

NOTE

ENABLING TELEVISION COMPETITION IN A CONVERGED MARKET

I. INTRODUCTION

In the 1950s, broadcast television overtook radio as the dominant mass medium in our culture and economy.¹ In the 1970s, cable technologies emerged as a new method of television programming delivery,² and over time — and after battling through regulatory standoffs with broadcasters — it became the dominant medium in television.³ The 1980s saw the growing potential of satellite as a rival delivery mechanism and its attendant regulatory and legislative wrangling,⁴ though it has not managed to displace cable. We now may be entering yet another phase change in the way video programming reaches our homes. Increasingly, consumers and distributors rely on the Internet to access or disseminate traditional television programming.⁵ Just as the emergence of cable and satellite necessitated shifts in the regulatory conception of the market for television, so too will the emergence of online video distribution. As online video distribution becomes more prevalent and the television market continues to evolve, currently dominant television distribution services — in particular incumbent cable providers — may entrench themselves, leading to higher prices, reduced innovation, and less diversity in programming.⁶ These incumbents can do so because in addition to dominating the market for television subscription, they also dominate the market for broadband Internet — the means by which the new online competitors reach customers' homes — and, increasingly, the programming new competitors need in order to thrive.

In October 2012, the Federal Communications Commission (FCC) declined to renew the program access rules (PARs) originally put in place by the Cable Television Consumer Protection and Competition

¹ CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: A HISTORY OF AMERICAN BROADCASTING* 283–86 (3d ed. 2002).

² PATRICK R. PARSONS, *BLUE SKIES: A HISTORY OF CABLE TELEVISION* 231 (2008).

³ *Id.* at 489.

⁴ *Id.* at 423–27.

⁵ See, e.g., Deborah Méndez-Wilson, *Cut the Cord and Say Goodbye to Cable*, USA TODAY (Dec. 8, 2012, 6:00 AM), <http://www.usatoday.com/story/tech/personal/2012/12/07/cutting-the-cord/1754509>.

⁶ See, e.g., Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 269–85 (2002).

Act of 1992⁷ (1992 Cable Act) to address the satellite phase change. These rules presumptively barred exclusive contracts between vertically integrated cable or satellite television providers and video programmers and required the FCC's permission for these entities to enter exclusive contracts rather than to license the content to competitors at competitive rates. The rules — intended to be temporary measures — aimed to encourage competitiveness in the market for subscription television services, particularly with regard to satellite entrants. The sunset of the PARs is premature; just as a new category of competitive video service is emerging, the FCC has abandoned a measure that would protect these services from actions by vertically integrated incumbents that would undermine the viability of the new competitors. Though the 2012 Sunset Order⁸ operated within the intended market boundaries of the 1992 Cable Act, which was enacted with only cable and satellite services in mind, these boundaries fail to appreciate that the market for television services is shifting in important ways. This shift comprises two major phenomena: First, the market for subscription television services no longer operates in isolation, but rather as a multiproduct bundle with broadband Internet. Second, incumbents have seen the development of competition in on-line video distributors (OVDs).⁹ Thus, the nature of the product that incumbents sell has changed, and they face new and developing competitors. The regulatory approach should adapt to the new landscape.

When one considers the ways the market for video delivery has evolved — particularly as a result of the convergence of television and Internet services — it becomes clear that vertically integrated incumbent cable companies are in a position to preserve their television dominance through conduct that suppresses the growth of new entrant OVDs. This Note argues that the FCC can and should account for these market changes in a way that promotes competition within the bounds of the 1992 Cable Act. First, it should classify certain OVDs within the same regulatory category as traditional cable and satellite television providers. These new entrants would then be subject to procompetitive FCC rules, and their inclusion in the market would inject a much needed competitive jolt into the industry. Second, justified by the incorporation of OVDs into the regulatory picture, the FCC

⁷ Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

⁸ Revision of the Commission's Program Access Rules, 27 FCC Rcd. 12,605 (2012) [hereinafter PARs Order].

⁹ These services stream video either in a timed, scheduled fashion (for example, Sky Angel, a niche, Christian-oriented service, see *infra* p. 2088) or in an unscheduled, on-demand fashion (for example, Netflix or Hulu). OVD is a growing and active product category. See Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television*, 18 COMMLAW CONSPECTUS 375, 375-77 (2010).

should seek to resurrect the PARs. These targeted regulatory moves would help level the competitive environment and enable the growth of OVDs as a plausible source of competition in the face of growing cable domination of the bundled-product market.

This Note proceeds as follows. Part II reviews the history of the PARs, their periodic renewal, and their ultimate sunset. Part III describes the technological and economic forces that have combined to create a market for a television-broadband bundle in which cable companies have a substantial and expanding advantage. It further describes the development of the OVD market. Part IV proposes a two-step solution to begin to address the changing competitive dynamics of the television delivery market in the context of bundling and the development of certain OVDs as competitors. Part IV also argues that even if the PARs are not resurrected, classifying certain OVDs as multichannel video programming distributors (MVPDs)¹⁰ — entities that deliver multiple channels of video content, such as DirecTV or Comcast — could still have positive effects on competition in the bundled market. Part V concludes.

II. HISTORY OF THE PROGRAM ACCESS RULES

The FCC has been charged with promoting competition in the MVPD market and encouraging the development of new communications technologies.¹¹ The 1992 Cable Act sought to increase competition among cable providers in a number of ways,¹² particularly by placing restrictions on vertically integrated entities¹³ — entities that control both the means of distribution as well as the distributed programming.¹⁴ These restrictions included channel occupancy restrictions, which permitted the FCC to place limits on the proportion of vertically integrated channels cable providers could carry; subscriber limit restrictions, which capped the market share that any individual operator could have; and a must-carry/retransmission consent election, which required cable operators either to carry broadcast stations within their service area or to negotiate in good faith with those stations to determine whether and under what financial terms they would be car-

¹⁰ MVPD is defined as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13) (2006).

¹¹ See *id.* § 548(a).

¹² See Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 1, 75–76 (2007).

¹³ See Yoo, *supra* note 6, at 219–20.

¹⁴ For a discussion of the basics of vertical integration more generally, see Friedrich Kessler & Richard H. Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959).

ried.¹⁵ PARs were part of this regulatory scheme. The rules prevented cable provider-owned programmers from using exclusive contracts to deny access to content that they owned to rival television distributors.¹⁶ Of particular concern to Congress in creating PARs was the development of new technology-based entrants like satellite services,¹⁷ which at the time had fewer than 600,000 customers.¹⁸

Similar restrictions on exclusive contracts had been included as requirements for the approval of mergers that would result in vertical integration — for example, those of Time Warner–Turner Broadcasting¹⁹ and Liberty-TCI.²⁰ The 1992 Cable Act’s incarnation of PARs, as implemented by the FCC, was intended to be a temporary measure, to be removed once the market reached a sufficiently competitive state.²¹ As a result, Congress included a sunset provision requiring the agency to justify their renewal after an initial ten-year period.²²

After 2002’s five-year renewal²³ ended in 2007, the FCC chose to renew the PARs for another five-year period, citing insufficient growth in MVPD competitiveness as reflected by growth of satellite market share in particular.²⁴ Cablevision challenged this decision in the D.C. Circuit, arguing that the FCC did not have sufficient justification for its decision.²⁵ The court ruled in favor of the FCC but doubted the long-term justification for continually renewing the PARs given trends in the satellite market, stating: “We . . . expect that [in 2012] the Commission will weigh heavily Congress’s intention that the exclusive

¹⁵ Yoo, *supra* note 6, at 221–23; see also Note, *Tilling the Vast Wasteland: The Case for Reviving Localism in Public Interest Obligations for Cable Television*, 126 HARV. L. REV. 1034, 1050–51 (2013).

