DEPARTMENT OF JUSTICE ROUNDTABLE ON ANTICOMPETITIVE REGULATIONS

May 31st, 2018

Submission of John Bergmayer, Senior Counsel, Public Knowledge

Public Knowledge believes that regulation can promote competition and protect the public interest, but that changes in technology and business models require that regulations periodically be re-thought. This testimony will focus on a few of these, from the media and wireless space.

First, though, two broad observations are in order. Regulatory agencies are generally well-suited to update their rules to match changing market conditions. However, often their hands are tied by overly-specific statutes that do not merely give agencies outcomes to pursue, but specifically instruct them how to pursue them. In some of the examples discussed here, the agency (here, the FCC) likely has the authority to reform the rules on its own, but even so in most cases there are legal arguments to be made on each side about the agency's authority. Some critics of what is seen as an excessively large administrative state believe that agency discretion is the problem, and would have Congress grant agencies much narrower delegations of authority (and would judicially roll back the Chevron doctrine, which holds that agencies should be granted deference when Congress has delegated them the job of clarifying ambiguous statutory terms). But ironically in many cases it is not agencies but Congress that are responsible for excessive "regulatory underbrush," and in this environment, too, agency actions are easier to challenge in the courts, tying up agencies and making reform still harder.

Second, Public Knowledge believes that regulations of various kinds are necessary for a well-ordered marketplace to function, and that the fundamental question is not whether to regulate, but how. Particularly in areas where the government itself defines the scope of a business and creates the relevant rights and causes of action the idea that there is a tradeoff between "regulation" and "deregulation" in a broad sense is incoherent. But that does not mean that all regulations as currently implement benefit consumers or the public interest, as they should. That said even when there are regulations in place that may not fulfill these broad goals Public Knowledge would also caution against premature or hasty regulation. In some cases incumbents who have benefited from the status quo would be able to take advantage of deregulation to lock in their current advantages. Therefore in some instances even when certain rules should eventually be rolled back, other measures may be more wise to take in the meantime.

Programming Exclusivity Provisions

A few years ago, led largely by now-Chairman Pai, the FCC on a bipartisan basis eliminated the sports blackout rule. This rule gave cable and broadcast companies a way to use the FCC to enforce their private contracts—turning a matter of private rights between different parties in the marketplace (to be enforced, if necessary, through the courts) into a regulatory issue requiring the involvement of an independent executive agency. These rules served no legitimate public purpose

and the predictions of doom from the broadcast industry that attended their elimination have all proved false.

It is time for the FCC to finish the job and eliminate similar protections, such as rules against distant signal importation and syndicated exclusivity. Then-Chairman Tom Wheeler proposed the elimination of such rules in 2015 but, according to industry reports, pulled back the proposal after significant Congressional pressure.[1] However, a blog post by the former chief of the FCC's Media Bureau, Bill Lake, persuasively explains why the rules are unnecessary today.[2]

First, it should be noted that to the extent that local broadcasters have bargained for exclusivity rights with program suppliers or networks they should of course continue to have those rights, using the same means that other businesses have to enforce their rights. There is no need for special rules or processes in this instance. Similarly cable systems or broadcasters who transmit programming they have no rights to may be found liable, for example, for infringing copyright law, or for retransmitting a broadcast station without its consent. The elimination of specific exclusivity rules does not mean an end to exclusivity—just an end to the government's thumb on the scale in favor of exclusivity.

Having specific rules about specific business arrangements has contributed to the rigidity of the video marketplace. Regulations that guarantee exclusivity enforcement mean that broadcasters do not have to bargain as hard for it. During a time of broadcast consolidation and broadcast deregulation it simply makes no sense for FCC rules to step in and give broadcasters legal tools and leverage unavailable to other media companies. Eliminating them might produce more alternatives for viewers and, to the extent that pay-TV providers would gain the ability to obtain lower-cost programming from new sources, lower bills.

Needless Technology-Specific Distinctions

The FCC should update its rules by abandoning, wherever the statute allows, technology-specific rules that artificially favor some kinds of video services over others. At some point when the video marketplace is fully competitive; the FCC (and Congress) can consider relaxing or eliminating some of these rules entirely. But in the meantime, while Public Knowledge supports keeping them in place, they must be interpreted in a way that allows for new entry.

