

**Remarks of
Jon Sallet, Federal Communications Commission General Counsel**

**As Prepared for Delivery at
The Future of Broadband Competition Conference
The Capitol Forum**

December 17, 2015

“Video, Broadband & Competition”

I appreciate the chance to appear at the Capitol Forum’s conference today. These views are, of course, my own and do not necessarily represent the views of the Commission.

This conference’s focus on the future of broadband competition is both timely and important. The Internet today is the platform on which modern communication is based – commerce and companionship, societal values and social media, economic growth and educational opportunity, to name just some of its important uses. And in the middle of it all is video – now the dominant form of traffic on the Web. From all kinds of sources, from aspiring singers and cat videos, to instruction of all kinds to the highest-gloss entertainment. And on all types of devices. What does it say about the age in which we live that someone like me picks up his iPad to watch a Red Sox game at home instead of walking twenty steps to my TV? Even though that would score steps on my Fitbit!

Today I’d like to focus on the rise of streaming video, which has replaced the mailed DVD, which itself replaced the video store, which itself replaced the black-and-white television on which once appeared Uncle Miltie. It hasn’t been that long since there was a Blockbuster store in every neighborhood, but in terms of video entertainment, it’s been ages. That is how fast things are moving.

Video competition is at the heart of intertwined policy choices that, both separately and together, can shape the extent to which consumers reap the benefits of video options. New video delivery options and business models are important because they can provide additional choices and value to consumers. But, equally importantly, video programming stands at the core of an open Internet these days, given the incentive and ability of broadband providers to limit the threat from over-the-top video to their own Pay TV offerings. And video programming can play an

important role as well in the advent of broadband competition, as the Commission observed, for example, in the recent review of the AT&T/DTV merger. If we get video competition questions right, then we are more likely to maintain an open Internet for consumers who are reaping the benefits of investment and innovation, alongside business models that are, as the Open Internet Order says, “busy being born”.

The obvious, but important, point is that streaming video services use the broadband networks owned and operated by incumbent video providers. What is good in the short-term for the Pay TV services of cable companies and telcos may not be good for consumers who wish to use their broadband connections to enjoy streaming video services. But consumers have the legitimate right to expect that the data they seek will be transmitted to them, to quote the Communications Act, “without change in the form or content of the information as sent and received.” A consumer who orders “King Lear” from Amazon does not expect her broadband provider to stop it and edit it along the way by inserting a happy ending.

Over the past few years, it has become clear that streaming video provided over the Internet has the potential to someday become a viable and sustainable substitute for traditional packages of services from the cable company.

What evidence do we have that the television market is undergoing a significant transition? According to Leichtman Research Group, 2014 marked the second consecutive year for overall Pay TV industry subscriber losses, a trend that has continued through 2015. Similarly, SNL Kagan has been reporting subscriber losses for all of the top cable networks. Meanwhile, the number of Netflix subscribers in the United States has risen to 42 million, increasing by about 6 million customers per year, Hulu reports 9 million subscribers, and Sandvine estimates that streaming video and audio traffic now constitutes 70 percent of peak downstream Internet traffic in North America. Seventy-five percent of American households have a broadband connection, and the number of broadband homes without a traditional Pay TV subscription is now estimated at more than 12 million. That’s about 10 percent of all households in the country.

For some time the debate has been whether cable bundles will be replaced by a la carte offerings. But there may be a third – maybe many third and fourth and fifth – alternatives. Video distributors like DISH, with its Sling TV, now offer slim bundles of channels to consumers, while traditional programmers have jumped into the marketplace with innovative direct-to-consumer offerings such as CBS All Access, HBO Now, and Showtime. AT&T and Verizon are seeking to

expand streaming rights for the mobile environment, and AT&T says that it will specifically target the 30 million homes without a Pay TV package. Amazon recently announced that channels like Starz and Showtime, which once depended entirely on Pay TV distribution, are available over its service. Large programmers like Disney, CBS and HBO seem willing to experiment with new delivery models demanded by consumers who have other options now. This is business model innovation enabled by the Internet and the availability of consumer broadband.

So what is the FCC's role during this transition? It is obvious that alternatives to the traditional video distribution model are coming to market, and more are likely. It isn't our job to decide which business model succeeds but it is our job to consider, within the limits of our statutory authority, how to remove artificial barriers to improved consumer choice, competition and innovation.

Let me walk through a few examples of how and why the Commission has acted, and may continue to act, to remove artificial barriers. For instance, in the Commission's review of the proposed Comcast/TWC merger earlier this year, the staff looked at a series of tools that might be available to a broadband/Pay TV provider to impact over-the-top video services. They include practices on the broadband network, like blocking and throttling; practices in the exchange of traffic; the retail terms and conditions applied to consumer subscriptions, like data caps; the nature of programming contracts; and practices relating to set-top boxes.

Pathways and Gates

As we worked on our Open Internet Order, the Commission focused on broadband Internet access providers because they act as the pathway between broadband consumers and edge providers. This is an important point – consumers today largely use their broadband connections as a pathway to third-party websites, applications, service or content. Think of Dorothy in the Wizard of Oz – the yellow brick road was the means by which she could travel to the Emerald City, but the path was distinct from the destination. So too with today's broadband service to consumers.