¹⁶ See 47 U.S.C. § 548(c)(2)(D) (2006).

¹⁷ See S. REP. NO. 102-92, at 26 (1991) (“[V]ertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms. Alternatively, these cable programmers may simply refuse to sell to potential competitors. Small cable operators, satellite dish owners, and wireless cable operators complain that they are denied access to, or charged more for, programming than large, vertically integrated cable operators.”); Yoo, *supra* note 6, at 224.

¹⁸ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 12 FCC Rcd. 4358, 4377 (1997) (stating that as of 1995 there were 1.7 million satellite subscribers and that this represented an increase of 1.1 million subscribers from the 1994 count).

¹⁹ See Time Warner Inc., 123 F.T.C. 171 (1997).

²⁰ See *United States v. Tele-Communications, Inc.*, Civ. A. No. 94-0948, 1994 WL 904122 (D.D.C. Aug. 19, 1994).

²¹ See 47 U.S.C. § 548(c)(5) (stating that the PARs will sunset unless the FCC finds it “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming”).

²² See *id.*

²³ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 17 FCC Rcd. 12,124 (2002).

²⁴ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd. 17,791, 17,792, 17,830–31 (2007) (extending the PARs for another five years).

²⁵ See *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1312 (D.C. Cir. 2010).

contract prohibition will eventually sunset. . . . [T]he Commission will soon be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition”²⁶

When the 2012 sunset date did arrive, the FCC chose not to renew the PARs.²⁷ In its decision, the Commission cited the D.C. Circuit’s warning that justifications for the PARs were wearing thin.²⁸ Noting that the marketplace “present[ed] a mixed picture,” it decided to rely on a case-by-case analysis of alleged anticompetitive abuse of exclusive contracts, rather than the presumptive ban, saying that such an approach “sweeps too broadly.”²⁹ The effect of the case-by-case analysis may often be to shift the evidentiary burdens required to support the allegation of anticompetitive discrimination.³⁰ The FCC described the MVPD market as a “mixed picture” because, though “the cable industry [is] now less dominant at the national level than it was when the exclusive contract prohibition was enacted, [there are] prevailing concerns about cable dominance and concentration in various individual markets.”³¹ In part because certain data in the decision has been redacted, it is difficult to gauge the extent of the FCC’s diagnosis.³²

In determining cable companies’ ability and incentives to suppress competition in the MVPD market, the Sunset Order classified only certain types of video distributors as MVPDs for the purpose of the analysis, focusing on satellite as the primary competitor in the market.³³ Significantly, it effectively excluded OVDs from the set of potential victims of incumbents’ anticompetitive moves but noted that OVDs may still be able to pursue claims under other antidiscrimination provisions.³⁴ Including OVDs as MVPDs would have enabled the FCC to expand the scope of its analysis of incumbents’ incentives and ability to suppress competition through exclusive contracts by introducing considerations such as access to broadband services and Internet-centric actions — highlighting the continuing relevance of PARs.

The FCC’s caution in this field is not unjustified. First, as discussed in section III.A.2, the FCC’s ability to regulate competition in broadband does not rest on strong ground.³⁵ Incorporating OVDs into

²⁶ *Id.* at 1314.

²⁷ See PARs Order, *supra* note 8, at 12,607.

²⁸ *Id.* at 12,608.

²⁹ *Id.*

³⁰ See *id.* at 12,666.

³¹ *Id.* at 12,608.

³² For example, one of the concerns that the FCC describes is regional clustering. See *id.* at 12,617–18. The extent of this problem has been obscured through the redaction of the number of areas in which major cable entities exceed 70% of households. See *id.* at 12,618.

³³ See, e.g., *id.* at 12,666–67.

³⁴ See *id.* at 12,635 n.172.

³⁵ See *infra* pp. 2085–86.

its conception of the pay-TV market would blur the line between broadband services and television, possibly weakening regulatory strength in the latter. Second, because cable and satellite remain the largest providers of pay-TV services, the FCC has a plausible justification for limiting the scope of its competitive review to those media. Its actions could still promote competition without introducing OVDs into the picture. Third, the inclusion of OVDs into the scope of the FCC's regulatory action would almost certainly draw sustained legal challenges from incumbent television providers that would face a newly strengthened field of competitors. Despite these plausible justifications for the FCC's narrow conception of the competitive landscape, however, the increasing dominance of incumbent cable MVPDs in the bundled-services market makes such an approach unwise.

III. CONVERGENCE AND THE MARKET FOR THE BUNDLE

One of the most important ways the market for television has changed in the years since the 1992 Cable Act has been the phenomenon of convergence: once-distinct communication services combining into a single physical means of delivery.³⁶ This has moved the market for paid television service into a multiproduct bundle, with consumers buying a combination of TV, Internet access, and phone service from a single provider.³⁷ The incumbents control the necessary means by which a class of new, potential competitors reach their consumers, as well as critical popular programming, and are thus positioned to stymie competition.³⁸ Now, more than at any time in the past twenty years, the major incumbents are able to shut out new competitors.

A. *The Players and Competition in the Individual Markets*

There are three primary physical means by which Internet and phone service reaches consumers' homes: copper wire, coaxial cable,

³⁶ See Rob Frieden, *Legislative and Regulatory Strategies for Providing Consumer Safeguards in a Convergent Information and Communications Marketplace*, 33 HASTINGS COMM. & ENT. L.J. 207, 208 n.1 (2011) ("Technological convergence refers to innovations that make it possible for ventures to offer a variety of services via a single digital conduit that previously were offered on a separate, stand-alone basis via different media.")

³⁷ See Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1261-62 (2007).

³⁸ See CARLOS KIRJNER & RAM PARAMESWARAN, BERNSTEIN RESEARCH, NFLX 4Q12 DEBRIEF: A "PERFECT QUARTER" — WHAT NOW? 2 (2013) ("Netflix must overcome an insurmountable challenge, namely an emerging monopoly in high speed broadband access (or at best a duopoly with a dominant player), where the dominant broadband player, the cable company (MSO), happens to be also the dominant provider of video distribution services. . . . [We believe that the consequences of Netflix's growth] would lead MSOs to change their pricing level or structure in ways that would be negative to Netflix's growth prospects.")

and fiber-optic cable.³⁹ These media differ in their abilities to deliver large amounts of data, with copper being the most limited and fiber bearing the greatest potential capacity.⁴⁰ In the pay-TV market, the primary physical media are coaxial cable, fiber-optic cable, and satellite.⁴¹ Though satellite is technically capable of providing, and in some cases does provide, a means for Internet service, it falls below FCC thresholds for broadband,⁴² and the satellite video distributors have no significant presence in that market.⁴³ Another important aspect of the market is the high correlation between the physical network and the network operator. For instance, with the exception of Verizon, which in the past few years has begun to lay the groundwork for a fiber-optic cable network,⁴⁴ the incumbent telephone companies operate copper-wire networks and use fiber only to limited extents.⁴⁵ Likewise, incumbent cable television providers operate coaxial cable networks.⁴⁶ With rare exceptions, network operators do not share access to their physical networks, and in any given area there is only one provider of each physical network type.⁴⁷ In the postconvergence world, operators compete with one another to provide the same services.⁴⁸ This state of affairs is referred to as "intermodal competition."⁴⁹

Partly due to this structure of intermodal competition, customers in the United States are limited in their choices for television, Internet, and phone service. With regard to television services, 65.7% of consumers have access to three or fewer MVPDs.⁵⁰ These distributors usually consist of satellite services and the dominant local cable provider.⁵¹ Consumers' options for wired broadband Internet are even

³⁹ See Dale N. Hatfield, *The Challenge of Increasing Broadband Capacity*, 63 FED. COMM. L.J. 43, 51-63 (2010) (describing the three physical media in addition to wireless connections).

