***Make service available to all residents, regardless of income.*** No one who currently has video service available to them should be excluded from the benefits of new competition. The benefits of competition and new technologies should not be distributed in a manner that creates or exacerbates a chasm between the information haves and have-nots;
- Protect subscriber ***privacy***;
- Offer ***equal employment opportunities***;
- Make ***channel blocking equipment*** available so that subscribers can limit access to programming if they so choose;
- Meet the ***local information needs*** of the communities they serve; and
- Comply with ***consumer protection obligations***.

Non-Facilities-Based Providers

In re-examining current law to determine the appropriate regulatory framework for video distribution services in an IP world, Congress and the FCC need to be cautious and thorough. Determining the economic and public policy ramifications of imposing, retaining or removing particular regulations is even more complex because IP video services will be offered by both facilities-based entities and over the Internet by *non-facilities-based* providers. While it may not be appropriate or even possible to subject Internet-based video providers to all of the requirements applied to facilities-based video providers, distribution of video programming via the Internet creates unique intellectual property, digital rights management, and other issues that need to be thought through in the context of longstanding regulations and laws designed to foster localism and to protect territorial distribution rights of copyright owners.

For instance, policymakers will want to examine whether or not to extend the cable compulsory license to Internet-based video distributors. Their viewers, unlike those of facilities-based providers, will not be limited to those within a defined geographical area. The availability of Internet-based video also calls into question the continued viability of geographic limits on the distribution of sports programming. Separate and apart from copyright and related issues, to the extent multichannel programming provided over the Internet evolves into a service that resembles and competes with local facilities-based multichannel video programming services, policymakers will need to re-evaluate the continued equity and necessity of the social obligations imposed on the latter.

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The core principles identified above – in particular, like treatment for like services, maintenance of entry regulation that encourages competition while preserving important social goals and intellectual property rights, and fair and equal taxation – should guide policymakers as they consider the impact of IP on the video marketplace and begin the work of designing an appropriate regulatory framework that will benefit consumers by fostering greater choice and more affordable services.