

# FCC Video Competition Proceeding To Address Online Video Distribution

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Since 1992, the Federal Communications Commission ("FCC") has been required to report to the U.S. Congress on the state of video competition. These reports are not often the most compelling reads available. With the rise of "over the top" online video distribution providers ("OVD"), this year's report could be more interesting than usual.

The dilemma for over the OVDs is not new. If you are a non-facilities based content provider, possibly now and certainly in the future, the customer's costs of using your services is the sum of whatever consideration you exact from them, plus the cost of their broadband service, which in some cases is based on usage. To use your content service, the customer has to pay another provider just to reach your service. That other provider (and potentially your competition) owns and controls the very delivery mechanism you must rely on for your services and has no obligation to you to ensure or even facilitate delivery of your content in a manner in which the end user would deem beneficial.

So, if your online content service business relies on the provision of internet services by a network and customer-relationship-owning provider, it is well past the time when you should have focused some effort on insuring that your access to your customer's broadband service is sufficient for delivery of quality services and affordable by the customer. Not easy to be sure -- maybe you are going to have to build networks; maybe you will enter into agreements with the facilities-based providers to give your content some measure of priority or quality when delivered to the end user, or maybe you will turn to Congress and the regulators to seek a legal and regulatory framework that requires certain facilities be made available to you. Regardless of which path is taken, the FCC's Video Competition proceeding has something that may be important.

In its annual Notice of Inquiry ("Notice") to solicit "data, information and comment" for the report, the FCC has requested information regarding: (i) regulatory and market conditions that affect OVD entry and competition; (ii) the influence of Open Internet rules and IP closed captioning requirements for video programming on OVD entry and competition; and (iii) how the relative lack of regulation for OVDs impact marketplace entry and competition. Responses to these questions -- particularly from the new entrants that are experimenting with new OVD business models -- could have an impact on future regulatory policy in this new area.

The FCC has outlined questions addressing each of the options facing OVD providers and the impact those have on broadband providers. The FCC is seeking information on how OVDs use the internet to deliver programming and what challenges the OVDs face today and what they might face in the future. For example, the FCC has requested information on: (i) the dependence of unaffiliated ISPs to deliver video content to consumers; (ii) whether this dependence is a hindrance to the OVDs ability to compete; (iii) whether the growth in the amount of internet traffic associated with online video programming affects market entry and competition; (iv) the impact of ISP data caps, tiered pricing,

or other user fees; (v) whether OVDs are developing content delivery networks (“CDNs”); and (vi) features, trends, other market conditions and factors regarding the participation of the OVDs in the video delivery marketplace as well as information on factors that contribute to OVDs exiting the video marketplace. In addition, to understanding the OVDs more fully, the FCC is also requesting information related to the types of investments OVDs are making, for example original programming, and what innovative services or technologies OVDs are deploying.

Comments are due March 21, 2014. To view the Notice, please click [here](#).