⁴⁰ See *id.* at 64-65 (referring to copper as "highly constrained" and fiber as "the gold standard").

⁴¹ See *id.* at 51-63.

⁴² See George S. Ford & Lawrence J. Spiwak, *Justifying the Ends: Section 706 and the Regulation of Broadband*, 16 J. INTERNET L. 3, 6 (2013) (discussing the availability of satellite broadband despite its exclusion from the National Broadband Plan on account of it not being able to meet minimum upload/download speed thresholds).

⁴³ George S. Ford et. al., *The Broadband Credibility Gap*, 19 COMMLAW CONSPECTUS 75, 106 (2010).

⁴⁴ See Robert W. Crandall et. al., *Does Video Delivered over a Telephone Network Require a Cable Franchise?*, 59 FED. COMM. L.J. 251, 254-55 (2007) (describing the efforts of Verizon and AT&T to upgrade to fiber networks in order to become competitive in the video market).

⁴⁵ See *id.*

⁴⁶ See Hatfield, *supra* note 39, at 52-53.

⁴⁷ See, e.g., FED. COMM'NS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, 37-38 (2010) [hereinafter NATIONAL BROADBAND PLAN].

⁴⁸ See generally George S. Ford et. al., *Competition After Unbundling: Entry, Industry Structure, and Convergence*, 59 FED. COMM. L.J. 331 (2006).

⁴⁹ *Id.* at 332.

⁵⁰ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 27 FCC Rcd. 8610, 8627 (2012).

⁵¹ See *id.* at 8624-25.

more limited, with 96% having access to two or fewer providers⁵² and 13% having only one option.⁵³ The typical options include the incumbent telephone company or the incumbent cable company.⁵⁴ A small number of consumers — around 4% of the population⁵⁵ — have a third option in either a municipal competitor or a cable overbuilder.⁵⁶ Even more indicative of the competitive picture in broadband is the fact that 94% of new broadband subscriptions in the third quarter of 2012 were going to cable services over DSL⁵⁷ — implying a rapid shift away from intermodal competitiveness toward the clustered dominance of cable.⁵⁸

1. *Television.* — An example of competitive problems in the MVPD market is the development of clustering, especially in relation to must-have local programming. Clustering is the phenomenon of MVPDs consolidating their services to select geographic regions while staying out of other regions altogether, leaving those for competitors.⁵⁹ This issue was noted but downplayed in the PARs Order.⁶⁰ This practice distorts the competitive picture when the MVPD market is viewed from a national level because, for example, while it may seem significant to note that Comcast has over twenty-two million subscribers and Time Warner over twelve million,⁶¹ the chance that any of those individual subscribers can choose between Comcast and Time Warner is

⁵² See, e.g., NATIONAL BROADBAND PLAN, *supra* note 47, at 37–38.

⁵³ *Id.*

⁵⁴ *Id.* at 37 (noting that this 4% who have three or more wired broadband providers have access to “either DSL or fiber, the cable incumbent and a cable over-builder”).

⁵⁵ *Id.*

⁵⁶ An overbuilder is a second cable operator that enters a market already dominated by another cable provider. See, e.g., James W. Olson & Lawrence J. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 CARDOZO ARTS & ENT. L.J. 283, 288 (1994).

⁵⁷ Sam Gustin, *Is Broadband Internet Access a Public Utility?*, TIME (Jan. 9, 2013), <http://business.time.com/2013/01/09/is-broadband-internet-access-a-public-utility>. DSL stands for “digital subscriber line” — the data service provided through wired telephone networks.

⁵⁸ Telephone service presents a segment of shrinking significance as customers increasingly rely on wireless phone service as their primary option. See, e.g., John Blevins, *A Fragile Foundation — The Role of “Intermodal” and “Facilities-Based” Competition in Communications Policy*, 60 ALA. L. REV. 241, 248 (2009); Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55, 69–70 (2007).

⁵⁹ See 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 27:11 (2003) (describing clustering as “the practice of acquiring as many cable systems in a given market as possible”); see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd. 17,791, 17,809–10 (2007) (noting the “significant” level of clustering present at the time).

⁶⁰ See PARs Order, *supra* note 8, at 12,617–20 (noting that clustering has increased since the 2007 extension but that where there was evidence in favor of extending the PARs in the past, the case-by-case discrimination procedures would now “adequately address” the issue, *id.* at 12,619).

⁶¹ See *Top 25 Multichannel Video Service Customers (2012)*, NAT’L CABLE & TELECOMM. ASS’N, <http://www.ncta.com/Stats/TopMSOs.aspx> (last visited Mar. 30, 2013).

slim.⁶² Thus, what may look like a competitive market in the aggregate may not in fact be, due to clustering activity.

Beyond the cosmetic, distortive effects in measurement, clustering can have an especially anticompetitive effect on popular regional programming, like sports, that are held in a vertically integrated fashion.⁶³ For instance, the ability to be the sole distributor of Red Sox games in New England would all but guarantee retention of a significant percentage of the market, regardless of the cost or quality of other aspects of the MVPD. Highly clustered incumbent cable companies quite often do own regional sports networks — as Comcast does in a number of cities through SportsNet.⁶⁴ Vertical integration of must-have local programming can effectively block a competitor's growth in a region if the vertically integrated MVPD can deny or delay access.⁶⁵ As a result, in addition to noncable competitors facing structural disadvantages when trying to offer a bundled product, the combination of geographic segregation and vertical ownership of regional sports networks is a troubling shadow looming over the market for video delivery. It is important to note that though the FCC has enacted special procedures⁶⁶ to address this specific problem,⁶⁷ these measures have not gone so far as to implement protections at the same level as PARs. The continued problem of clustering and must-have local programming⁶⁸

⁶² See *Implementation*, 22 FCC Rcd. at 17,809–10 (2007) (“The percentage of cable subscribers that are served by systems that are part of regional clusters has increased since 2002, from 80 percent to as much as 85 to 90 percent, by some estimates, taking into account the acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia.”).

⁶³ See Ammori, *supra* note 9, at 403–04; Mark Cooper, *Open Communications Platforms: The Physical Infrastructure as the Bedrock of Innovation and Democratic Discourse in the Internet Age*, 2 J. ON TELECOMM. & HIGH TECH. L. 177, 236–37 (2003).

⁶⁴ See COMCAST SPORTSNET, <http://www.comcastsportsnet.com> (last visited Mar. 30, 2013) (listing regional sports networks in eleven regions).