Specifically, the FCC should find that online services that offer multiple channels of linear video are "multichannel video programming distributors" under the law. This regulatory clarification would benefit consumers by increasing competition, by permitting purely online

---

[1] Doug Halonen, Wheeler Backs off on Exclusivity Rules, TVNewsCheck (Oct. 29, 2015), http://www.tvnewscheck.com/article/89609/wheeler-backs-off-on-exclusivity-rules.
[2] Bill Lake, The Time Has Come to End Outdated Broadcasting Exclusivity Rules, FCC (Sep. 22, 2015), https://www.fcc.gov/news-events/blog/2015/09/22/time-has-come-end-outdated-broadcasting-exclusivity-rules.

services to negotiate for and retransmit broadcast programming under the existing legal framework, as well as benefit from statutory protections that prevent incumbents from denying programming to new entrants. These “program access” rules are a valuable way to limit vertical leveraging in the media marketplace, and properly interpreted they can help ensure that competitive video providers can carry “must-have” programming. Similar rules (“program carriage”) prevent MVPDs from discriminating against third-party programming on the basis of its ownership or affiliation.

At the same time, the FCC could clarify that some MVPD- or cable-specific rules (e.g. those having to do with signal leakage or competitive devices) would apply only to facilities-based MVPDs. Distinguishing between various providers in ways that reflect their actual differences is good policy; granting regulatory advantages to one class of providers over another based on technological and regulatory path-dependence does not.

Retransmission Consent Rules Should Ultimately Benefit the Public

The FCC should also update its retransmission consent rules to better reflect today’s marketplace. It is a travesty that consumers are paying more and more simply to access “free” TV, as a result of a tilted negotiating process that holds viewers hostage, while failing to promote the purported goal of broadcast localism. Thus, to best protect consumers and localism, the FCC should find that certain retransmission consent negotiating tactics are *per se* bad faith and thus unlawful, such as, but not limited to:

- Restricting online video and consumer device usage
- Ceding control over negotiations to third parties
- Timing blackouts to coincide with marquee events
- Demanding per user fees for non-subscribers

The FCC should also be remedy the disparate bargaining power that large broadcast chains have, particularly when they negotiate for stations across different areas, and affiliated with different networks. Finally, the FCC should also establish a process for challenging bundling and tiering demands, adopt baseball-style arbitration rules, and require interim carriage, when necessary.

Media Ownership Rules Should Promote Diversity, Competition, and Localism

The FCC's media ownership rules are a complex area, but their original purpose is very simple. First, the rules were designed to promote competition in media markets. In this way they went beyond antitrust’s mandate of preventing harms to competition. Second, they were designed to promote public interest goals it was felt the market by itself would not provide, such as localism.

Broadcast companies receive a valuable benefit by being permitted to use the public airwaves--airwaves which now could be put to many other purposes, such as mobile broadband, inter-vehicle communication, and public safety. To the extent that the broadcast regulatory model is maintained it is fair to demand of broadcasters that they fulfil a broader public interest mandate in return.

However the current rules are failing at this purpose. Currently, different broadcast stations that operate essentially as a single enterprise through "joint sales agreements" count as different companies for the purpose of ownership rules. To the extent that the FCC expressly allows collusion between competitors in a local marketplace, this may be immune to antitrust review as well. Local stations no longer have to have their main studio in the community they purportedly serve. Multiple stations in a single market may share a common owner and large chains of broadcasters such as Sinclair are transforming what were once local broadcast stations into something more like a national broadcast network or a national cable news outlet.

It is time for a broad re-thinking of broadcast policy that is informed by the function broadcasters are intended to perform, not just by what some broadcast companies think would benefit their bottom line. If the purpose of broadcast is to ensure that viewers have access to free TV, then the FCC's rules should be updated accordingly. If the purpose of broadcast is to ensure that local communities have access to programming tailored to their specific needs, then broadcast rules should reflect that, as well. As it stands, however, the FCC's broadcast rules appear to be tilted toward giving individual broadcasters the maximum discretion to do as they will, with little thought given to the social and economic costs this creates.

FCC Rules That Prohibit À La Carte Offerings Should Be Eliminated

The Commission's basic tier buy-through rules require that cable operators include broadcast stations in all of the programming packages they offer. They go further than the statute requires and needlessly prevent MVPDs from offering à la carte service. There is no reason why viewers who wish to subscribe to cable service should be required (as opposed to having the option) of paying for over-the-air programming they can get for free with an antenna. While these rules are far from the only barrier preventing more consumer choice, the Commission can at least help move the industry closer to more subscriber-friendly plans.

The Commission's regulation implementing the buy-through requirement states that "Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming." 47 CFR § 76.920.

