

## COMPTEL's Response to Questions in House Energy and Commerce White Paper

### Regulation of the Market for Video Content and Distribution

COMPTEL supports competition across all platforms and for all services. For purposes of encouraging competition in the video marketplace, we submit that Congress should lower the barriers to entry for competitors, promote access to content that encourages the development and availability of competition, and ensure over-the-top video services are not disrupted by incumbent broadband Internet access service providers.

The way Americans access video services continues to change. While many Americans continue to rely upon traditional broadcast television, cable, and satellite services, the growth of on demand, streaming and other over-the-top video services such as Hulu, Netflix, Amazon Prime, or YouTube continues to increase significantly. In fact, many Americans are forgoing traditional linear programming packages entirely in order to enjoy the content of their choice at the time of their choosing. A simple broadband connection is all that is needed for many consumers to gain access to the content they prefer and enjoy.

As such, it is crucial for Congress to consider how video impacts the availability of other services, like broadband Internet access service. For example, COMPTEL members have found that to provide a competitive broadband Internet access service in the residential marketplace, there is still demand for linear video by most consumers. Therefore, it is critical for competitors to offer a linear programming option in addition to a competitive broadband Internet access service; however, the availability and pricing of video is such that competitors often offer it at a loss, thereby impacting their financial capability to extend broadband facilities in direct competition against incumbent providers.

Accordingly, COMPTEL recommends that Congress take a broad view on how to promote competition in the video marketplace, including the promotion of competition in the delivery of broadband networks. To this end, we offer some areas for further exploration and consideration by the Committee below.

#### **Lowering Barriers to Entry for New, Competitive Networks**

##### *Constructing New Networks Requires Access to Rights-of-Way, Poles, Ducts, and Conduit*

In order to lower the barriers for new construction of networks, Congress can take several steps to promote access to rights-of-way, poles, ducts and conduit.

First, Congress should adopt a federal dig once policy. Federal funding rules should include installation of broadband conduit during all federally funded or federally mandated projects. As the U.S. upgrades or builds its highways and other utility infrastructure, broadband conduit should be installed and made timely available to communications providers at reasonable rates. A federal dig once policy has the potential to improve access to rights-of-way which will promote more advanced and competitive networks.

As the Committee is aware, access to poles, ducts and conduit largely owned by electric and telephone companies is necessary for competitors to build their own networks. Congress should take several steps to lower barriers to the availability of rights-of-way, poles, ducts, and conduit. First, all broadband and IPTV providers should have the ability to gain timely and dependable access to the physical infrastructure needed, including poles, ducts, and conduit, at reasonable and predictable rates and timeframes. Accordingly, in its revision to the Act, Congress should extend Section 224's rights and protections to ensure such access. Indeed, Congress should consider broadening the Section in a way

that is technologically neutral by extending it to all communications providers. Congress should future proof its revisions to Section 224 and use broad definitions so as to promote deployment and competition by different kinds of networks. Similarly, pole owners should be required to dedicate additional space for new entrants when they replace their poles. Make-ready for poles and the coordination of pole attachers add significant delay and costs for each build project. The FCC should maintain oversight to set reasonable timeframes for access and make-ready. It is important that a federal agency have policymaking authority to establish/modify timeframes as necessary and resolve disputes.

Congress also should address the availability of the necessary information that is required to deploy new networks. Access to the information about rights-of-way, poles, ducts, and conduit is critical for planning deployments. Congress should specifically require federal, state, and local agencies that maintain such information to make it readily available and require that this information be kept up-to-date with timely revisions.

#### *Constructing New Networks Requires Access to Content and Navigation Devices*

Providers seeking to compete with a linear programming package should be able to obtain access to video programming at reasonable prices, terms and conditions. In order to promote competition by new entrants and encourage deployment of new networks, Congress should:

- Ensure that new entrants can access programming networks or other content affiliated with incumbent cable operators or broadcasters on a reasonable and unbundled basis; and
- Ensure that all programming (including broadcast, cable programming, and independent programming) remains available during contract renewal disputes so consumers are not harmed, subject to true up payments once the carriage contract is renewed.

Tying (or bundling) in the video marketplace—that is, requiring that video providers purchase a number of programming networks together has become common. This practice has contributed to the increase in pricing for linear programming packages. As discussed above, the cost of video programming is significant and most small and mid-sized competitors offer linear programming at a loss. Such costs discourage or impede competitive network deployment. Congress should restrict tying practices for new entrants so as to encourage competitive network deployment. Similarly, new entrants must compete against incumbents which benefit significantly from volume discounts, another barrier to entry in this market.