⁶⁵ In such instances, companies took advantage of the “terrestrial loophole” in the PARs. For example, Comcast was able to exclusively distribute the Philadelphia-centered regional sports network, leaving sports-minded customers nowhere else to turn for an MVPD. See Keith Klovers, Note, *Unfit for Prime Time: Why Cable Television Regulations Cannot Perform Trinko's “Antitrust Function,”* 110 MICH. L. REV. 489, 506 (2011). The “terrestrial loophole” describes a method by which vertically integrated cable providers avoided the PARs' presumptive ban on exclusive contracts. Because the rules were limited to satellite-delivered programming — that is, programming that is sent to the local cable network by means of satellite transmission — a vertically-integrated cable provider could circumvent the proscription by not using satellite transmission. Such a practice is practical only over short distances between programming origin and destination, as is the case with most regional sports programming.

⁶⁶ Take, for example, merger conditions or the 2010 Terrestrial Loophole Order. See, e.g., Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, 25 FCC Rcd. 746 (2010).

⁶⁷ See, e.g., James B. Speta, *Supervising Managed Services*, 60 DUKE L.J. 1715, 1729 (2011).

⁶⁸ See, e.g., Todd Spangler, *Google: TWC Is “Withholding” Metro Sports RSN in Kansas City*, MULTICHANNEL NEWS (Jan. 15, 2013, 2:43 PM), <http://www.multichannel.com/cable-operators/google-twc-withholding-metro-sports-rsn-kansas-city/141231> (describing Google's allegation that

demonstrates the dangers vertical integration poses to competition in this market and the continued need for PARs.

In addition to the sports example, the FCC acknowledged the more general problems of anticompetitive incentives that follow clustering in the PARs Sunset Order.⁶⁹ In particular, it noted that vertically integrated entities with a high level of market concentration will have the incentive to deny critical programming to potential competitors that threaten to break their regional clusters.⁷⁰ What the dominant incumbent may gain in protecting the tight cluster is more valuable than what it may gain through an expanded viewer base.

2. *Broadband*. — The state of competition among broadband providers in the United States is a subject of much contention.⁷¹ While it is true that there are slivers of the country where customers have a choice between more than two providers, for the most part the choice is between copper-wire DSL and cable.⁷² As noted above, however, consumers seem to be leaving DSL rather quickly⁷³ as a result of the improved service that cable can provide in comparison. Further, international comparisons suggest that the United States has relatively expensive and slow Internet service compared to countries that enjoy more robust competition.⁷⁴ With the trajectory that we are currently on, in which telephone companies are declining to roll out fiber networks and cable providers are poised to continue increasing speeds for low build-out costs, a plausible outlook is that those seeking high-speed Internet access will have only one viable option.⁷⁵

The FCC's power to regulate competition in broadband directly, however, is limited. Broadband service is classified as an information service against which the FCC cannot exercise its full regulatory might.⁷⁶ This fact was recently, and prominently, demonstrated in *Comcast Corp. v. FCC*,⁷⁷ in which the D.C. Circuit curbed the Com-

Time Warner Cable is withholding a popular local sports channel to impede its fiber-based entry into the Kansas City market).

⁶⁹ See PARs Order, *supra* note 8, at 12,615–20.

⁷⁰ See *id.* at 12,619–20.

⁷¹ Compare Rob Frieden, *From Bad to Worse: Assessing the Long-Term Consequences of Four Controversial FCC Decisions*, 77 BROOK. L. REV. 959, 973–74 (2012), with Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, 58 FED. COMM. L.J. 477, 482 (2006).

⁷² See NATIONAL BROADBAND PLAN, *supra* note 47, at 37–38.

⁷³ See *supra* p. 2083.

⁷⁴ See BERKMAN CTR. FOR INTERNET & SOC'Y, NEXT GENERATION CONNECTIVITY 54–79 (2010); SUSAN CRAWFORD, CAPTIVE AUDIENCE 185–87, 261–62 (2013).

⁷⁵ See, e.g., Susan P. Crawford, *The Looming Cable Monopoly*, 29 YALE L. & POL'Y REV. INT. ALIA 34, 36 (2010).

⁷⁶ See Frieden, *supra* note 36, at 209–10 (discussing the implications of *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)).

⁷⁷ 600 F.3d 642 (D.C. Cir. 2010).

mission's ability to regulate network management practices.⁷⁸ In a market in which video, voice, and broadband services have converged, however, the lines between different regulatory categories have become blurred.

B. Bundle Dynamics

Of all the entities offering pay-TV or broadband Internet access, cable companies have been able to offer a superior bundled service. The incumbent cable companies have a number of advantages that they have been able to leverage to reach this point.⁷⁹ First, other than fiber, coaxial cable is effectively the only medium able to provide both high-speed Internet and video programming over the same physical network.⁸⁰ The technological impediments inherent in satellite make Internet access a difficult prospect,⁸¹ and as a result satellite providers must typically partner with local or regional telephone operators (whose legacy copper-wire systems require upgrades to handle video service)⁸² to provide a bundled product with DSL service.⁸³

Fiber's entry into the market as an intermodal competitor has been limited, despite its potential to offer equivalent or superior services compared to cable.⁸⁴ Verizon, whose FiOS offering has been the best-known fiber rollout to date, has since stopped the build-out in part due to a competitive imbalance with cable companies, which have had a long head start.⁸⁵ The imbalance arises for two reasons: First, it is expensive to lay a new network.⁸⁶ A new fiber entrant needs to spend large sums of money simply to enter any given region, meaning it will have to charge higher prices to compensate for the capital expenditure.

⁷⁸ *Id.* at 644 (holding that the FCC could not prevent Comcast from hampering Internet traffic that travels over protocols commonly used for file-sharing because doing so was not reasonably ancillary to its statutorily mandated responsibilities).

⁷⁹ See Ammori, *supra* note 9, at 381–88 (discussing how the current market structure for cable companies creates a “cozy” environment for them, *id.* at 381).

⁸⁰ See CRAWFORD, *supra* note 74, at 65–66.

⁸¹ See Ford & Spiwak, *supra* note 42, at 6.

⁸² See Crandall et. al., *supra* note 44, at 254–55.

⁸³ See, e.g., *Bundles*, CENTURYLINK, <http://www.centurylink.com/home/bundles> (last visited Mar. 30, 2013) (advertising bundles that include DSL Internet and phone service provided over the CenturyLink infrastructure and video service through a partnership with the satellite provider, DirecTV); see also Susan P. Crawford, *The Communications Crisis in America*, 5 HARV. L. & POL'Y REV. 245, 247–48 (2011).

⁸⁴ See John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 383 (2012) (“[T]he larger telephone companies have recently signaled that they are effectively conceding the high-speed wireline market to the cable industry by reducing or even halting investment in network expansion. Some argue that the companies have decided to focus on the wireless market rather than contesting cable companies that have a big head start in high-speed deployment.” (footnote omitted)).

⁸⁵ See *id.*

⁸⁶ See Crawford, *supra* note 75, at 37.

Second, the minute a fiber network has been rolled out, cable providers are capable of increasing network speeds through protocol and head-end upgrades⁸⁷ — without significant capital expenditure — meaning they can offer a competitive Internet product without substantially increasing costs to the end user.⁸⁸ The result is that it is expensive and unrewarding for telephone companies to launch fiber networks in the face of established cable competitors.⁸⁹

With fiber expansion limited and unlikely to grow through the efforts of a national competitor,⁹⁰ the primary alternative to the cable bundle is the combination of separate satellite and copper-wire DSL products, sold together to approximate a converged bundle. This leaves cable as the only medium for offering an attractive bundled product, given the superior broadband speeds and simplicity of single-wire delivery.⁹¹ Since consumers are increasingly likely to want some form of high-speed broadband Internet connection in addition to television — as evidenced by the success of the bundled offerings⁹² — the future is looking bright for cable companies.