However, the buy-through requirements in the statute itself apply only to cable systems for which there is no effective competition: the basic tier itself is defined as the "basic tier subject to rate regulation," and the prohibition on buy-through of other tiers is found in subsection (b) of 47 U.S.C. § 543, which pursuant to 47 U.S.C. §§ 543(a)(2) and (a)(2)(A) may only be used to regulate the rates of cable systems not subject to effective competition. Yet the Commission's

implementation in 47 CFR § 76.920 has no such limitation. (A related provision, 47 CFR § 76.921, does.)

The Commission's reasoning in applying the buy-through prohibition to all video subscribers, not just subscribers of systems that do not face effective competition, was based on reading the basic tier regulation provisions in the context of must-carry rules. The Commission reasoned, agreeing with the National Association of Broadcasters, that since all cable systems must "provide" their subscribers with must-carry stations, 47 U.S.C. § 534, and because must-carry stations are part of the basic tier, that all cable customers must subscribe to the basic tier. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, Report and Order and Further Notice Of Proposed Rulemaking, 8 FCC Rcd 5631, ¶¶ 164-66 (1993).

However, this analysis was flawed. While it is true that cable systems in markets not subject to effective competition may not offer a version of the basic tier that consists only of must-carry stations, but are required to offer a basic tier that meets the "minimum contents" described in the statute, there is no such statutory requirement as to systems for which there is effective competition. Thus, even accepting the (debatable) interpretation that for a cable system to "provide" a must-carry station, all its customers must actually subscribe to it, there is no reason why customers in markets that are subject to effective competition should be required to pay for stations that elect retransmission consent, instead of simply using an antenna.

It is absurd that Commission regulations, unsupported by a sound reading of the statute, currently prohibit à la carte with respect to broadcast stations. For these reasons, the Commission should modernize it rules to require that consumers purchase, at most, a tier containing must-carry stations, not all broadcast stations.

Spectrum Policies Should Better Promote Competition

Various policies the FCC has adopted over the years have inhibited the development of wireless competition and have harmed smaller providers.

- The FCC's preference to opt for large geographic license sizes for spectrum frequencies is essentially a form of industrial policy that only benefits the four large nationwide wireless providers and is an impediment to new market entrants, innovative alternative uses of the spectrum, and competitive providers that focus on local markets, rather than the national market. Large providers could nest together small licenses to establish the nationwide footprint they want, but the FCC's policy of creating geographically large spectrum licenses makes the licenses cost prohibitive to everyone other than already entrenched national carriers. This harms competition and innovation.

- FCC's spectrum policy treats licenses as presumptively renewable so long as the licensee has complied with build-out conditions. Long initial license terms (usually 10 years) and a presumption of unlimited renewability of those licenses artificially drives up the cost of the initial license. As a result, licenses become too cost prohibitive for new market entrants to acquire, leaving little new competition in the market. Licenses in densely populated markets become too expensive for everyone except the largest incumbents to acquire, which means that smaller competitors and new entrants are largely precluded from ever offering a viable alternative to mobile customers - locking the marking into at most 4 firm competition, with further attempts at consolidation at the doorstep.

- The FCC has a preference for existing business models and already deployed technologies that undermine innovation and competition. The Ligado/GPS controversy is a good example. The receivers on GPS devices are cheap, and don't adequately filter out transmissions on neighboring bands. As a result, proposed uses of neighboring spectrum bands are discouraged. This spectrum lies fallow and new use cases or new competitive business models can't get off the ground.

- The FCC has typically opted to maximize licensee control of spectrum, even when the licensee has not commenced any operations in the band, to the detriment of public access to the band and innovative unlicensed uses. Instead of adopting "use or share" requirements for licensed frequencies that would allow for unlicensed use of bands where the licensee has not yet deployed, those frequencies can lie fallow for years after they are licensed. In general, unlicensed use of spectrum has proven to be one of the most efficient ways to deploy new technologies and services, yet decades of success have failed to dislodge the presumption in favor of exclusive licensed spectrum access—in large part because certain industries benefit from keeping spectrum closed off to the public.

Finally, the FCC's methods for calculating the value of spectrum holdings do not properly weigh licenses by the spectrum's technical characteristics. As a result it is difficult to get a clear picture of the advantages that various carriers have with respect to spectrum holdings or to craft rules that prevent single carriers from hoarding spectrum, not to use it, but simply to keep potential competitors from having it.

* * *

The specific examples cited in this submission are far from the only instances where regulations either stand in the way of competition or should be updated to promote it. However they may serve as illustrative examples from the media space that can inform policymakers in other contexts.