The lack of access at competitive prices to advanced innovative navigation equipment (aka set top boxes) remains an impediment to new entrants in the video programming marketplace. Congress should foster a competitive marketplace for navigation devices for providers seeking to offer linear programming packages. Just as consumers can attach their own computers and other types of devices to the Internet to obtain content, services, and applications, Congress should promote third party navigation devices for linear programming that also can access the Internet. The development of open, standard protocols for navigation devices that permit consumers to access their linear programming and over-the-top applications and services will foster more competitive and advanced network deployments.

## **Promoting Video Availability and Competition Over-the-Top**

As discussed above, a number of video on-demand providers now offer over-the-top options for consumers. Others, such as Dish, are beginning to offer competitive linear programming options over the Internet. The development of over-the-top video options is good for consumers and competition. Some broadband Internet access service providers (“ISPs”) have used their gatekeeper position to demand tolls at the point of interconnection, simply to allow content that their end users requested to be delivered at the speeds for which the end users have paid. They have allowed their ports with transit providers, and others to congest, and refused to augment capacity until those providers pay. As discussed by the New America Foundation’s Open Technology Institute, the M-Lab study clearly demonstrates congestion encountered by Tier 1 backbone providers at interconnection points with the largest ISPs and that those providers used the congestion as leverage in demanding tolls for delivering video traffic to their subscribers.<sup>1</sup> Consumers were not receiving the service from the broadband ISPs that they paid for, and there was much confusion and frustration among consumers about these problems. ISPs’ use of their gatekeeper power to block or degrade traffic to demand tolls is a harmful practice that will harm the development of video competition over-the-top if it is not adequately addressed.

Moreover, where programming is unreasonably withheld by entities that are threatened by the development of over-the-top competition, they have the incentive to withhold programming with which they are affiliated or to demand independent programmers to withhold programming. Accordingly, Congress should permit over-the-top providers to avail themselves of the same program access protections provided other competitors, such as DBS providers, should they choose to do so. And incumbent video providers should not be permitted to stifle competition by restricting independent programmers from offering their programming over-the-top. Similarly, regulatory burdens that could stifle the growth of over-the-top video programming should be avoided so as to encourage innovative offerings that potentially could compete against current video programmers.

New entrants should be encouraged to explore new business models for video programming—as such, it is important that they may offer exclusive programming in order to differentiate their products from incumbents and attract consumers.

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<sup>1</sup> See Open Technology Institute Letter to the FCC, GN Dockets Nos. 10-127, 14-28, MB Docket No. 14-57 (filed Dec. 22, 2014) (citing “Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes,” Open Technology Institute, November 2014 and “ISP Interconnection and its Impact on Consumer Internet Performance,” Measurement Lab, October 28, 2014).

## Questions:

2. Cable services are governed largely by the 1992 Cable Act, a law passed when cable represented a near monopoly in subscription video.

a. How have market conditions changed the assumptions that form the foundation of the Cable Act? What changes to the Cable Act should be made in recognition of the market?

*As described above, access to programming and consumers are required in order to offer a competitive alternative to cable services. Cable operators have an incentive to withhold their own affiliated programming from competitors—often programming such as regional sports networks that are a must have in order to compete against them. They also have the incentive to demand independent programmers to withhold programming over-the-top, and to use their gatekeeper position as ISPs to block, degrade, and charge unreasonable fees to over-the-top video providers. These are all incentives that Congress should address in its review of the Act as we propose above.*

3. Satellite television providers are currently regulated under law and regulation specific to their technology, despite the fact that they compete directly with cable. What changes can be made in the Communications Act (and other statutes) to reduce disparate treatment of competing technologies?

*Satellite television largely has been a successful due to congressional action that promoted competition - providing access to cable affiliated programming. Congress must now look to the future as to what the next new entrants will need to succeed against incumbents. We have offered that new networks should be encouraged, and Congress should implement policies that will allow next-generation video offerings to compete in the marketplace.*

4. The relationship between content and distributors consumes much of the debate on video services.

a. What changes to the existing rules that govern these relationships should be considered to reflect the modern market for content?

*Congress should promote the use of copyright compulsory licensing where it will promote more competition in the video marketplace, taking into proper account the rights of content creators.*

5. Over-the-top video services are not addressed in the current Communications Act. How should the Act treat these services? What are the consequences for competition and innovation if they are subjected to the legacy rules for MVPDs?

*Congress should strive to promote new entrants in the video marketplace in order to encourage competition for the benefit of consumers. Regulatory burdens on new entrants should be avoided where possible so as not to discourage new network deployments and innovative offerings. COMPTTEL proposes a number of prudent measures described above that will promote over-the-top video. With more options, consumers will benefit.*

Thank you for the opportunity to comment.

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