Among the services that make up the bundled product, video is the driving component: there are a greater number of households with pay-TV service than with Internet subscriptions,⁹³ and consumers are

⁸⁷ A “head-end” facility is a central node in a region of a cable network from which data flows to individual consumers’ households. See Ralitzia A. Grigorova-Minchev & Thomas W. Hazlett, *Policy-Induced Competition: The Case of Cable TV Set-Top Boxes*, 12 MINN. J.L. SCI. & TECH. 279, 289–91 (2011) (describing the structure of cable systems in the context of cable television set-top boxes). A protocol is the logical structure by which data travels over the physical network. See Rob Frieden, *Assessing the Merits of Network Neutrality Obligations at Low, Medium and High Network Layers*, 115 PENN ST. L. REV. 49, 49–50 & n.3 (2010).

⁸⁸ Crawford, *supra* note 75, at 37 (“It is much more expensive to upgrade existing copper phone line connections to fiber (FiOS) than it is to upgrade cable electronics to DOCSIS 3.0. Copper connections have to be replaced with fiber, and the streets have to be dug up to allow this; cable electronics can be swapped out and upgraded with far greater ease. DSL connections are too slow to be substitutable for DOCSIS 3.0.”).

⁸⁹ See Blevins, *supra* note 84, at 380–84.

⁹⁰ See, e.g., David Murphy, *Verizon Axes FiOS Expansion*, PCMAG.COM (Mar. 27, 2010, 11:54 PM), <http://www.pcmag.com/article2/0,2817,2361919,00.asp>.

⁹¹ See Sylvia M. Chan-Olmsted & Miao Guo, *Strategic Bundling of Telecommunications Services: Triple-Play Strategies in the Cable TV and Telephone Industries*, 8 J. MEDIA BUS. STUD., Summer 2011, at 63, 79 (“It is our conclusion that the strategic bundling of telecommunications services have [sic] played to the strengths of the cable sector. With cable’s environmental and resource advantages, the [incumbents] were able to offer aggressive bundling discounts and product differentiation.”).

⁹² See Julian Clover, *Triple Play Subscriptions to Quadruple*, BROADBAND TV NEWS (July 18, 2011, 9:02 AM), <http://www.broadbandtvnews.com/2011/07/18/triple-play-subscriptions-to-quadruple>.

⁹³ See *ICT Statistics Database*, INT’L TELECOMM. UNION, <http://www.itu.int/ITU-D/ict/eye/Indicators/Indicators.aspx> (last visited Mar. 30, 2013) (placing U.S. broadband subscriptions at approximately 85.63 million in 2011); Mark Rogowsky, *Are Cable TV Carriers Seeing Meaningful Subscriber Degradation Due to Young People Not Signing Up?*, FORBES (June 20, 2012, 10:40 AM), <http://www.forbes.com/sites/quora/2012/06/20/are-cable-tv-carriers-starting-to-see-meaningful-subscriber>

increasingly abandoning landlines for wireless phone service.⁹⁴ Indeed, incumbent cable providers have focused more on investment in the television portion of their bundled services than in broadband.⁹⁵

C. Development of OVDs

The past few years have seen the development of online video services. Netflix, for example, has boasted of more than thirty million subscribers.⁹⁶ Though at the moment none of these services fully replicate traditional television services with regard to content, entities like Sky Angel replicate television's structural model.⁹⁷ To some degree, the availability of such services has led to a phenomenon called "cord cutting," in which customers cancel television subscriptions and rely only on their Internet connections to view paid video content through these OVD entities.⁹⁸ Despite the practical friction such a move may entail,⁹⁹ this threatens the integrity of the TV-Internet bundle, which has become the main product for incumbent cable providers. As a result, many entities have priced bundled products at levels lower than Internet access on its own.¹⁰⁰

Incumbent cable providers have created a product, called "TV Everywhere," to compete in the OVD space and help preserve the

-degradation-due-to-more-young-people-not-signing-up-for-cable-or-satellite-tv-in-their-homes (stating that about 103 million of the 114 million American households have TV subscriptions).

⁹⁴ See Daniel A. Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulation?*, 43 U. MICH. J.L. REFORM 383, 384 (2010) ("Americans talk more minutes on cellular phones than landlines each month, while voice-over-Internet-protocol (VOIP) service . . . continue[s] to make inroads . . .").

⁹⁵ See Rob Frieden, *Assessing the Need for More Incentives to Stimulate Next Generation Network Investment*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 207, 211-12 (2012) ("[I]ncumbent carriers have not aggressively sought to make broadband Internet access a major focus for investment, even though it constitutes a component in the triple- or quadruple-play bundle of telephony, Internet access, and video programming services incumbents now emphasize." (footnote omitted)).

⁹⁶ See *Investor Relations: Overview*, NETFLIX, <http://ir.netflix.com> (last visited Mar. 30, 2013).

⁹⁷ Sky Angel provides programmed channels of "Christian [and] family-friendly" content over customers' broadband connections, through a set-top box. *Welcome and Vision*, SKY ANGEL, <http://www.skyangel.com/About/CompanyInfo/Overview> (last visited Mar. 30, 2013); see *Is Sky Angel Just Like Having Cable or Satellite TV?*, SKY ANGEL, http://www.skyangel.com/About/faq/general_faq.aspx#TEXT;splash=f;supportID=195 (last visited Mar. 30, 2013).

⁹⁸ See, e.g., Jeff John Roberts, *Time Warner CEO: Cord Cutters Not an Issue, "Cord Nevers" Might Be*, PAIDCONTENT (Nov. 16, 2012, 1:12 PM), <http://paidcontent.org/2012/11/16/time-warner-ceo-cord-cutters-not-an-issue-cord-nevers-might-be>; Janko Roettgers, *FiOS TV Exec: Cord Cutting Is Growing, and Changing the TV Biz*, GIGAOM (Sept. 6, 2012, 1:36 PM), <http://gigaom.com/video/fios-tv-cord-cutting>.

⁹⁹ See, e.g., Nicholas Deleon, *Video: Experiment Shows Cord-Cutting Simply Too Difficult for Average Families to Grasp*, TECHCRUNCH (Jan. 28, 2011), <http://techcrunch.com/2011/01/28/video-experiment-shows-cord-cutting-simply-too-difficult-for-average-families-to-grasp>.

¹⁰⁰ See Shalini Ramachandran, *Cord-Cutting: Cable's Offer You Can't Refuse*, WALL ST. J. (Nov. 13, 2012, 1:25 PM), <http://online.wsj.com/article/SB10001424127887324073504578109513660989132.html>.

sanctity of their bundled offerings.¹⁰¹ TV Everywhere works by offering certain OVD content or services to viewers who prove that they have a cable television subscription.¹⁰² As a result, incumbent providers can use TV Everywhere effectively to block certain programming for would-be viewers who are not customers of an incumbent. This phenomenon may increasingly occur in the future, to the extent that existing OVDs participate in TV Everywhere authentication¹⁰³ and incumbents become more vertically integrated. For example, in order to watch the 2012 Summer Olympics on NBC's website, viewers had to demonstrate that they were subscribers to a TV Everywhere-participating MVPD¹⁰⁴ — despite the fact that NBC provided free broadcasts of the same programming over the air.