As the Commission found in 2010 and again in 2015, broadband providers are gatekeepers, with both the incentive and the ability to curb edge traffic.

But there is not just one gate that broadband providers operate – there is the residential connection where customers access the edge content and also the interconnection points, where providers receive the edge content. This is why, in

addition to the bright line rules that bar blocking, throttling and paid prioritization, the Commission adopted standards to review, if necessary, the interconnection practices of broadband providers.

The potential for harm seems clear. The “no blocking” rule, for example, prevents a broadband provider from denying a consumer the ability to have video delivered from a lawful service using his or her broadband service. But that same end could, as a matter of theory, be attained by refusing to accept the same streaming video at the interconnection point. Of course, whether such a set of facts will arise remains to be seen.

Broadband connections are the indispensable conduit by which to reach consumers with streaming video. If broadband providers could interfere with online video distributors, then that would be a simple means of protecting incumbent video revenues. By eliminating that possibility, the Commission’s Open Internet Order promotes competition on the basis of innovation and new product features – not blocking, throttling or otherwise unreasonably interfering with over-the-top competitors. If a broadband competitor wishes to compete in the market, it has to come up with its own better value proposition, perhaps better programming, perhaps a better bundle.

In fact, despite some dire warnings from interested parties, innovation appears to be accelerating since we reinstated open Internet protections. We have seen, for example, new announcements concerning the ability of mobile users to gain access to streaming video without running into usage allowances, and the ability of consumers to stream video content provided by their cable system.

The Commission has not, of course, had the occasion to consider the potential for benefit or harm of any of these new practices – such a formal review, if conducted, would fall under the case-by-case approach of the so-called General Conduct rule. But the fact that innovation from broadband providers is coming to the marketplace with Title II in effect demonstrates that permission-less innovation can exist simultaneously for both edge providers and the broadband networks themselves. That is, of course, the best outcome for innovation and investment, and ultimate consumer benefit.

Retail Terms and Conditions of the Broadband Service

In the AT&T/DirecTV merger, the Commission conditioned approval of the transaction to explicitly prevent one type of discrimination against online video

competition. Specifically, AT&T is prohibited from excluding its affiliated video services and content from data caps on its fixed broadband services. One of the asserted benefits of that transaction was the launch of affiliated online video services by the merged entity. Over-the-top providers would directly compete with these newly-offered services and at the time of the merger, AT&T was alone among the large ISPs in applying set data caps across its fixed broadband services. This condition prevents AT&T from using its broadband service retail terms to discriminate against new forms of video competition.

Access to Programming

Another potential artificial barrier to entry is in the acquisition of licensing rights to valuable programming. The Commission faced this issue in reviewing the Comcast/NBCU merger. Under the particular circumstances presented by that transaction, the Commission and the Department of Justice worked to clear the way for more online delivery by prohibiting Comcast from employing “alternative distribution method” or ADM clauses in programming agreements that had the effect of limiting a programmer’s ability to supply its programming to over-the-top providers.

Devices

It is also worth considering the role of devices in empowering new competitive choices. Some over-the-top video providers, like Amazon and Apple, are supplying their own devices for streaming video services. The role of the cable box remains, however, important. It is estimated that 99% percent of Pay TV subscribers lease their set-top boxes from their service provider. Section 629 of the Communications Act broadly authorizes the Commission to ensure the commercial availability of retail navigation devices, while protecting the security of the Pay TV provider’s transmission, which is important to programmers as well. In the STELAR legislation enacted last year, Congress directed the Commission to establish a Downloadable Security Technical Advisory Committee to recommend ways in which downloadable security can promote that statutory objective. The Committee’s report recommended possible approaches, and in August the Commission sought comment on the report. The Commission’s staff is reviewing the report and the comments to consider how competition in set-top boxes can best be promoted going forward.

Competitive Choices in Broadband

All of this must be considered against the backdrop of competition, for example, in the supply of fixed broadband connections. At the end of 2014, only about one-third of residential broadband consumers had a choice of provider at speeds of at least 25 Megabits-per-second downstream. The other two-thirds had either no such provider offering service that fast to their home, or there was only a single provider, most likely the cable company. In rural areas, the situation is much worse. In our 2015 Broadband Progress Report, over half of Americans in rural areas had no provider offering residential broadband at speeds of at least 25/3. There is a similar lack of options in terms of the technology used. For instance, 86% of residential fixed connections at downstream speeds of 25 Megabits or more are on traditional cable plant. All this is to say that at higher broadband speeds, most Americans have no choice – just one, single provider.

Conclusion

This is an amazing time. If “The Graduate” were remade for our times, the takeaway word wouldn’t be “plastics”, it would be “video”. Video is exploding, in ways utterly familiar to us, like new, original programming on Netflix and Amazon, and the prospect of a new Star Trek series on CBS All Access. And in ways utterly new, from entire engineering courses available on video, to teenage sensations posting two-minute, daily You-Tube videos.

Each day, consumers are accessing more and more video, and expect to do so anytime, anywhere, including in the car. Young people especially expect to be able to access the Internet, including high-quality video, wherever they may be, and advances in wired and wireless technology will continue to enable that. In this changing environment, the Commission is able to exercise its network expertise and regulatory authority to eliminate artificial barriers to video competition and further promote broadband’s unique role in enabling ceaseless innovation in communications markets.