Precisely because of the incentive to enter into exclusive contracts to exclude new entrants and protect their MVPD products, TV Everywhere has been criticized as an anticompetitive practice designed to leverage the advantages cable providers have in Internet access into continued dominance in pay-TV.¹⁰⁵ This structure is particularly troubling considering OVDs cannot rely on PARs or retransmission-consent negotiations, and it is not known to what extent content providers are participating in TV Everywhere on an exclusive basis with regard to online distribution.¹⁰⁶ With exclusive, or even restrictive, licenses, consumers will have little choice but to continue to purchase television service from incumbents, and OVDs will be effectively blocked out.¹⁰⁷ Vertically integrated incumbents have a strong incentive to create such exclusive contracts and deny popular programming to new entrants. The danger of this possibility highlights the structural advantages cable companies have in the bundled market. Dominance in the provision of high-speed Internet could translate into domin-

¹⁰¹ See Chris Albrecht, *Everything You Need to Know About TV Everywhere*, GIGAOM (June 23, 2009, 11:03 PM), <http://gigaom.com/video/what-you-need-to-know-about-tv-everywhere>.

¹⁰² See *id.*

¹⁰³ See Claire Atkinson, *TV in Real Dime*, N.Y. POST (Apr. 29, 2012, 11:34 PM), http://www.nypost.com/p/news/business/tv_in_real_dime_phoGiKk7rC9agDUEkHae2I (describing talks between Hulu's owners and cable providers to require TV Everywhere authentication); Peter Kafka, *NBC's Olympic Web Video Plan: Live, Legal and "Painful,"* ALLTHINGS.D (June 5, 2012, 4:37 PM), <http://allthingsd.com/20120605/nbcs-olympic-web-video-plan-live-legal-and-painful/> (describing the TV Everywhere authentication for online viewing of the 2012 Summer Olympics).

¹⁰⁴ See Kafka, *supra* note 103.

¹⁰⁵ See, e.g., MARVIN AMMORI, FREE PRESS, TV COMPETITION NOWHERE: HOW THE CABLE INDUSTRY IS COLLUDING TO KILL ONLINE TV 2 (2010), available at <http://www.freepress.net/sites/default/files/fp-legacy/TV-Nowhere.pdf> ("Adopted after lengthy discussions among incumbents, TV Everywhere is designed to crush online competition while being marketed as a consumer-friendly feature.")

¹⁰⁶ See James B. Speta, *Supervising Managed Services*, 60 DUKE L.J. 1715, 1746 (2011).

¹⁰⁷ See *id.*

ance in video delivery. The development of OVDs, then, underscores why vertical integration is a growing concern in today's landscape.

In incorporating OVDs into the regulatory conception of the television market, the FCC should look to Congress's approach toward satellite in the 1992 Cable Act. Like satellite in 1992, the OVD model is not currently a viable full alternative to cable. Its programming options are limited, and early entrants are still in the process of determining how the business model should work. But just as the inability to point to a viable alternative in satellite did not prevent its inclusion in the regulatory market picture in 1992,¹⁰⁸ so the youth of OVD should not serve to exclude it from playing a role in policymakers' visions of how to increase competition moving forward. Such an approach is important to recognizing the historical shift that pay-TV is undergoing and to ensuring that consumers benefit from these changes.

IV. TWO-STEP SOLUTION

Satellite providers, 1992's new entrants, face substantial disadvantages in offering a bundled product due to the nature of satellite communications.¹⁰⁹ Meanwhile, though incumbent telephone providers have entered the market, only some have been able to offer competitive bundles.¹¹⁰ There are also new potential television-delivery competitors to the dominant cable providers — competitors like Netflix, Hulu, or as-of-yet undeveloped services along the structural lines of Sky Angel.¹¹¹ The developing market dynamics call for a new approach to ensure that incumbents do not leverage control over broadband access and programming into control over the MVPD market.

The case-by-case approach adopted by the 2012 PARs Order is not sufficient to address the growing competitive imbalance. There are two primary problems with case-by-case review as compared to a presumptive ban on exclusive contracts. First, it places an uncertain and variable evidentiary burden on the party alleging anticompetitive action.¹¹² This burden raises the cost of alleging competitive discrimination for new-entrant competitors, who may face the difficulty of producing evidence of anticompetitive behavior between units of a vertically integrated entity without the benefit of discovery.¹¹³ Second, for a competitor to initiate case-by-case review, it must commit to an extensive, and likely expensive, process of litigation before the FCC.

¹⁰⁸ See *supra* pp. 2078–79.

¹⁰⁹ See Ford & Spiwak, *supra* note 42, at 6.

¹¹⁰ See *supra* section III.B, pp. 2093–95.

¹¹¹ See *supra* p. 2088.

¹¹² See PARs Order, *supra* note 8, at 12641–42.

¹¹³ Cf. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 66 (2010) (noting that in many cases critical evidence of wrongdoing lies in the hands of the defendants).

During the review process, the party alleging discrimination will continue to feel the effects of that discrimination — further eroding the incentives for potential competitors to enter the market in the first place.

Instead, the FCC should recognize certain OVDs as MVPDs. This would enable broadband-only competitors to offer a bundled product either explicitly (by partnering with a linear, programmed OVD) or implicitly (by enabling consumers to pick their own such OVD service). Further, the OVD-MVPD category could develop quickly from its current, niche state once it has secured the protections of MVPD status. However, without access to content from vertically integrated incumbents, this development is less likely. Thus, to protect OVD development and head off the anticompetitive effects of TV Everywhere, the FCC (or Congress, if necessary) should reinstate the PARs, at least with regard to the newly minted OVD MVPDs.¹¹⁴ Together, these proposals would dampen the ability of converged and vertically integrated incumbents to throttle OVD competitors.

A. Including Certain OVDs as MVPDs Would Promote Competition

The FCC should classify OVDs that provide multiple scheduled channels of video programming as MVPDs. Not only is including solely OVDs that provide linear, programmed channels of video content to the exclusion of on-demand providers the best reading of the statutory language,¹¹⁵ but it could also be important for the clear demarcation of the scope of the market in terms of functionality rather than technological form. Such boundaries would accord with the potential limitations that the FCC faces in broadband regulation.¹¹⁶ Under this approach, only those entities holding out services that seek to replicate and replace traditional MVPDs would face the same regulatory treatment. On-demand entities like Netflix, however, plausibly fill a role that is *complementary* to rather than substitutive of traditional MVPDs. As a result, it would make less sense to subject them to a set of rules designed to regulate the relations between pure substitutes. To date, OVDs of the linear, programmed variety are few — with the major example being AT&T's U-Verse, which is analytically distinct from other OVDs due to its ownership by a major incumbent.

¹¹⁴ These recommendations are less ambitious than at least one other alternative, proposed by Professor Marvin Ammori. Ammori has suggested a compulsory licensing regime for MVPDs, which would necessarily go further in preventing the ill effects of vertical integration, *see* Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television*, 18 *COMMLAW CONCEPTUS* 375, 411 (2010), but may be more difficult to implement due exactly to its effectiveness and the scope of incumbent cable's lobbying power. Comcast alone spent \$14,750,000 on lobbying in 2012. *Comcast Corp*, *OPENSECRETS.ORG*, <http://www.opensecrets.org/orgs/summary.php?id=D000000461> (last visited Mar. 30, 2013).

¹¹⁵ *See infra* section IV.D, pp. 2102–04.

¹¹⁶ *See supra* pp. 2085–86.

One goal of the expanded classification, then, would be to make investment in these entities more attractive. For those who take a skeptical view of the effectiveness of federal regulation in promoting competition,¹¹⁷ an additional benefit of the limited expansion of MVPD status would be precisely its limited nature. Under this proposal, on-demand services would be free of such burdens.

On its own, classification of this category of OVDs as MVPDs would benefit competition in the pay-TV market, though the benefits would be milder in a world without PARs. MVPDs possess statutory benefits that stem from classification as such. These benefits used to include PARs, but they still obligate broadcast networks that have elected retransmission consent over must-carry to negotiate with MVPDs in good faith.¹¹⁸ This alone could help OVD MVPDs gain access to broadcast channels that otherwise might not have been willing to be carried by the non-MVPD OVDs.¹¹⁹ Consumers, then, could see a wider range of viable television options than the two or three most consumers face today.¹²⁰ Moreover, increasing the number of distribution outlets for broadcast networks may exert downward pressure on licensing costs to MVPDs,¹²¹ incumbent and new entrant alike. Specifically, if networks are forced to negotiate in good faith with more MVPDs that serve overlapping subscriber bases, then the networks would lose some of the hold-out value of their bargaining position. Also, providing more options for viewers and more potential distribution outlets for networks may help reduce the consumer cost of heated retransmission-consent negotiation battles between cable incumbents and networks.¹²² This benefit may be somewhat attenuated to the extent that OVDs are unable to replicate the costly distribution agreements currently in place with cable incumbents.¹²³ However, this could be resolved as the sector matures. In all, the introduction of

¹¹⁷ See generally, e.g., Thomas W. Hazlett, *A Reply to Regulation and Competition in Cable Television*, 7 YALE J. ON REG. 141 (1990); Hazlett, *supra* note 71.

¹¹⁸ See 47 U.S.C. § 325(b)(3)(C) (2006 & Supp. V 2011).

¹¹⁹ Network broadcast programming is the most popular category of video programming and, as a result, a critical piece for a new entrant. For instance, the average number of viewers for the top ten nonnetwork programs during the week of February 11, 2013, was 5,644,300, while the average for the top ten network programs over the same period was 11,880,154. See *Top Tens & Trends*, NIELSEN, <http://web.archive.org/web/20130304004650/http://www.nielsen.com/us/en/top10s.html> (last visited Mar. 30, 2013).

¹²⁰ See *supra* p. 2083.

¹²¹ See Comments of Public Knowledge at 21, Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, MB Docket No. 12-83 (Fed. Comm'ns. Comm'n May 14, 2012).

¹²² See Note, *supra* note 15, at 1051 ("[F]requent breakdowns in retransmission consent talks have in recent years led to widespread channel outages . . .").

¹²³ See, e.g., CRAWFORD, *supra* note 74, at 135 (discussing the frequently contentious negotiations between broadcast networks and cable incumbents over the cost of distribution).

OVD MVPDs would serve to break the entrenching bargaining (and increasingly, ownership) relationship between major programmers and incumbent cable MVPDs.

Along with the benefits of MVPD status, however, there are also burdens that critics of this approach predict might have a chilling effect on the development of OVDs.¹²⁴ The burdens MVPDs face include closed captioning, program carriage, video description, the MVPD good faith negotiation obligations of retransmission consent, and equal employment opportunity rules.¹²⁵ Additionally, there are the general regulatory obligations and uncertainty concerns of being a regulated entity.¹²⁶ Each of these requirements would restrict, to a degree, the ability of an OVD provider to arrange its product offering and configuration. Such impositions could prevent new-entrant OVDs from experimenting with new modes of distribution. However, the proposal envisions a rather narrow application of MVPD status to OVDs — namely, only to those OVDs that mimic much of traditional MVPD behavior and rely on prescheduled channels of video content.¹²⁷ As a result, conforming to the basic requirements of traditional MVPDs would not be a stretch for such an entity. Where the proposal may have the most negative effect would be with regard to niche OVD products like Sky Angel, which would not be able to refuse to (1) carry a broadcaster that has elected must-carry status or (2) negotiate in good faith with a broadcaster whose video content may not fit with the OVD MVPD's desired market segment.

In sum, even if the FCC is not successful in reinstating PARs, there remain nonnegligible benefits to classifying certain OVDs as MVPDs. However, the removal of PARs from the picture would still substantially hobble new-entrant OVD MVPDs: incumbents, especially those with substantial vertical integration, would have greater ability to withhold material from OVDs than would broadcasters, leaving new-entrant MVPDs without as full an offering for consumers.

B. Resurrecting PARs Will Promote Competition

The FCC relied on a conception of the television delivery market in the 2012 Sunset Order that does not reflect the competitive reality in a postconvergence market. As discussed earlier, the competitive land-

¹²⁴ See, e.g., Comments of Comcast Corporation at 12–13, *Interpretation*, MB Docket No. 12-83 (Fed. Commc'ns. Comm'n May 14, 2012).

¹²⁵ See 47 U.S.C. §§ 325(b), 536, 554(i)(1)(A), 613 (2006 & Supp. V 2011).

¹²⁶ See Jerry Brito & Jerry Ellig, *Video Killed the Franchise Star: The Consumer Cost of Cable Franchising and Proposed Policy Alternatives*, 5 J. ON TELECOMM. & HIGH TECH. L. 199, 229 (2006) (“[H]ow a new service is classified — that is, how it is found to fit within the existing statutory definitions — determines the regulatory obligations that apply.”).

¹²⁷ See *supra* pp. 2091–92.

scape now consists primarily of a bundled product with television service at its center; within the pure-TV zone, a number of competitors offering a variety of services have emerged. The purpose of the PARs was to ensure competition among MVPDs against the growing dominance of vertically integrated incumbent cable providers. Rather than the "mixed picture" that the FCC believes exists at the moment, it is clear that incumbent cable providers hold a strong upper hand in the bundled market and are positioned to smother competition from the new-entrant OVDs. If the FCC were to bring certain of these OVDs into the MVPD fold, however, it would be better able to express the scope of this competitive imbalance: the threat of vertical integration through TV Everywhere and the wane of satellite as the primary MVPD competitor change the calculus used in the PARs Order. With OVD MVPDs, the justification for PARs becomes the development of new competitors to vertically integrated incumbents.

The primary benefit of reinstating PARs, then, would be to enable the newly minted OVD MVPDs to overcome the incentive and ability of vertically integrated incumbents to block OVD MVPDs' development through exclusive contracts. For instance, imagine that an entrepreneur creates a new OVD company that provides multiple channels of linear video content. If GenericCableCo (providing broadband and television services) were to own ESPN, it may be in its interest to deny the entrepreneur's company access to ESPN because it threatens GenericCableCo's potential dominance in the bundled market, including both its stake in the traditional cable television market and its growing stake in the OVD market through TV Everywhere. PARs would have the effect of forcing GenericCableCo to enter into good faith licensing negotiations. Since the upfront costs of creating an OVD MVPD are much lower than creating a wired or satellite MVPD,¹²⁸ the end result should be more viable television delivery options for consumers — viable because these new competitors would not be denied access to critical programming.

Renewing the PARs might also benefit the troubled area of broadband Internet access competition. If OVD PARs create a competitive MVPD market in which an MVPD can fluidly partner with any broadband provider, the barriers to entry for pure-broadband competitors like municipal fiber networks or overbuilders would be reduced. These new entrants would be able either to provide their own OVD-MVPD service without being stymied by vertically integrated incumbents or to choose from a range of options beyond partnering with satellite.

¹²⁸ Creating an OVD does not require putting satellites in space or wires in the ground.

C. Resurrecting PARs May Be Permissible

One problem is whether now, after choosing to sunset the PARs, the FCC would be able to reinstate them. The 1992 Cable Act does not explicitly exclude or permit a postsunset resurrection of PARs should the market conditions warrant it.¹²⁹ As such, a court might defer to the FCC's decision to renew the rules under its general rulemaking authority. Here, one must look to *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*¹³⁰ So long as the agency decision is not an unreasonable application of the relevant statutory provision, and so long as it falls within the agency's overarching statutory authority, the FCC has the discretion to interpret the law where Congress has left a gap.¹³¹ Were a court to interpret the 1992 Cable Act to have such a gap, the market conditions as described in this Note, especially if they worsen over time, should provide sufficient evidence of anticompetitive behavior in the market¹³² such that resurrection of the PARs would not be an unreasonable application of the statute. An interpretation permitting their revival is especially attractive given the pro-competitive goals of that legislation.¹³³ Admittedly, the sunset provision may easily be taken as evidence that Congress did not intend for the agency to have the authority to renew the PARs after they sunset, in which case a court might decline to defer to the FCC's renewal. If this is the case, Congress should step in and renew the PARs by statute.

D. Encompassing OVDs as MVPDs Is Permissible

Because they are directly mentioned in the Act, entities like cable companies and satellite providers traditionally have been the core of the MVPD category. They provide both the connection and the video content to the customer's home. However, it is not clear that providing the medium of transmission is a necessary element of MVPD status. In the spring of 2012, responding to an issue raised in the Sky Angel program-access complaint,¹³⁴ the FCC's Media Bureau began

¹²⁹ See 47 U.S.C. § 548(c)(2)(B) (2006).

¹³⁰ 467 U.S. 837 (1984).

¹³¹ See *id.* at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). Indeed, independent agencies are entitled to just as much judicial deference under *Chevron* as executive agencies. See generally, e.g., Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006); Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433 (2010); Joan Solanes Mullor, *Why Independent Agencies Deserve Chevron Deference*, INDRET (Oct. 2010), http://www.indret.com/pdf/762_en.pdf.

¹³² See *supra* section III, pp. 2088-97.

¹³³ See Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305, 325-27 (1993) (describing the Act's concerns over competition).

¹³⁴ Sky Angel U.S., LLC, 25 FCC Rcd. 3879 (2010).

addressing the definitional issue of whether “provision of a transmission path” is a prerequisite to falling within the MVPD definition.¹³⁵ The outcome boils down to a matter of interpretation of the word “channel” as defined in the statute.¹³⁶ The definition of this term, in turn, will determine whether OVDs qualify for and are subject to the benefits and obligations that follow. The problem is that the definition of “channel” in the Cable Communications and Policy Act of 1984¹³⁷ ties the word to a specific technological medium,¹³⁸ while the use of the term in the 1992 Cable Act’s MVPD definition implies a broader use of the term.¹³⁹

Proponents of the view that providing a transmission path is necessary posit that Congress intended to promote *intermodal* competition by defining “channel” as the “electromagnetic frequency spectrum which is used in a cable system” — and that it likely did not imagine the development of OVDs.¹⁴⁰ As a result, they argue, the definition of “channel” must be specific to the medium of transmission, not content centered.¹⁴¹ Proponents of the opposite view argue that “channel” refers both to the frequency of transmission as well as to the structure of the content that is being transmitted, and that the MVPD definition uses the latter.¹⁴² They also contend that this understanding aligns with the procompetitive ambitions of the 1992 Cable Act.¹⁴³

Nonlinear services like Netflix do not easily fall into the MVPD category using either approach. Under the transmission-path reading, such services do not provide physical connection to the customer. Non-transmission-path readings, however, tend to rely on an interpretation of “channel” that incorporates the notion of scheduled programming delivered in a linear fashion as distinct from “on-demand” programming.¹⁴⁴ This interpretive split leaves two possible readings: (1) no

¹³⁵ Public Notice: Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding, 27 FCC Rcd. 3079, 3079 (2012).

¹³⁶ See *id.* at 3081–84.

¹³⁷ Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended in scattered sections of 47 U.S.C.).

¹³⁸ See 47 U.S.C. § 522(4) (2006) (“[T]he term ‘cable channel’ or ‘channel’ means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel . . .”).

¹³⁹ See *id.* § 522(13) (“[T]he term ‘multichannel video programming distributor’ means a person . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming . . .”).

¹⁴⁰ Comments of Comcast Corporation, *supra* note 124, at 4 n.7; see *id.* at 4–10.

¹⁴¹ See *id.* at 8–9.

¹⁴² See, e.g., Comments of Public Knowledge, *supra* note 121, at 2–14.

¹⁴³ See *id.* at 22–24.

¹⁴⁴ See, e.g., *id.* at 11 (“Congress drew a line between providers of prescheduled video programming on the one hand, and providers of on-demand video programming on the other.”); Reply Comments of DIRECTV, LLC at 8, Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding,

OVDs are MVPDs or (2) some OVDs are MVPDs depending on whether their product configuration fits within the descriptive bounds. The second is the better reading based on interpretive and policy grounds.

The use of “channel” in the 1992 Act suggests that the no-transmission-path reading is more plausible, though both have awkward implications.¹⁴⁵ Where the no-transmission-path reading is the strongest, however, is in the competition-specific policy rationales — chiefly, by creating a lower barrier to entry for competitors that seek to offer a traditional, linear, scheduled video consumption environment. Effectively, this reading creates a technology-agnostic definition, focused on the nature of the product rather than the means by which it arrives. As a result, competition in the MVPD market would not be limited to those that can undertake the expensive wires-in-the-ground approach that has proven prohibitive even to giants like Verizon.¹⁴⁶

Though contested, there is sufficient justification for the FCC to bring scheduled-programming OVDs within the MVPD definition. Doing so would enable the growth of competitors and head off anti-competitive acts of vertically integrated bundled-product providers.

V. CONCLUSION

The market for television delivery has changed significantly since 1992, 2002, and even 2007. Though cable incumbents have seen a reduction in their television market share largely due to the now-waning success of satellite, they have become dominant in the market for the bundled, TV-broadband product. The FCC should act to protect the nascent category of competitors in OVDs. Doing so would require first categorizing as MVPDs those OVDs who act like traditional MVPDs. Second, it would require resurrecting PARs to enable OVDs to provide a plausible consumer option outside of cable or satellite.

Federal communications policy stands at yet another crossroads in the development of broadband and television delivery. Doing nothing to change course will serve only to entrench incumbents; moving to meet new developments head-on offers the possibility of increased competition in the television delivery market and an opening for new entrants to compete. The FCC should opt for the latter path.

MB Docket No. 12-83 (Fed. Commc'ns. Comm'n June 13, 2012) (“OVDs that offer only video-on-demand . . . rather than multiple networks of linear programming would not qualify . . .”).

¹⁴⁵ To read a transmission-path requirement into the definition of “MVPD” would obviate previous decisions to include cable overbuilders in the definition of “MVPD” despite the fact that they have not provided their own transmission path; to read no requirement would remove much significance from Congress’s reference to spectrum in its definition of “channel.”

¹⁴⁶ See *supra* pp. 2086–87.

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